JUDICIAL REFORM AND DEMOCRATIZATION: MEANS VS. ENDS IN PERCEPTIONS OF LEGAL CHANGE IN ECUADOR

By

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To my family, who have been far from me for so many years, but who live close to my heart every day: *mami*, *papi*, what would I do without you? To my brother, for helping me to look at difficult times as something to laugh at, and to my little sister, Camila, for lightening up my life.

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CAFTA	Central American free trade agreement
IDB	Inter-American development bank
INLAUD	Institute for the prevention of crime and treatment of offenders
IMF	International monetary fund
JR	Judicial reform
JRM	Judicial reform movement
JSCA/CEJA	Justice studies center of the Americas
LDCs	Less developed countries
NAFTA	North American free trade agreement
OAS	Organization of American states
PAHO	Panamerican health organization
UNDP	United nations development programme
USAID	United States agency for international development

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More than ever before, the democratization process as well as the future of democratic regimes in Latin America have been associated with the need to strengthen the rule of law. As a result, a regional and international movement for judicial reform (JR) in Latin America has emerged as a new development paradigm. In their efforts to empower the judiciaries and promote the rule of law in the Latin America, the reform movement proposes to strengthen the administration of justice by establishing the adversarial, prosecutorial system of Western Industrialized nations and focusing on four main legal mechanisms: judicial independence, judicial effectiveness, state accountability to the law through checks and balances, and citizens' access to justice. Although Judicial Reform is not a new development project, it has experienced an unprecedented momentum in the last decades, with the support of major international organizations and lending institutions promoting it. At present, every country in the region, except for Uruguay, has begun a process of JR, with more reforms yet to come.

In this context, JR is also an attempt to modernize the Latin American judiciaries, promoting the rule of law as a tool for social, political and economic development. Nonetheless, research and assessments of the current state of judicial reform in the region have begun to question whether reforming the legal system is indeed conducive to democracy. Importantly,

these concerns arise from researchers and scholars who have promoted reform efforts in different Latin American nations for various years, but who believe that a traditional analysis of judicial reform provides an incomplete assessment and insufficiently explores necessary criteria associated with development objectives. Perhaps due to a lack of communication between different disciplines in the social sciences, especially sociology and law, JR discussions have failed to acknowledge the complexity of development processes.

In an effort to contribute to this subject, this project analyses JR as a development framework, focusing specifically on the assumption that JR will lead to democratization. This work is also based on my own research project conducted in Quito, Ecuador in the Summer of 2007. The results presented derive from interviews I carried out with key legal actors in the country. Drawing from vast research on JR and development in different countries in Latin America, as well as from my own research in Ecuador, I contend that strengthening the rule of law is foremost a political matter that can only be attained through long-term consensus; to succeed it must therefore be an embedded feature of a larger democratic process. In the end, my study suggests that unless the unilinear approaches and simplistic assumptions of the development processes are carefully considered, legal reform in the Americas only risks becoming another cacophonous waltz in its development path.

CHAPTER 1
INTRODUCTION

Since its discovery, America has been portrayed as "the promised land, a continent that held the promise of a better life and a better future" (Santiso, 2006: 13). The series of development discourses, ideologies, policies and reforms, implemented throughout Latin America for more than five centuries illustrate how today, in the 21st century, that image of utopia prevails. Indeed, in the 20th Century alone, Latin America radically moved from structuralism to monetarism and from Import Substitution Industrialization (ISI) to free-market neoliberalism, resembling "waltzing paradigms" as Javier Santiso (2006) has described this trend.

Today, Latin America is beginning to waltz to yet another tune: Judicial Reform (JR). Essentially, JR implies breaking away from the inquisitorial legal tradition inherited from the colonial period, to an adversarial, prosecutorial system, much like the one of the Western industrialized nations. Although JR is not a new development project, it has experienced an unprecedented momentum in the last decades, with the support of major international organizations and lending institutions promoting it. At present, every country in the region, except for Uruguay, has begun a process of JR, with more reforms yet to come. Thus, this reform trend is a regional as well as an international effort, referred to as the *Judicial Reform Movement* (JRM).

In this context, JR is also an attempt to modernize the Latin American judiciaries, promoting the rule of law as a tool for social, political and economic development. Former World Bank President, James D. Wolfensohn, declared that, "…without the protection of human and property rights and a comprehensive framework of laws, no equitable development is possible" (Thome, 2000: 695). In terms of the economic development and the market, it is

thought that judicial reform will provide a stable, reliable legal framework with uniform, predictable rules that guarantee property, contractual as well as intellectual rights, ever more needed in free trade and globalization era (Frühling, 1998; Thome, 2000). Admittedly, under this premise JR not only benefits the private sector, but also the average Latin American citizens by assuring that their individual and collective rights expressed in the Constitution are guaranteed. This includes their right to property, but also their right to justice in a very broad sense. By enhancing the efficiency of the system, people of all economic sectors can have access to the courts and thus, their issues and needs will be addressed. As a consequence, JR also creates the need to change the structural organization of justice by implementing an autonomous judiciary that can assure transparency and accountability of its actions. This feature in particular has become one of the focal points of the JRM advocacy, given the repressive authoritarian regimes of the past, as well as the rise in crime and violence in the last decade. This is when the democratic component comes into play. Reform advocates believe that by promoting the rule of law, institutions will gain legitimacy, the citizenry will trust and respect the government, and consequently, democracy can be consolidated in Latin America (Frühling, 1998; Hammergren, 1998; Carothers, 1999; Prillaman, 2000; Thome, 2000). At first glance, the potential benefits of JR appear to be remarkable indeed.

Nonetheless, another voice in this debate remains skeptic of the feasibility and potential success of the ambitious JRM agenda. Importantly, this voice is not an echo from people who oppose the reform or who believe the rule of law is unimportant for development. On the contrary, these concerns arise from researchers and scholars who have promoted reform efforts in different Latin American nations for various years, but who believe that a traditional analysis of judicial reform provides an incomplete assessment and insufficiently explores necessary

criteria associated with development objectives. Followers of this perspective question whether judicial reform will indeed translate into development, unless certain crucial variables are taken into consideration. Particularly, they argue, JR will not lead to democratization, but in fact, a deeper process of democratic embeddedness is required prior to undergoing JR. Thus, a more comprehensive assessment of factors illustrates the emergence of a pragmatic perspective regarding the benefits of judicial reform.

Certainly, JR has increasingly become a central issue in development projects as well as 21st century public policy. However, perhaps due to a lack of communication between different disciplines in the social sciences, especially sociology and law, JR discussions have failed to acknowledge the complexity of development processes. Importantly, although the study of "institutions" has been a focal point of study in sociology and social anthropology for more than a century, in other disciplines such as economics, this is more of a novel term. Although Douglas North has been regarded as a pioneer in economics for paying attention to the central role of institutions, many sociologists and other economists had already addressed the issue long before North. Moreover, the concept of "institutions" seems to have been oversimplified in economics and politics, coming to merely mean that social constraints matter. From this viewpoint, all that needs to be done is to export institutions- such as the judiciary- from industrialized nations to LDCs (Less Developed Countries) and promote social change (Snodgrass Godoy, 2004; Portes, 2006). In reality, the issue is not so simple.

In an effort to contribute to this subject, this project analyses JR as a development framework, focusing specifically on the assumption that JR will lead to democratization. For this purpose, this project is organized as follows:

In Chapter 2, I provide a historical synopsis of sate organization in Latin America. I focus on the practices that have influenced how the legal system has been structured for centuries. This includes several unique traditions such as Presidentialism and *caudillismo*. Following this section, I offer an overview of the inquisitorial legal tradition adopted by the region after independence. Overall, Chapter 2 introduces the reader to judicial practices and organization prior to JR.

Chapter 3 moves on to discuss JR. I explain in detail what JR means and the changes it implies for the traditional inquisitorial system. I present a historical summary of the first attempts to reform the Latin American judiciaries in the 20th century. The next section moves on to describe the current JRM, the forces that drive it, as well as its assumed goals. I pay particular attention to the link between JR and democratization. Thus, the final section in Chapter 3 specifically addresses the theoretical framework underlying the traditional JR and democracy perspective. The purpose is to provide a balanced analysis of JR, before moving on to a critique. In the end, both perspectives will be juxtaposed in order to acquire a better understanding of JR as a development project.

Chapter 4 illustrates the pragmatic perspective of JR that contests the assumptions of the traditional framework described in Chapter 3. I focus on analyzing the Latin American experience in the strengthening of the main components of the rule of law: efficiency, access and judicial independence. It will be shown how growing evidence from different Latin American nations point to the lack of long-term political consensus as the main obstacle to implementing a comprehensive JR. In fact, research shows that it is precisely those state actors responsible for carrying out JR that impede its implementation. Thus, at the heart of this pragmatic perspective is the realization that JR is foremost a *political* matter. To illustrate this situation, I provide

evidence from various research projects as well as country case studies that ultimately suggest that democratization must take place along with JR, if not precede JR.

In Chapter 5 discusses the case of judicial reform in Ecuador. Based on my own research project conducted in Quito Ecuador in the Summer of 2007. The results presented derive from interviews I carried out with key legal actors in the country. One of the reasons I chose to study the Ecuadorian case was the striking lack of literature available on JR in that country. Although some books mention details about it, sufficient information to understand its situation remains scarce. Nonetheless, this project it is not a descriptive piece regarding the reforms efforts and its technical results. Rather, my interest is to acquire a better grasp of legal actors' perceptions of JR. The value of such approach is that actors' reactions to institutional change disclose crucial issues in the milieu, often responsible for advancing or hampering JR efforts. Certainly, this information and perspectives are not easily found in books; yet they are particularly important because they are not coming from researchers or scientists, from politicians, or from average citizens in the streets. Rather, they come from the actors who compromise the legal system *itself*. Evaluations of JR that concentrated on technical matters or reform implementation, although crucial to the JR effort, tend to miss the more fundamental social processes that create, react to, or affect change. With this in mind, the project presented here hopes to fill in some of the holes within the JR debate.

The final chapter draws conclusions from the information and arguments presented. I contend that the current JR approach confuses development means with development goals; Development is not an automatic, natural, or guaranteed outcome of JR, but rather a vital component of its success. In the end, my study suggests that unless the unilinear approaches and

simplistic assumptions of the development processes are carefully considered, legal reform in the Americas only risks becoming another cacophonous waltz in its development path.

CHAPTER 2
LATIN AMERICA PRIOR TO JUDICIAL REFORM

Introduction

Important to the discussion of JR are the historically trends that characterize Latin America's political and legal organization. Although I do not take a path-dependence or historical deterministic view on this subject, it is important to understand the context and reality of Latin American nations and their struggles towards development. Indeed, the political organization of the region during the colonial era, especially its hierarchical nature, influenced the development of the nation-sate after independence. Importantly, this situation led to the formation of the Latin American "strong executive" model where the commander in chief holds most of the governmental power.

This situation had important consequences for the judicial function. On one hand, it helped institutionalize the submission of the judicial branch to the executive. At the same time, it allowed leaders to preserve the *inquisitorial model*, a hierarchical system of justice instituted during the colonial era. Since the JRM aims to break way from this long-standing legal process, it is important to understand how the system functions in order to have a better understanding of what JR is all about.

Historical Roots: Presidentialism and Judiciary Control

The formal-legal aspect of the president, especially the control it exerts over the judiciary, is a central to discussions of JR and democracy. However, it is a complex issue that requires an analysis of the intellectual, cultural and historical roots of presidential power. This section provides a brief synopsis on this topic.

Presidentialism

Colonial state organization was characterized by a high concentration of political power[1]. There were three viceroyalties or territorial administrations: *Nueva España* (Mexico, Central America and the Caribbean), *New Granada* (the Andean region), and *Río de la Plata* (Argentina, Uruguay and Paraguay). The *virreys* or viceroys were the king's representatives in different areas of the Americas (Vanden and Prevost, 2006). They headed the administration of the colonies and enjoyed vast powers and authority in executive, military and even some legislative matters. Unlike the English colonies in the Americas, there were no representative assemblies in Spanish America. Spain insisted on ruling from a far, often trying to control from Seville everything that happened in the entire colonial territory. Laws and decrees were in the hands of the monarchs, the Council of Seville, or the viceroys. Thus, a model of centralized political power was established the legacies of which are manifest to this day (Mirow, 2004; Vanden and Prevost, 2006).

Geographic obstacles made communication slow. Orders from Spain were often bypassed by the interests of powerful elites in the colonies, who enjoyed the wealth and power in the new territories (Sondrol, 1999; Ungar, 2002; Mirow, 2004). The *audiencias* or advisory councils, composed of judge-presidents, *corregidores* or mayors, and appointed judges, were famous for corrupt practices. For instance, laws that were meant to protect the Indigenous were more often than not unendorsed by the local elites and authorities. In short, territories governed by Spain were characterized by feeble infrastructure, lack of organization, unaccountable local rule, personalistic government (*caudillismo*) and mercantilist economies (Sondrol, 1999).

[1] This was a Spanish practice not only exercised in the colonies but in their own soil as well (Sondrol, 1999: 422).

People in the colonies, on the other hand, perceived that norms and rules were imposed on them with no consideration for their realities and needs. Given the limited applicability of the laws, informal and unwritten modifications of the law became necessary and ultimately, a common practice. However, there were those who also took advantage of the situation to gain personal power. Most of the population lived in rural areas, isolated from the courts and the system in general (Mirow, 2004; Vanden and Prevost, 2006). The large rural landowners, therefore, were there to fill in the holes in the system, becoming more of a figure of authority than the law or the colonial rule itself Consequently, landowners managed to impose their own rules in the rural areas, promoting a system of clientelism. Thus, a chasm separating the government, the law, and the people was shaped (Mirow, 2004).

After independence, the tendency to centralize power (*centralismo*) and to protect the interests of the elites remained. Among the ideas proposed for government-building were conservative models, radical constitutions (moral populism trying to reach to the popular sectors), and liberal constitutions (Gargarella, 2004: 142) Thus the proposals included systems with a monarch, an emperor, a life-president, or a life-consul. This does not mean that an effort to establish different forms of government, or an effort to separate powers, was not attempted. The French and the American Revolutions inspired early *pensadores* and *libertadores,* like Bolivar, San Martín, and Sucre (Sondrol, 1999; Mirow, 2004). In fact, their writings reflect a rejection for the Spanish Crown oppression and an eagerness to install a system, much more like the American one, with checks and balances in the scheme of government and with a federal union arrangement. Yet, since its early years, Latin American efforts to reform government organization were hampered by lack of party discipline, lack of consensus (*inmobilismo*), and factionalism in parliamentary and executive systems (Sondrol, 1999; Ungar, 2002: 24).

This situation, in turn, led the liberators to conclude that building republics with values from France or America was not possible in Latin America at that time. In their view, what the new republics needed was to find their own path after independence (Mirow, 2004). After several civil wars, the consensus among leaders was to follow a system of centralized political power, where the decision-making process was placed in the hands of the president and the administration in the capital city. This type of state organization has been referred to as *Presidentialism* or *Ejecutivismo*, and *centralismo* (Sondrol, 1999; Gargarella, 2004).

Since then, much to the convenience of the elite, Latin America adhered to a political model were power was centralized and governance was exclusionary. By the late 19th century, new constitutions helped provide a certain degree of political order, but coercive government practices remained. Elites and oligarchies continued to rule, and violations to the constitution were still common practice. More problematic, those agents of the law themselves, including legal educators and students, were also perpetrators of elite control of the law and the courts. This development of governance influenced Latin American political development for centuries (Sondrol, 1999; Ungar, 2002; Gargarella, 2004; Mirow, 2004).

Judiciary Control

In light of its political development, Latin American judiciaries have historically been controlled by the executive, and used as a tool to advance political interests. Although contemporary Latin American Constitutions stipulate an equal division of power among its branches (Executive, Legislative and Judiciary), in reality the Executive enjoys most of the power and control (Larkins, 1996; McAdams, 1997; Hammergren 1998; Thorp, 1998; Domingo, 2004; Mirow, 2004; Sondrol, 1999; Ungar, 2002: 119). Evidence from country-case analysis shows the judiciary's inability to challenge executive prerogatives. In times of "emergency," for example, the constitution allows for unlimited powers of the president over the legislative and

justice apparatus. Similarly, the courts remain subservient to the President. Perhaps one of the best examples in recent history is the case of Peru and Alberto Fujimori's self-coup in 1994. Despite the explicit violation of the constitution, Fujimori was able to dissolve Congress and dismantle the Legislative and Judiciary apparatus to rule unchallenged for several years (Hammergren, 1998; Ungar, 2002: 636). Thus, "Ejecutivismo is both a cause and consequence of the failure of countervailing institutions. Legislatures and Judiciaries, while theoretically co-equal with the executive branch, are inevitably overshadowed by presidential predominance" (Sondrol, 1999: 429).

Latin American Judiciary Prior to Reform

This section outlines the Latin American legal model prior to JR, known as the *inquisitorial model*. I emphasize those features that make it unique and that have important implications for the overall functioning of the system. The goal is to be consistent with the goals of the overall chapter, providing the background for understanding the process of JR in Latin America.

Inquisitorial Legal Tradition

The legal system Latin America inherited from the European empires and formally adopted after independence is known as the *inquisitorial* system. Its peculiar name is derived from its hierarchical legal design and structure, particularly, the powerful role accorded to the judge (McAdams, 1997; Duce and Pérez Perdomo, 2003: 71; Duce, 2007: 1).

In the inquisitorial system the most important agent of the state is the judge, who is in charge of both prosecuting and deciding the verdict of a case. This legal tradition is thus based on the idea that the judges are fact-seekers, responsible for establishing "truth." Therefore, the judge is not only responsible for carrying out criminal investigations, but also enjoys the

privilege of determining how the trial should be resolved, making the judge one of the most powerful actors in the system (Ungar, 2002; Duce and Pérez Perdomo, 2003; Duce, 2007: 16).

Another key actor on the inquisitorial tradition is the defendant, although for very different reasons. Given the nature of the judges' duties, the investigation is the most important phase in the process. Therefore, the starting point of an investigation, as well as the principal evidence, was the confession of the person being accused. If extreme methods such as torture were necessary, these were deemed justified. According to legal scholars, torture was considered a "useful" tool to gather information (Duce, 2007: 3). This does not mean that there is no defense for the accused in this model. Defense lawyers are part of the legal process but their role is substantially limited (I address this in more detail in the paragraphs below).

Perhaps the most consequential feature of the system is its written nature. The inquisitorial process is based on written motions. This means that all matters concerning legal procedures, including all arguments and debates, are recorded in writing. No oral hearings or trials exist. This eliminates the opportunity to have a real confrontation between the parties involved, or even for cross-examination of witnesses. In fact, more often than not, trials only consist of reading these written files compiled by the judge (Thome, 2000; Ungar, 2002; Duce and Pérez Perdomo, 2003). In practice, this type of legal model has permitted non-judicial staff, such as clerks or judges' assistants (*actuarios* or *secretarios*), to handle the resolution of cases. This represents a complete violation of the code since the fate of the accused is being placed in the hands of people with limited or no knowledge of the law (Duce and Pérez Perdomo, 2003: 73).

As a result, under the inquisitorial system the defense has very limited rights. The use of strictly written records undermines the participation of the defense at different levels. Litigants for their part are limited to working with written files, and judges have little contact with the

accused and their defense attorneys. In practice, this means that the job of those involved in the process is more bureaucratic and administrative in nature (Frühling, 1998; Hammergren, 1998; Domingo, 2004; Duce, 2007). Thus, according to Duce and Pérez Perdomo, "The accused is conceived as an object of the process more than as a subject with rights" (2003: 71).

This tradition also has several consequences for the overall functioning of the justice system, especially in terms of efficiency. For example, under the inquisitorial process judges work under the "principle of criminal legality," which obliges them to investigate *every* case that comes to their attention until it is solved (Duce, 2007). The only acceptable reason to stop an investigation is in cases where it is not possible to gather sufficient evidence. Judges are thus overwhelmed with work, often adopting dubious measures to solve cases. Overall, these are time-consuming and expensive practices that place considerable burden on the administration of justice (Frühling, 1998; Thome, 2000: 702).

Latin American judiciaries also exhibit a hierarchical structure of authority. For example, allowing the judges to make ample decisions and limiting the role and rights of the accused, inevitably concentrates power and undermines the role of other legal actors (Duce and Pérez Perdomo, 2003). Furthermore, the inquisitorial process allows for the review and reversal of trial decision. Since there is a written record of all procedural matters, the superior tribunal has the power to review the case, deciding whether or not the laws have been properly applied. In legal language, these elements are referred to as *in toto* and *ab initio* (Duce, 2007: 3).Thus, in Latin American judiciaries "the truth" can easily be changed, adjusted or reestablished by those in a higher position.

Finally, the organization of the judicial branch as a potential career for citizens also exhibits a hierarchical structure with clientilistic practices. The Supreme Court (and sometimes

the President) usually has control over all the courts and its administration, including the selection of entry-level judges and their subsequent promotions. Consequently, the system has facilitated the practice of widespread of patronage and corruption at all levels (Hammergren, 1998; Sondrol, 1999; Thome, 2000: 703; Ungar, 2002; Mirow, 2004).

Conclusion

Vast and complex historical and structural processes explain many of the current issues regarding the Latin American democracies and judiciaries. The Spanish colonial organization, for one thing, had a strong impact on how the government and the law were organized in the region. After independence, the region's search for the best path to prosperity proved challenging. Hundreds of revolutions and changes in power took place, but in the end the Presidentialist political model was implemented and the inquisitorial legal system preserved, at least in most countries. Despite centuries of social, political and economic changes, its legacies in contemporary Latin America remain strong. This situation is reflected in the series of revolutions and authoritarian takeovers of the past centuries, as well as in the democratic instability of the last few decades (Sondrol, 1999; Valenzuela, 2004). In terms of the justice system, perhaps one of the most consequential results of these early events has been the inability to institute independent judiciaries in the region, with checks and balances in the scheme of government.

In the context of JR, however, these events and trends represent much more than just history. The Presidentialist political model along with the legal practices created under the inquisitorial system for more than 500 years have a direct impact on the results of JR today. The impact of these trends in the efforts towards JR will be more apparent in subsequent chapters. In the mean time, I now turn to Chapter 3 where I explain its premises, history, and driving forces

CHAPTER 3
JUDICIAL REFORM IN LATIN AMERICA

Introduction

Although most Latin American countries achieved independence during the early 1800s, by the turn of the 20th century, they still functioned under the legal structure instituted during the colonial period; a system known as the *inquisitorial* model. Despite the formation of new republics and the existence of a liberal ideological movement, modern day Latin American judiciaries are still based on an 18th century European legal system. Even though continental Europe continued to systematically reform their judicial system, adopting a procedural model, Latin America only began to implement major changes in the 1980s (Popkin, 2000; Ungar, 2002; Duce and Pérez Perdomo, 2003; Mirow, 2004; Duce, 2007). These relatively recent modifications, nevertheless, paved the way for other major reforms of the justice system to take place around the region, with many more currently on their way. This phenomenon, often referred to as the *JRM* enjoys an unprecedented momentum today, supported by many of the world's largest and most important organizations and banking institutions (Hammergren, 1998, 2002; Méndez et. al, 1999; Popkin, 2000; Prillaman, 2000; Thome, 2000, Domingo, 2004).

This chapter provides an analysis of judicial reform and the contemporary JRM in Latin America. I begin by defining what JR means, including the technical and administrative changes involved in a justice reform. I then provide a brief history of the early attempts for JR in Latin America, to finally expand on the contemporary JRM. I discuss the characteristics, goals and forces behind it. For purposes of this study, however, I will pay particular attention to the premise that JR can help strengthen the rule of law and promote democratization.

Reform: What It All Means

In the case of Latin America, JR entails a move away from the inquisitorial judicial system to a prosecutorial legal order, similar to the one in Western Industrialized nations. Certainly, legal structures in a society are dynamic, not static. Therefore, throughout the centuries after independence, Latin American judiciaries did, in fact, change and adapt. Yet, none of the changes represented a divergence from the inquisitorial model instituted during the colonial period (Hammergren, 1998; Popkin, 2000; Duce, 2007).

On the other hand, the prosecutorial legal tradition originated in England, and is often referred to as the *common-law tradition*. However, it has been called *accusatorial* because in its early days, the process was initiated through an accusation by a private individual, unlike the Latin American system where a judge could do so, with or without the interest of a victim. Today, however, it is the prosecutor who can initiate the investigation, and he or she can do so without the need of a private citizen to make a claim (Duce, 2007). Moreover, unlike the inquisitorial process, the judge's role is to act as a referee between parties in an oral hearing, where both sides have the opportunity to confront each other, present evidence, cross-examine witnesses, and have access to all the information relevant to the case. It is a jury, not the judge, however, who decides the verdict, thereby allowing a more transparent procedure where citizens become part of the decision-making process. The United States, as a former British colony, inherited this adversarial tradition (Duce and Pérez Perdomo, 2003: 72).

In order for the adversarial system to work properly, the process of JR needs to transform three different levels of the old systems: structure, substance, and legal culture. Ultimately, this entails the complete elimination of the old system, the creation of new institutions to support the new system, and changing the practices, procedures, behaviors and customs of the main participants of the legal system (Hammergren, 1998; Prillaman, 2000; Duce and Pérez Perdomo,

2003: 78; Duce, 2007: 14). Therefore, in terms of specific reforms, Latin American judiciaries are supposed to introduce oral proceedings and public hearings; separate the duties and roles of the judges and prosecutors; recognize suspects', defendants' and victims' rights; and introduce the principle of "timeliness" to solve cases more efficiently (Hammergren, 1998; Prillaman, 2000; Duce and Pérez Perdomo, 2003: 78).

By introducing the oral process, the written judicial record no longer remains the judges' principal duty, nor the main source of evidence. Further, the evidence is orally presented at hearings as opposed to merely relying on a written record that is read out loud during a trial (Duce and Pérez Perdomo, 2003; JSCA, 2005; Duce, 2007). Similarly, opponents have the opportunity to face each other, present evidence in their defense or against the other party, as well as present oral arguments. This feature has great significance since, as Frühling points out, the possibility of having an oral trial with witnesses telling their stories live, with the additional opportunity of cross-examinations, also permits the corroboration of their versions, making it a more efficient way to detect false testimonies (1998: 244). Moreover, the judges have the opportunity to hear both parts and reach a verdict only after having done so. The secrecy of the inquisitorial tradition is thus eliminated in the process, reducing judges' work and providing more accountability of their decisions (Frühling, 1998; JSCA, 2005; Duce, 2007).

Similarly, JR entails a significant decrease in the role of the judges and the emergence of a new legal actor: the prosecutor. Under the new system, the prosecutor is in charge of the investigation, and is thus the one who collects evidence (Hammergren, 1998; Duce and Pérez Perdomo, 2003). To do so, this, the prosecutor works closely with the police, thereby eliminating the need for judicial investigations. The idea behind the reform is to limit the judge's role to safeguarding constitutional rights and granting any necessary judicial authorizations, thus making

sure that cases are investigated and conducted according to the law. Judges acting in this pre-trial stage are referred to as the judge guarantor or the examining magistrate (JSCA, 2005; Duce, 2007).

The prosecutor also enjoys discretionary power to select cases he or she believes should be brought to court. This latitude is governed by the "principle of opportunity" that allows prosecutors to select cases based on several criteria, such as whether or not there is public interest in the case, or whether the accused has a significant participation in the crime. This feature is particularly important because, if implemented properly, it can allow poorly-funded judiciaries, like the ones in Latin American, to concentrate resources on so those cases important to society, thus working more efficiently. Additionally, the establishment of an independent prosecutor's office permits the accused access to the collected information and evidence regarding his or her case (JSCA, 2005; Zalameda, 2005).

As opposed to Anglo-Saxon tradition, Latin American judiciaries, for the most part, still lack the trial by jury component. This means that the judge still decides the verdict. Yet, under the reform, the Latin American model has introduced a panel composed of three judges that determines the verdict. The decision does not have to be unanimous, but simply decided by a majority of two out of three judges (Ratliff and Buscaglia, 1997; Duce and Pérez Perdomo, 2003). Another distinctive feature of the Latin American case is that the panel of judges is allowed to introduce additional evidence and directly interrogate witnesses, even when the parties involved have not yet had the opportunity to do so (JSCA, 2005; Duce, 2007).

By implication, these components enhance the rights to the accused. In contrast to the authoritarian nature of the previous colonial order, there is some transparency in the way the investigation process is carried out. Constitutional rights tend to be more enforced and, prosecutors have the obligation to provide information about their charges before deciding whether to take the

case to trial. Consequently, the accused have the opportunity to seek legal advice and a defense attorney, giving them the opportunity to negotiate a plea in cases of minor to medium offenses (Ratliff and Buscaglia, 1997; JSCA, 2005; Zalameda, 2005). Indeed, concepts such as assuming that the accused is innocent until proven guilty, and the need to provide free legal counseling, have been introduced in the codes (Ungar, 2002, JSCA, 2005; Zalameda, 2005).

Ultimately, all these proposed changes are meant to contribute to strengthening of the rule of law. This means that, theoretically at least, these reforms will allow the justice system to solve cases in an efficient and timely fashion, grant citizens from all economic spheres more access to justice, and enhance transparency of the system, as well as more accountability (McAdams, 1997; Hammergren, 1998; Prillaman, 2000; Thome, 2000; Ungar, 2002; Ferrandino, 2003; Navarro, 2003). However, keep in mind that all the legal reforms and technical modifications presented in this sections, are the rationale behind JR. It does not mean that these changes have been introduced everywhere, nor does it mean that they have been successfully introduced (Hammergren, 1998, 2002; Carothers, 1999; Prillaman, 2000; Ungar, 2002; Navarro, 2003; Domingo, 2004). Before turning to discuss these issues in more detail, however, I first introduce a brief history of the reform movement, in order to understand its evolution and significance today.

History

The process of JR in Latin American begun as early as 1939, when significant changes in the code of criminal procedure were applied in the Argentine province of Córdoba. For the first time in the region's history, oral proceedings were introduced in the penal system, becoming the first major attempt to break from the inquisitorial process inherited from the colonial era. This practice would later spread to the rest of the country at the federal level through a reform proposal known as the Maier reform, published in 1986 when the JRM was back on the development agenda. In 1972, Costa Rica became the first nation to follow the Córdoba

example, although it would take several decades for this trend to spread to the rest of the continent and gain the momentum it enjoys today (Frühling, 1998; Duce and Pérez Perdomo, 2003). Nevertheless, the Argentina experience represents a milestone in JR efforts, since it became the basis for the model code proposed in 1988 by the *Instituto Iberoamericano de Derecho Procesal* (the Ibero-American Institute of Procedural Law), one of the most influential actors in the JRM (Frühling, 1998; Thome, 2000; Duce, 2007).

It was not until the 1960s that the issue caught the attention of some members of the international community, mainly social scientists in the United States, as theories of development began to emerge. Essentially, they argued that underdevelopment was "caused by the uneasy co-existence of Western and traditional traits and institutions," which, in the case of the judiciary, implied a combination of different types of legal systems. This combination included practices that resembled foreign systems and informal models with traditional customs and values, making the entire system inefficient (Frühling, 1998: 239). Note, however, that this "modern" vs. "traditional" dichotomy is still part of the philosophy of the current JRM (Frühling, 1998; Thome, 2000; Portes, 2006).

Furthermore, the Law and Development movement of the 1960s gave priority to reforming legal education. It was thought that badly trained judges and lawyers were one of the principal problems of the justice system. In fact, in some of the reformers' view there was a "lack of concern for the growth of public laws shown by jurists [as a] consequence of training that was excessively concerned with the concepts of *private* law" (Frühling, 1998: 239; emphasis added). Consequently, from 1959 until 1965, various Conferences of Latin American Law Schools took place in different countries, with the assistance and participation of many U.S. law schools,

foundations and government agencies. Particular attention was given to the support of research and training of law professors at different institutions (Frühling, 1998; Carothers, 1999).

Nevertheless, the reform efforts put little emphasis on working with sectors outside education, thus minimizing their impact. Importantly, since law professors were the main target, the judges were excluded from the reforms, and many people in the legal education arena did not support the changes. Later on, when military regimes spread throughout the region, JR was put on hold (Frühling, 1998). The period of authoritarianism that began in the 1960s not only meant that the Law and Development movement lost its momentum, but JR also lost the ground that had been gained. Countries like Argentina, Chile and Uruguay experienced some of the worst episodes of human rights abuse in the region, with thousands of people disappeared and killed during that time. In the process, judiciaries were virtually dismantled and existed mainly to serve the interests of those in power, allowing them to commit state sponsored crimes with impunity (Frühling, 1998; Carothers, 1999; Pereira and Davis, 2000; Domingo, 2004).

It was not until the democratization process that began in Ecuador in the late 1970s that judicial reform was once again on the agenda (Frühling, 1998; Huntington, 2001). When civilians retook control of the government, democratic regimes were put in place under the ideal of continuing the path to development. Along with democratization came a series of neo-liberal policies, determined to open the markets to international competition and reduce the role of the state. Neoliberal reforms became the dominant formula for successful development around the world (Frühling, 1998; Thorp, 1998; Thome, 2000; Sunkel, 2005).

Contemporary Judicial Reform Movement

A distinguishing feature of this new generation of the JRM is its regional scope. All Spanish-speaking countries from Mexico to Argentina have initiated the process of reform. The two exceptions are Panama, where the reform is pending approval by the legislative body, and

Uruguay, where there simply has not been the necessary political or technical consensus to agree on a reform. Brazil, on the other hand, is missing from the list since their system is a legacy of the Portuguese system. The difference in language poses further obstacles for them to undertake the same type of reforms as the rest of Latin America. This is not to say that Brazil has not attempted to change their judicial system for, in fact, several reforms are already well underway (see JSCA, 2005; Duce, 2007: 6).

The international community has, nonetheless, played a key role towards the promotion of JR. Political and economic integration of the Latin American nations to global trends have become a major force driving many of the changes taking place in the region. Politically, for example, the pressure for reform was also based on the need to attain international legitimacy (Popkin, 2000; Prillaman, 2000; Thome, 2000). Many developed nations and international organizations demanded these changes as a condition working with Latin America. During the same period the reforms initiated, several Latin American nations signed international human rights treaties, like the American Convention on Human Rights in San José, Costa Rica; or the International Covenant on Civil and Political Rights. Signing these treaties meant governments were willing and ready to commit to guaranteeing human rights in their countries, which included the right to a fair trial and due process, inexistent components under the inquisitorial process (Carothers, 1999; Popkin, 2000; Prillaman, 2000; Ungar, 2002; Duce, 2007). In this context, advocacy for JR became easier and more widely accepted. Thus, today the international community puts a lot of pressure on governments to dedicate more attention to judicial reform efforts. In this sense, as Thome argues, that the pressure to establish national international legitimacy in a globalized era has become a major pressure for Latin American nations to set forth a process of JR (2000: 694).

In terms of economic integration, given the global trend towards neo-liberal economic policies that call for a reduced role of the state and increased role of the market, a new legal framework was seen as necessary (Frühling, 1998; Thome, 2000; Prillaman, 2000; Portes, 2006). Such is the case with many of the bilateral and multinational agreements signed during the last decades, calling for a more globalized economy and political system. Treaties like NAFTA or CAFTA demand very specific legal mechanisms, forcing many Latin American nations to adopt dispute settlement and arbitration methods, especially when it comes to disputes with foreign investors (Frühling, 1998; Thome, 2000; Duce, 2007). Some even argue that one of the main purposes of economic integration is, in fact, the export of United States legal norms to Latin America, in order to protect foreign investors' interests (see Baker, 2005).

Not surprisingly, therefore, during the 1980s the United States, through its Agency for International Development (USAID), was among the first actors supporting judicial reform was. USAID's mission was to improve the administration of justice, especially criminal justice. This included training police forces and judges in matters such as case investigation, case management, and the creation of legal databases. Later, some of these projects were carried out in conjunction with the United Nations, but it was the United States that planned and financed much of the JR efforts (Frühling, 1998; Carothers, 1999). Another actor lending substantial support to the JRM has been *Instituto Iberoamericano Procesal Penal* (the Ibero-American Institute of Procedural Law), which developed a model for reform based on the German process, with some influence from the Portuguese and Italian legislation (Frühling, 1998; Duce and Pérez Perdomo, 2003; Duce, 2007).

Importantly, the current JRM is also promoted by an elite group of Latin American intellectuals working for the Justice Studies Center for the Americas (JSCA/CEJA), supported in

part by the Organization of American States (OAS). Reformers encompass professionals from various disciplines, mainly attorneys with academic experience in criminal law. These attorneys cooperate across different nations, lending technical assistance and developing reform models to improve each country's efforts (JSCA, 2005; Prillaman, 2000; Duce, 2007).

Forces in Favor of Judicial Reform

Certain key motives connect the Latin American reform efforts. Although many of these are connected to the idea of modernizing the state, and the need to improve efficiency of the justice system, other factors are at work as well. The sections that follow provide a glimpse of the views and reasoning of those actors and forces that believe JR is an appropriate tool for achieving development in many LDCs. Although these forces vary in intensity in every country, common factors across countries influence the reform movement. In no particular order, these are: increasing violence and citizen insecurity; eroding confidence in the judiciary; economic development; and democratization and the rule of law.

Violence and Citizen Insecurity

As the turn of the 21st century approached, concern for public safety took a central role in political debates as Latin America was identified as "the most violent region in the world" (Pereira and Davis, 2000: 5). No longer limited by the censorship imposed by authoritarian regimes, the media propagated cases of crime and violence in the streets, and exposed a justice system that was unable to protect citizens from a growing sense of insecurity. Thus, as inefficiencies, corruption, and abuse of power of the existing criminal justice system became routine headline news, advocacy for judicial reform gained more strength (Caldeira and Holston, 1999; Pereira and Davis, 2000; Davis, 2006). The consequences turned out to be far-reaching indeed, as the public and the media talked about a collapse of the criminal justice system and the

Panamerican Health Organization (PAHO) classified this increase in crime and violence as "the social pandemic of the 20th century" (Prillaman, 2003: 3).

It is important to highlight that despite the transition to democracy, state coercion continues to be a major problem in many countries in the region. In Brazil, for example, Caldeira and Holston's ethnographic study of violence in the cities of São Paulo and Brasília revealed that "Police violence has reached unprecedented levels, and the forces of law and order are themselves one of the main agents of violence in many cities" (1999: 695). Police brutality, for example, continues to be an issue both inside and outside of the jails. Human Rights organizations working in Brazil have showed evidence of how the police tortures arrested citizens when investigating a case (Caldeira and Holston, 1999: 701; Méndez et. al, 1999).

Corruption has further tainted the police's public image. Caldeira and Holston found corruption to be one of the most common problems in many of the police forces. Yet, the problem goes even further since many police officers are "entangled" with organized crime (1999: 695). In countries like Argentina, El Salvador and Guatemala, military officers and off-duty policemen take advantage of their authority to have access to weapons and use their power to cover-up information that could link them to organized criminal groups or drug trafficking (Prillaman, 2003: 6).

Particularly problematic is the "bottom-up" violence taking place in the region. (Snodgrass Godoy, 2004). Crime has soared to record levels, yet the problem in Latin America is not only that robbery has increased, but that violent crime is more prevalent than before. Murder, in particular, has escalated during the past decade. For instance, Caldeira and Holston (1999) report that the homicide rate for Brazil in 1981 was 14.62 per hundred thousand. By 1996, the rate had climbed up to 47.3 (1999: 696). During the same period, astonishing increases were recorded in

Argentina (300%), Peru (379%), and Colombia (336%) (Prillaman, 2003: 1). Overall, the region's homicide rate is as high as 23 per hundred thousand, constituting more than twice the world's average (Prillaman, 2003: 3).[1]

Eroding Confidence in the Judiciary

Thus, it is not surprising that all over Latin America, citizens hold little confidence in the justice system or the police. Prillaman portrays this situation reporting that in a poll conducted in Brazil and Mexico, half of the respondents declared that they do not even call the police when they have been victims of crime, because this would only be "a waste of time" (2003: 9). Similarly, this negative image of the police has also lead citizens to avoid reporting crimes for fear of repression (Méndez et. al, 1999; Prillaman, 2003). This is especially the case of poor people who are more frequently the target of police abuse, a phenomenon that has been referred to in sociology as the "criminalization of the poor." Consequently in Latin America, as Caldeira and Holston put it, "…the poor have learned to fear the police and distrust the judiciary system" (1999: 701).

As a result, the already negative perception of the justice system deepened, as it proved to be ineffective in providing public security, especially for violent crime. This provoked serious consequences for the legitimacy of the criminal justice system and some of the major state institutions, as parallel systems of justice became commonplace. Several recent events in Latin America show evidence of citizens taking the law into their hands. For example, in the absence

[1] Although I do recognize that "crime" and "violence" do not have the same meaning, I follow Prillaman's arguments for using both concepts interchangeably in this work. "Not all crime is violent and not all violence is criminal," yet, there is an overlap between both concepts, allowing many to identify them as proxies for each other (Prillaman, 2003: 5). For instance, domestic abuse is violence, yet in many countries it does not constitute a criminal act. Additionally, I am discussing the particular case of Latin America, where the issue is the intensification of violent crime, thus both concepts tend to overlap even more. Finally, the lack of data and the vast discrepancies between sources, also lead to use both crime and violence as proxy measures to discuss the current situation in the region (Prillaman, 2003).

of the police the privatization of justice and alternative forms of justice have become a common phenomenon. In Brazil, as in many other countries in the region, the landscape of cities are changing as increasingly more people hire private security guards to watch over their houses or businesses, and some even build walls and place bars in front of their houses or apartments (Méndez et. al, 1999; Caldeira and Holston, 1999: 714).

In less privileged segments of society where people cannot afford these types of protection, residents have opted for more extreme measures. For instance, there has been a rise in the number of registered, as well as illegal guns. Although possession of illegal weapons in penalized by the law, in light of the lack of police protection, citizens have opted to acquire and use them for their own defense (Caldeira and Holston, 1999). More problematic, however, is the increasing trend to hire vigilantes to deal directly with criminals. This practice is widespread in the Brazilian *favelas* (shantytowns), and rural communities in Guatemala where the purpose is to kill criminals (Méndez et. al, 1999; Caldeira and Holston, 1999; Snodgrass Godoy, 2004). Prillaman reports that in Ecuador the situation is such, that "public executions no longer shock the average citizen" (2003: 10).

In light of these circumstances, advocacy for reform of the criminal justice system seemed to be more critical than ever before. Particularly, reformers argue that since fear and insecurity are socially constructed, improving the efficiency of the justice system could substantially help improve the situation (Duce and Pérez Perdomo, 2003).

Economic Development

Beginning in the early1990s, along with democratization and as a means to tackle the devastating debt crisis of the 1980s, Latin America embarked on a series of Structural Adjustment Programs and neoliberal economic policies, vehemently advocated by agencies like the World Bank and the International Monetary Fund (IMF). These neoliberal economic policies

were supposed to put an end to inflation and to offer rapid economic growth for the region. Some of these policies included the opening of its economies to international competition by eliminating tariffs and privatizing former state-owned enterprises, debt repayment programs, significant cuts in social spending, monetary devaluation, and tax reforms (Thorp, 1998; Sunkel, 2005; Santiso, 2006). Nevertheless, in order to accomplish these economic goals, the consensus was that it was necessary to count on the support of an effective, reliable judicial structure (Frühling, 1998; Prillaman, 2000; Thome, 2000; Domingo, 2004; Baker, 2005; Portes, 2006). Central to this argument was the sudden realization in certain economic development scholarship and international financial organizations research, that institutions matter; a development trend that Portes (2006) refers to as "neo-institutionalism."

From this perspective, a change in the judiciary could help achieve economic development by providing a stable, reliable, transparent legal framework with uniform, predictable rules that guarantee property rights, including intellectual property rights, as well as contractual rights (Frühling, 1998; Thome, 2000; Baker, 2005). Therefore, JR was also way to establish a secure legal climate for private and foreign capital looking to invest in the region. For example, the World Bank, one of the largest advocates of JR in the last ten years viewed "…the rule of law… as a precondition for *private* sector development" (Thome, 2000: 697; emphasis added).

As a result, beginning in the 1990s international cooperation agencies began to take an interest in the subject. Some of these include United Nations agencies such as the United Nations Development Programme (UNDP), and the Institute for the Prevention of Crime and Treatment of Offenders (INLAUD); and the Organization of American States (OAS) through its Justice Studies Center of the Americas (JSCA). Bilateral support from country's like Germany, Spain and, more recently, Canada has been considerable, although the United State's assistance still

remains as the most prominent. USAID's, collaboration has been consistent, although it has varied on a country- case basis. Cooperation of international lending agencies, like the Inter-American Development Bank (IDB); and the International Monetary Fund (IMF) has also been relevant (Frühling, 1998: 247; JSCA, 2005; Duce, 2007:11). Among these, the World Bank is the major player in judicial reform efforts throughout the continent. By 2000, The Bank carried out 10 free-standing judicial reform projects with another 14 on the way. Another 15 projects addressed legal and judicial concerns, plus another 350 projects were carried out in 87 nations (Thome, 2000: 697).

Democratization and the Rule of Law[2]

In the late 1970s and particularly in the 1980s, Latin America experienced a wave of democratizations[3], as the military of country after country turned the control of government to electoral officials. Nevertheless, it was thought that without a proper, efficient judiciary that could help uphold democratic values and support the changes needed in social life, democratization could not be attained. In many cases, especially in those nations that

[2] As a form of government, "democracy has been defined in terms of sources of authority for government, purposes served by government, and procedures for constituting government" (Huntington, 1991:5). Similarly, Constitutions lay the basis for governance and delineate rights and obligations of both the State and the citizens in a democratic system (Eckstein and Wickham- Crowley, 2003: 6). The basic among these rights and duties is, however, the respect for formal electoral rights, where there must be regular, free, elections based on universal and equal suffrage. Nonetheless, this definition is too narrow for purposes of this study. Consequently, the vision of democracy of interest here is the one referred to as "true democracy' or "full democracy;" essentially, a democracy of *liberté, egalité, fraternité*, This refers to a system of governance which, in addition to having the right to vote, people also have the right to nominate representatives for political office, having more than one political party to chose from, freedom of expression and association, collective rights for indigenous groups and minorities; and a commitment to adhere to the protection of universal human rights as stipulated by the *United Nations International Covenant on Civil and Political Rights*, based on the *Universal Declaration of Human Rights* (entered into force on March 23rd, 1976) (Huntington, 1991: 25; Eckstein and Wickham- Crowley, 2003: 18).

[3] Following the contemporary definition of democracy, *democratization* has been commonly defined as "…a gradual, evolutionary, and delicate process during which democratic procedures of government are established and maintained…" (Larkins, 1996: 605). Essentially, *democratization* is the process of change from a non-democratic political system to a democratic one. The latest trend towards democratization was evidenced between 1974 and 1990, and has been referred to as "the third wave." Latin American nations are part of this third wave, as they began their transition from authoritarian military regimes in the late 1970s (see Huntington, 1991).

experienced more repressive dictatorships, this meant a reconstruction of the legal apparatus (McAdams, 1997; Carothers, 1999; Prillaman, 2000). As democracy and free trade became the new dominant development paradigm, a regional movement looking to reform the legal order emerged. The idea was to establish a legal order that was compatible with democratic values, reforming the criminal justice system and its hierarchical nature, presented the perfect initial focus (Duce, 2007).

Despite decades since the democratic transition was initiated, Latin American governments continue to experience instability, economic crisis, pervasive social and economic inequalities, and cases of human rights abuse. Today, many scholars question the quality of democracy, and whether values associated with democracy have permeated the region (Caldeira and Holston, 1999; Carothers, 1999; Méndez et. al, 1999; Eckstein and Wickham- Crowley, 2003; Pérez-Sainz, 2005; Sunkel, 2005; Santiso, 2006). According to Prillaman, polling results show that distrust in democratic institutions in Latin America, especially in those concerning with justice and crime prevention, are much higher than the international average (2003: 8).

Data from the 2004 Latinobarómetro survey confirm this trend. Table 3-1 shows the levels of confidence in three of the key state institutions: the judiciary, the government and the political parties. Each category reflects a strikingly low level of faith in the institutions in Latin America. Indeed, almost 75% of the respondents are either “not at all” or “not very” confident in the judiciary, the government and the political parties. Thus, these figures corroborate that, overall, Latin Americans today have low confidence in state institutions. In fact, the Latinobarómetro survey discloses that since 1996, in most countries of the region, confidence in the judiciary barely reaches a level of 30% (Duce, 2007: 9).

Similarly, polling results suggest that citizens in Latin America are not satisfied with democracy. The data in Table 3-2 show the levels of satisfaction with democracy for all of Latin America in 2004. The results reflect how dissatisfied people in the region are with "the way democracy works in their country" (as stated in the Latinobarómetro question). Out of 17,074 cases in the entire region, only a 9% (1,520) responded that they were "very satisfied" with democracy. Thus, once again more than half of the respondents (65%) were either "not at all" or "not very" satisfied with the way democracy works in their country.

In light of these circumstances, the need to strengthen the rule of law[4] in order to consolidate democracy in the region has become the focus of attention in the JR agenda (McAdams, 1997; Hammergren, 1998; Carothers, 1999; Prillaman, 2000; Ungar, 2002; Domingo, 2004). Social scientists, researchers and policy makers agree that "Democracy cannot exist without the rule of law" (Ungar, 2002 :1). The reasoning behind this argument is that the rights and duties stipulated in the constitution (i.e. electoral rights, individual rights, collective rights, human, rights) cannot be guaranteed unless they are enforced by the law. The Constitution becomes a mere piece of paper unless there is a judiciary behind it protecting the fulfillment of all rights and regulations. Therefore, the rule of law is what allows the Constitution to take form and become a reality and, by implication, what allows the consolidation of democracy. In turn, legitimacy of the State and the system of governance depends on the ability of the State to enforce constitutional laws and safeguard constitutional rights. This, however, can only be attained through the rule of law (Larkins, 1996; Eckstein and Wickham- Crowley, 2003). From this perspective, therefore, the rule of law plays a principal role in allowing the democratization

[4] The most widely-accepted definition of the rule of law comprises four main features: judicial independence, judicial effectiveness in the administration of justice, state accountability to the law through checks and balances in the scheme of government, and citizens' access to justice (Prillaman, 2000; Ungar, 2002).

process to transpire, as well as to consolidate democracy itself. Theoretically, strengthening the rule of law implies a stronger democratization process and, in the end, the survival of democracy (Larkins, 1996; Frühling, 1998; Hammergren, 1998; Carothers, 1999; Prillaman, 2000; Thome, 2000; Ungar, 2002; Domingo, 2004; Eckstein and Wickham- Crowley, 2003).

In practice, however, it is not so simple. Research increasingly shows how this "linear" sequence of the JR framework has lost its shape and has begun fading as the reform process is carried out. JR efforts have and continue to experience obstacles and set-backs to the point of opening the question of whether JR strengthens democratization, or, if democratization (showing signs of deeper democratic embeddedness) is actually needed prior to the reform of the justice system (Carothers, 1999; Diamond, 1999; Popkin, 2000; Prillaman, 2000; Ungar, 2002; Navarro, 2003; Domingo, 2004). Importantly, this concern is not coming from an anti-reform faction or mere critics, but from researchers and advocates of the strengthening the rule of law. While the need to improve the rule of law and justice in Latin America is not the topic of debate, the current approach of the JRM towards the strengthening of the rule of law is.

Conclusion

Reforming the justice system is by no means a new practice. Most nations in the world have systematically made changes to their judicial structure throughout centuries. As opposed to the United States and Western European nations, however, Latin American countries, along with other LDCs, did not significantly modify their judiciaries, thereby maintaining the inquisitorial legal system inherited during the colonial era for over five centuries. As a result, vast differences mark the Western Industrialized nations' judiciaries with those of Latin America and, by implication, their legal culture and practices. Similarly, the JRM is not a new phenomenon in the region. The first steps towards JR date as far back as 1939 in Córdoba, Argentina. Since then, various attempts to change the justice system have been recorded in different nations, although

none of them truly significant up until the 1980s. The resurgence of JR in Latin America thus coincided with the process of democratization in the region.

Today, JR stands as one of the most important development tools, supported by the world's largest and most prominent international organizations. It is thought that breaking away from the inquisitorial legal order to a prosecutorial system, can improve the social, economic and political situation in Latin America. Without a doubt, many issues directly or indirectly tied to the legal system afflict Latin American nations. Nonetheless, as civilian rule returned to the region in the late 1970s, democratic stability and the future of democracy in the region became one of the greatest concerns in the international development agenda.

In the view of the reformers, accomplishing democratic objectives was not possible under the inquisitorial system. The upsurge of violence, extra-legal forms of justice, as well as declining confidence in the institutions of the last decade, helped reinforce the belief that JR was indispensable. The consensus among reformers was that the structural design of this colonial legal system promoted significant inefficiencies and delays in the criminal justice system and compromised some of the most fundamental democratic values (i.e. the right to due process, the rights of the victim, and the rights of the accused). Lack of adequate funding for the judiciary and its main branches was considered an important factor, yet the root of the problem was traced to the inquisitorial system. Hence, the only viable solution was thought to be the complete elimination of the inquisitorial tradition and a radical transformation of its main institutions. This included the need to strengthen the rule of law by establishing an independent judiciary with checks and balances, and enough power to guarantee the respect for constitutional norms and regulations. The alternative at hand was the adversarial, prosecutorial system of the Western Industrial nations.

As this chapter illustrates, however, JR is a complex process that requires vast changes at different levels, including structure and legal culture. Even more problematic, different motives and interests drive the forces comprising this debate, questioning how far JR can move forward. In the next chapter, I address this topic in more detail, paying particular attention to the assumption that adopting an adversarial, prosecutorial model will help promote democratization in Latin America.

Table 3-1. Confidence in state institutions in Latin America 2004

	Confidence Judiciary		Confidence Government		Confidence Political Parties	
Level of Confidence	N	%	N	%	N	%
Not at All	6,632	37	7,274	40	10,278	57
Not Very	6,554	37	6,131	34	5,038	28
Fairly/ Some	3,433	19	3,319	18	2,025	11
Very/A lot	1,203	7	1,378	8	588	4
Total	17,821	100	18,101	100	17,929	100

Source: Latinobarómetro 2004. Those who answered "Don't Know" or did not answer the question have been excluded (Missing Values).

Table 3-2. Levels of satisfaction with democracy in Latin America 2004

Level of Satisfaction	N	%
Not at All	3,860	23
Not Very	7,202	42
Fairly/ Some	4,492	26
Very	1,520	9
Total	17,074	100

Source: Latinobarómetro2004. Those who answered "Don't Know" or did not answer the question have been excluded (Missing Values).

CHAPTER 4
JUDICIAL REFORM AND DEMOCRATIZATION: MEANS OR ENDS?

Introduction

More than ever before, the democratization process as well as the future of democratic regimes in Latin America have been associated with the need to strengthen the rule of law. As a result, a regional and international movement for judicial reform in Latin America has emerged as a new development paradigm. In their efforts to empower the judiciaries and promote the rule of law in the region, the reform movement proposes to strengthen the administration of justice by establishing the adversarial, prosecutorial system of Western Industrialized nations and focusing on four main legal mechanisms: judicial independence, judicial effectiveness, state accountability to the law through checks and balances, and citizens' access to justice (Larkins, 1996; McAdams 1997; Hammergren, 1998; Prillaman, 2000; Ferrandino, 2003; Navarro, 2003; Domingo, 2004).

Nonetheless, research and assessments of the current state of judicial reform in the region have begun to question whether reforming the legal system is indeed conducive to democracy. Importantly, this concern has emerged from researchers and scholars who support the reform, but do not agree with its approach. In their opinion, while enhancing the administration of justice is essential, it is not the same as promoting the rule of law. The bottom line, they argue, is that democratization is needed prior to undergoing a judicial reform (Carothers, 1999; Diamond, 1999; Pásara, 2000; Popkin, 2000; Prillaman, 2000; Ungar, 2002; Navarro, 2003; Domingo, 2004).

This chapter explores this latter perspective by analyzing some of the experiences and results of the JRM's agenda with respect to the rule of law[1]. I concentrate on the three main aspects: efficiency, access, and judicial independence. I intend to show that, while many reforms and new mechanisms have been introduced, whether they are actually being implemented is a completely different story. Indeed, resistance to the reform comes from various groups, whose actions hamper the proper functioning of the new system. Ironically, however, opposition comes primarily from actors within the judiciary itself, as well as from other members of the State[2] and political institutions, whose powerful interests are jeopardized by JR. Thus, in the end, I contend that the rule of law is foremost a political matter that can only be attained through long-term consensus; to succeed it must therefore be an embedded feature of a larger democratic process.

Efficiency

As discussed in Chapter 3, one of the reasons for the introduction of the adversarial legal tradition has been the notion that this system can help enhance judicial efficiency. By introducing oral procedures and hearings, the burden of preparing written records is eliminated, rendering a lot of other bureaucratic procedures unnecessary as well. Additionally, the reforms have introduced the concept of "timeliness," limiting the time allowed for judges and prosecutors to manage cases and trials (Duce, 2007). At the same time, by introducing the prosecutor as a new a actor in the legal realm, judges are no longer responsible for solving cases and can thus perform other duties, such as acting as the guarantors of constitutional rights, and contribute to a

[1] Reforms evaluations are vast and complex and they come from an array of scholars, researchers, lawyers and other actors, whose conclusions and evaluations sometimes coincide but other times differ. For purposes of this study, however, I have concentrated on the crucial components and issues found in a variety of literature available on the topic of judicial reform.

[2] Today, the Sate has been commonly defined as a political community with national and international sovereignty, where an overwhelming consensus of its people exists to grant legitimacy to the system through the institutions. The State is structured by the division of power (although not necessarily equally) between three main institutional branches: The Executive (President), the Legislative and the Judiciary; each branch compromised of more of its own institutions (i.e. police, military) (Huntington, 1968: 1).

speedy judicial process overall. Taken together, all these changes help increase confidence in the judiciary and the rule of law in general, contributing to the legitimacy of state institutions.

In reality, many of the components designed to enhance efficiency have been either partially or fully ignored by the actors responsible for implementing them. For example, written procedures have not completely disappeared. Records and files are still in writing and under the control of different legal actors. Some judges still allow the introduction of written reports and testimonies as evidence, as they would have done under the inquisitorial legal order (Duce, 2007). Even more problematic, the lack of training and personnel forces the judges to continue dedicating their time to bureaucratic, administrative issues like signing documents and checks. In Argentina, Brazil, Peru and Ecuador, for example, judges spent 65% to 70% of their time in non-judicial tasks (Ratliff and Buscaglia, 1997: 64). Additionally, Latin American pre-trials are still held in the traditional inquisitional manner. They still rely on written motions and records, and place more weight on the testimony of the police than that of other actors. Prosecutors rarely make use of their discretionary power, and, in many cases both judges and prosecutors are reluctant to grant the accused their new rights (Carothers, 1999, Pásara, 2000; Popkin, 2000; Navarro, 2003; JSCA, 2005).

To complicate matters, the introduction of oral hearings and procedures has not been successful in eradicating certain illegal practices within the system. For instance, one of the main arguments in favor of JR was that the written nature of the inquisitorial model permitted judges to violate the right to a fair trial. The issue was that judges would not even be present for the trial, but simply delegated the resolution of cases to non-judicial staff, such as clerks or assistants (*actuarios* or *secretarios*). Later, the judges simply signed the necessary papers to validate the verdict, as if they had been in charge of the entire process themselves (Duce, 2007). Hence, verdicts were often placed in the hands of people who provided little or no knowledge of the

laws, violating the code of procedures and the right to justice. Despite the introduction of the adversarial system with oral proceedings, today it is still commonplace for judges to delegate the resolution of cases to their staff. If the judge does not *sign* the transcript of the proceeding, the hearing is null and void. Yet, the absence of the judge from the hearing does not affect its validity as long as the judge signs the transcript (Duce and Pérez Perdomo, 2003: 73).

All of these issues, therefore, have reduced the positive impact on efficiency that JR was supposed to have. Consequently, these mixed findings point to a major difference between JR in theory and JR in practice. JR has successfully made changes in paper, but it is not in itself sufficient to transform the legal culture prevalent in the region for 500 years of inquisitorial tradition, even if it is *the* "modern" legal system of advance Western nations.

Access

Access to the system of justice through the courts is one of the most important components of the rule of law. Access to justice is premised on the idea that everybody has the equal right to justice and, in turn, that the justice system is responsible for responding to the fulfillment of this right (Ferrandino, 2003). Therefore, at the heart of the *access* to justice component is the notion of "equality for all," a central democratic ideal. Likewise, access has been the center of attention in the last decade given the widespread phenomenon of citizen insecurity (described in Chapter 2). Consequently, one of the principal changes under JR is the creation of a public defense institution where citizens can have access to a lawyer at no cost. While this component and its implications are essential for the proper implementation of an adversarial justice system, basic mechanisms to ensure the necessary changes, nevertheless, remain poorly implemented (Ratliff and Buscaglia, 1997; Carothers, 1999; Diamond, 1999; Prillaman, 2000; Ferrandino, 2003).

Follow-up studies to evaluate the reforms show that the goal for access to justice still remains far from a reality. One of the main problems has to do with the lack of efforts to actually

provide free defense for the accused. Funding for public defense lawyers remains scarce. The number of citizens in need of a lawyer outnumber available public defenders by the hundreds, making it very difficult to address people's needs (Ferrandino, 2003; JSCA, 2005). Likewise, the non-judicial administrative matters that judges still manage under the new system (described above) further complicates the availability of access to justice. At the same time, availability of courts and court rooms remain poorly funded. Keep in mind that the introduction of oral proceedings inevitably creates the need for more courts, since it requires public hearings and trials. Thus, the lack of funding for courts is particularly problematic in rural areas where lack of state presence and infrastructure has historically been the norm (Ferrandino, 2003: 78).

Making matters worse, citizens in many rural and more isolated communities do not speak Spanish or, at least, not sufficient Spanish to be able to communicate with legal representatives. This problem partly explains citizen's reluctance to report crimes and other problems, thereby creating a wider division between the citizenry and the institutions of the law. This in itself is counterproductive to the establishment of the ideal of "access to justice for all." Therefore, initiatives to expand access to the system should also focus on resources for language interpreters (Ferrandino, 2003; Snodgrass Godoy, 2004).

Nonetheless, it is important to recognize that certain advances, such as implementing constitutional courts of justice, and tribunes for people's defense (*las defensorías del pueblo*), have successfully extended access to justice in many places (Ungar, 2002; Ferrandino, 2003).

Judicial Independence

Despite the vital role that efficiency and access play in the administration of justice, it is said that the rule of law is nothing without judicial independence (Larkins, 1996; Ungar, 2002). The basic characteristics attributed to *judicial independence* are impartiality and independence. Impartiality refers to the notion that the judges make decisions on a case based on the application

of the law and the facts, and not on who the litigants are, or, based on a preference for one of them. Independence, or "political insularity," means that the judiciary is protected from being used as a political tool so that interest and power groups cannot use it as a tool to advance their own agenda (Larkins, 1996: 609; Ungar, 2002).

Nevertheless, Larkins (1996) is particularly critical of the way political and legal scholars have assessed judicial independence in countries where judicial reform is taking place. He argues that, while judicial independence seems like an obvious trait to detect, in practice, procedures that undermine its autonomy are blurry (see Larkins, 1996; Ratliff and Buscaglia, 1997). Therefore, Larkins attempts to provide better tools to recognize and measure the presence or absence of judicial independence and its effectiveness. He proposes that, in addition to impartiality and independence, judiciaries must also have the *power* to act as separate entities *detached* from the State.

> "Thus, a more accurate definition of judicial independence might look like something like the following: Judicial independence refers to the existence of judges who are not manipulated for political gain, who are impartial toward the parties of a dispute, and who form a judicial branch which has the power as an institution to regulate the legality of government behavior, enact "neutral justice," and determine significant constitutional and legal values" (1996: 611; italics in the original).

In short, judicial independence implies that the law supersedes everything and everyone, promoting the existence of a more egalitarian society where all citizens have the same rights and expectations, hence its importance for the performance of a democratic regime.

Desirable as this goal may be, in practice, it has proven to be the most challenging aspect of JR. Several countries such as Argentina, Ecuador, El Salvador, Peru and Venezuela have passed minor reforms to grant some autonomy to the judiciary, yet, none of the initiatives have been significant to actually allow its independence. The underlying obstacle in most countries has been that, despite the *transition* to democracy, the judiciary is still dominated by other

branches of government, especially by the Executive, which shows little change (Carothers, 1999; Diamond, 1999; Popkin, 2000; Prillaman, 2000; Ungar, 2002; Domingo, 2004).

As discussed in Chapter 2, this practice has been part of Latin American history since the colonial era and, despite, various changes in the type of government, it has continued to be the norm ever since.

For example, studies on El Salvador conclude that, despite massive funding available from USAID and the United Nations, as well as other international lending institutions, even the most basic technical reforms (such as introducing the oral system) took decades to be approved by the government. Later on, any efforts to grant the judiciary more independence were hampered by members of the government itself, obstructing any possibility of prosecuting cases of human rights violations. In fact, according to reform evaluators at JSCA, even though investment in the judiciary increased from 8% of the national budget in 1997, to 19% in 2000, El Salvador continues to experience problems implementing major reforms. Popkin concludes that, "…a critical weakness of the reform effort [in El Salvador] was the failure to develop a *broad national consensus* or to win the support of members of the judiciary" (2000: 251; emphasis added).

Ungar (2002) reaches the same disappointing conclusions after examining the issue of judicial independence in Argentina and Venezuela. His research revealed that,

> "When such reforms are enacted, however, they are often not as effective as planned *because of the very conditions that promoted them*…Executive power and judicial weakness then, limit reforms' effectiveness. The executive rarely loses its determination to stock the judiciary with friendly judges, side-lining new merit-based procedures in the process, and practices such as patronage, favoritism and discriminatory prosecution are engaged into internal judicial functioning" (2002: 142; emphasis added).

In the end what this means is that the rule of law- the central, if not defining, component of the current JRM- is not possible unless the institutions and actors comprising the State *as whole* are willing to relinquish their power and cede it to the judicial branch (Larkins, 1996; Carothers,

1999; Diamond, 1999; Popkin, 2000; Ungar, 2002). Thus, "a democracy working to promote the rule of law is trying to pull itself up by its own bootstraps: the same officials and institutions it relies on are the same ones that obstruct needed change" (Ungar, 2002: 2).

Democratization and Judicial Reform

Thus the relevant questions here are: Does the judicial branch itself want to be reformed? And, more importantly, given the strong roots of Presidentialism and submission of the judiciary to elite control, can judicial reform be achieved without a democratization process first? In the this last section I answer these questions, arguing that the obstacles to the implementation of a rule of law in Latin America represent much more than just administrative obstacles for judicial reform. Taken together, these findings suggest that democratization is not a natural, guaranteed outcome of JR, but rather, an essential component of its implementation.

First, the evidence presented from numerous case studies in different Latin American nations points out that, indeed, opposition to change comes from the judiciary itself as well as from the rest of government and political branches, historically accustomed to utilizing the justice system as a tool to advance their own agendas.

These studies emphasize how, in practice, the "institutionalization of the rule of law" ultimately entails "*the submission of the state*" (Larkins, 1996: 606; Carothers, 1999; emphasis added). These affirmations make sense since, after all, the rule of law promoted by judicial reform implies a major transformation of the State *power* structure. Introducing checks and balances in the scheme of government, as well as accountability techniques, are both methods that will insert greater control of state actors. These changes inevitably cause unease among the elite groups and government officials whose actions and decisions within the system will be more scrutinized (Domigo, 2004; Portes, 2006).

This is especially the case in Latin America and other LDCs, where the judiciary has long been subservient to the Executive and power elites. Consequently, as numerous studies suggest, achieving effectiveness, access and judicial independence (the essential components for the rule of law and democracy) is a political and institutional matter that depends on the willingness of the state and its actors to achieve a *long- term consensus* that allows JR to happen (see Carothers, 1999; Diamond, 1999; Pásara, 2000; Popkin, 2000; Prillaman, 2000; Ungar, 2004).

A negotiated consensus is at the heart of the process of democratization itself. As Huntington points out,

> "How were democracies made? They were made by *the methods of democracy*; *there was no other way*. They were made through negotiations, compromises, and agreements. They were made by political leaders in governments and oppositions who had the courage both to challenge the status quo and to subordinate the immediate interests of their followers to the longer-term needs of democracy. They were made by leaders in both government and opposition who withstood the provocations to violence of opposition radicals and government standpatters. They were made by leaders in government and opposition who had the wisdom to recognize that in politics no one has a monopoly on truth or virtue…. *Negotiations and compromise among political elites were at the heart of the democratization processes*…" (1991: 165; emphasis added).

Since JR has been hampered by a lack of *consensus* among state and judicial actors alike, the situation reveals that the root of the problem of JR implementation is an incomplete *process of democratization*. Therefore, the issue with the current JRM approach is that it assumes that democratization is a natural, automatic, guaranteed outcome of the reform when, in reality, democratization is the *means* through which the rule of law can be consolidated, since, democratization, among many other things, means *consensus*. Even more challenging, Larry Diamond (1999) concluded that democratic consolidation is actually a *pre-requisite* for judicial reform; and Prillaman criticizes Hammergren and other researchers' theories and assumptions on judicial reform. Prillaman states that their theoretical models do not fully explain the role JR plays in democratic consolidation, if it plays one at all (2000: 4).

Conclusion

Although an efficient, accessible, transparent justice system, capable of protecting and responding to the needs of all citizens alike, sounds like desirable, collective ideal, interests and politics continue to interfere in its materialization. Inevitably, strengthening the rule of law implies changes in the organization of the legal structure and as a consequence, a different distribution of power among its actors. These changes cause unrest among elite groups and government officials accustomed to influence the judiciary to protect their interests.

Given the historical tradition of the strong executive, the situation is particularly challenging in Latin American nations. Country case studies have shown how, despite to the return to civilian rule, the *balance of power* has not been altered in most Latin American countries. Nor have values associated with democracy permeated the political elites or the state actors, whose interest continue to hamper progress in the region. According to Domingo,

> "Judicial reform has been undertaken with singular enthusiasm throughout Latin America, but with disappointing results. Reform objectives have been a mixed bag, with varying degrees of political commitment and consensus, and different emphases on the range of issues that have been brought under the umbrella of judicial reform" (2004: 118).

Thus, a deeper democratic embeddedness- the reform's assumed goal- is precisely what is still missing in order to implement the reform *itself*.

Moreover, the research and evaluation here presented point to two basic conclusions: a) the judicial system must have been working properly for some actors and/or for certain interests in particular; and b) the willingness of those beneficiaries of the old system to allow for a more transparent, accountable judiciary remains doubtful at best. In fact resistance comes from the judiciary itself, as well as from the state as whole. How else do we explain centuries of neglect of the administration of justice? After all, the "inefficient" inquisitorial legal tradition of Latin America has, despite minor reforms, remained virtually unchanged for *over 500 years*.

Democracy, on the other hand, has been repeatedly interrupted by authoritarianism, even in this last wave of democratization that took place only a few decades ago (see Valenzuela, 2004). Therefore, although Latin American nations may be governed by elected representatives, democratic values and practices have not been fully implemented.

In the section that follows I provide a closer analysis of these issues by showing results from interviews conducted to key legal actors in Quito, Ecuador. Their perceptions of JR in the country illustrate that obstacles to the strengthening of the rule of law in the country represent much more than just obstacles to JR.

CHAPTER 5
COUNTRY CASE STUDY: ECUADOR

Introduction

To illustrate the dynamics of judicial reform in Latin America, this final chapter focuses on the case of Ecuador. The Ecuadorian experience with judicial reform, with its accomplishments, challenges and assumptions, is a good example to represent many of the themes discussed throughout previous chapters, particularly the assumption that JR will bring democratization. Also, this is a good way to provide a closer picture of JR in the rest of the region.

I chose to work on the case of Ecuador for two reasons. First, Ecuador is one of the countries where the vast dysfunctions and issues plaguing its judiciary have been unveiled more than ever before in the last decade. Citizen insecurity and extra-legal forms of justice, such as lynchings, have become generalized; and large, nation-wide social movements demanding government responsiveness continue to emerge (Prillaman, 2003: 8; Snodgrass Godoy, 2004; see El, 2006). Likewise, even though Ecuador initiated the third wave of democratization when the last military coup stepped down in the late 1970s, it has also proven to be one of the most unstable nations with several democratic regimes overthrown. Nonetheless, Ecuador initiated JR efforts back in the 1990s, and continues to work on these endeavors today. Given these circumstances, therefore, Ecuador is an interesting case to examine the development of a JRM.

The case study that follows is the result of research conducted in Quito, Ecuador during the Summer of 2007. I conducted semi-structured interviews using a grounded theory approach (Corbin and Strauss, 1990) with key legal actors from a variety of sectors: law school students, law professors, litigants, Ministers of Criminal Justice, private sector lawyers, lawyers working in public ministries, representatives of the Supreme Court of Justice, and representatives of the *Tribuna Ecuatoriana de Consumidores y Usarios* (Ecuadorian Tribune for Consumers and

Users). All of my interviews lasted a minimum of an hour and in some cases I was lucky enough to have been granted more time. Following rules and guidelines of the Internal Review Board (IRB) of the University of Florida, identities of interviewees will remain confidential.

Since there are numerous topics and issues under the umbrella of judicial reform, for purposes of this study, I here provide a *summary* of my findings. I depict common themes brought up by different actors during the interview process so that information remains concise, as well as consistent with the topic of judicial reform and democratization discussed in previous chapters. The advantage of doing so is that it will show how there are common concerns and opinions among many different actors and how these are crucial to the study of judicial reform. This will help readers concentrate their attention to the most relevant issues as well.

Additionally, it is worth emphasizing that my questions did not direct attention to technical or administrative matters of JR. I concentrated on legal actors' *perceptions* of judicial reform in the country since, as I have argued earlier, the problem with the reforms is not so much to include them in the books, but to actually enact them and put them into practice. Moreover, my interviews were semi-structured which allowed all the respondents to talk freely about the issues *they* thought were important as well, minimizing any biases that might misguide the conversations because of the researcher's background or ideology. Allowing the interviewees to include topics or expand on them, turned out to be very valuable because legal actors' perceptions of institutional change are first-hand information that unveil how the concept of judicial reform is being processed in the nation. After all, the reform is in part targeted to all of these actors. Their reaction has a lot of influence on the future of the JRM in the country. Thus, by interviewing legal actors themselves, one can get a better appreciation of what is taking place during the reform process, and what are the unspoken, unwritten issues in the legal realm that

have the potential to either promote change or hamper it. Before I turn to this topic I briefly discuss the historical legal and political background of Ecuador in order to have a better understanding of the context in which judicial reform is being set forth.

Ecuador's Development Path

Ecuador, once a part of the Spanish Empire, shares with Latin America that history of highly centralized political organization. Along with Venezuela and Colombia, present-day Ecuador was part of the viceroyalty of New Granada, of which the city of Quito was one of its *audiencias,* or advisory councils. These advisory councils where composed of president-judges, appointed judges, and *corregidores* or mayors, who were the local-level governors. Moreover, history tells us that these council posts were notorious for corruption and dictatorial attitudes. Thus, like much of the rest of Latin America, Ecuador's early political path was characterized by an authoritarian central power where the Spanish and *criollo* elites (sons and daughters of the first Spanish settlers) ran the country at their pleasing (see Chapter 2) (Vanden and Prevost, 2006).

Despite the break from Spain the political organization in the post-independent period represented more of a transfer of power from the Spanish Crown to the local elites, who managed the territory. Thus, concentration of power in the hands of a few continued to be the norm. As it has been the case in most of Latin America, Ecuador shares a culture of "the strong Executive," fueled by *caudillismo,* where the judiciary branch subdues to its power (see Chapter 2).

Nonetheless, throughout the 20th century, Ecuador's trajectory continued to experience several obstacles. Military take-overs, the upsurge of populist regimes, plus a lack of consensus between the Congress, the Presidents and the elites, have been the norm. Indeed, one of the major characteristic of the Ecuadorian case has been a very strong regional division between the

Sierra (the Andean region) and the *Costa*, (the tropical zone in the Pacific). According to Thorp, each region "had a strong life of its own," a feature that further weakened the country's ability to reach a national consensus in a variety of issues (1998: 83). Javier Santiso, in his evaluation of Latin America's path to development, labeled Ecuador's as a more "erratic" trajectory (2006: 7).

In more recent history, however, the picture does not look more encouraging. In 1990 Ecuador, along with the rest of Latin America, initiated trade liberalization policies. It opened up its economy by eliminating tariffs and privatized former state-owned enterprises. In 1992 more stabilization policies, especially those concerning debt-repayment and cuts in social spending were underway (Thorp, 1998: 128). Consequently, Ecuador embarked to the neo-liberal economic package, reducing the role of the state and letting the Market dictate the rules of the game, and thus conforming to what Sunkel calls "acceptable by American standards" (Thorp, 1998; Sunkel, 2005; Santiso, 2006).

Nevertheless, as with many other changes in the past, these Structural Adjustment Programs (SAPs) were not as easy to institute in Ecuador as in other countries. While there were the "radical stabilizers" (using Thorp's term) like Argentina, Bolivia, Chile, Mexico, Peru and Uruguay; Ecuador proved to be a more challenging case (1998: 262). The interest of traditional export elites continued to be an obstacle to the passage of new policies. However, so was the widespread popular unrest caused by the threat to remove subsidies and reduce salaries. To complicate the situation, an inefficient Congress that was more preoccupied with political power than to working for the country, contributed to a weak democracy where there was little room for *consensus* in order to pass legislation (Thorp, 1998: 262).

With each presidency, economic as well as political deterioration worsened, culminating in a sequence of extreme political instability. Ecuador has seen a total of 10 presidents in only 12

years (Thorp, 1998; Valenzuela, 2004)[1]. As Arturo Valenzuela illustrates in his article "Latin American Presidencies Interrupted" (2004), Ecuador is not alone in this regime- overthrowing trend, but it has proven to be one of the most unstable democracy, with the most number of presidents deposed from office.

This widespread discontent with the democracy and the most crucial state institutions, including the judiciary and the government in general, are confirmed by the data on Ecuador in the 2004 Latinobarómetro survey. Table 5-1 displays the results of a frequency distribution of responses to a questions regarding confidence in Police, Judiciary, Government and Political Parties in Ecuador for the year 2004. Almost a 73% of respondents have little or no confidence in the police; almost 86% of Ecuadorians have little or no confidence in the judiciary (alternatively, only 163 people out of a total sample of 1,187 have a lot or some confidence in the system); 11.2% have a lot or some confidence in the government; and a bare 6.3% of respondents have a lot or some confidence in the political parties. Evidently, the data show low regard for the key institutions in the country.

Figure 5-1 provides a better picture of the overall satisfaction with democracy in Ecuador. A frequency distribution of responses to the 2004 Latinobarómetro question shows that 86% of respondents are either not at all or not very satisfied with the way democracy works in their country. Importantly, a mere 1% of people replied that they are very satisfied with the democratic system of governance.

So given the focus of this project on the process of *democratization* as essential (and for some even a pre-requisite) for judicial reform, and given the low levels of confidence and

[1] Valenzuela's article on 2004, does not include information on the latest civilian coup, where former President Lucio Gutierrez was overthrown, and replaced by the Vice-President, Alfredo Palacio. Since then, new elections took place, giving the presidency to 43 year-old economist, Rafael Correa. Thus a total of 10 presidents have been in power in a lapse of only 12 years.

satisfaction with democracy and its institutions, what has been the Ecuadorian experience with a change in its legal system? In the section that follows I discuss this topic in more detail. I begin by providing some information about the reform process itself, to later continue to discuss what my interviews on the subject revealed.

Judicial Reform in Ecuador: Perceptions of its Legal Actors

In December 1993, the Ecuadorian government disclosed its first signs of intention to reform the judicial system by passing the "State Modernization Law" (*La Ley de Modernización del Estado*). It stipulated the need to reform the administration of public entities, including judicial reform, as part of its agenda (ProJusticia, 2007). Later on, on August 30th 1995, by Executive Decree, the *Unidad de Coordinación para la Reforma de la Administración de Justicia en el Ecuador* (ProJusticia) (Coordination Unit for the Reform of the Justice Administration in Ecuador- ProJustice), was created as an entity ascribed to the Ecuadorian Presidency. Two years later, on April 1997, ProJusticia was ascribed to the Presidency of the Supreme Court of Justice (ProJusticia, 2007). The World Bank and the International Monetary Fund (IDB) were the two main entities that supported the reform efforts in Ecuador. They provided financial support with grants and loans, under the label of "technical cooperation" (Projusticia, 2007).

Nonetheless, passing these modifications and implementing these small projects was a lengthy process. It took Congress an entire decade to agree to pass the legislation to implement JR. With respect to criminal justice, when the legislation to approve its reform passed in January 13th 2000, instead of allowing for a gradual process of change (as had been the recommendation), Ecuadorian legislators decided to introduce all the new codes of procedure needed for the reform, and fully implement the oral, accusatorial system. As a result, on June 13, 2001, only a

year after the legislation was passed in Congress, the new system formally went into force in the in the entire country (Zalameda, 2005: 76).

Ecuador's trajectory with the reform continues to experience difficulties. The principal problems are related to "an inadequate normative design, an almost complete lack of implementation, and the *serious institutional problems* that it has confronted in the last few years" (Duce, 2005: 10; emphasis added). For example, it does not allow for prosecutors to make use of their discretionary powers, one of the basic components of the adversarial system, and one of the most advocated reasons for arguing JR could help alleviate the system's overwhelming workload. In addition, Ecuador has the lowest number of prosecutors per person compared to the rest of Latin American nations that have adopted the new adversarial system. As of 2004, there were only 2 prosecutors per 100,000 inhabitants. Similarly, there is almost no training available to prepare people in the system to fulfill their roles and duties, as well as a lack of infrastructure and necessary technology for the proper functioning of the judiciary. Finally, although the availability of a public defense office is vital for access and efficiency to the justice system, up until 2005 (decades after the JR of the criminal system entered into force) there was still no Public Defense Office in Ecuador (JSCA, 2005: 190; Zalameda, 2005). Not surprisingly, therefore, according to Zalameda, the current legislation for reform "lacks pragmatism" (2005: 76).

As in many other Latin American nations under judicial reform, the actors involved in the system continue to exhibit behaviors and procedures that were more in tune with the old inquisitorial order. For example, written procedures still outnumber oral procedures, oral trials are not taking place even though the legislation stipulates they must, there is no free-assessment of evidence (certain testimonies and evidence are given more weight than others- as was the case

in El Salvador with the police testimonies), and basic tools such as cross-examination and objections are not being utilized (Zalameda, 2005: 77).

Nonetheless, these obstacles are much more complicated than administrative deficiencies or system inefficiencies, because it means that the system is disorganized, that the reforms are not being implemented or followed, when these were, in fact, the same problems the reforms were supposed to alleviate in the first place. In 2004 alone, for example, judges faced an average case workload of 4,033. Of those, only an average of 16% were cleared (JSCA, 2005: 190).

When I interviewed one of the *Ministros de lo Penal* (Criminal Justice Ministers), I asked his opinion of the changes in the new criminal justice system. Specifically, I asked if he agreed that judicial reform could help alleviate many of the issues afflicting Ecuador and Latin America in general. He responded,

> "A partir del 2000 tenemos el codigo de procedimiento penal que es acusatorio y ya no inquisitivo. De modo que la situación varió totalmente a partir de ese código. Para mi ese código se dio a partir de una situación mas bien externa y creo que los resultados, que es una aculturación, una mezcla tal; que se confunden los sistemas. Lo cual es lógico porque si nosotros teníamos un sistema inquistivo durante tantos años en donde las cosas se hacían más por escrito y no oralmente, el cambiar de un momento a otro trajo una serie de problemas por que la gente no estaba preparada. Ni los jueces, ni los abogados, ni las entendían tampoco los jusiticiados. De modo que se produjeron problemas muy serios y todavía, a pesar de que hay muchas materias en las que sí ha dado buenos resultados, sobre todo en que dio la oportunidad de ser escuchado en los juicios, bueno en teoría, pero yo creo que la impunidad ha subido. Por que las denuncias que se presentan en las fiscalías llegan a tal número que es un porcentaje mínimo el que llega a establecerse en la instrucción y menos todavía a juicio. De modo que decir que hemos ganado…(pausa…)….Sí, relativamente por que estamos modernizados pero no necesariamente en mejor situación."

> "Beginning in the year 2000 we have the criminal code of procedures, which is part of the adversarial system, not the inquisitorial anymore. Therefore, the situation changed completely after that code [was passed]. In my opinion, that code was more the result of external situations, and I think that the results are an acculturation; such a mix, that in the end the systems are simply confused. Which of course makes sense because if we had an inquisitorial system for so many years, in which things were done in writing and not orally, the sudden change [to a new system] *brought a series of problems because people were not prepared. Neither were the judges, nor the lawyers*, and not even the accused understood [the changes]. Thus, the problems created have been very serious and today, despite that

> there are a lot of other mattes in which there has been in fact an advance, especially that there is now the opportunity to be heard in a trial, well in theory at least, but I think that impunity has actually increased. Because the number of reports that are presented to the fiscals reach such high that only a minimal percentage actually get to be established for instruction, and far fewer to actually go to trial. So, have we accomplished anything?…..(pause)….Yes, relatively because we are modernized, *but not necessarily in a better situation*" (emphasis added).

I asked the Minister to clarify what he meant about "external situations" and "modernized but not in a better situation." He responded that, "*La presión externa se dio básicamente de la embajada*" ("The external pressure basically came from the embassy"). He meant, the United States Embassy. Also, he told me that by modernization he meant that it was a just a more modern system of justice and that it is used by the US and Europe, but that the system had not necessarily helped alleviate the already existing problems under the old, inquisitorial system because,

> "El establecer normas tan drásticas nos obliga a nosotros a despachar dejando a un lado todo lo demás, muchas veces se van con errores por que no hay tiempo para atender todo así. Tomando en cuenta que 50 juicios semanales no pueden ser atendidos, muchas veces no son ni leídos. El sistema funciona sin que haya los medios. No tenemos los medios necesarios. Tan es así que las audiencias, lo ideal sería que haya algo en la corte suprema y se tenga los videos de declaraciones de los imputados de las partes. A lo mucho tenemos una grabadora común y corriente donde se graba, pero solo las voces. Pero no tenemos los medios y no los vamos a tener por que evidentemente eso significa que el gobierno aumente los recursos para la función judicial. Pero en el último presupuesto, en vez de subir, bajó. Así que dentro de esas enormes limitaciones no se puede tener un eficiente sistema y aunque ha habido mejoras evidentemente, todavía tiene de largo por haber un cambio."
>
> "Establishing such drastic norms forces us to dispatch [cases], leaving aside everything else. Often times, they are sent out with mistakes because there is no time to take care of everything. Taking into account that 50 trials per week cannot be attended. Often times they are not even read. *The system operates without the resources. We do not have the necessary resources.* The situation is such, that in the hearings, the ideal would be to have something in the Supreme Court and to have the videos of the testimonies of the accused and the parties. We barely have a regular, simple tape recorder where the voices are recorded. *But we do not have the resources and we are not going to have them either because, evidently, that means that the government will need to increase funding for the judicial function. But in the last government budget, instead of increasing, it decreased.*

> So, with such big limitations we cannot have an efficient system, and even though there have been some improvements, evidently, we still have a long way to go" (emphasis added).

A good example of the disorganization and lack of technological support for the reforms, came up during my interview with one of the leaders of the Ecuadorian Tribune for Consumers and Users. A well-established lawyer and active member of this entity expressed her concerns on this issue. She told me,

> "Pero de qué te sirve el sistema acusatorio si no generaste ni la estructura, ni la más mínima tecnología para que funcione el sistema acusatorio? Entonces el gobierno americano se comprometió con el Ecuador. Les dio una donación importante y mandó gente para que pruebe y regalar las máquinas. Pero teníamos un ministro fiscal que no hacia nada y ahí los americanos dijeron 'no.' Y ahí quedó. Entonces quedó a medio hacer y no hay salas para que se atienda al acusado, ni tecnología, entonces ahí quedó todo. Es terrible…terrible. No tienes la más mínima facilidad ni agilidad. Después de una batalla de casi 15 años se logró que casi todos los juzgados tengan computadoras. Entonces algunos todavía usan máquinas de escribir y eso en Quito! Cómo será en provincia. Si vas a la corte superior de justicia, ves que hay en cada piso ministros que tienen salas cómodas pero los tres tienen una señorita que trabaja en la sala con ellos. Y ellos les pagan del mismo sueldo de ellos para que escriban por que ellos no saben usar la computadora!"

> "But of what use is the adversarial system when you did not generate the infrastructure, nor the minimum technology so that the judicial system works? So, the American Government committed itself with Ecuador. They gave [Ecuador] an important donation and sent people for trial programs and gave machines (computers). But we had a Fiscal Minister that did not do anything and so then the Americans said 'no more.' And it was left there. So, it was only half- way implemented and there are no rooms to take care of the accused, nor the technology. So it was left there. It's terrible, it's terrible. There are not even the minimal facilities or promptness. After a battle of almost 15 years, they were able to have computers in almost every court. So, there are still some who use type writers and this is in Quito! Imagine how it must be like in the rest of the provinces. If you go to the Superior Court of Justice, you will see that the ministers have comfortable offices in each floor. But all three of them [in each floor], have a young lady who works in the office with them. And the ministers themselves pay these young ladies from their own salary for them to type stuff for them, because they [the ministers] do not know how to use a computer!"

These same concerns and air of disappointment was shared by a member of the Unit of the Reforms of the Supreme Court of Justice. I asked him about Ecuador's situation regarding the judicial reform, and in terms of supporting it. He replied,

> "Por un lado, las dificultades son la falta de apoyo financiero, no. No se da prioridad a estos temas. La función judicial pidió o presupuestó un monto de alrededor de 800 millones de dolares para su presupuesto del año 2007 y recibió 140 en realidad. Entonces un poco menos de la mitad de lo que pidió. Con lo cual quiere decir que su presupuesto esta financiado con las justas para temas operativos. Todo lo nuevo, todo lo que es de las reformas, de crear juzgados, que hacen falta, y aunque no son la principal solución, pero hacen falta…. No se puede."
>
> "On one hand, the difficulties are the lack of financial support, ok. *There is no priority given to these topics*. The judicial branch requested or budgeted a sum of around $800 million dollars for its 2007 budget, and it received $140 millions in reality. So, a bit less than half of what it requested. Which means that its budget is barely financed. We barely have enough for operational tasks. All the new stuff, all that related to the reforms, creating courts which is needed, although they are not the solution, but they are needed…. is not possible" (emphasis added).

The lack of financial support for JR is evidenced in the amount invested in justice, relative to that of the rest of the economy. According to the Report on the Judicial Systems in the Americas from JSCA, the 2005 budget for the justice sector in Ecuador represented less than 2% of the total fiscal budget for that year (2005: 190).

As I carried out my interviews I found that concerns and disappointments with the legal system where indeed widespread. The chain of problems afflicting the judiciary and the rule of law in general, came up in every one of my interviews. One area of concern lead to another. There was a general feeling that the problems associated with the reform, as well as the changes needed to improve the situation, were overwhelming. However, as I wanted to know specifically their perceptions of the reform as a development tool, I inquired how they viewed the matter.

I asked one of the lawyers if she thought that judicial reform, in the long run, could help achieve social, political and economic development. Her response was,

> "Si es cierto. Bueno, de cierta forma. Lo que pasa es que también hay situaciones más profundas de inequidad que están en la sociedad y en lo que es la parte económica. Y sí está relacionado con el tema de justicia por que de cierta manera a la gente que maneja la economia también le interesa manejar la justicia… Por que la justicia es la forma en cómo se debe impartir la justicia. Y eso puede implicar que se afectan beneficios o perjuicios para quienes manejan el poder. Entonces de ahí para abajo empieza el deterioro por que todo el mundo se considera con derecho a justicia, pero no de una manera positiva, sólo

para su propio beneficio. Entonces yo sí creo que la inequidad en el Ecuador está vinculada al mal funcionamiento de la justicia, por que como el poder está concentrado en pocas manos, y ese poder económico y político también se mete en lo que es la justicia. Entonces hay gente que esta por encima del bien y del mal. Por encima de las normas, que puede burlar la ley. Entonces yo me pregunto, el problema esta en los códigos, o en cómo esta estructurado el poder y la justicia? Entonces a mí me parece que quienes están peleando por esta situación, están mas bien curando la fiebre en vez de la enfermedad."

"It is true. Well, in a way. The thing is that there are also more profound situations of inequality in society and in the economic aspect. And it is related with the topic of justice because in a way the people who manage the economy are also interested in controlling the justice [system]. Because justice is about the way that justice is distributed. And that can affect the benefits or bring losses to those who control power. So from there down begins the erosion because everybody considers him or herself with the right to justice but not in a positive way, but only to their own benefit. So I really do think that inequality in Ecuador is linked to the malfunctioning of justice, *since power is concentrated in a few hands*, and the economic and political powers also interfere with the justice…*So there are people who are above good and evil. Above the norms. Who can mock the law. So, I ask myself, are the codes the problem? Or is it the way that power and justice are structured? So I think that those who are fighting for this situation [the reform], are taking care of the fever but not of the sickness"* (emphasis added).

This respondent's answer is particularly insightful. Using a metaphor, she illustrated how introducing a new legal system is only addressing *certain* aspects afflicting the country's judiciary. However, new codes or new procedures are not addressing the more fundamental need of *justice* in the country, the true problem or sickness troubling the nation.

When I asked the same question to a corporate lawyer, he responded,

"Eso tiene más que ver con la crisis económica. Con la crisis hay más violencia. Lamentablemente yo creo que la globalización ha afectado en ese sentido. Además se trata de hábitos culturales….tendencias que se trastmite por medios y está permanente en la cabeza de la gente. Influencia de la cultura mundial, medios de comunicación. Pero también la parte económica ya que el tener menos acceso a las cosas provoca situaciones de violencia. Ya sea por que la gente ve a qué puede acceder y a qué no puede, y la frustracion también provoca violencia. Está vinculado también a la información y la parte económica... No se trata de más leyes, si no de tratar de que las que ya se tienen se cumplan."

"That has more to do with the economic crisis. With the crisis there is more violence. Unfortunately, I believe that globalization has affected the situation in that sense. It also has to do with cultural practices as well. It is transmitted by the media and it is permanently in people's minds. But also the economic side, because the lack of access to things provokes violent situations. It is also linked to information and the economic

situation… It is not about more laws, but to try that the ones that we already have are respected."

Similarly, a young female lawyer, working for the one of the government ministries replied,

> "La reforma trajo un montón de cambios para dar más derechos a los ciudadanos. Trajo más leyes. Trajo un marco legal donde todo está estipulado paso a paso. Como te digo hay miles de leyes y tu ves y las leyes son maravillosas. Te dicen todo, paso uno, dos, tres, el respeto, derecho a esto, y tienes derecho a esto y… mentira! En la realidad no es así. No pasa nada de eso. El problema no está solo en la estructura legal. No necesitamos más leys, sino un cambio en la justicia social."
>
> "The reform brought a lot of changes to give more rights to citizens. It brought more laws. It brought a legal framework where everything is expressed step by step. As I was saying, there are a thousand laws and you look and see that the laws are wonderful. They tell you everything, step one, step two, about respect, you have the right for this and the right for that and… Its all a lie! In reality it is not like that, nothing happens. The problem is not just in the way the justice system is structured. We do not need more laws, but a change in social justice."

Once again, the last two responses illustrate the idea that JR is not sufficient to solve the vast range of issues in Ecuador. A lack of legal framework is not the real problem; and incorporating more laws is not the solution to the actual problems either. Both legal actors identify other issues, such as economic hardships and injustice (in a broad sense), as the true problems associated with the legal system. They mention the need to make both the laws and people's rights *respected*, and not for them to just figure in the books as part of poetic language. In other words, JR may change the legal system into an adversarial order, but it does not mean that it will, *by itself*, bring the rule of law. Underlying this discussion is thus, the confusion between development means versus development ends.

Moreover, the introduction of a new legal system implies a different organization of the legal structure and as a consequence, a different distribution of power among its actors. This is especially the case with the contemporary judicial reform movement in Latin America where the new system looks for more independence for the legislative body, historically controlled by the

executive. Likewise, it calls for the revision of the distribution of checks and balances in the scheme of government, as well as for greater accountability and transparency of legal actors. These changes inevitably cause unrest among elite groups and government officials whose actions and decisions will be more scrutinized (Domigo, 2004; Portes, 2006).

Indeed, this is the situation currently hindering the Ecuadorian JR efforts. According to one of my interviewees at the Supreme Court of Justice, whose job is precisely to implement the reforms, it should not be surprising that resistance to change comes from within the legislative body itself. He told me,

> "Curiosamente la primera resistencia es al interior mismo de la función judicial. Y es la más complicada, la que más obstáculos genera, por que que los propios jueces se opongan a la reforma, evidentemente genera graves problemas prácticos. Y claro,fortalecer la justicia también significa limitación de poder y fortalecer la independencia judicial, y no siempre el poder está dispuesto a esas limitaciones. Entonces la reforma incomoda."
>
> "Interestingly, the first sign of resistance comes from within the judicial body itself. And it is the most difficult one, the one who brings more obstacles, because the fact that the judges themselves oppose to the reform evidently causes difficult problems in practice. And of course, strengthening the justice system also means limitation of power and strengthening judicial independence. And those in power are not always willing to accept those limitations. So, the reform causes uneasiness."

In the case of the judges, their resistance comes primarily from the fact that they no longer have control over the investigation process, where they alone had the power over the entire case. With oral hearings they are now more accountable for their decisions. Likewise, the introduction of the oral tradition implied their return to academies where, after years of legal practice, they have to learn a whole new procedure all over again. As Messinger's study of social movements revealed decades ago, organizations and movements "[have] been torn between those who wish to remain loyal to the original function and those who put organizational imperatives first. *If the latter are successful, the dominating orientations of the values of the organization is taken to*

represent, to maintaining the organizational structure as such, even at the loss of the organization's central mission." (1955:10; italics in the original).

Resistance to JR also comes from the government and political branches as well, because they have been accustomed to using the judiciary as a political tool to push for their own agenda. Indeed, using the judiciary as a political tool is a deep-rooted practice in Latin America, and one hard to get rid off in places where democratization is still weak (Thome, 2000; Domingo, 2004; Prillaman, 2000; Portes, 2006).

In the case of Ecuador, a sign of the severity of such practice was recently evidenced in December 2004 when former President Lucio Gutiérrez used the judiciary to make a political move by replacing and later dissolving the Supreme Court of Justice. The allegations were that he was favoring a particular political party, the PRE (*Partido Roldosista Ecuatoriano*) so that former President Abdalá Bucaram could return to the country without being tried for corruption charges (JSCA, 2005: 190). These perceptions of abuse of power are not found only within the legal system. Unfortunately, it is a widespread belief among all Ecuadorians that the government and the system in general, only serves its own interest groups. People's needs are left as the last wheel of the cart. Figure 5-2 confirms this trend.

Figure 5-2 shows the results of a frequency distribution ran on a 2004 Latinobarómetro question that says: "In general, would you say that the country is governed for the benefit of a few powerful interests or is it governed for the good of everyone?" The respondents options were: It governs for: The Benefit of powerful interests, or, For the good of all. Those who answered 'Do not know' or did not answer have been excluded. The results show how an overwhelming 80% of Ecuadorian respondents believe that their government rules for the benefit of powerful interests.

In the same manner, a representative of the Supreme Court of Justice in Ecuador considered that state support and leadership for a real change was the vital component for a JR success. He told me,

> "Tiene que haber un liderazgo institucional para poder superar esas incomodidades…todo el mundo se queja. Entonces internamente hay que superar dificultades. Es decir, si no hay consenso, no van a poder arreglar las cosas"
>
> "There needs to be institutional leadership to be able to move on from that uneasiness…everybody complains. Therefore, we need to overcome internal difficulties. In other words, *if there is no consensus, things will not improve*" (emphasis added).

Clearly, his response echoes those of many JR researchers cited in this text, such as Carothers (1999), Prillaman (2000) and Ungar (2002); whose experience in the field show that without consensus at the government level, a true process of JR is simply not possible.

Finally, although Supreme Court of Justice and ProJusticia state that the reforms are a national priority, my interviews with the members of these institutions suggested otherwise (ProJusticia, 2007). During my interview with a representative of the Unit for Judicial Reform at the Supreme Court of Justice this very same point came up. I was told,

> "Creo que no se han logrado hacer todavía hacer de la reforma judicial una política de estado. Una política sostenible. Y no solo con pequeños eventos y financiamientos, importantes que nos han dado su aporte, pero que no responden a un verdadero proceso de fortalecimiento institucional. Y creo que ese tema también responde a la fortaleza democrática. Tanto en las élites políticas, como en la manera en que funcionan las instituciones o en la manera en que se quiere que funcionen las instituciones.
>
> "I do not think that we have been able to make of judicial reform a state policy. A sustainable state policy. And not just with small events and financings, important of course because they have given us their support, *but that do not respond to a true process of institutional strengthening*. And I think that that topic is also related to democratic strengthening, both in the political elites as well as in the manner that the institutions work or how we would like them to work" (emphasis added).

As I carried out the interview with this representative, and all the issues with the reforms were discussed, the need for democratization in order to carry out an appropriate, successful JR was more evident. The Supreme Court of Justice representative concluded by saying,

> "Entonces creo que falta en el Ecuador esa política pública, esos compromisos de estado, para mejorar los servicios. Y luego también hace falta una mejoramiento de la actividad política en su conjunto. Que se permita un desarrollo institucional de acuerdo a las normas constitucionales. Por que sucede que las prácticas políticas en el Ecuador todavía son prácticas que no responded a la constitución, sino a fuerzas y a equilibrios y desequilibrios de poder. No tanto de aplicación normativa, entonces todavía ha pasado en nuestra historia muy reciente que el Congreso, órgano político, o el Ejecutivo, órgano político, toma decisiones, en función de sus posibilidades de poder y no en función de la normativa constitucional. Y evidentemente también la función judicial ha sido capturada por esas otras políticas y ha sido instrumento de esas otras fuerzas políticas. Entonces todavía hay un proceso de avance y retroceso en cuanto al fortalecimiento institucional y por tanto democrático. Y no se sabe bien qué es primero, el huevo o la gallina. Si es que es fortalecer primero la democracia para luego mejorar el servicio de justicia realmente, o si es que se mejora primero el servicio de justicia y se va al mismo tiempo mejorando el sistema democrático. Simplemente no se sabe bien."

> "So I think that in Ecuador there is a lack of public policy, those State commitments to improve services. And then there is also the need for the improvement of political action in its entirety. To allow an institutional development according to constitutional norms. Because it is the case that public practices in Ecuador are still not practices that respond to the constitution, but to forces and balances and imbalances of power, not so much the application of norms. Thus it is still the case in our very recent history that Congress, a public apparatus, or the Executive, a public apparatus, takes decisions according to its possibilities for power and not according to the constitution. And evidently the judiciary has also been captured by those types of politics and has been a tool for those types of politics. Therefore, there is still a process of advancements and backlashes in terms of institutional strengthening and consequently, of democratization. *And it is not known what comes first, the chicken or the egg. If we have to strengthen democracy first to later be able to improve legal services, or if we improve the justice system we can strengthen democracy at the same time. We just don't know"* (emphasis added).

That is exactly the debate presented in this project: JR does not necessarily translate into democratic development; not without taking into account several other variables that range from historical roots, to development processes, to globalization. This should not be interpreted as a pessimistic view but rather as a pragmatic one. The theoretical and ethnographical literature, as well as my interviews with legal actors in Ecuador, suggest that in practice, institutional reform is not a magic potion, regardless of its benevolent intentions. It is a matter of realizing that many variables come into play in the development process. Whether we like it or not, implementing a judicial reform needs to be paired with working on the process of the democratization at the

same time, since as Prillaman concludes, "… judicial reform does not shape the nature of the consolidation of politics: politics shape the nature of the judicial reform" (2000: 8).

Conclusions

Ecuador is one of the many Latin American countries currently undergoing a process of radical judicial reforms. Changing from an inquisitorial legal tradition that has prevailed for over 500 years, to an adversarial Western model has raised several important issues in the legal realm. Focusing on how legal actors respond to the judicial reform, my conclusions reveal the many obstacles and issues in the current JRM approach.

More than anything, the assumption that judicial reform can indeed bring democratization has been challenged. If anything, the results show that this linear concept of development with which the JRM is operating, may end up being part of the problem afflicting the Latin American judiciaries. The criminal justice system in Ecuador, for example, operates without the sufficient implementation, training, technology or funds, creating vast and complex problems even in the technical administrative areas, when JR was supposed to alleviate these same problems. The adversarial system has been in place for more than a decade now, yet, the legal culture of the inquisitorial tradition has been maintained. If the situation persists the way it is, JR will continue to encounter dead-ends to advance.

It is also worth mentioning how, despite having interviewed a varied sample of legal actors (including different ages and areas in the legal realm), responses to many of the questions coincided. Essentially, there was a general feeling of disappointment in the legal system and the faith in the potential impact of JR. Their views, however, reflected a more profound disappointment in politics and governance in general and, more importantly, in how *justice* works in the country (i.e. social and economic justice). These perspectives are particularly important because they are not coming from researchers or scientists, from politicians, or from

average citizens in the streets. Rather, they come from the actors that compromise the legal system *itself*. Evaluations of JR concentrating on technical matters or reform implementation, although crucial to the efforts of JR, tend to miss the more fundamental social processes that create, react to, or affect change. With this in mind, this thesis hopes to fill in some of the holes within the JR debate. These perspectives can guide reformers towards areas that have the potential to affect JR and provided the needed attention. Ignoring these perspectives, on the other hand, means facing the danger of only promoting progress and change on paper.

Although Ecuador's development trajectory is perhaps more problematic than other nations' experiences, by no means, the challenges to its JR are the exception. Several other case studies and theories reach similar conclusions. Although judicial reform can help achieve more efficiency in the system and more access to justice, it does not mean that it is the solution to a nation's problems. If implemented without considering a country's degree of democratic embeddedness, the reforms are doomed to fail to achieve its ambitions goals. The problem is that if the problems persist, JR faces the possibility of becoming part of the problem and not the solution.

Table 5-1. Confidence in state institutions in Ecuador 2004

	Police		Judiciary		Government		Political Parties	
Level of Confidence	N	%	N	%	N	%	N	%
A lot	43	3.6	24	2	12	1	5	0.4
Some	272	22.70	139	11.7	122	10.2	71	5.9
A little	475	39.6	425	35.8	405	33.8	290	24.2
No Confidence	407	33.9	599	50.5	659	54.9	824	68.7
Total	1,198	100	1,187	100	1,200	100	1,190	100

Source: Latinobarómetro 2004. Numbers exclude missing values (Respondent answered 'Do not know' or did not answer).

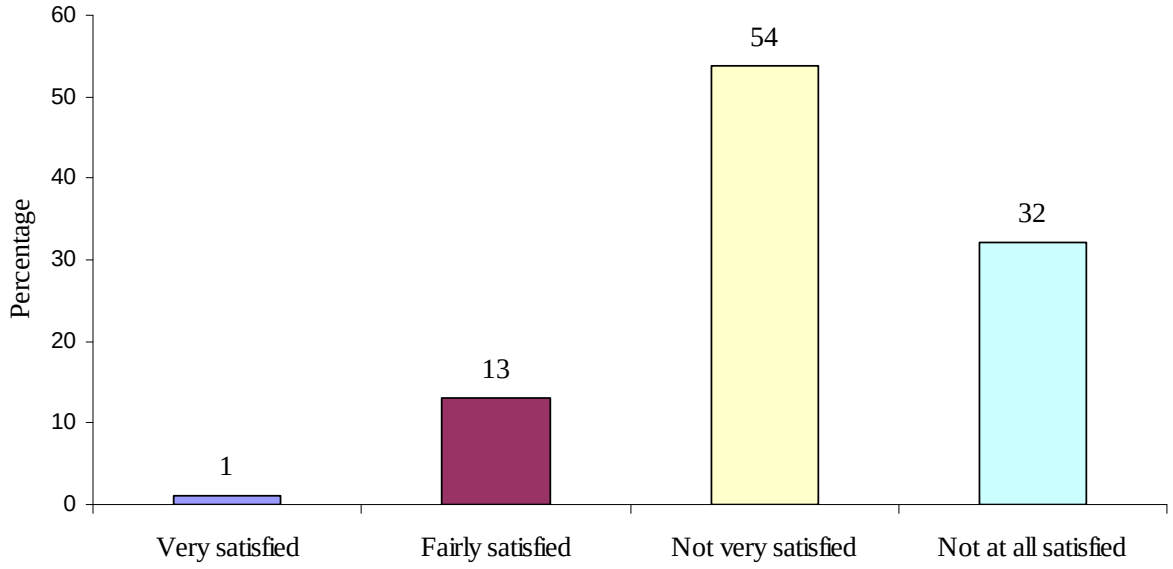

Figure 5-1. Satisfaction with Democracy in Ecuador 2004. Source: Latinobarómetro 2004. Numbers exclude missing values (Respondent answered 'Do not know' or did not answer).

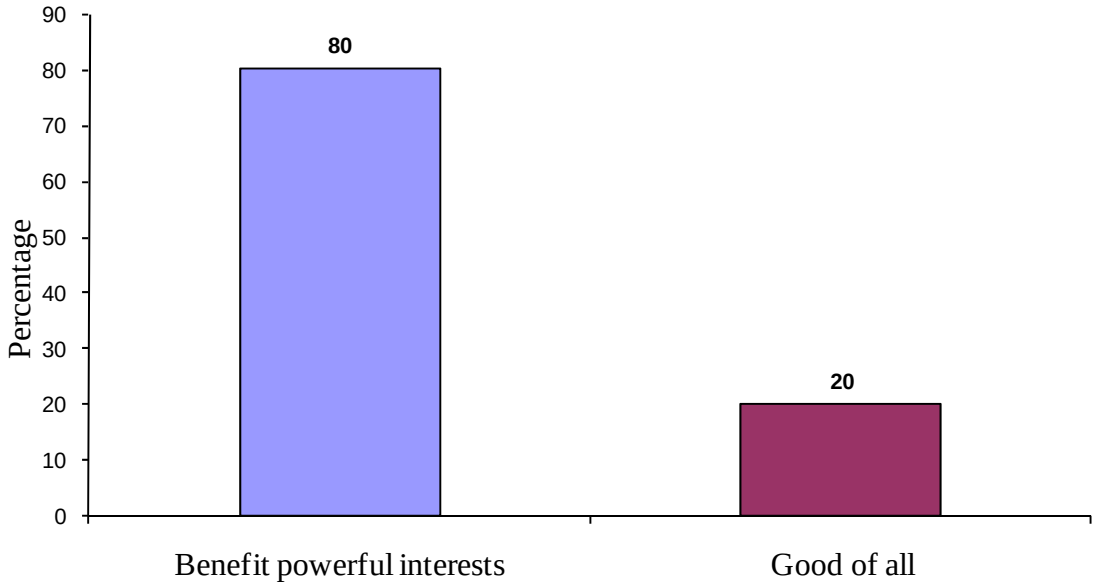

Figure 5-2. Country governed for powerful interests in Ecuador 2004. Source: Latinobarómetro 2004. Numbers exclude missing values (Respondent answered 'Do not know' or did not answer).

CHAPTER 6
CONCLUSIONS

Since its independence, Latin America has been a land of development experiments. Advances and setbacks as well as triumphs and hardship, have characterized its rollercoaster-like path over for centuries. Meanwhile, theories of development, aiming to unwrap the mystery of the Latin American experience have emerged, with social scientists, researchers and policy makers looking for the missing piece of the puzzle.

More recently, a new development paradigm has emerged, as many began to argue that the Latin American judiciaries were the "weakest link" in the democratic transition (Carothers, 1999: 316). The argument was that the inquisitorial legal order was an archaic, inefficient system, failing to live up to the demands and values of the "democratic" era. As a result, a strong regional movement for judicial reform emerged. International banking institutions and donor organizations increasingly promoted this project, fueling support for the change towards the adversarial, prosecutorial model of Western, industrialized nations.

Throughout this thesis, I have introduced the rationale behind the contemporary judicial reform movement, paying particular attention to those areas where a new legal order is posited that it will make significant improvements in Latin America. These include: citizen security, "modernization" of the state, economic development, and democratization. Although the potential benefits of the judicial reform movement are seemingly far-reaching and target the critical issues confronting Latin American nations, a pragmatic approach calls into question the actual delivery of these promises and argues for a more cautious approach.

In fact, a pragmatic perspective questions whether judicial reform will indeed translate into development, unless certain crucial variables are taken into consideration. From this perspective, development is not an automatic, natural or guaranteed outcome of a judicial reform, but rather a

vital component for its success. In light of these considerations, a traditional analysis of judicial reform provides an incomplete assessment and insufficiently explores necessary criteria associated with development objectives.

Although this perspective pertains to various assumed benefits of the reform, in this thesis I have focused on the supposition that the introduction of the adversarial system will strengthen the rule of law and as a consequence lead to democratic consolidation. Nonetheless, as research and evaluations of many different country case studies show, JR is not merely a technical or administrative issue, but a political one, that requires a long-term commitment and, by implication, amore profound process of democratization in order to be implemented successfully. Notably, this perspective does not come from critics who believe the rule of law is irrelevant, or that judiciaries do not play a prominent role in a democratic regime. Rather, this voice emerges from researchers and scholars whose evaluations of the JRM show how the varying results pertaining to the wide range of issues relating to judicial reform do not act in isolation. In light of this recognition a pragmatic approach to judicial reform recognizes that while the rule of law is necessary in a democratic regime, the reform of the judiciary alone does not sufficiently resolve the issues that confront the region. Thus, a more comprehensive assessment of factors illustrates the emergence of a pragmatic perspective regarding the benefits of judicial reform.

In Chapter 4, cases from Argentina, El Salvador, Guatemala, Venezuela, among others, explored by several prominent scholars illustrate this point. Importantly, their research reveals how judicial reform is hampered precisely by those actors whose support it needs, calling for the need to reframe the approach towards JR. Likewise, in the case of Ecuador explored in Chapter 5, one-on-one interviews with key legal actors in Quito provided a closer glimpse of the wide array of issues affecting the system of justice in the country. The respondents coincided in the

idea that changing the legal system is not itself sufficient to promote the rule of law or *justice* in the country. Notably, as it happens in other nations, resistance to legal reform comes from members of the judiciary itself, unveiling the powerful interests in keeping the status quo. In this sense, the current JR approach has not been successful in changing the power structure needed to strengthen the rule of law, especially judicial independence.

This is not to say that it has been impossible to pass any reforms. As I discussed in previous chapters, various countries have indeed begun a process of JR. There is a regional as well as international movement supporting them. However, these initiatives do not translate into an equally supporting national movement for reform and, unfortunately, this is precisely what the JRM needs to succeed. If anything, the lack of national support for JR is precisely what has hampered change (Hammergren, 1998; 2002). The basic goal of this project, however, was to bring together both perspectives, juxtaposing JR in theory and JR in practice, in order to build on a more practical approach towards JR efforts.

In fact, Ungar argues that more often than not, the reform of the justice system is driven by motivations that tend to have more to do with fear of delegitimization of government, rather than by a strong drive for change (2002: 3). Certain standards and criteria for international legitimization (i.e. demand for the protection of human rights), for business partnerships and investments (protection of foreign capital), and, in some cases, from elected officials who realize the institution is not responding to citizen or investor needs and are afraid they will be blamed for it (Thome, 2000; Ungar, 2002). As Prillaman states,

> "…a more fundamental error in the conventional wisdom relates to the true nature of judicial reform. At bottom, judicial reform is not merely a sterile, apolitical, administrative issue or a universally- desired collective good that can be managed through narrow and staggered institutional tinkering. Rather, it is, for better or worse, an inherently *political* undertaking" (2000: 7; italics in the original).

Citizen insecurity and the intensification of crime and violence, for example, were major forces that pressured the Latin American nations afflicted with this phenomenon to pay attention to the reform of the criminal justice system. However, this took place when the situation was already out of control (i.e., increasing episodes of mob justice both in urban and rural areas). Undoubtedly, other motivations and driving forces for JR exist, yet, these do not guarantee a true process of institutional change when a true commitment from authorities remains weak. Importantly, "demand for change is necessary but hardly sufficient condition for reform" (Hammergren, 2002: 2). Thus, once again, a true commitment and consensus for change in the long-run remains absent because democratic embeddedness is still weak.

Equally problematic, the interviews presented also revealed that doubts about the benefits of JR are not just conclusions from certain researchers, or, of a particular agenda. It is shared by people who act in the legal realm daily, and whose own first-hand experiences have led them to this conclusion. Clearly, many of their concerns were related to budgetary and technological matters as well, but the fact that the national government does not make a priority of JR by supporting it financially either, further serves to portray the importance of a long-tern, national consensus in order to implement the reforms successfully. In turn, this issue also unveils the need for further democratic embeddedness in order for this ideal situation to take place.

Going along those lines, the question of improving *efficiency* shows mixed results. While some aspects of this component have been aided by the oral process, the current state of affairs does not call for victory yet. As the Ecuadorian case described in Chapter 5 reveals, the reforms have also introduced confusion into the system, without the necessary training, infrastructure, or technology to confront them. Thus, there is the risk of making it a very inefficient *adversarial* system. The Minister I interviewed said that the judiciary might be "modernized" because it

employs many components of judiciaries of advanced Western nations, but in terms of improved efficiency, that is a different story. What was the benefit of leaving behind an inefficient inquisitorial system for an adversarial system if it is not going to work properly?

The problem that I foresee is that fixing these problems in Latin American judiciaries will not be the same as when reforms were carried out in the United States or Europe. In those nations, the reforms were a gradual process of change that evolved naturally and throughout centuries. In Latin America, however, JR implies a radical change from the previous system, and in most cases, without even the minimum necessary physical assets to implement it, nor without adequate training for those involved in it, and, on top of everything, with a very weak national drive to support it. Portes, in his latest work on institutions and development makes a similar point by stating,

> "When imported institutional blueprints are superimposed on such realities, the results are not hard to imagine. These plans do not necessarily backfire, but they can have a series of unexpected consequences following from the fact that those in charge of their implementation and the presumed beneficiaries view reality through very different cultural lenses" (2006: 243).

Along the same lines, Prillaman (2000) has argued that there are not yet even the necessary tools to measure inputs and outputs of JR to assess whether or not the reforms are really working; and Thome argues that when judicial reform projects are implemented with such a linear approach, they fail to take into consideration the reality of Latin America and how foreign judicial systems will not perform the same way in the receiving country (1998: 75).

Latin America is not a uniform body of nations but rather vast differences mark each country's development experience. All nations have different histories of state formation, therefore they all have a different situation concerning state presence (regardless of whether it was democratic or dictatorial), state embeddedness, and outreach of public institutions and state capacity. Therefore, different power relations and institutional processes took place in every

country, and to this we may add that these are not uniform within nations, since some areas, notably the capital cities and important commercial cities have received more attention and resources than isolated towns. Consequently, even the priority given to the judicial reform debate varies by each country's democratic situation (Domingo, 2004: 106).

The Chilean legal reform illustrates this point. As part of my research efforts for the development of this thesis, I participated in the Legal Study Tour of the Americas in Santiago, Chile during March 2007[1]. I had the opportunity to meet with some of the leaders of the reform efforts in the country, as well as intellectuals behind the reform process in the rest of the region. In one of the lectures I attended, a famous Chilean historian explained the success of the country's legal reform by stating that since its very first days as a republic, Chile was "*la Patria del Estado,*" a country where citizens obeyed the state. According to him, the influence of Andrés Bello's Civil Codification was much influential in this aspect. Thus, it was not the quality of academia, of judges or any other sector, but the fact that Chile had reach a minimum degree of "stateness" that other Latin American countries are still lacking (see also Mirow, 2004: 137). Not surprisingly, Chile is the only country in the region that has been able to implement a radical reform of the criminal justice system. According to one of the JR experts I interviewed at the JSCA, the capacity to make a long-term political commitment to the reform is one of the key lessons learned from the Chilean case. In fact, Chile initiated its efforts in the early 1990s with the support of a wide political spectrum which only allowed making constructive criticisms of the reform. This prevented any opponents from using this issue as means of advancing personal agendas and gave the country consensus to move forward with the reform. As the expert declared, "*En Chile, dejaron gobernar*" ("In Chile, they let govern").

[1] The Legal Study Tour of the Americas in Santiago, Chile was sponsored by the UF Levin College of Law, the UF's Center for Governmental Responsibility, and the Center for Latin American Studies at UF.

Therefore, the problem with this development project lies in the assumption that an industrialized nation's development experience can be replicated in Latin America, disregarding the influence of many different variables such as historical context, the different colonial experiences, different sociological, demographic and even geographic backgrounds. If there are vast differences within and among the Latin American nations, then there are even greater differences with the United States or Western Europe. As Alejandro Portes (2006) argues on his conceptual reanalysis of institutions and development, many reformers have overlooked the long-standing sociological research and conceptualization on norms and values, which Durkheim discussed a century ago. This "neo-institutionalism" assumes that by simply transporting Western institutions to LDCs, the institutional problems in those countries will be automatically solved. Yet, as the research presented in this project suggests, JR is not a magical potion that will bring democratization. On the contrary, democratization is needed in order to carry out a JR. The current JRM approach confuses its goals with the means it actually relies on. After all, as Portes argues, "…institutional change is not the same as a change in the class structure or in the value system—processes that ultimately affect institutions but that occur elsewhere" (Portes, 2006: 249).

Portes' (2006) criticisms of this "*neo*-institutionalism" paradigm highlights another good point. The idea that all that needs to be done is export Western institutions to Latin America, portraying a "modern" vs. "traditional" dichotomy, reflects the same premises of previous development models of the 1950s. They were based on the belief of "the unity of goodness: to assume that all good things go together and that the achievement of one desirable social goal aids

in the achievement of all others" (Huntington, 1968: 5).[2] Yet, projects implemented with such unilinear approach have already proven to be ineffective. When evaluating JR in Latin America, Domingo concluded that,

> Critiques of these endeavors point to the wastage and mismanagement of resources in the design and implementation process of these reforms, and suggest that they often represent ill-conceived but universally applied prescriptions that bear little relation to specific local needs and conditions (2004: 122).

Therefore, although I am not rejecting the need to strengthen the rule of law and promote justice (in a very broad sense), I do argue that the framework with which reform projects are being carried out needs to be revised: JR will not, by itself, bring the rule of law. As Santiso argues, it has already been years of implementing one development model after another, yet these opposing paradigms bring nothing new into the table. In fact, they just represent the "emergence of a new cognitive style" in which key words are replaced by new vocabulary. The domination of single paradigms in the past has already showed that development does not occur in a linear sequence of events where everything is predictable. In the context of JR, development is not a natural, guaranteed outcome of the reforms, but actually a key ingredient for its successful implementation. Since, as the experience with many other development paradigms suggest, there is not a single magical cure for the many problems affecting Latin America. Assuming that all that needs to be done is to bring in the state institutions of justice and to increase access to the courts for the average citizen, overshadows the more fundamental need for "…real reforms of state structures" (Snodgrass Godoy, 2004: 627). Thus, JR efforts need to work on a comprehensive reform that will, indeed, guarantee justice in every sense of the word. Otherwise legal reform will only become part of the many issues afflicting Latin America.

[2] Nobel Prize winner Amartya Sen (1999) has already argued this point when analyzing the impact of economic development projects in LDCs. He argues for the need to differentiate between "growth" and "development," urging policy-makers to envision growth as the *means* to acquiring development, instead of viewing it as an end in itself.

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Alexandra Anda was born in Quito, Ecuador, where she lived until she moved to United States to attend school. She graduated with a Bachelor of Arts in international studies from Albion College in Albion, Michigan. She later interned at the Organization of American States in Washington, D.C. for year. She moved to Florida to complete her Master of Arts in Latin American Studies, with a concentration in development studies at the University of Florida. Her research interests include social development, gender, culture, criminology, governance, inequality, economic development, and judicial reform in Latin America.