

## The Modernization of the Judicial System

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1. Among the most noteworthy developments that emerged in Latin America in the late 1980s was the emphasis that international organizations, political groups and academics began placing on institutions, particularly state institutions. To a degree seldom seen in Latin American history, we are witnessing an attempt to design, or in truth redesign, the state, a phenomenon comparable only to the constitutionalist era at the end of the 19<sup>th</sup> century. Then, jurists contrived to structure society through legal codes. Today, our concern is with the quality of our institutions, the hope being that that improving them will contribute to the well-being of society as a whole. Although an encouraging development, it will suffer the same fate as those of the 19<sup>th</sup> century, as well as more recent attempts this century, unless it is translated into clear and practical ideas about what needs to be done about legal institutions. Nor will we be able to reform legal institutions unless we understand that merely translating ideas into laws is not enough. A policy for legal reform demands that vision be coupled with a realistic appraisal of what can be accomplished. In other words, in order to improve Latin America's judicial systems, the quality of politics itself must improve, replacing empty rhetoric with a longer-term approach guided by principles of efficiency and impartiality.

2. Here I set forth the general outlines of such a policy framework for institutional reform. What are, in my judgment, the key elements of such a framework, one which must reflect both a sense of history and empirical plausibility? As I will explain, there are two fundamental components, although from each one are derived an important set of consequences. First, a legal framework for the region must take into account the transitional nature of the state at this point in time. Legal reform should be viewed as an indispensable component of public sector

modernization. Second, a legal framework should be formulated with economic considerations in mind, since institutional reform is part of a development strategy which, to be effective, must include economic and financial considerations. In the following pages, I will elaborate further on these concepts.

## I

3. Among the most notable phenomena in Latin America are the various experiments underway to transform the public sector. The abandonment of the state-interventionist development model in Latin America following the external debt crises of the 1980s; the increasingly important role of civil society coupled with the concurrent decline of communities and, consequently, the greater socialization of the state; the gradual disappearance of economic barriers between countries; the increasing rarity of dictatorships and the associated rise of democracies; and finally, a greater awareness of human rights in the region's legal and political culture, are just some of the factors that have contributed to a shift in the state's traditional functions.

4. These processes are helping to redefine the role of the state. The loss of centrality of the state has given way to a greater role for the market and a higher standard of living, but also to a dangerous rise in income inequality. The changing role of the state means that it must now provide services which it is poorly equipped to deliver. Until recently, to the extent that these were provided, they were furnished not by erecting a welfare state (which is virtually non-existent in Latin America), but rather by enacting short-sighted populist programs that tended to produce instability. Human rights have penetrated the culture of the region. Because of that, people no longer blame dictatorships, which have all but ceased to exist, for the government's shortcomings. Instead, they blame democracies and their policies. The virtual dissolution of economic borders and the processes of globalization require more and more institutional harmonization among countries.

5. Undeniably, governments today face challenges which they are ill-equipped to confront. The restructuring of the state—of which judicial reform is a part—can thus be seen as a deliberate attempt to bring all public sector institutions into line with the most obvious trends in the development of the region. I am referring to a process of strategic adaptation which is occurring not only in Latin America, but also in relatively more developed countries, such as Canada, the United Kingdom, New Zealand, and Australia. Of course, the processes are different: while those countries' governments are strong and consolidated, Latin America's governments are heavily bureaucratic and weaker in other ways. Nonetheless, both types of countries are experimenting with restructuring, or modernization of the public sector, as it is more commonly termed today.

It follows, then, that the judicial sector also needs to undergo a process of strategic adaptation. The restructuring of the state and judicial reform are inextricably linked. It is impossible to speak of modernizing the state without including the administration of justice. To pretend to modernize the state without also modernizing the judicial systems would be an exercise in futility.

Modernizing the institutional routines of the court system and fostering innovative, efficient, and service-oriented behavior are common challenges faced by Latin American countries in their efforts to modernize the public sector. In other words, the new scenario of Latin American problems will demand of the judiciary styles and modes of behavior for which it is clearly not trained. Bringing the judicial system into harmony with this new reality is an essential part of the overall modernization of the public sector. If before, the inefficiencies in Latin America's administration of justice were obscured by the inefficiencies of government in general, today this is no longer possible. The judicial system must be modernized, so that the state can perform its new roles.

6. Now then, along what lines has the modernization of the state usually occurred, and how is it related to the reform of systems of administration of justice?

It seems to me that it is possible, based on some comparative information, to identify four orientations in the restructuring of the public sector.

First, there is privatization, or outsourcing of services and productive activities. In its most obvious form in Latin America, this has usually meant a change in the size of the state, but not necessarily in its functions. Reducing the size of the state by privatizing state-owned enterprises does not amount to modernization if the state is not capable of performing essential functions which have generally not been provided in the countries of the region, such as, for example, ensuring balanced growth. Changing the size of the state doesn't necessarily amount to weakening it; rather, it can strengthen it in some areas. We are talking about right-sizing and a shift in functions, which the judicial system must also undertake. An example of this, to cite only one, are attempts to resolve legal disputes other than through traditional judicial procedures, that is, initiatives designed deliberately to change the nature of litigation. This is similar to outsourcing of services. There is no reason to fear the right-sizing of the judicial system, outsourcing, or decisions based on economies of scale. Nor is there any reason to fear the consolidation of administrative services associated with the judiciary but which have nothing to do with the actual decisions of the courts. Reorganizing court administration would strengthen the ability of the courts to carry out their most essential functions.

To this must be added a growing concern about the need for performance evaluation and human resource development in the public sector. Latin American governments have structured their public sectors in such a way that performance evaluation and greater flexibility in the management of human resources is virtually impossible. The results are well known: the public sector in many of our countries is the refuge of the most risk-averse people, whose guaranteed employment removes the incentive to be more efficient. Public-sector culture is highly

ritualistic, placing great store on compliance with exasperatingly detailed regulations while completely neglecting the achievement of results. The judicial sector exhibits all of these defects. Other challenges of both public-sector modernization and judicial reform include improving organizational management and providing incentives to improve performance. To date, the results in Latin America have been poor across the board. It seems to me that, without threatening the mandatory guarantees for the stability of judges—without which there can be no genuinely independent judiciary—adequate incentives and methods to evaluate results must be established.

Third, the processes of public sector modernization seem to be motivated by a trend toward decentralization, or de-concentration of government services and activities. The extreme centralization that characterizes Latin American governments—a true remnant of the Bourbon administration of the 16<sup>th</sup> century—is a serious defect that needs fixing. This is particularly urgent in the case of judicial systems. Their vertical structure, whereby judicial power is concentrated in the highest court, which more often than not also wields administrative power, fosters clientelism. Such a structure works to retard judicial independence among the judges of the lower courts.

Fourth, and perhaps most important, public-sector modernization requires that public administration be conceived as a service provided to the citizens. The relationship between the government and the governed must be transformed into a relationship between the administration and the citizens. The politically-oriented citizenry—one which is usually purely formal—must be replaced by an administratively-oriented citizenry. Citizens must participate not only in the selection of who will administer the state, but also in the day-to-day monitoring of its activities. The same should occur in the justice system. It is necessary, I believe, to increase the justice system's user, or citizen, orientation. The inquisitorial tradition of Latin American jurisprudence tends to view the accused as a subject, not a citizen. This is extremely harmful, not only for

moral and legal reasons, but also for political reasons: a modern and robust political system should be capable of embracing a large number of its citizens in the bureaucratic exercise of power. Judicial systems are places where citizenship is intensely manifested: in the courts, citizens appear as equals alongside government, asserting their rights before an impartial third party. If that impartial third party identifies with the government and views the citizen with suspicion, citizenship is necessarily devalued. In turn, the chance that democracy will thrive and become consolidated is virtually nil.

7. But the need to modernize the justice system comes not only from the transformations occurring in the public sector. It also comes from the increasingly manifest relationship between a well-functioning judicial system and a state of economic well-being.

## II

8. We now know that the quality of institutions is a key aspect of economic growth and one of the main deficiencies in Latin American countries. In this context, the main challenge for developing countries is modifying their institutional framework in a way that expands the ability of their economy to produce goods and services, in order to allow them to enjoy the benefits of their innovative and technological capacities. As Douglas North's studies of economic history have suggested, it is possible that Latin America's problem is not its lack of capacity to innovate but rather, to an important degree, an institutional framework that has not caught up to that capacity.

For this reason, attempts to reform the institutional framework—that is, attempts to modify institutions—must be considered an indispensable investment for economic growth and poverty alleviation. This is the reason that reform of the judicial system has a central role in efforts to improve well-being. It is the only way that countries with small economies, such as Chile or Ecuador, can internationalize, and, in this way, render the Hobbesian prediction of a nasty, brutish and short life only a bad dream.

9. Having said that, economics is important not only in terms of the impact judicial reform has on economic growth. Economics also provides an approach for addressing judicial reform. Three questions should be kept in mind. The first is that justice functions, in a relevant way, as a private good (although it has positive externalities, most of them are internalized within the litigants). The second is that the legal framework must be not only morally sound (and satisfy political and ethical standards) but also efficient, which means that it must be able to adopt the best alternative (the optimal, although not always the substantively superior one). The third is that, improving the administration of justice means that the question of access must be addressed (that is, it is not enough to address only the supply of justice, but also the demand for it, in such a way that those with equally compelling claims enjoy equal access.

In that order, I will expand on each of these questions in the following paragraphs.

10. From an economic standpoint, justice is predominantly a private good not a public one. That fact forces us to consider more carefully the economic considerations inherent in the administration of justice, and particularly, the sometimes regressive effect of the resources invested in it. I do not know the details of the Latin American situation, but I believe that they must not be too different from what occurs in Chile. In Chile, in the last 20 years, some 75 percent of the judicial output in the civil area consists of cases linked to the credit system. It is easy to understand the regressive effect of this effect on the expenditures invested in the justice system. All of those excluded from the system, particularly the poorest, end up subsidizing, by their very exclusion, firms which pass on part of their litigation costs to the class of all possible litigants.

This situation, typical in Latin American countries, is due, of course, to the non-existence of court hearing fees. Free justice—one of the many myths circulating in our countries—is actually a subsidy for the rich and a harm to the poor. The idea that nothing in life is free is a cliché that we tend to forget when we are talking about justice. To correct this situation, there are

of course a number of mechanisms. The most important, in my judgment, are the establishment of court hearing fees, that is, the introduction of a certain price structure for litigation; a better utilization of the cost system to regulate the propensity to litigate; and finally, an intense promotion of the system of arbitration, particularly institutional arbitration. Arbitration, as it is understood, is a mechanism where litigants absorb the costs of their litigation and are therefore prevented from passing those costs on to others. I believe that this aspect of the administration of justice is particularly relevant. If the system of administration of justice lacks a price structure, and if, moreover, it is highly uncertain (since, for example, it has a weak system of cassation) it tends to increase the propensity to litigate, thus worsening an already critical situation in the majority of Latin American countries.

11. To this must be added that judicial reform—in order to achieve objectives both politically and morally advantageous such as those which reform of the criminal justice system is attempting to achieve—it must also satisfy some optimal degree of economic efficiency. Since this proposition may perhaps be too general, I will subdivide it into some more basic propositions.

11.1 The first efficiency-related proposition that I would like to put forth has to do with the objectives that we must pursue with respect to the administration of justice. From an economic point of view, it seems obvious that resources should be allocated where they will do the most good. Given that, is the court system, in the strictest sense of the word, the place where the resources invested in the administration of justice will be put to best use? The impression, in light of available empirical evidence, is that the judiciary is not the most appropriate place to invest in justice. Rather, it is better to invest also in alternative mechanisms that are socially more effective and economically more efficient. The analyses that we have carried out in Chile suggest that we should invest resources for the administration of justice in a plural and heterogeneous system of conflict resolution and not only in the creation of more courts. The creation of more courts does not appear to be the best way to allocate public expenditures in this

area. Given existing practice, the creation of each new court has decreasing marginal utility. Moreover, creating more courts tends to increase congestion in the short term, since decreasing the waiting time increases the propensity to litigate. Thus, as experiences elsewhere have shown, the processes of modernization occurring in Chile and other Latin American countries give rise to the emergence of new types of conflict—family conflict, petty crime—for which the courts are ill-suited. Mechanisms such as mediation, or in the case of criminal matters, alternatives to trials, are required.

11.2 The second efficiency-related proposition I want to discuss is the need for judicial reform initiatives to satisfy the general conditions that any public policy must satisfy. Cost-benefit analyses—customary in public policy—should be mandatory when analyzing judicial reform initiatives. Empirical studies, a reliable system of information on the judicial sector, and adequate oversight mechanisms to monitor expenditures would seem to be indispensable for any successful reform policy. In Latin America, however, we tend to lose sight of these requirements. Lawyers and other players in the legal system tend to be endowed with impressive rhetorical capacities which, although they may trump their adversaries, can obscure the political and technical shortcomings of reform initiatives.

11.3 Third, I want to demonstrate the need to consider organizational aspects of judicial work and not simply procedural aspects. By that I mean the need to separate the juridical from the purely administrative aspects, establish performance evaluation systems for judicial personnel, and increase flexibility in the use of resources of the judicial sector so that resources can be rapidly re-allocated to where the most litigation occurs. Finally, it is important that there be an appropriate training system for judges, a system which aims not only to imbue them with the ideals of the democratic state but also to teach them to be efficient managers of the court system. These are some of the key elements that should be taken into account. All of this requires, as I insisted at the beginning, conceiving judicial modernization as part of the more general

modernization of the state as a whole. Because this is, in the end, what we are talking about. The challenge of modernization is not limited to judicial systems; rather, it affects the state as a whole. Policies designed to modify the judicial sector—traditionally insufficient in the region—can only be effectively implemented by a state with technical capacity that strives for operational efficiency. Correctly targeting the most vulnerable groups, designing indicators to identify them, and creating organizations capable of making optimal use of public resources and ensuring maximum efficiency in public-sector management are all objectives related to modernization of the state. These objectives will also result in improved political and social capacity to develop judicial systems. Taking on the modernization of the legal system simultaneously with the modernization of the state as a whole will prevent legal reform from becoming merely a rhetorical exercise. Trying to modernize the justice system in isolation would only reveal the inadequacy of the region’s political and legal systems and demonstrate that the declarations of rights in our region are, for the most part, empty promises. Instead, combining legal modernization with the modernization of the state as a whole will build up, within legal institutions, the organizational and technical capacity to respond to these demands.

11.4. Finally, we must address the question of access to justice. If we only improve the supply of judicial services without at the same time addressing demand, we will merely be increasing the already deep asymmetries in the countries of the region. A good judicial system with a bad system of access is tantamount to a good system of justice for those who can have access to it, who are always those with the most resources. In economic terms, this means that not only does supply need improvement—by making it, as I have said, more plural and heterogeneous by means of introducing alternative mechanisms—but we must also consider the demand side. A sound policy on access must take account of variables such as confidence, information, and costs. It must also be capable of identifying those who should benefit from access to justice. Being able to identify the poor—knowing who and where they are and not simply paying lip service to them—

is an essential task for any public policy, including a legal policy. A high-quality system of justice (or, for that matter, a high-quality system of education or health care), which fails to address the question of access and does not attempt to correct the most extreme social asymmetries through better targeting of expenditures commits an error which undermines its institutional legitimacy.

### III

12. The elements that I have just laid out—and which would advance us in the direction of adapting our institutions to satisfy the strategic objectives of political and economic development—are not at variance with, but rather complement, the substantive elements of reform. Modernizing the judicial system in the way I have described is, in my view, the only way to ensure the stability and permanency of legal systems inspired by worthy political and moral goals. We gain nothing by improving the criminal codes, establishing *Ministerios Públicos*, or proclaiming rights that satisfy the most strident demands of the legal dogmatists if these laws, once approved by our respective parliaments, clash with the inefficiency of the state and the organizational processes within which they must operate. The reality in the region is that governments, with their antiquated judicial systems, are impervious to purely normative changes. We must aspire, therefore, to avoid repeating the contradiction between the words in the texts, and the sometimes cruel reality of our legal and political institutions, for this would bring shame on the words which have been, since the beginning, the foundation of our freedom and democracy.