Searching for Justice in the Era of Rule of Law Programs: Case Studies of Colombia, Peru and Venezuela

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Introduction

The last two decades were characterized as a period of different political, economic and social transitions in several countries of Latin America. The decade of the eighties was a period of struggles for democracy and social equity against authoritarian regimes that different Latin American societies experienced within the context of international polarization. For instance, the social and political tensions that emerged in Central America and revealed themselves as a conflict between the guerrilla movements and the traditional authoritarian regimes were impacted by the political environment of the Cold War. The United States government's fear regarding the possible expansion of the socialist project in Latin America, and the illegitimacy of the rightist authoritarian regimes, resulted in the funding of "Projects of Democracy" in the region and in the need to address the situation of human rights. In the early nineties, the changes in the international context and the rise of a consensus among the industrialized nations regarding definite democracy and rule of law projects as a way to foster economic growth and political stability, seemed to represent the beginning of a period of globalization of law and democracy.

As Boaventura de Sousa Santos singles out, the process of globalization of democracy and law results from a consensus among the developed countries regarding four elements: the neoliberal economic model, the weak state, liberal democracy and the rule of law.[1] However, the process of disseminating this consensus through-

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1 Boaventura de Sousa Santos, "Law and Democracy: (Mis) Trusting the Global Reform of Courts."

out semi-peripheral countries –in this case, Latin American countries– leads these developing countries to face several contradictions. For instance, during the nineties Latin American countries faced, on the one hand, old local and national conflicts that had not been solved in the past and, on the other hand, the pressure from transnational entities to provide a better environment for business.[2] Within this setting, the quest for democracy and the rule of law again rise as crucial problems to be faced over the next few years, and which concern both theoretical and empirical dimensions.

From a theoretical perspective, this quest has recently been put forth as the contradiction between two models. The first model suggests an instrumental conception based on the idea that democracy is a system of competitiveness involving parties that struggle for the favor of the voters.[3] Later, the need to design an alternative, second model that includes a minimum level of social equality begins to emerge. For instance, O'Donnell suggests that the assumption of the autonomy of individuals is not enough to achieve a democratic system. Sufficient resources need to be allocated in order to allow individuals to enjoy that autonomy.[4] In a similar position, Santos singles out two different models of democracy. In the first, the value of freedom prevails over the value of equality. In the second, there is an effort to find a balance between freedom and equality.[5] These attempts to elucidate the scope of democracy extend to the question of the justice system to the point in which the set of rules and values that shape the role of the justice system develop underlying political principles related to a specific concept of democracy.

But the notion of the rule of law is also a problematic expression. In the Common Law tradition, even though there is acceptance of the idea that the rule of law (as opposed to the rule of men) implies the existence of a set of general rules and a trustful court system that is able to protect the rights of citizens against the abuse of the government, within Anglo-Saxon jurisprudence there are manifold debates about its contents.[6] But the elements of legal theory are not enough to understand the contents of the "Rule of Law" projects funded by transnational organizations. From a social-legal perspective, David Trubek has observed two main components of the Rule of Law programs that can provide elements for a more critical analysis. The first component is the *Market Project*, that is to say, the aim to reach a trustful legal system and predictable court decisions in order to foster free trade. The second com-

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To be published by Jane Jenson and Boaventura de Sousa Santos. (eds). *Globalizing Institutions: Case Studies in Social Regulation and Innovation* (Adershot: Ashgate, 2000), p. 412.

2 Ibrahim Shihata, "The World Bank." Jarquin and Carrillo (eds.), *Justice Delayed. Judicial Reform in Latin America* (Washington, DC: Inter-American Development Bank, John Hopkins University Press), pp. 117-131.

3 Joseph Schumpeter, *Capitalism, Socialism and Democracy* (New York: Harper & Brothers), p. 269.

4 Guillermo O'Donnell , *Polarchies and the (Un)Rule of Law in Latin America*. Paper presented at the Meeting of the Latin American Studies Association, Chicago, September 1998.

5 Boaventura de Sousa Santos, *Law and Democracy: (Mis) Trusting the global reform of courts, op. cit.*

6 For instance, see Allan Hutchinson and Patrick Monahan (eds.), *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987).

ponent is the *Human Rights Project*, which stresses the protection of individual rights against the abuses of state power.[7]

From the elements explained above, one could formulate the following initial hypotheses about the concept of democracy and of rule of law underlying the reforms of the justice systems in Latin American countries. First, the concept of democracy is restricted to a competitive system of elections and based on the assumption that the unequal enjoyment of individual rights among citizens does not affect the enjoyment of political rights. Secondly, the concept of rule of law stresses the existence of a set of rules enforced by a judicial system whose decisions provide certainty and protection of individual rights for those who can enjoy them. Nevertheless, in order to test these hypotheses it is necessary to go beyond the limits of the overall discourse on globalization and the rule of law, and to inquire about the experiences in specific cases. In the heterogeneous and complex scenario of the semi-peripheral countries, the social reality and the experience of the reforms can provide new elements for understanding the reforms of the justice systems that are funded by transnational actors.

This paper is an attempt to inquire specifically about the "Rule of Law" projects funded by the main transnational organs in Latin America, about the underlying political assumptions and aims that those programs propose and about the dynamic of specific scenarios in which these programs have been introduced. In order to achieve these purposes, this paper will be divided into four chapters. In the first chapter we will address the origin of the reform programs and the concern of the three main organs that fund the "Rule of Law" programs. The following three chapters will expose the specific cases of judicial reform in three Latin American countries: Colombia, Peru and Venezuela. Each case will be examined from the perspective of the social role of the justice system, of the process of transformation of the justice system, and of the role of the transnational organs in the general context of the justice system reforms. These case studies are not intended to be an exercise in comparative law, but rather are an attempt to take into account common elements and differences in the midst of a complex social dynamic.

The Rule of Law Programs: Origin and Concerns

Origin and stages of the programs

The concern for legal systems is not new to foreign entities. Its emergence is associated with the social and political context of the Cold War era during the sixties. By that time, many resources and efforts were put together to promote development and economic growth in Latin America from a perspective in which development

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7 David Trubek, *Law and Development: Then and Now*, ASIL Proceedings of the 90th Annual Meeting. Washington, DC, March 27-30, 1996. See also, Joseph Thome, *Heading South but Looking North: Globalization and Law Reform in Latin America*. Paper presented at LASA 2000, Miami, Florida.

framed the concept of institutional action. These efforts involved different fields of knowledge and groups of professionals. In the particular case of the field of law, its contribution to the development programs was known as the Law and Development movement, financed especially by the Ford Foundation and the United States Agency for International Development (USAID).[8] According to Blair and Hansen, the programs carried out mainly by USAID can be divided into four periods.[9] The first period corresponds to the sixties, when the Law and Development movement grew under the influence of Max Weber's framework. In this period, USAID promoted legal training programs in different countries in Latin America, which were carried out by junior lawyers and young professors from several US law schools. When the program was highly criticized in the late sixties and seventies, it began a second phase characterized by a concern for the access to justice and for legal aid programs.[10] What Blair and Hansen call the third and fourth periods corresponds to the Administration of Justice (AOJ) and Rule of Law (ROL) programs that were developed during the eighties and nineties. This period, which covers the past two decades, is the main concern of this research.

The Administration of the Justice programs during the eighties

During the seventies and early eighties, the political and social situation in Central America began to be of great concern for the government of the United States. On one hand, there was concern about the conditions of poverty and the unequal distribution of wealth, as well as about the very political regimes (based on authoritarian models and supported by upper classes) featured by such countries as El Salvador, Guatemala and Nicaragua. On the other hand, the demonstrations of popular discontent and the increase in political violence, repression and the emergence of guerrilla movements were evidence of the turbulent moment in the region. The political intervention of the US government in the region intensified, especially after the Nicaraguan Revolution. During this period, the Reagan administration not only promoted economic aid to the armed opposition against the Sandinista regime in Nicaragua -*The Contras*-, but also offered aid in "security programs" to those Central American governments that had been threatened by revolutionary groups.[11]

In 1984, after the murder of the four American Maryknoll nuns in El Salvador, the US government established a commission to analyze the situation in Central America and to recommend measures to resolve it. The so-called "Bipartisan Commission," headed by former Secretary of State Henry Kissinger, focused on three main issues: "Democracy and economic prosperity," "Human development" and "Security issues." One of the recommendations related to "Human development" con-

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8 Harry Blair and Gary Hansen, *Weighing in on the Scales of Justice*, USAID Program and Operations Assessment Report No. 7, February 1994, p. 3.

9 *Ibid.*

10 James A. Gardner, *Legal Imperialism* (Madison: University of Wisconsin Press, 1982), pp. 3-26.

11 National Bipartisan Commission on Central America, *Report of the National Bipartisan Commission on Central America* (New York: MacMillan Publishing Co., January 1984), pp. 84-103.

sidered that the United States should help strengthen the Central American judicial systems.[12] The concern for the judicial systems lay in the fact that only by means of a strong judiciary would it be possible to solve citizen conflicts and to avoid the practice of private justice. For the Commission, it was necessary to strengthen human rights protection, and confidence in the judicial system as an independent branch from the executive branch. Paradoxically, the report also expressed a major concern for the so-called "Soviet-Cuban connection" and for the need to support security programs for Central American countries.[13]

Then, during the eighties, different Administration of Justice programs were initiated in several Central American countries as well as in Colombia, as part of USAID's "Democracy Program."[14] The AOJ program had two stated goals. First, "to increase the interdependence and competence of justice systems in Latin America and the Caribbean through assistance to court systems and police functions related to the administration of justice." And second, "to strengthen democracy in the region by providing justice systems that are 'fair, efficient and accessible'." By the end of the eighties, the AOJ programs turned out to be the largest component among the various democracy programs.

The Rule of Law programs during the nineties

During the nineties, the Administration of Justice programs were expanded not only to other Latin American countries, but also to different countries in Eastern Europe, Asia and Africa. The assistance also began to broaden its scope to include activities related to the transformation of the legal system. Furthermore, other entities got involved in the funding of the programs; of particular note was the participation of the World Bank and the Inter-American Development Bank (IDB) in Latin America. Now let us observe the differences and similarities of the programs carried out by all these agencies.

Development of the USAID programs

USAID's Rule of Law program was expanded to 40 countries in Latin America and the Caribbean, although 76.4 percent of the entire funding for the region was concentrated in seven countries: Haiti, El Salvador, Colombia, Bolivia, Nicaragua, Guatemala and Panama.[15] The contents of the programs included a wide gamut of activities, nevertheless the Rule of Law program emphasized reforms in criminal justice.

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12 The recommendations were as follows: Enhance the training and resources of judges, judicial staff, and public prosecutors' offices; support the modern and professional means of criminal investigation, and promote the availability of legal aid materials to law schools, and support for local bar associations. *Ibid*, p. 74.

13 *Ibid.*

14 Washington Office on Latin America, *Elusive Justice. The US Administration of Justice Program in Latin America* (Washington, DC: WOLA), pp. 10-16.

15 United States General Accounting Office (GAO), *Rule of Law Funding Worldwide for Fiscal Years 1993-1998.*, Report to Congressional Requesters, GAO/NSIAD-99-158, Washington, DC, June 1999, p. 3.

According to the US General Accounting Office (GAO), the assistance could be divided into six categories. Among these categories, the greatest funding was focused on programs for Criminal Justice and Law Enforcement (57 percent, US$199 million); Assistance for Judicial and Court Operations (21%, US$74.2 million); and Assistance for Civil Government and Military Reform (13.6%, US$47.6 million).[16] However, what are the conclusions and the results of the large amounts of money devoted to the Rule of Law programs and, especially, to the Criminal Justice programs? During the decade of the nineties there have been several occasions in which different agencies and officials have expressed concern for the results of the USAID Rule of Law programs.

According to a report of the General Accounting Office written in 1993, it is possible to identify different problems associated with the Rule of Law assistance and to learn from the different experiences. The main concern was related to the lack of political commitment by the governments to support the programs, as was the case in El Salvador, Guatemala, Costa Rica and Honduras. Nevertheless, the GAO alluded to the Colombian case as a model of commitment, in which the Colombian government promoted the reform of the Constitution and the introduction of new legal institutions before even receiving the assistance of USAID.[17] This report also reflected the existence of political tensions between different agencies of the US government. On one hand, the GAO and the US Congress were concerned about the performance of the program and about its success once the ROL assistance was approved for a country. On the other hand, USAID defended its actions and argued that in some countries the fragile support and the political conditions made it more difficult to develop a ROL program. In 1994, USAID assessed its programs and established that to start a ROL program, it would be necessary to take into account different criteria: the level of potential support among the political elite and elite constituencies, judicial autonomy, corruption, freedom of the press, and donor leverage. Additionally, the study evaluated the strategies that should be developed through the program.[18] But some questions arise after these evaluations: What has been done? What is the transformation in terms of democratic achievements? According to the last report written in 1999 by the General Accounting Office, the program had helped countries to revise criminal codes, train judges and officials, and to facilitate the transition to a civilian order in countries such as El Salvador, Guatemala, Honduras and Panama. Moreover, it helped to create local justice centers in Colombia and Guatemala. However, this institutional perspective only takes into account the formal changes and is unable to provide elements to understand the social and political processes within the national scenarios themselves.

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16 The other categories are: Democracy and Human Rights, Others and Law Reform. Ibid, pp. 1-15.

17 United States General Accounting Office (GAO), *Promoting Judicial Reform to Strengthen Democracies*, Report to Congressional Requesters, GAO/NSIAD-93-149, Washington, DC, September 1993, p. 8.

18 These strategies are: Support constituency and coalition building; strengthen structural reforms, strengthen access creation, and strengthening the legal system. See Harry Blair and Gary Hansen, *Weighing in on the Scales of Justice*, USAID Program and Operations Assessment Report No. 7, *op. cit.*, pp. 10-50.

World Bank programs

Another major actor in the transnational context that has fostered justice system reform programs is the World Bank. The concern of the World Bank for judicial and legal issues can be interpreted as the outcome of different social, political and economic events that took place worldwide during the late eighties and the early nineties. By that time, the Bank experienced a transition that led to a review of its perspective on development and on the role the institutions played vis-à-vis economic growth, especially with respect to the role of legal systems in stabilizing the economic environment.

A first element to take into account has to do with the failure of the structural adjustment policies in developing countries, especially in Latin America. These policies, on the one hand, implied putting pressure on national governments to adopt drastic economic measures that were usually translated into the introduction of new legal instruments and, on the other hand, the assessment of those adjustments programs showed not only undesirable social effects, but they were also criticized for failing to enhance sustainable economic growth.[19] Second, Latin American countries –as many others developing countries– began to shift their economic model and policies of development. In the case of Latin America, the assessments of economic growth stressed the idea that the model of import-substitution could no longer enhance the process of economic development. Another fact that held enormous weight in the emergence of the rule of law programs within the Bank was the fall of the socialist economic model in Eastern Europe and the former Soviet Union.[20] This fact not only represented a virtual triumph for the capitalist system, but also a new challenge to initiate the transition to a market economy in countries in which the legal system had been built upon the principles of a directed economy.[21] A fourth element of the new perspective of the World Bank was the rise of the neo-institutional perspective guided by Douglass North, according to which the institutions perform an important role in economic growth to the extent to which they affect the costs of exchange and production.[22] Finally, the Bank could observe that the field of justice system reforms was not totally unexplored. On the contrary, the experience of the Administration of Justice programs in Latin America, led by USAID, and the discourse of "Law and Development" could provide an important starting point for the new policies of legal and judicial reforms.[23]

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19 World Bank, *From Crisis to Sustainable Growth*, World Development Report, Washington, DC, 1992. Cited by Catherine Weaver, *The Discourse on Law and Economic Development in the World Bank*, paper prepared for the MacArthur Conference on the Changing Role of Law in Emerging Markets and New Democracies, University of Wisconsin-Madison, March 24-26, 2000, p. 4.

20 World Bank. Legal and Judicial Reform Unit, *Initiatives in Legal and Judicial Reform* http://www.1.worldbank.org/legal/legop_judicial/Judannex.htm, p. 1.

21 Ibid, pp. 1-15.

22 Douglass North, *Institutions, Institutional Change and economic performance* (Cambridge: Cambridge University Press, 1990).

23 Mohan Gopal, *Law and Development: Toward a pluralist vision*, ASIL, proceedings of the 90th Annual Meeting, Washington, DC, March 27-30, 1996, pp. 231-237.

Based on these circumstances, the Bank found elements to design an acceptable framework in the perspective of economic rationality. At the same time it was able to manage the restriction imposed by its mandate that forbade the Bank to intervene in political issues. Thus, the Bank assumed the importance of enhancing institutional credibility as a crucial element to foster economic growth in developing countries. Unlike the USAID legal reform programs, the Bank stressed economic goals and technical methodologies. According to the framework developed by the Bank, the purpose of the programs was to "promote a stable business environment in which investment for productive purposes may expand."[24] For the Bank, the emergence of an open market and the transition to wider economic scenarios of business relationships implied the need to achieve efficient and predictable systems of dispute resolution.[25]

The methodology of the Bank was based on the assumption that the problems of the judiciary were similar in any society, regardless of the cultural and political background. According to Ibrahim Shihata, "whether a country follows Roman Civil Law traditions, Common Law, Islamic Shari'a or another legal system, the steps to be taken in identifying problems in the administration of justice do not vary greatly."[26] Consequently, there is an underlying conviction that it is possible to build a general model of reform based on the identification of the main institutional pitfalls of the legal and judicial systems. For the Bank, those problems are relatively uniform, such as the inadequate legislative tools used by judges, the inefficient organization of the courts, the lack of management skills among judges to handle caseloads, the inexperience of judges in exercising discretionary powers, the lack of training in new areas, etc.[27]

Following the development of the program throughout the nineties, the Bank has had to address different conflicts and contradictions. A first conflict relates to the Bank's past experience with the "Law and Development" movement. On the one hand, part of the Bank's staff has expressed interest in learning from the experiences of the Law and Development movement and in avoiding the same mistakes of the past. On the other hand, the very nature of the institution and the pressure of the designed goals force the program to emphasize quantitative outcomes and efficiency over respect for the social processes of each context. A second conflict is related to the political nature of the reforms and the restriction to participate in political issues. So far, the Bank has opted to frame its discourse as a technical set of postulates based on empirical data, which has been difficult. This technical framework explains –at least partially– the general feature of the proposed elements for reform, irrespective of the relations in the political environment and legal institutions. These two problems lead to a third one, which is the outcome of the justice programs. The institutional assessments of the program are limited to formulate general conclu-

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24 Ibrahim Shihata, "The World Bank", in *Justice Delayed. Judicial Reform in Latin America*, Jarquin and Carrillo (eds.) (Washington, DC: Inter-American Development Bank, 1998), p. 117.

25 Maria Dakolias, *The Judicial Sector in Latin America and the Caribbean. Elements of Reform*, World Bank Technical Paper # 319 (Washington, DC: World Bank, 1996), pp. xi-xvi.

26 Shihata, *op. cit.*, p. 118.

27 *Ibid.*

sions that do not provide specific information on the achievements of the programs in particular countries.[28]

Programs of the Inter-American Development Bank

The Inter-American Development Bank (IDB) is a multilateral organization focused on the promotion of economic growth in the American continent, and basically shares the same theoretical framework as that of the World Bank. However, given that it does not have the same restriction to participate in political issues, it has broadened its framework and has emphasized the relationship between institutional efficiency and economic performance through its programs of good governance. In this perspective, for the IDB, the Rule of Law project has raised a crucial device to enhance the economic development of the hemisphere. For the IDB, as well as for the World Bank, the optimal functioning of the justice and legal systems are necessary conditions to guarantee greater private investment. According to the IDB, "clearly defined rules of the game, with transparent scenarios that reduce transaction costs, are the basis of any effort to establish goals supportive of democracy and the market economy."[29] Initially the IDB organized two main conferences focused on the question of judicial reform. The first conference was held in San Jose de Costa Rica, in 1993, and the second one in Montevideo, Uruguay, in 1998.[30] Both conferences attempted to bring together the experiences and reflections of different agencies and governments about the reform of legal institutions and judicial systems. But during the second half of the decade, the IDB did not limit itself to promote justice system reforms, it also initiated programs that include institutional strengthening, the reform of the legislative branch and civil participation.[31]

The Reform of Justice in Colombia

The political and social role of the justice system

In order to understand the emergence and development of the Administration of Justice and Rule of Law programs in Colombia, it is important to take into account the country's social and political context and the sociopolitical role of the judiciary. Then, several questions may be asked. First, what has been the social and political role of the justice system within the social framework? How can the emerging importance of the judicial system during the eighties and nineties be explained? And, what were the links between the perceptions of the justice system and the contents of the USAID program?

A critical historical perspective of Colombian society during the last century provides evidence on how the construction of the political and legal institutions was the

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28 World Bank, *op. cit.*, pp. 8-10.

29 *Ibid.* p. v.

30 Edmundo Jarquin and Fernando Carrillo, *Justice Delayed. Judicial Reform in Latin America* (Washington, DC: Inter-American Development Bank, 1998).

31 Fernando Carrillo, "Los retos de la reforma de la justicia en América Latina," *Reforma Judicial en América Latina. Una tarea inconclusa* (Bogota: Corporación Excelencia en la Justicia, 1999), pp. 34-60.

result of a process of top to bottom modernization led by local dominant sectors. These institutions were far from being formed as a result of a social consensus, or as the expression of consolidated social and economic capitalism as occurred in Europe, which may offer an explanation as to why the history of Colombia is one of manifold and deep social contradictions and paradoxes. As Hernando Valencia Villa affirms, despite the fact that Colombia is known as one of the oldest and more stable democracies in the hemisphere, the institutional bases were supported on practices that restricted the participation of different social groups in political decision-making, and the possibility to foster a welfare state project. In this context, the judiciary developed a subordinate role.

During most of the Twentieth Century, the institutional framework was established upon the bases of the Constitution of 1886, which did not necessarily imply the existence of political stability. Up until 1986, the Constitution was reformed 76 times, as Valencia Villa explains. This fact reveals a paradox: public instability contrasted with the stability of private law, especially when considering the fact that the civil code has remained unchanged since 1887. Under that institutional framework, the President was bestowed with overwhelming faculties while he had to show almost no accountability to the other branches of government. At the same time, the judiciary was restricted to solve the civil disputes among individuals, but never to act according to the principle of checks and balances.[32] Another paradox is the origin of the organic independence that distinguished the Colombian judiciary from the rest of the countries in Latin America. This organic independence was a by-product of the political transition from the dictatorship of Gustavo Rojas Pinilla (1953-1957) to the period of the "National Front" (1957-1974).[33] Since then, the organic independence of the judiciary has coexisted with diverse expressions of intervention by the executive branch and the traditional parties. One form of intervention was the administrative and economic control by the executive of the assignation and distribution of the budget. Another way of intervention was carried out by means of the influence of the political parties, which must have equal representation in the judicial branch. And another mechanism was exerted through the extensive use of the "state of siege," especially during the seventies and eighties.

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32 Hernando Valencia Villa, *Cartas de Batalla* (Bogota: Universidad Nacional-Cerec, 1987), pp. 140-148.

33 By the end of the dictatorship of Gustavo Rojas Pinilla (1953 to 1957), the traditional parties and the Military Council *Junta Militar* agreed to subject the political contest to a pact that was called the National Front in order to restore the constitutional order. One of the articles of the plebiscite included the proposal stating that the justices of the Supreme Court should be appointed by the court itself in a procedure called "*cooptación.*" This particular reform proposed by the military junta and originated in the interest that the political parties did not promote judicial actions against the leaders of the military regime, became the basis of the organizational independence of the judiciary in Colombia. Rodrigo Uprimny, "Administración de Justicia, sistema político y democracia: algunas reflexiones sobre el caso colombiano," *Justicia y Sistema Político* (Bogota: IEPRI-FESCOL, 1997), pp.78-81.

Nevertheless, the visibility of the judiciary as an element of political concern only appeared during the seventies. The political confrontation with guerrilla movements in some places of the countryside and the manifestations of social disorder associated with a new urban society enhanced the interest of the government in increasing social control and in modernizing the criminal law institutions. The shortcomings of the judicial system, especially with regards to the criminal law justice system, were interpreted by the traditional legal and institutional perspective as problems of insufficient institutional capacity. The perception of the judicial crisis led the government to attempt different reforms of the judiciary and to diminish its organic independence. The first reform occurred in 1976, during the government of Alfonso López Michelsen, and the second occurred in 1979, during the government of Julio César Turbay. But if in the seventies, the political importance of the judiciary was associated with the interest to control the judicial system, during the eighties, manifold perspectives focused on the judiciary as a crucial institution to remedy the situation of violence. The social and political circumstances of the eighties were crucial to the emergence of the high visibility of the judiciary and to the crisis of the legal system. Different factors converged to search for new reforms. First, the pervasive nature of the different manifestations of violence made public opinion turn its attention to the judiciary as one of the main possible solutions. This was paradoxical, taking into account that the judiciary had also become in a victim of violence, not only by organized criminals but also by the state, especially when one recalls the takeover of the Palace of Justice in 1985. Secondly, the perception of the insufficiency of the justice system to solve citizen conflicts and the discovery of the poor conditions under which the judiciary worked, enhanced the promotion of new initiatives to modernize the judicial system.

Thus, the concern for violence from manifold perspectives and social sectors made the judiciary the focus of special interest. Of the new diagnoses issues during the eighties, three main ones may be singled out. A first diagnosis was based on a legal-democratic perspective. This perspective was an expression of a criminal law trend called *"dogmática jurídico-penal,"* which was inspired by liberal principles and the respect for the dignity of the human being.[34] The second one was an alternative-critical perspective, based on a structuralist conception of law.[35] And the last one was an administrative-technical perspective, based on the application of principles of technical knowledge-management to handle the organization of the justice system.[36] This last trend would be most influential during the reforms in the Constituent Assembly in 1991 and, over the course of the nineties, during the Rule of Law program.

This brief account of the sociopolitical role of the justice system explains at least partially the context in which the first phase of the Administration of Justice program

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34 Germán Silva, "Justicia, jueces y poder político en Colombia," *Jurimprudencias. No. 2* (Bogota: ILSA, 1991), pp. 59-94.

35 Germán Palacio, "Administración de Justicia, jueces y la crisis institucional en Colombia: Contradicciones y Dilemas," *Jurimprudencias No. 1* (Bogota: ILSA, 1990), pp. 33-46.

36 Jaime Giraldo Angel, Alfonso Reyes and Jorge Acevedo, *Reforma a la Justicia en Colombia* (Bogota: Instituto SER de Investigaciones, 1987).

emerged and the transformation that took place with the enactment of the new Constitution in 1991. We shall now view in greater detail the emergence of the justice system reform funded by USAID, which was most influential in the country during the eighties and the nineties.

The Justice Sector Reform Program (JSRP)

Now we shall analyze the nature and meaning of the USAID assistance to the justice system reforms, and address several questions. What was the goal of the USAID projects in Colombia? And what was the relationship between the transnational and national interests in the development of this program?

The first phase of the *JSRP*

As mentioned above, the emergence of the justice assistance programs was related to the political and social context of the eighties and an apparent consensus about the need to solve the crisis of the justice system. During the eighties, the Foundation for Higher Education (FES) contacted USAID, which had been absent from the country for several years, to finance programs related to education. However, in 1986, both institutions started the Administration of Justice program: *Programa para la Modernización de la Administración de Justicia* or PMAJ. This program would be characterized as an exploratory moment that could be extended depending on the outcomes. The main goal of the program was to improve the performance of the justice system, although there was no particular emphasis on any of its different components. Some projects aimed to equip the courts with computers and libraries, others supported training members of the judiciary, and others financed academic events to discuss new reform projects.[37]

The international and national contexts in the early nineties

By 1990, there were international and national political circumstances that facilitated the conditions for the continuity of the cooperation programs supported by USAID. The government of Colombia initiated an international campaign vis-à-vis the international order in an attempt to get the international community to assume its accountability in the war on drugs. This meant that the European countries and the US should not only fund the programs to combat the production of illicit drugs, but also introduce trade preferences in order to enhance the economic growth of the country. By that time, there was an important meeting between George Bush and the Presidents of the so-called cocaine producing countries: Colombia, Peru and Bolivia. In this meeting, known as the Cartagena Summit, the US government accepted its responsibility as a principal destination for the drug supply, and committed to donate US$40 million to support the war on drugs in Colombia.[38]

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37 FES-AID, *1986-1991. Informe de actividades al 31 de Diciembre de 1991* (Bogota: Fundación para la Educación Superior FES, 1992).

38 Alfredo Vásquez Carrizosa, "La conferencia de presidentes de Cartagena para la lucha antinarcóticos," *Análisis Político No. 9* (Bogota: Universidad Nacional, 1990).

In the national arena, by that time the public's perception of drug traffickers was associated with the most gruesome expressions of violence in Colombia, namely massacres and terrorism. The institutional perspective of the problem led to the belief that a strong criminal jurisdiction and strong law enforcement could defeat the large drug cartels. Along with the strong visibility of the problem of public order associated with the war on drugs, the underlying political tensions that remained from the past led to a collective perception of the need to reform the institutional basis of the country's political organization. For instance, in 1989 and 1990, paramilitary groups associated with drug traffickers murdered three presidential candidates.[39] By that time a great number of students organized a social movement called "the movement of the seventh voting paper" (*"movimiento de la séptima papeleta"*) to initiate a process calling for a constitutional assembly. Finally, after intensive protests against the traditional politicians, the climate favored the convoking of a National Constituent Assembly in 1990.

At the Constituent Assembly, the government presented a project on the reform of the justice system based on the diagnoses and discussions that had taken place in the late eighties, and influenced by the conclusions of the research undertaken by the SER Institute and by the JSRP in its first phase. The reform of the judiciary comprehended different points, such as the problem of the administration of the judiciary, the creation of a Constitutional Court, or the introduction of human rights protection mechanisms. Nevertheless, the issue that was most aligned with the goals of the JSRP and that represented the possibility to decrease the problems of impunity and violence referred to the need to change the criminal law system and to improve the phase of inquiry. One of the outcomes of the program in its first stage was precisely its influence on the emergence of an institutional consensus about the need to reform the system of criminal procedure and to introduce the adversarial model.

Characteristics of the second phase of the JSRP

By 1991, the political and institutional environment favored intensifying the program of USAID. Despite the fact that the Cartagena Summit took place in 1990, the formal agreement between the US and Colombian governments was not signed until August 19, 1991, once the new president –César Gaviria– had taken office. The total amount of the funding was US$36 million. The execution of the program began in January 1992 and continued until 1997. Between 1990 and 1992, a bridge agreement was formalized to keep supporting several programs. Based on this bridge agreement, USAID helped to equip the Public Prosecutor's Office, which was created by the new Constitution.[40]

The second phase of the JSRP program had several differences compared to the first one. First, the aim of the program was definitively clear to the extent that it anticipated the improvement of the performance of the judiciary, specially regarding

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39 Luis Carlos Galán, Carlos Pizarro and Bernardo Jaramillo.

40 FES-AID, *Programa para la Modernización de la Justicia PMAJ. Final Report. 1992-1995*, Bogota, 1996, pp. 5-19.

the phase of inquiry in the criminal law procedure.[41] The development of the Public Prosecutor's Office was the main endeavor of the program.[42] Second, the magnitude of the program, in terms of its worth and the number of institutions engaged, made the JSRP one of the justice assistance programs in Latin America that received the most financing. Third, the political moment was particularly special to the extent that at the beginning of the nineties, the country had a series of expectations regarding the development of the new constitutional and legal framework. And fourth, due to the significance of the program and the need to maximize results, the administrative organization was designed to operate according to technical principles of rationalization. This administrative organization was divided into three main branches and each would manage its corresponding budget: the FES would manage US$19,359,000, USAID itself would manage US$9.7 million and the ICITAP would manage US$6,950,000.[43] Given the restriction on access to information, we shall focus here on the JSRP managed by the FES.

The development of the program

A general glance over the political environment under which this second phase of the program emerged reveals the existence of explicit political motivations and goals. Nevertheless, an allegedly technical perspective based on institutional engineering seemed to prevail at the micro-institutional level where the development of that program took place. The agreement between the FES and USAID established that it was then necessary to fulfill general guidelines and standards of impact in order to meet the goals that had been designed.[44] The second phase of the JSRP began with 52 projects, and since USAID had a small staff in Colombia, the FES provided the administrative capacity to manage the program. The development of the program brought about manifold conflicts, difficulties and unexpected results. Since we cannot explain the whole spectrum of institutional tensions that emerged in the shadow of that program, we are going to single out three main points derived from the tensions between transnational and national interests: a) the lack of consensus among national institutions, b) the institutional preferences and distances, and c) the conflicts between the JSRP and USAID-Washington.

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41 According to the bilateral agreement, the main goal of the program was: "the support of the activities to strengthen the administration of justice, particularly the criminal justice system, in three basic ways: better organization and planning of the Justice Sector, greater effectiveness of the investigation and presentation of charges in serious crimes, and the strengthening of the administration and independence of the judicial system." Ibid, p. 6.

42 *Ibid.*

43 *Ibid.*

44 The designed indicators included: "Number of cases pending for the preliminary investigation, prosecuting and sentencing stages; Percentages of the types of legal decisions in each stage of the process; Average duration of the cases; And fourth, the public opinion of the legal system with respect to accessibility, fairness and effectiveness." *Ibid.*

a. Lack of consensus among national institutions

Traditionally the justice sector has not been a scenario of consensus among the institutions that form it. This is due to the fact that the structure that existed for a long time before the new Constitution bestowed the Ministry of Justice with the legal capacity to make administrative decisions. Once the new legal structure was framed in accordance to the new Constitution, the strong power of the Ministry of Justice was cut down and new different organs were created, such as the Superior Council of Justice, the Constitutional Court and the Public Prosecutor's Office. The participation of the upper level representatives of these organs at the Executive Committee of the JSRP was one of the very few spaces where the heads of institutions met to discuss the situation of justice. According to different people that participated in the development of the JSRP, it was possible to notice several conflicts in the development of the program in Colombia. There was no consensus on the diagnosis and the situation of the crisis of the justice system, as each institution established its priorities according to its institutional needs and goals in the short run. This pursuit of institutional goals created different conflicts: among several institutions and the JSRP, among the political spheres in the US government and the USAID in Colombia, and between USAID and the FES.

b. The JSRP, its preferences and its distances

One major characteristic of the program was its strong influence on the institutional design of the Public Prosecutor's Office. This institutional bond contrasted with the gap between the Superior Council of Justice and the JSRP. Despite the fact that Superior Council was the organ that represented the Judiciary in the Colombian justice system, the projects that were favored for the overall judicial system represented less than 7 percent of the invested budget. Several differences emerged between the program and the Superior Council. First, the Council was reluctant to admit the intervention of a foreign organ in a national issue. Second, according to former representatives of the FES and USAID, once the Council accepted to take part in the program, it endeavored to present "mega-projects" that were difficult to fund. For the representatives of the program, the priorities of the Council were different from those the program had established. For instance, the Council insisted on the importance of developing programs that covered the whole judicial system instead of focusing only in the Public Prosecutor's Office.

c. The JSRP challenges vs. USAID's political goals

As the JSPR developed, it began to operate at its own pace, which led to the program's relative autonomy regarding the political outcomes desired by USAID in Washington. The designed organization of the program was mainly based on technical management criteria. In this perspective, the decision-making process was subject to principles of rationalization of the funding. However, the program had to face different challenges that had their origins in the political and social context. Perhaps the main challenge for the JSRP was the transformation of the legal cultural pattern. In the former criminal law procedure, the inquiry was a function of the "instructing judges" (*"jueces*

de instrucción") and was based mainly on written procedures. Moreover, the insufficient funding for the entire system did not provide good salaries for the judges, or adequate buildings and equipment for their jobs, or any training for the judges and the officials of the offices.

According to some staff of the JSRP, if the program wanted to have an impact on the level of impunity and violence, it needed to invest not only in equipment but also in disrupting the cultural inertia that dominated the former system. Therefore, the new Public Prosecutor's Office was designed and implemented according to new criteria of rationality and efficiency based on the adversarial model of the American system. Finally, in the mid-nineties, in the middle of a turbulent political crisis and the pressure of the US government to obtain visible outcomes, USAID developed an assessment that led it to reformulate the program and to get through the agreement with the FES Foundation.[45]

The Reforms of the Peruvian Judicial System

The Role of the Judiciary in the Social and Political Context

Historically, the role of the Peruvian judicial system within the political system has been one of political subordination, with two main characteristics: direct intervention of the executive branch in the composition and orientation of the courts, and a continuously low budget that caused the absolute economic collapse of the judicial branch. The fact that Peru had military governments during most of the Twentieth Century contributed to relegate the role of the judicial branch within the political scenario. However, at the end of the sixties and the beginning of the seventies, Peru had an atypical military dictatorship in the Latin American context of the era. The dictatorship of General Velasco-Alvarado (1968-1975) gave the judicial branch a very special role in his reformist political project. Velasco-Alvarado had a project to modernize the social relations in the rural areas, centered on an agrarian reform that eliminated the landowner or *"terrateniente"* elite and the pre-capitalist social relations that existed in many Andean rural communities.

Velasco-Alvarado gave the law a primordial role, especially in relation to issues of agrarian reform and, to a lesser degree, to capital and labor relations. With this idea, Velasco-Alvarado's government created two special jurisdictions: the so-called agrarian code or jurisdiction (*"fuero agrario"*) and the labor code (*"fuero de trabajo"*). The first was responsible for the application of the reform of property in the rural areas, and the second for the goal of facilitating an active role of the executive branch in the solution of the labor conflicts. Velasco-Alvarado was ideologically critical of the role of the law and the courts as factors that contributed to the reproduction of the relations of domination and injustice within Peruvian society. With this dis-

[45] Interview with Luis Alfonso Roa, former representative of USAID in Colombia, interviewed by Gabriel Gómez, CIJUS, Bogotá, December 1996.

course, Velasco-Alvarado tried to reach a compromise with the members of the judicial system on his revolutionary project, especially with the idea of overcoming the judicial formalism of judges.[46] At the same time, Velasco-Alvarado intervened in the composition of the courts through the creation of laws that modified the judges' conditions for retirement and replaced them with other judges who had gained the confidence of the executive.

However, the contradictions of the "Velasquista" project and its revolutionary discourse, together with the change in the international context, made the experiment fail. The same military institutions, under the leadership of General Francisco Morales-Bermúdez, were responsible for aborting of the reform experience. In effect, in 1975, Morales-Bermúdez took power and was supported by the most conservative sector of society, which was not interested in permitting more structural changes in Peruvian society. Morales-Bermúdez was a typical figure of transition, and his mission was to organize the transfer of power to civilian governments. This would be guaranteed through a constitutional reform that stated that the new social realities pushed forth by the military (especially in the rural areas) would be stipulated in a new constitution written by a Constitutional Assembly. The Constitution of 1979 was written with a broad participation of the different political parties, replacing the Constitution of 1933.

In one of the last acts of the Morales-Bermúdez government, the Peruvian military created a legal framework for a new reorganization of the courts, in order to erase the last evidence of "Velasquismo"–particularly the plurality of critical positions about the social role of the law that had been created inside the judicial system.[47] Therefore, the military experiment of governance between 1968-1980 opened and closed with strong interventions of the executive branch in the composition of the courts. However, the application of the last intervention corresponded to Fernando Belaunde-Terry (1980-1985), the first constitutional president after the military dictatorship. The Alan García government (1985-1990) followed the same tradition. In this way, civilian governments did not break this tradition of intervention in the composition of the judicial structure.

The path chosen by the Constitution of 1979 for the appointment of judges at all levels made the political subordination of the judicial branch even more widespread, because the political parties took bureaucratic control of the judicial system. At the same time, after the military dictatorship, the civilian governments maintained the judicial branch in a situation of subordination and without resources in order to keep

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46 One of the most famous sentences of Velasco Alvarado was: "In our country the judicial system always had two faces: one severe and cruel for the modest people and the other tolerant and good for the people with power" (this and all other translations are ours). Javier de Belaunde, "Aproximación a la realidad de la administración de justicia en el Perú," *Poder judicial y democracia*. Diego García-Sayan (ed.) (Lima: Comisión Andina de Juristas and Centro para la independencia de jueces y abogados, 1991).

47 Luis Pasara, *Jueces, Justicia y poder en el Perú* (Lima: Centro de Estudios de Derecho y Sociedad, 1982).

the judiciary from gaining any control over its actions.[48] In the eighties, the Peruvian political scenario and judicial system had to confront unexpected challenges caused by the emergence of two guerrilla groups, the Maoist *Sendero Luminoso* or Shining Path, and the Tupac Amaru Revolutionary Movement (MRTA), as well as the increase in drug trafficking.

Fujimori´s Era and the Judicial System (1990-2000)

Alberto Fujimori was first sworn in as Peru's President on July 28, 1990. Since his first day in office, Fujimori began to attack the judicial system and to have strong conflicts with Congress over who had the power to pass laws. In his inaugural address, Fujimori referred to the Palace of Justice as the "Palace of Injustice," and stated that the judicial system was a corrupt entity and indifferent to social problems.[49] In the following months, it became common knowledge that the President publicly criticized the judicial system for its corruption, abuse, etc. Despite the fact that many of the criticisms of the judicial system were justified, its problems were very complex and most of them were related to its historical marginality inside the Peruvian political system, and to its lack of independence.

On the night of April 5, 1992, at the same time that the military took to the streets and occupied the Congress and the Supreme Court, Fujimori announced the installation of an "Emergency and National Reconstruction" government. Fujimori declared that he wanted a new Constitution, elaborated by a commission of jurists, which should then be approved by referendum.[50] Fujimori assumed all the powers of government through a "law" that he called the "Law of the Emergency and Reconstruction Government," which suspended the articles of the Constitution that were opposed to it. As a result, the Congress and the Tribunal of Constitutional Guarantees were closed by Fujimori. Thirteen of the 18 judges of the Supreme Court were dismissed. The Attorney-General and the Comptroller General were dismissed as well. One-hundre-and-thirty judicial officials in the Lima and Callao districts were dismissed 20 days after the "self-coup" or "*auto-golpe*." Fujimori appointed a new president and 13 members of the Supreme Court, an Attorney-General and a Comptroller General. Then, Fujimori authorized the new Supreme Court to fill the vacancies in the Superior Courts and in the Public Ministry, then continued with the process of "evaluation." As a result, Fujimori´s Supreme Court dismissed almost 100 judges and replaced all of them on a provisional basis.[51]

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48 Despite the fact that the Constitution of 1979 expressly established that not less than 2% of the budget should be sent to the judicial branch, in the six years following, its share never surpassed 0.9%. Javier de Belaunde, "Aproximación a la realidad de la administración de justicia en el Perú," *op. cit.*

49 *Ibid.*

50 The sui generis "*coup d´etat*" was the origen of a new word for the event: the "Fujimorazo" or the "auto-golpe" (self-*coup d´etat*).

51 United Nations. Economic and Social Council. Commission on Human Rights. *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Cumasaswamy. Addendum: Report on the mission to Peru.* E/CN.4/1998/39/Add.1, Geneva, February 19, 1998.

The Local Impulse to the Judicial Reform

The Jury of Honor of the Magistracy

The removal of a number of Supreme Justices (*Vocales Supremos*) and other judges was one of the central pieces of Fujimori´s "*auto-golpe.*" As a result, a number of judges of the superior courts, called *Vocales Superiores*, were appointed as *Vocales Supremos*. They began to dismiss judges at all levels. All the positions were filled on a provisional basis. The entire process resulted in the appointment on a provisional basis of 80 percent of the judicial system and of the Public Minister.[52]

In April 1993, the Constituent Congress elected a group of five "honorable" people to what was named the Jury of Honor of the Magistracy. This group was to be an ad hoc mechanism to deal with the problem of the provisional judges in the judicial system. Fernando de Trazegnies, a prestigious law professor, stated that this ad hoc body was created by the Democratic Constituent Congress (CCD) to solve the problems of corruption that resulted from the elevated number of provisional judges.[53] The initial task was to select the candidates for judge that would be appointed by the CCD as Supreme Justices and *Fiscales Supremos*. The other justices would be appointed by the Commission of Justice. The new Peruvian Constitution created the National Council of the Magistracy, with the task of appointing and removing judges. However, in December 1993, the CCD approved a constitutional law that established that the Jury of Honor of the Magistracy would continue working until the National Council of the Magistracy was installed. At the same time, the CCD increased the powers of the Jury of Honor and established that they had the full power to appoint judges. Despite the important advance in the appointment of judges with the goal of eliminating the problem of the provisional judges, the Andean Commission of Jurists (a Lima-based NGO) stated that at the end of 1994, approximately 60 percent of the judges were still provisional.[54]

The creation of the National Council of the Magistracy

Article 150 of the 1993 Constitution created the National Council of the Magistracy as an independent body responsible for the selection and appointment of judges and prosecutors. The Council initiated activities at the beginning of 1995, following the election of its members. The main problem that the Council had to deal with was that the judges and prosecutors appointed to their positions provisionally constituted one of the principal obstacles for a real independence of the judiciary. The National Council of the Magistracy, as a typical characteristic of the judicial institutions in Fujimori´s era, was short of accomplishing its goal. Between 1993 and 1998, the number of provi-

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52 Fernando de Trazegnies Granda, "El jurado de honor de la magistratura: balance de cierre," *Ideele* # 71-72, December 1994.

53 *Ibid.* Since this moment, De Trazegnies, a law professor and part of the old Law and Society Movement, has been one of the most important figures of Fujimori´s regime.

54 Comisión Andina de Juristas, *Democracia, Derechos Humanos y Administración de Justicia en la Región Andina* (Lima: CAJ, 1994).

sional judges and prosecutors grew 20 percent. In fact, in 1998, the number of provisional judges was 779 and the number of provisional prosecutors was 964, of which more than 70 percent were assigned to the Public Ministry.[55] The independence of the judicial system continued to be a big problem for Peru. On March 12, 1998, the National Council of the Magistracy was a victim of a new attack by Fujimori´s allies in Congress. Taking advantage of the fact that Peru lacked any form of constitutional control, the Peruvian Congress passed Law 26933, which eliminated the disciplinary power of the judges and prosecutors of the National Council of the Magistracy, in accordance with Article 151(3) of the Peruvian Constitution. The next day, all seven principal members of the Council resigned in protest.

The creation of the Academy of the Magistracy

The Peruvian Constitution of 1993 established the Academy of the Magistracy as the institution responsible for the training of judges and prosecutors, and of the future candidates to those positions. As a result, the lawyers interested in being part of the judicial system had to first take a course at the Academy of the Magistracy, and only if they passed were they considered a potential candidate. Despite the high level of provisional judges and prosecutors, in 1997, the Academy of the Magistracy established that the courses would be six months long. The practical result of this measure was that the National Council of the Magistracy was prevented from appointing judges or prosecutors between mid-1997 and March 1998. Additionally, on August 14, 1998, a new rule was established by the Executive Commission on the Judicial Power, and the duration of the courses was prolonged to two years. People who were trained for six months needed to complete the new disposition as well. With this measure, the new judges and prosecutors would be appointed by the middle of the year 2000, if even. According to Marcial Rubio, the goal was "to create the conditions to maintain the provisional nature of judges and prosecutors in Peru during the presidency of 1995-2000."[56]

The Executive Commissions of Reorganization of the Judicial System

Article 143 of the Peruvian Constitution of 1993 established for the first time a separation between the administrative organs of the judicial system and the jurisdictional organs. The Organic Law of the Judicial Power established that the body responsible for the administration of the judicial branch would be an Executive Council, coordinated by a general director dedicated exclusively to this task. The other members of the Executive Council would be members of the Supreme Court or Superior Courts, making them thus responsible for the general policies of the branch. The Executive Council would have a similar structure at the regional level. Before 1993, the responsibility of the administration of the judicial branch was centralized in the president of the Supreme Court of Justice.[57]

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55 Marcial Rubio Correa, *Quitate la venda para mirarme mejor* (Lima: DESCO, 1999), p. 175.
56 *Ibid.*
57 *Ibid.*

After Fujimori´s reelection in 1995, he announced the beginning of a judicial reform in Peru. The main support for this purpose were his unconditional allies in the Supreme Court of Justice. In September 1995, the President of the Supreme Court tried to create an external commission to reform the judicial power. However, the majority of the members of the Supreme Court were opposed to the measure and the proposal failed. On November 20, 1995, Congress passed Law 26546 that created the Executive Commission on the Judiciary, which was made up of three members of the Supreme Court. As an exceptional measure that changed the rules established in the Organic Law of the Judicial Power, the new law stated that the Executive Commission would work for only one year. As a result, Law 26546 transferred the functions of the government and the administration of the judicial system, including the budget, to the Executive Commission. The law established that the Commission would be directed by an Executive Secretary. Jose Dellepiane Massa, a former Navy commander, was appointed to that position. With this measure the executive branch, in collaboration with its allies in the Congress and the Supreme Court, again took control of the judicial branch.[58]

On June 18, 1996, only six months after the Executive Commission's activities started-up, Congress, through Law 26623, created the Executive Commission on the Public Ministry with the intention to reform that institution as well, until December 31, 1998. The tenure of the Executive Commission on the Judiciary was extended without a fixed deadline, although the Constitutional Tribunal established that it would operate until December 31, 1998. At the same time, Law 26623 increased the powers of the Executive Commission on the Judiciary to deal with issues relating to the courtroom, the judicial profession, the Organic Statutes of the Magistracy, the Academy of the Magistracy, and the legislative initiative on issues relating to the judicial system. However, the most important point was that through Law 26623, the Executive Commission had the power to dismiss judges. This last disposition was declared unconstitutional by the Constitutional Tribunal on October 19, 1996.[59]

Law 26623 produced much criticism and protest. Two members of the Academy of the Magistracy resigned as a show of protest against the loss of independence. Six members of the Supreme Court publicly protested because of the lost legislative initiative; however, the majority of the members of the Supreme Court supported the law. A critic of Law 26623 stated that: "taking into account the historical lack of autonomy of our country's judges and prosecutors, the establishment of a super-power over them is in fact an even bigger limitation on the possibility of freedom of opinion, not to mention of official opinions."[60]

The process of concentration of power in the Executive Commission on the Judiciary was completed on December 2, 1996, through Law 26695. That law established that the Executive Commission had the power to create and reorganize tran-

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58 *Ibid.*

59 *Ibid.*

60 Ernesto de la Jara, "Reforma de la administración de justicia: Al pan, pan y al vino, vino," *Ideele* # 89, Lima, August 1996, p. 12.

sitory chambers of the Supreme Court of Justice and other Supreme Tribunals. At the end of 1998, a new law extended the existence of the Executive Commission on the Judiciary until December 2000.[61]

International Funds for Judicial Reform

Peru has received at least US$54.8 million from the three principal donors and lenders for judicial reform programs in Latin America since 1986 (including the project that was canceled by the World Bank). As in other Latin American countries, these three international organizations are USAID, the Inter-American Development Bank and the World Bank.

The US Agency for International Development (USAID)

The Peruvian government has been receiving resources since 1986, under USAID's Administration of Justice (AOJ) programs. During the period 1986-1991, USAID invested US$2,850,000 in Peru.[62] During the period 1993-1998, USAID invested US$8.1 million in Peru as part of its so-called "Rule of Law" programs. In 1990, during the fiscal year of 1991, the US Congress "conditioned the provision of anti-narcotic-related security assistance on specific human rights achievements and required the executive branch to issue a determination that those steps had been taken before releasing anti-narcotic aid."[63] The inclusion of the conditionality of funds for the war on drugs in Peru created a conflict between the US Congress and the Bush administration over US policy toward Peru. There were three main points to the conditionality: "(1) The creation of a public, national registry of all those detained by Peruvian security forces; (2) The provision of access by the ICRC [International Committee of the Red Cross] and public prosecutors to all places of detention immediately following arrest; and (3) Progress in the prosecution of those implicated in nine well-known human rights cases."[64]

USAID was involved in the creation of a national registry of detained persons,[65] which was considered an important strategy to prevent the security forces from disappearing people. Despite the fact that the Fujimori government agreed to implement it in 1992, the registry only was created in February 1994 for those detained after January 1, 1993[66].

In 1993, the Clinton administration and the Peruvian government agreed to set-up an independent international commission of prestigious lawyers to visit Peru and draft a report on the changes in the judicial system, and make proposals of reforms.[67]

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61 Marcial Rubio, *op. cit.*

62 WOLA, *Elusive Justice. The US Administration of Justice Program in Latin America, op. cit.*

63 Coletta Youngers, *After the Autogolpe: Human Rights in Peru and the US Response, op. cit.*, p. 40.

64 *Ibid*, p. 62.

65 Linn A. Hammergren, *The Politics of Justice and Justice Reform in Latin America. The Peruvian Case in Comparative Perspective*, Westview Press, 1998, p. 180.

66 *Ibid.*

67 In an interview with a Peruvian magazine, Professor Robert Goldman, the head of the Commission, stated: "Tuvimos un encargo del gobierno norteamericano, el que fue presentado ante el gobierno peruano y este lo aprobó. La conformación de la propia comisión fue nominada por el gobierno de los EE.UU. y aprobada por el gobierno del Perú." "Habla Goldman," *Caretas*,

The commission was composed of four well-known lawyers who visited Peru in September 1993. "Its mandate was to review the status of due process guarantees in Peru, judicial independence, and changes in the judiciary adopted in the new Constitution, and to propose necessary reforms."[68] The reaction of Fujimori's government to the report was very aggressive. Minister of Justice Vega strongly criticized the commission as interventionist in Peruvian affairs. After the Peruvian government's criticism, Professor Robert Goldman, head of the commission, stated in an interview that: "the study was an analysis *per se* or *prima facie* about the compatibility of the Peruvian anti-terrorist laws and other measures connected with the obligations assumed by the Peruvian government in international treaties about this matter."[69]

In 1995, USAID started-up a project of several years (1995-2002) called Justice Sector Support (JUST), with the goal of "providing assistance to local human rights groups to defend those unjustly accused of terrorism, to inform citizens of their rights, and to promote the development of the Ombudsman's Office."[70] This project is one of three of a larger program called "Broader Citizen Participation and More Responsive Public Institutions."[71] Some of the specific results claimed by USAID as a product of the Justice Sector Support project are:[72] (1) the release, through the legal defense efforts of USAID-supported NGOs, of hundreds of people unjustly accused of terrorism: 200 in 1996, 500 in 1997 (including the pardons for 74 citizens as recommended by the Pardon Commission and the Ombudsman), 360 in 1998, and 700 in 1999; (2) the realization of the first comprehensive survey of Peruvian citizens' perceptions of the human rights situation; (3) the provision, through USAID-sponsored legal clinics, of free legal, mediation and conciliation services; (4) the training of human rights promoters; (5) the preparation of the country, through the support of the Ministry of Justice and private groups, for training on conciliatory cases that will become effective in the year 2000.

The Inter-American Development Bank (IDB)

In 1994, Peru received US$1.4 million donation from the IDB, with resources from the Multilateral Investment Fund, for a program in alternative conflict resolution. The first loan was made by the IDB on November 25, 1997. The loan totaled US$20 million for Peru "to support the beginning of a judicial reform program in geographical and social sectors that do not have enough access to the judicial system due to a lack of human and physical resources."[73]

April 21, 1994, p. 16.

68 Colletta Youngers, *After the Autogolpe: Human Rights in Peru and the US Respons, op. cit.*, p. 45.

69 "Habla Goldman," *Caretas*, April 21, 1994, p. 16.

70 USAID Congregational Presentation FY 1997, Peru <http://www.info.usaid.gov/pubs/cp97/countries/pe.htm> (visited March 11).

71 The name of the other two projects are: the Participatory Democracy (PARDEM) project and the Local Government Development (LGD) project.

72 Information from the *USAID Congresional Presentation*, Fiscal Years 1997, 1998, 1999 and 2000 related to Peru.

73 BID, *Press Release*, "BID aprueba US$20 millones para mejorar el acceso a la justicia en Peru,"

The World Bank

The World Bank announced on December 4, 1997, that it had approved a loan of US$22.5 million to Peru. The Bank stated that "the project will modernize the administrative structure and operation of the judiciary, develop a merit-based and transparent judicial career system while improving its performance to achieve independence, accountability, efficiency, increased accessibility, professional competence and integrity."[74] The announcement of the loan was made only two weeks after the IDB announced a loan for judicial reform. In fact, the Bank confessed in an early version of the project that: "There has been close coordination between the Bank and the IDB during preparation, including joint missions."[75] There are many reasons to believe that the two loans should be considered a joint effort by the multilateral banks to support the Peruvian government. These reasons include its economic neoliberal path and its political success at defeating the subversives. However, the World Bank's project had to deal with many problems since the beginning of the negotiation in 1995. The main problem was that since the beginning, the World Bank ignored the well-documented evidence of the subordinated status of the Peruvian judicial system, and the authoritarian record of interventions of Fujimori in the judicial system.

Within this context it is clear that Fujimori's judicial reform project started as a way to take advantage of the loans financed by the World Bank and the Inter-American Development Bank, and institutionalized many of the President's interventions in the judicial system. The resources to start a judicial reform program were donated by the Government of Japan. In effect, the Japanese government donated US$850,000 to the Peruvian government to prepare the terrain for a bigger financial investment in the judicial system.

Despite the lack of autonomy of the Peruvian judicial system, the World Bank approved a loan for US$22.5 million, in December 1997. However, the crisis exploded only three months later when, on March 12, 1998, the governmental coalition of the Peruvian Congress approved Law 26933. This law eliminated the power that the National Council of the Magistracy had to sanction judges and prosecutors and transferred it to the Executive Commission on the Judiciary. The members of the National Council of the Magistracy resigned in protest. As a reaction to the government's intervention in the National Council of the Magistracy, the World Bank decided to postpone the start-up of the loan for a period of six months.

Finally, the project was canceled in 1998. The World Bank's web page offered the following statement about the loan: "The Loan Agreement terminated before it became effective due to adverse developments affecting the Judicial Council and demonstrating a lack of Government commitment to the reforms."[76]

November 25, 1997.

74 World Bank, *Press Release*, "World Bank Helps Pioneer Judicial Reform in Peru," Washington, DC, December 4, 1997.

75 World Bank, *Peru-Judicial Reform Project. Project ID. PEPA40107*, December 1996.

76 World Bank's web site, <http://www.1.worldbank.org/legal/legop_judicial/Judannex.htm> (visited March 22, 2000).

The Political System and Judicial Reform in Venezuela

The Role of Judiciary in the Social and Political Context

During most of the century, the judicial branch in Venezuela was relegated to a very secondary role within the political arena. This was possible because military dictatorships governed Venezuela during the first half of the century. With the return of democracy at the end of the fifties, a new political system was built. This was stipulated in the Constitution of 1958. The new democratic institutions subordinated the judicial branch to the bureaucratic control of the political parties. The sixties and seventies were years of increasing intervention of the state in the economy and in social conflicts. This was an additional reason for the greater relegation of the judicial branch, which was responsible for processing individual conflicts in areas of civil and labor law and for punishing criminal behavior. The state had reserved for itself the right to process collective social conflicts relating to labor and agrarian issues. This tendency was reinforced in the seventies after the oil boom of 1973 and the nationalization of oil in 1974, which were the origins of a paternalistic state.

The change of the economic model imposed by the international economic context was introduced at the beginning of the second government of the social-democratic President Carlos Andrés Pérez. This change was avoided by the governments through the eighties. President Pérez signed a "stand by" agreement with the International Monetary Fund with the idea of submitting the Venezuelan economy to a structural adjustment program. The announcement of the economic reforms, that were hidden during the electoral campaign, produced an incredible social uprising in February 1989, called the "Caracazo." The protest resulted in the death of at least 300 people.

The crisis that exploded in 1989 was the beginning of a very deep social reaction against the corruption in the entire political system. The political corruption in Venezuela wasted the enormous economic resources that the Venezuelan economy produced in the period of the Interventionist State. This social, political and economic crisis produced an unexpected call to the high court that had to make pronouncements on some of the most controversial issues of the political arena, such as the investigation of the events of February 1989. The judicial system was unable to decide on the responsibility for the deaths in the popular uprising. At the same time, the judicial system was not exempt from public complaints about corruption. When the political parties called on the judicial branch to help stop the political crisis, that only worsened the crisis of the judicial branch and increased its loss of social prestige. This occurred because the judicial branch was an important part of the crisis in the political system. It was a very significant part of the political "clientele" and of the corruption of the entire political system. The Supreme Court was responsible for resolving the political impasse originated by the denouncements of corruption against President Carlos Andrés Pérez in 1992. The Court decided to arrest the President, leading him to resign from office.

Judicial Reform, Reform of the State and Constitutional Reform

Under the framework of the studies for the reform of the state elaborated by the Presidential Commission for the Reform of the State (COPRE), Venezuela started to discuss the need to make major reforms to the judicial system. In fact, by the end of 1986, the COPRE recommended a number of measures to President Jaime Lusinchi relating to legal and administrative aspects of the judicial system. At that moment, two laws were proposed to deal with the problems identified by the COPRE; both were related to the Judicial Council: the first was the creation of an organic law of the Judicial Council, and the second one called for the transference of some executive functions to the Judicial Council. In 1987 and 1988, the Venezuelan Congress approved some of proposed laws; however, they created more confusion with respect to the functions of the different judicial institutions and the majority were never applied.[77]

As we stated before, the crisis of 1989 was the beginning of a decade of political instability, economic collapse and social eruption. For this reason, the different intents to reform the judicial system were blocked by a lack of political consensus among the different political forces in the parliament regarding the reforms of the entire Venezuelan political system. Since that moment it was evident that the reform of the judicial system was tied to one of the most central points of the political discussion: the need for constitutional reforms to modify the structure of the state and to create a new social pact. However, the political system was unable to achieve this. For this reason, all the proposals based in constitutional or legal reforms of the judicial system failed. Some of them included the following:

- In 1990, a Judicial Reform Committee was formed with the participation of the Supreme Court of Justice, the Judicial Council, the Attorney General's Office and the Minister of Justice. The Committee tried to realize the proposals that the COPRE had been making since 1986. To this effect, the Committee drafted laws relating to the Judicial Council, the Supreme Court of Justice, etc. However, all of them were filed.[78]
- In 1992, a Bicameral Commission lead by ex-president Rafael Caldera (at that moment a Senator) was established to revise the Constitution, and made a series of proposals relating to the need to reform the constitutional framework of the judicial system. The proposals were filed for lack of political consensus over the reforms to the Constitution.[79]
- In 1996, a special sub-commission of Congress elaborated some proposals to reform the constitutional chapter relating to the judicial system. However, the proposals were filed again.[80]

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77 Provea, "La reforma judicial: una década de intentos inconclusos," *Situación de los derechos humanos en Venezuela. Informe Anual. October 1996 - September 1997*, <http://www.derechos.org.ve/situacio/informes/anual/9/index.html>.

78 *Ibid.*

79 *Ibid.*

80 *Ibid.*

The International Funds for Judicial Reform

Venezuela was the first county to receive a loan from the World Bank for a judicial reform project. The project was formally approved by the World Bank in August 1992,[81] and soon turned into an incredible process of political and bureaucratic obstacles that have made the loan a real nightmare for the World Bank. Venezuelan political instability made it impossible to sign the agreement with the World Bank for almost a year and a half. The economic measures that the IMF and the World Bank imposed on Venezuela were one of the causes that originated in the political crisis –or so it seemed to the majority of the Venezuelan people. Finally, in December 1993, the agreement was signed by incoming President Caldera. The World Bank loan was worth US$30 million. The agency representing the Venezuelan government in the project was the Judicial Council.

That first judicial project by the World Bank was very similar to the judicial projects supported by USAID in the eighties in other Latin American countries. They included objectives such as improving the administrative capacity of the Judicial Council, modernizing courtroom management, reopening a judicial school, and constructing, rehabilitating and upgrading court buildings.[82] The Bank's goal was aimed at strengthening the institutional capacity of the Judicial Council to manage the court system and to improve the physical infrastructure of the courts.[83] The results of this World Bank project were similar to other initial USAID experiences with judicial reform programs: very poor.

The original project was designed with the commitment of the Venezuelan government to contribute to the project's financing with an additional US$30 million. The entire US$60 million project was distributed in four big components: (1) US$5.3 million to the Judicial Council: to strengthen its planning, budgeting and management capacities; (2) US$19.7 million to reorganize and ensure the courtrooms' autonomy; (3) US $5.3 million to the Judicial School; (4) US$25.4 to rehabilitate existing and to construct new courtroom facilities.[84] The Venezuelan government was responsible for financing the rehabilitation and construction of the new courtrooms.

On December 30, 1997, the World Bank announced a second loan for Venezuela worth US$4.7 million, "to help modernize the Venezuelan Supreme Court through the collaboration of stakeholders such as internal staff and the justice, concerned NGOs, business groups, Justices of the Peace, and other institutions of the Judicial Sector."[85]

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81 Provea stated that the process of negotiation between the Venezuelan government, represented by Cordiplan (office of national planning), the COPRE (Presidential Commission to the Reform of the State) and the Judicial Council, with the World Bank started at the end of 1991. *Ibid.*

82 Lawyers Committee for Human Rights and Provea, *Halfway to Reform. The World Bank and the Venezuelan Justice System*, New York, 1996.

83 *Ibid.*

84 *Ibid.*

85 World Bank, *Press Release*, "Innovative Loan for Judicial Sector in Venezuela," December 30, 1997.

The negotiation process of this new loan started in 1996 and financial support for the first steps of the project was received from the Japanese government at the beginning of 1997.[86] Based on some criticisms by NGOs of the first judicial project of the World Bank in Venezuela, the Bank used an inclusive way to push the process of reform in this second project. Provea called this experience the "social way" to reform the Venezuelan judicial system.[87]

The Venezuelan "revolution" through a Constituent Assembly: The leading and contradictory Role of the Supreme Court of Justice

The election of Hugo Chávez as President was the beginning of the Venezuelan "revolution" through a Constituent Assembly. It worked for four months and wrote a new Constitution that transformed the political structure of the state. The entire constituent process in Venezuela during 1999 was achieved through three national elections: the elections for the referendum on April 25, 1999, the election of the members to the Constituent Assembly on July 25, 1999, and the referendum that approved the new Political Constitution, on December 15, 1999.

Between February and October 1999, the Venezuelan Supreme Court of Justice issued nine judicial decisions on different aspects of the constituent process. This averaged to more than one judicial opinion a month, in a country (and a court) with huge problems of judicial backlog and a tradition of taking extensive amounts of time for decision-making. It is clear that the traditional political parties *Acción Democrática* (AD) and COPEI tried to use the Supreme Court of Justice to stop a process of political change that they could not stop in the political arena. At the same time, inside the Supreme Court there were different political positions over the process of institutional change, which played a role throughout the discussion and the final solution. The large amount of judicial "production" on the political process of change made the process itself extremely uncertain in political terms. This was probably the most important reason for a large verbal confrontation that transpired initially between President Chávez and the President of the Supreme Court, and later between the National Constituent Assembly and the Supreme Court. Chávez and his followers considered the process to establish a Constituent Assembly as supra-constitutional. The process of change led by Chávez, which promised to be radical, could not be limited by uncertain judicial decisions. However, they could not be forced either.

The Supreme Court was not the victim of this process, as some international media and some analysts tried to portray. It was a very important actor, with real power but without enough social legitimacy to contain the political and social forces supporting the institutional change. Despite the Court's signals of more independence from the old political structure, especially when dealing with the large amount of resources from

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86 Provea, *Situación de los derechos humanos en Venezuela. Informe Anual. Octubre 1996 - Septiembre 1997, op. cit.* The mechanisms of the support of the Japanese government to start judicial projects that would be approved by the World Bank was also used in Peru.

87 Provea, *Situación de los derechos humanos en Venezuela. Informe Anual. Octubre 1996 - Septiembre 1997, op. cit.*

the project financed by the World Bank, its historical links with the traditional political parties eroded the low level of legitimacy that it had, and in the end the Court had to back down to the new political and social actors.

The Constituent Assembly and the Reform of the Judicial System

The Creation of the Commission of Judicial Emergency

Some sectors of the Supreme Court of Justice, led by its president Cecilia Sosa, believed that the Court had to perform the task of "super"-overseer of the actions and decisions of the Constituent Assembly. Even after the Assembly started working, Chief Justice Sosa continued with the public polemic over the power of the Constituent Assembly. In the middle of August 1999, she stated in an interview: "The Constituent Assembly cannot substitute, or co-administer, or co-govern the Executive, Legislative or Judicial Power."[88] However, her criticisms went beyond this point when she said: "The National Constituent Assembly (ANC) is not organized to dictate acts, it is organized to write a Constitution and act as a consultant to the people. I don't know why they have a Constituent *Gazeta* (...). The only act that the bases authorized to the Assembly was to dictate its own rules."[89] In the same interview she talked about the possibility to control the acts emanated by the Constituent Assembly. Sosa stated: "all acts [emanating from the Assembly] can be presented before the Supreme Court of Justice for its knowledge, and the Court can decide if they need to be submitted to the constitutional control of the Court."[90]

The reaction of the Constituent Assembly was immediate. On August 19, 1999, the Constituent Assembly approved a "Decree of Judicial Emergency" and created a Commission of Judicial Emergency, with the mission of immediately evaluating the institutional functioning of the Supreme Court of Justice. Some members of the Constituent Assembly, as well as Justice Alirio Abreu Burelli, a member of the Inter-American Court of Human Rights, were appointed to this mission. The Assembly established that the Judicature Council would present an evaluation of the judicial system 20 days later. The expedition of the decree was preceded by a very polemic debate inside the Assembly, because a group of Patriotic Pole members wanted a full intervention of the Supreme Court of Justice and the Judicial Council. When the Assembly organized a consensus about the decree of Judicial Emergency, Luis Miquilena, the President of the Assembly, stated: "If the Supreme Court takes any measures that clash with the decision of the Constituent Assembly, you can be sure that we will not hesitate to eliminate it by unanimity."[91] The constituents of the opposition strongly opposed the majority decision, since they did not believe in the original nature of the Assembly.[92]

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88 Carlos Blanco and Alonso Moleiro, "La Constituyente no puede sustituir ni co-gobernar a los poderes públicos," *El Nacional*, Caracas, August 17, 1999.

89 *Ibid.*

90 *Ibid.*

91 Alexander Duarte, "La Constituyente evaluará todos los órganos del Poder Judicial," *El Nacional*, Caracas, August 20, 1999.

92 Alcides Castillo, "La Asamblea Constituyente carece de atribuciones para intervenir el sistema

The official position of the Court on the decree of the reorganization of the judicial power was established by the full Supreme Court of Justice through a communiqué dated August 23, 1999. The Court stated:

> The situation of Judicial Power and the vices that affect it has been a permanent issue in our national political debate. Inside this debate, the Supreme Court of Justice has been present establishing the basic lines of action to become a more sane branch of the public power (...). The Decree of Reorganization of the Judicial Power (...) establishes an obligation to the National Constituent Assembly to proceed immediately through a Commission of Judicial Emergency to check the files of judges and to make an evaluation (...).[93]

The accord was approved with a vote of 8 of the 14 Supreme Court Justices. The next day, the President of the Supreme Court, who voted against the text of the communiqué that was approved by the majority, resigned. After her resignation, she called a press conference and read a very dramatic statement where she said:

> The Supreme Court of Justice dissolved itself. I am talking to the democratic world and in particular to the democratic people of my country because the Supreme Court of Justice, by a majority of eight votes to six, violated the rule of law and endorsed the intervention of the National Constituent Assembly against the independence of the Judicial Power (...). I consider that the Supreme Court dissolved itself when it accepted the decree of judicial emergency that was established by the National Constituent Assembly. I cannot form part of an illusion of the Supreme Court. In simple words, the Venezuelan Supreme Court of Justice committed suicide to avoid being killed. The result is the same: it is death.[94]

The words of the former Chief of Justice had a very strong impact especially outside Venezuela. The media worldwide presented the event as the closing of the Supreme Court of Justice. The practical result of Sosa's resignation was the change of forces inside the Court. The Full Court of the Supreme Court of Justice expressed that change of the correlation of forces within a judicial opinion delivered three weeks later, on October 14, 1999, when the Court decided on a legal action submitted by the President of the House of Representatives, Henrique Capriles. The legal action was presented with the intention that the Supreme Court declare the nullity of the decree dated August 25, 1999, by the National Constituent Assembly. This decree regulated the functions of judicial power. The Full Court, with an opinion delivered by Justice Iván Rincón, declared the supra-constitutionality of the Assembly.

Some weeks later, Justice Iván Rincón, the new President of the Supreme Court, stated in an interview that with the declaration of supra-constitutionality of the Na-

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de justicia," *El Nacional*, Caracas, August 20, 1999.

93 *Acuerdo de la Sala Plena de la Corte Suprema de Justicia de Venezuela*, August 23,1999.

94 Cecilia Sosa Gómez, *Renuncia de la Presidencia de la Corte Suprema de Justicia*, Venezuela Analitica. http://www.analitica.com.

tional Constituent Assembly, the Justices of the Court showed political and juridical maturity to adapt to the constituent process. In his opinion, "this adaptation did not erode the jurisdictional control that the Court exercised and its role as the responsible body of the rule of law."[95] Justice Rincón said that they did not receive any kind of pressure to declare the supra-constitutional character of the Constituent Assembly.

The composition of the new judicial institutions

One of the last measures taken by the National Constituent Assembly (ANC) on December 22, 1999, decreed a regime of transition of public powers. With this measure, Congress concluded its functions as did the regional legislative assemblies. At the same time, the ANC elected 22 members to the Legislative Commission or "*Congresito*" (small Congress) that would be the provisional legislative body until the election of the new Congress, now a unicameral body called the National Assembly. The ANC appointed a new Attorney General, a new Comptroller General and the first Ombudsman or "*Defensor del Pueblo.*" At the same time, the ANC elected new members of the Supreme Tribunal of Justice and organized the composition of its new branches.[96]

The new Supreme Tribunal of Justice initiated activities on January 12, 2000. At the opening of judicial year 2000, the President of the Supreme Tribunal of Justice, Iván Rincón, stated that one of the priorities of the new judicial body would be the access to justice. He announced that the Supreme Tribunal of Justice would open an Office of Citizen Orientation to be funded by the World Bank (US$200,000) and the United Nations Development Program, UNDP (US$70,000), and it would offer services in different regions of the country.[97]

The Commission on the Functioning and Restructuring of the Judicial Power

The Commission was installed on January 21, 2000. It represented one extension of the Commission of Judicial Emergency, which finished its work when the Assembly did. The Commission was comprised of eight members. Former constituent Manuel Quijada was elected as the president of the Commission, as he was the president of the Commission that existed before. Following the installation of the Commission, its president made a series of public announcements: (1) 60 or 70 percent of the current judges would be removed;[98] (2) the Commission would audit the use of funds by the former Judicial Council, especially those related to the funds of the World Bank project;[99] (3) the Commission would restructure the former Judicial Council;[100] (4) the number of

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95 Edgar López, "La Corte Suprema no puede erigirse como una pared para contener la ANC," *El Nacional*, Caracas, October 24, 1999.

96 Cenovia Casas and Alcides Castillo, "ANC designó al fiscal, contralor y defensor del pueblo," *El Nacional*, Caracas, December 23, 1999.

97 Edgar López, "Investigan a ex magistrados del Consejo de la Judicatura," *El Nacional*, Caracas, January 13, 2000.

98 "Manuel Quijada prevé destitución de 70% de jueces actuales," *El Nacional*, Caracas, January 22, 2000.

99 Willmer Poleo Zerpa, "Comisión de reestructuración judicial auditará al Consejo de la Judicatura," *El Nacional*, Caracas, January 25, 2000.

100 *Ibid.*

courtrooms would be increased from 1,200 to 2,000;[101] (5) approximately 400 judges had been suspended or fired from the judicial system since the judicial emergency was declared by the Constituent Assembly;[102] (6) at least 20% of the new judges were appointed on a permanent basis, and more than 80% were appointed on a provisional basis;[103] (7) the evaluations of the new judges would be made by an ad hoc group of special jurors. The evaluators would be appointed by law schools, bar associations, the Supreme Tribunal of Justice, NGOs, and the community in general. To this end, the Commission published in the newspapers a list of 180 candidates for the evaluator positions, to select 150 among them.[104]

One of the first measures of the Commission on the Functioning and Restructuring of the Judicial Power was to announce the list of the 108 candidates to substitute the same number of judges that were suspended by the Constituent Assembly. The candidates could be objected by anyone who held evidence against them. However, the substitutes would be appointed on a provisional basis until a contest to vie for a post in the judicial system is opened in the future.[105] By publishing the list of candidates, it was possible for the public to denounce that one of them was not a lawyer and had false documents. The denunciation was very embarrassing for the members of the Commission who pre-selected the candidates.[106] Nevertheless, it is too soon to make a definite assessment of the work of the Commission.

Conclusions

During the last decade, the "Rule of Law" projects have played an important role in the general context of reforms of legal and judicial systems worldwide. Nevertheless, the so-called process of the globalization of law implies a complex interaction among transnational, national and local spheres that needs to be observed carefully. Then, in order to understand this intricate process, it is important to overcome the commonsensical discourse that reproduces the framework of the transnational actors, and to inquire about the actual political and social processes in specific cases. Thus, regarding the Rule of Law programs funded by USAID, the World Bank and the Inter-American Development Bank during the nineties in Latin America, and the programs of reform developed in Colombia, Peru and Venezuela, we can notice that both the experiences of the transnational organs and the experiences of the countries allow us to introduce different elements of critical analysis.

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101 Alexander Duarte, "Incrementaran a 2.000 el número de tribunales en el país," *El Nacional*, Caracas, February 24, 2000.

102 Manuel Quijada, "El nuevo poder judicial," *El Nacional*, Caracas, April 14, 2000.

103 *Ibid.*

104 *Ibid.*

105 Edgar Lopez, "108 candidatos a jueces serán evaluados por la sociedad civil," *El Nacional*, Caracas, February 16, 2000.

106 Willmer Poleo Zerpa, "Por denuncias graves suspendieron a 83 jueces en todo el país," *El Nacional*, Caracas, March 30, 2000.

An observation of the funding and the priorities of the above mentioned organs allows one to understand the real contents of the ROL assistance. The World Bank and the IDB have invested almost US$300 million between 1992 and 1999 to fund the reforms of the justice systems throughout Latin America. They have focused on what David Trubek has called the *Market Project*, that is to say, an attempt to enhance economic growth and prosperity by means of the existence of efficient legal institutions.[107] In turn, USAID has allocated US$410.7 million between 1986 and 1998 to fund ROL programs in 21 Latin American countries. The role of USAID has been more complex and controversial due to its links with the US government and to the political nature of its activities. The majority of the programs funded by USAID stressed an interest for the criminal law system and law enforcement training, although sometimes it funded in a lesser proportion programs in other fields such as human rights or access to justice. Despite the paradoxical concern of USAID to promote the protection of human rights during the eighties, its interventions in countries with political troubles seem to be part of a broader project of political stability and social control, especially by means of the criminal law justice system. The broad contents and versatility of USAID's ROL programs allows it to intervene differently according to the political priorities of the US government. This fact explains the assistance to manifold programs such as the prosecution of drug traffickers (for example, in Colombia), criminal justice and law enforcement (in Argentina, Bolivia and El Salvador), the promotion of a transition to civil governments (in Panama or Haiti), or the training of police forces (in Haiti and El Salvador).

Politics and "Rule of Law" programs are indivisible despite the discourse of each transnational organ. For instance, the World Bank's staff has convinced itself that its program is strictly technical, while the IDB has designed an intermediate position to the extent that it draws on the framework of neo-institutional economics to promote projects of good governance and efficient political institutions. USAID and the US Government have provided the most explicit statements about the links between the programs and the political dimension, based on which it is necessary to promote the political commitment of the recipient governments. However, these links between the rule of law and politics, which are restricted to meet the institutional goals of the program and the US Government, vanish at the micro-level of the programs' development, where the technical discourse of institutional engineering cuts down communication with the existing social process. Yet beyond the institutional discourse of each organ, the nature of the reforms to the justice system and the ROL programs imply not only an attempt to transform the institutional framework and the emergence of conflicts among different political actors, but also the need to understand the spaces of production of social conflicts. In the national contexts there is a wide gamut of confrontations that yield unpredictable results, and even more, that can influence what transnational organs call the success or failure of legal reforms. In the context of the

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107 David Trubek, *Law and Development: Then and Now*, ASIL Proceedings of the 90th Annual Meeting, *op. cit.*

countries we have reviewed, the irruption of ROL programs arose at the same time as the internal processes of crisis in which the contents and the meaning of democracy and justice were at stake. The transition from an incomplete welfare state economic model to a neoliberal model of economy implied the increased visibility of institutional failures and the emergence of different political struggles.

In the case studies, the dynamics and results have been different but there are several elements that are important to take into account. First, in all three cases the judiciary has played a historic marginal role in the social field, as is expressed in phenomena such as organic and economic dependence (with the exception of the organic independence of the Colombian judicial system), and restricted judicial activism. This social irrelevance contrasts with the traditional prominence of the executive branch during the period of the welfare state model. However, all these countries have experienced a process of political and economic transition that demands a new social role of the justice system.

Regarding the origin and development of the AOJ and ROL programs, different stages can be observed. The first stage was rather exploratory, and it happened in the first phase of the JSRP in Colombia funded by USAID (1986-1990), the program of USAID in Peru (1986-1991), and the program of the World Bank in Venezuela (1992). However, during the nineties the reforms were raised in a moment of two different transitions within the countries: the transition to a new economic model and the transition to a new political structure. Thus, the reforms attempted to break up the economic or the political past to build a new institutional order. For instance, the program of reform in Venezuela funded by the World Bank in 1992, was a consequence of the process of economic adjustment. The second stage of the JSRP in Colombia came after the new political framework of the Constitution of 1991, and the reform in Peru was the outcome of the political transformation imposed by Alberto Fujimori. In this context of rupture, there were different social expectations about democracy, the economy and institutional trustfulness that led the judicial system to be considered both as a target and as a means. It was a target of reforms in the three examined cases, because of problems of inefficiency, or because of impunity (such as in Colombia), or because of corruption (such as in Peru and Venezuela). However it was also considered a means to the extent that it should enhance the building of a new institutional and social process. Nevertheless the contents and outcomes have been diverse in each case.

Third, the political transformation and the process of reforms of the justice system within the national context during the nineties have different characteristics. First, the wide scope of contents reflects the intricate political scenario in each country. For instance, the emergence of new political frameworks and constitutions in Colombia, Peru and Venezuela have permitted attempts for major reforms of the judicial and legal system. These reforms covered issues such as the organization of the judicial branch, the relations among the public branches, the creation of organs responsible for the management of the judicial branch, the introduction of new courts, and the reform of the criminal law systems. Second, along this broad spectrum, it is possible to

find both liberating and conservative institutions. And third, the carrying out of the reforms yielded unexpected results that are difficult to foresee, as Uprimny has singled out in the case of Colombia.[108] For instance, the introduction and development of the Constitutional Court and the writ of the tutelage in Colombia unexpectedly became a major element of closure for the legal system and society. On the other hand, after the reform introduced by Alberto Fujimori, the control of the executive over the judiciary in Peru has cut down the possibility to develop an independent judicial system.

In the case of the ROL programs, in the examined cases it is possible to identify three main characteristics. First, conversely to the wide range of institutional changes in the legal and justice systems, the ROL programs have had a rather punctual scope. Second, they are an example of what Santos calls "high intensity globalization," which consists of strong pressure from the transnational organs and a lack of (or at least weak) consensus among national institutions and social sectors.[109] The emergence and carrying out of the examined programs have revealed different processes characterized by the lack of institutional consensus within the national sphere about the contents of the reforms and the paradoxical contribution of the transnational organizations to the institutional fragmentation. Third, the contents of the programs stressed the goals of economic and political stability. While the World Bank and the IDB have been concerned with social stability as a means to foster a good economic environment in the three countries, USAID has been interested in the criminal law system as a means to meet political and social control, especially in Colombia and Peru.

Finally, although in this complex and ever-changing landscape the expectations about democracy and justice are still open, knowledge has been acquired which is important to take into account in order to explore more democratic horizons. Since the field of democracy and justice seems to be wider than that of the institutional transformation in a period of political and economic crisis, the sociology of law in Latin America has to face at least two challenges: first, to promote the acknowledgment of the social and political process in each country, and secondly, sooner than later, it is important to take into account the experiences of emancipation of both the formal and informal legal systems.

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Annexes

1. A general quantitative perspective of the funding of USAID, the World Bank and the Inter-American Development Bank

In the following table we observe how the Justice Reform programs are spread throughout Latin America. This assistance covers at least 21 countries and amounted to US$710.3 million until 1999. The most extended and influential agency has been USAID, which is present in all 21 Latin American countries. USAID has allocated at least US$410 million in the assistance program alone. The second most influential organ is the Inter-American Development Bank, which has assistance programs in 13 Latin American countries and has allocated US$183.4 million. Finally, we find the World Bank funding justice programs in six countries which amount to a total of US$116.2 million.

Table 1.
Funding for Judicial Reform Programs in Latin America,1986-1999
(Millions of Dollars)

COUNTRY	USAID	IDB	WORLD BANK	TOTAL COUNTRY
Argentina	$ 2.0 (1989-1993)a			
	$ 5.5 (1993-1998)v	$ 5.0 (1998)e	$ 5.0 (1998)w	$ 17.5
Bolivia	$ 3.5 (1988-1993)c			
	$20.2 (1993-1998)v	$ 2.7 (1999)u	$ 11.0 (1998)w	$ 37.4
Brazil	$ 4.2 (1993-1998)v	-	-	$ 4.2
Chile	$ 3.2 (1993-1998)v	-	-	$ 3.2
Colombia	$ 2.7 (1986-1991)a	$ 9.4 (1995)f		
	$20.5 (1993-1998)v	$ 1.2 (1995)g	-	$ 33.8
Costa Rica	$ 2.9 (1988-1991)b			
	$ 0.8 (1993-1998)v	$ 11.2 (1995)h	-	$ 14.9
Dominican Republic	$ 4.7 (1993-1998)v	$ 32.0 (1997)i	-	$ 36.7
Ecuador	$ 8.4 (1993-1998)v	$ 2.0 (1997)j	$ 10.7 (1996)m	$ 21.1
El Salvador	$13.7 (1984-1992)b			
	$ 40.7 (1993-1998)v	$ 22.2 (1996)k	-	$ 76.6
Guatemala	$ 6.1 (1987-1993)b			
	$15.0 (1993-1998)v	$ 25.0 (1998)l	$ 33.0 (1998)t	$ 79.1
Haiti	$137.0 (1993-1998)v	-	-	$ 137.0
Honduras	$ 15.8 (1987-1994)a	$ 7.2 (1996)n		
	$ 7.8 (1993-1998)v	$ 1.5 (1996)n	-	$ 32.3
Jamaica	$ 2.8 (1986-1990)c			
	$ 2.3 (1993-1998)v	-	-	$ 5.1
Mexico	$ 7.3 (1993-1998)v	-	-	$ 7.3
Nicaragua	$18.8 (1993-1998)v	$ 1.7 (1996)o	-	$ 20.5
Panama	$ 13.1 (1990-1995)			
	$12.0 (1993-1998)v	$18.9 (1998)p	-	$ 44.0
Paraguay	$ 3.3 (1993-1998)v	$22.0 (1996)m	-	$ 25.3
Peru	$ 2.8 (1986-1991)c	$ 1.4 (1994)q		
	$ 8.1 (1993-1998)v	$ 20.0 (1997)r	$ 22.5 (1997)m*	$ 54.8
Trinidad and Tobago	$ 0.5 (1993-1998)v	-	-	$ 0.5
Uruguay	$ 0.8 (1990-1993)a			
	$ 1.4 (1993-1998)v	-	-	$ 2.2
Venezuela	$ 3.7 (1993-1998)v	-	$ 30.0 (1992)m	
	$ 4.7 (1997)m			$ 38.4
Regional	$18.1 (1993-1998)v	-	-	$ 18.1
Others: Caribbean Countries and territories	$ 1.0 (1993-1996)v	-	-	$ 1.0
TOTAL	**$410.7 (1986-1998)**	**$183.4 (1995-99)**	**$116.2 (1992-99)**	$ 710.3

SOURCES:

(a) Blair, Harry and Gary Hansen, *Weighing in on the Scales of Justice. Strategic Approaches for Donor-Supported Rule of Law Programs*. USAID Program and Operations Assessment Report # 7. February 1994.

(b) United States General Accounting Office. *Foreign Assistance. Promoting Judicial Reform to Strengthen Democracies*. Report to Congressional Requesters. GAO/NSIAD-93-149. September 1993.

(c) Washington Office on Latin America. *Elusive Justice. The US Administration of Justice Program in Latin America*. 1990. p. 14.

(d) United States General Accounting Office. *Aid to Panama. Improving the Criminal Justice System*. Report to the Chairman, Subcommittee on Foreign Operations, Committee on Appropriations, US Senate, GAO/NSIAD-92-147. May 1992.

(e) A BID Press Release. February 11, 1998.

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(m) Lawyers Committee on Human Rights. *Selected World Bank, IDB and ADB Judicial, and/or Legal Reform Projects*. March 1998.

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(p) Project IDB 1099/OC-PN.

(q) No returnable. Press Release. IDB, November 25, 1998.

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(v) United States General Accounting Office. *Foreign Assistance: Rule of Law Funding Worldwide for Fiscal Years* 1993-98. GAO/NSIAD-99-158. Washington, DC, June 1999.

(w) World Bank web page.

* Loan agreement was terminated before it became effective.

2. Quantitative perspective of the USAID program in Colombia

A quantitative analysis allows us to verify the preeminence of the criminal system and especially the function of prosecution assigned to the Public Prosecutor's Office. According to Table No. 2, the approved projects assigned US$8.6 million to the Public Prosecutor's Office, which represented 63 percent of the budget managed by FES. According to the goals of the program, the other organs received fewer resources for their programs. For instance, the Superior Council of Judiciary was only assigned 5.28% of the budget managed by FES, the Public Ministry, which also included the Ombudsman's Office received only 12%.[110]

The program for the Public Prosecutor's Office was the most privileged. Similar to the other programs, the projects were divided in three main tasks: Training, Organizational Development and Information System. All those tasks converged on the main goal of efficiency. Eight of the projects funded by FES-USAID were defined in the first two years or this phase. All of them stressed efficiency in performance, with the exception of the human rights project. Finally, it is important to highlight the weight of the component of Information System, which represented 64% of the budget and was the centerpiece of the program.

Table No. 2
Investment of USAID 1992-1996

Recipient	Approved Amount	Spent Amount	% Approved	% Spent
Public Prosecutor's Office	$8,609,000	$5,547,000	63.54	62.66
Ministry of Justice	$1,338,500	$655,200	9.88	7.40
Public Ministry	$1,749,000	$1,514,000	12.91	17.10
Superior Council of Judiciary	$715,000	$590,000	5.28	6.66
Inter-Institutional Programs	$1,137,000	$547,000	8.39	6.18
Total	$13,548,500	$8,853,200	100.00	100.00

See FES-AID. Programa para la Modernización de la Justicia PMAJ. Final Report. 1992-1995. Bogota, 1996.

Table No. 3
Projects of USAID for the Public Prosecutor's Office

Training

Project	Amount Approved	Amount Spent	% Approved	Year
Short run training	$36,000.00	$34,000.00	0.42	92
Strategic management workshops	$129,000	$88,000	1.50	92
Conciliation in criminal law field	$268,000	$227,000	3.11	94
Human Rights	$70,000	$64,000	0.81	95
Subtotal	$503,000.00	$413,000.00	5.84	

Organizational Development

Project	Amount Approved	Amount Spent	% Approved	Year
PPO Units	$1,929,000	$1,615,000	22.41	92
Strengthening of PPO Units	$4,000	$4,000	0.05	92
Organization of PPO Units	$205,000	$51,000	2.38	93
PPO Caseload decreasing	$407,000	$136,000	4.73	94
High Staff organization	$15,000	$15,000	0.17	95
Subtotal	$2,560,000	1,821,000.00	29.74	

Information System

Project	Amount Approved	Amount Spent	% Approved	Year
Database on criminal law	$21,000	$21,000	0.24	92
I. S. for Faceless Prosecutors	$327,000	$316,000	3.80	92
I. S. for the Public Prosecutor's Office	$5,125,000.00	$2,948,000	59.53	93
I. S. for planning office	$73,000	$28,000	0.85	95
Subtotal	$5,546,000	$3,313,000	64.42	
Total	**$8,609,000.00**	**$5,547,000.00**	**100.00**	

See, FES-AID. *Programa para la Modernización de la Justicia PMAJ. Informe final. 1992-1995.* Bogota, 1996.