All Justice is Local:
Judicial Access and Democracy in Latin America

by

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In the effort of new or unstable Latin American democracies to build a rule of law, one of the biggest and potentially most explosive problems is access to mechanisms for resolving conflicts and grievances. Unprecedented freedoms and organization in many countries have led to pressing and often overwhelming demands for justice not only regarding past rights violations, but regarding current conditions and the actions of both state officials and other citizens. General resentment based on perceived injustices over the distribution of power and resources can also get channeled into judicial and related institutions, complicating the very ideas of "access" and of "justice" as well as endangering political and social stability. In most Latin American countries, most of the institutions and mechanisms created to resolve such conflicts and grievances are severely limited in their

effectiveness and accessibility by bureaucracy, institutional limitations, legal constraints, and other problems. These problems have been prompting governments to initiate long-needed reforms, but the mixed results of many of these reforms have aggravated the problem of poor judicial access, leading to even greater pressure and frustration.

This paper is a step toward understanding why judicial access is important to Latin American democracy - and why governments are having such difficulty in developing it. Such an understanding requires an analytical framework that combines the idea of judicial access with the political realities of contemporary Latin American governments, and the paper will begin to develop this framework through four steps: re-conceptualizing the idea of judicial access to demonstrate its extent and centrality; looking at how its historical development set the stage for difficulties in establishing it in times of democracy; and, most importantly, explaining the political opportunities and obstacles in Latin America that undermine both reform proposals and the effectiveness of those proposals that do get enacted. Though covering all of Latin America, the paper will focus on Venezuela, one of the region's oldest democracies whose experience with judicial access exemplifies the problems faced by other countries.

The first two sections show how the roots of the problem are both conceptual and historical. As a concept, judicial access has been far from a routine part of government policy or a central concern of constitutional law. Yet a closer examination at the idea shows how important it is in citizen acceptance and confidence in a democratic regime; it is not limited to issues like defendants' rights in a trial, but extends many demands of society regarding the very functioning of the state. Historically, furthermore, "judicial access" has had little support because it is a relatively new idea. Even in the long-established democracies in Europe and North America, where the movement for judicial access began, it has followed a slow and sometimes regressive path. But with the advancement of civil rights, the expansion of the middle class, and the stability of democratic institutions in these countries, access to justice has developed a stable foundation. In new and unstable democracies without such institutions or developments, however, demands for access take on a more urgent and destabilizing nature. When suddenly exposed to the possibility of "justice" after the collapse of a long authoritarian regime, a society often pushes for judicial access in ways that could short circuit the entire judicial system.

Such pressure has led to judicial access reforms throughout Latin America. Facing citizen resentment and saddled with institutions that do not function, political officials have taken measures to redress the problem. But many proposals to improve access often lack sustained public consensus and political support, leading to inconsistent and ad hoc reform projects. While many individuals and groups in society have inadequate access to judicial mechanisms, they do not share perceptions and objectives regarding those mechanisms. Indigenous groups demanding land rights share little with urban sectors concerned over waste disposal methods. The measures for increasing access to the judiciary that tend to be enacted, therefore, are those with support by groups with political influence and that least threaten the structures and powers that officials control. At the same time, though, this window of opportunity has at least allowed most Latin American countries to enact a limited number of adjustments and reforms. Most reforms follow one of two approaches.

One is the establishment new procedures within existing judicial structures, such as increasing the availability of support from legal defense agencies. Such reforms improve efficiency within current institutions and can be more easily controlled or monitored by officials, and so usually enjoy adequate political backing. The other common approach is setting up new and separate judicial mechanisms, such as mediation and judges of the peace, forming parallel or complementary systems to the courts. This approach is more politically risky, and usually occurs only with sharp social divisions and a prolonged malfunctioning of judicial structures. Political support for both kinds of changes, though, often do not hold out once access reforms are implemented. Measures to improve existing mechanisms often collide with executive authority, disarray in the judiciary, and manipulation by political parties, while those that set up alternative system are often undermined by weak civil society organization. The intention of some reforms to get around existing problems is thus the source of both their promise and their tenuousness.

I The Concept of "Judicial Access"

To understand the judicial access reform process in Latin America, it is first necessary to outline the conceptual context of "judicial access" itself. Many problems with reform stem from unclear conceptions and differing perspectives, which have affected reform when Latin America since the transition toward democracy. On the most basic level, judicial access can be defined as *the opportunity by citizens to use judicial institutions and mechanisms of conflict and grievance resolution.* But even this minimal definition involves a wide set of actors, institutions, and issues. To understand what judicial access entails, it must be conceptualized around three basic questions: "Access by who?", "Access to what?" and "Access for what?". "Access by who?" is the assumption that true access includes all types of individuals and sectors in a society, from economic classes to ethnic minorities. "Access to what?" is that true access means access not only to the courts, but to the state agencies with judicial functions, and to non-state institutions with influence or control in the judiciary. "Access for what?" finally, means inclusion of the results of access, such as the resolution of a legal question to the enforcement of court-ordered remedies.

In Latin America - with highly polarized societies, many informal channels of influence and power, and a history of poor enforcement of the law - these three questions highlight the real challenge to the establishment of judicial access in the region. Because justice in Latin America is understood and wielded in many different ways, real judicial access must follow its patterns. Access, first of all, implies equal access by all citizens. Citizens fall into many categories, which can determine a great deal of the level of access that they enjoy as individuals or as groups. These categories fall along two dimensions: the citizen's relation to judicial mechanisms in a specific conflict or grievance, and their general social-economic status. In this first dimension, access is affected by the citizen's relation to the legal matter: whether she or he is bringing an individual complaint in a minor conflict, is a criminal defendant, is part of a group lodging a major lawsuit, or has some other role in a judicial procedure. Within a country, for example, there may be ample access for those with minor complaints but little access for those facing criminal charges or with "class action" claims. In the second dimension, access is determined by the citizen's social-economic makeup, regardless of the type of judicial procedure in which they are (or are not)

involved. Throughout Latin America and other regions, officials and procedures treat people differently and provide different levels of access depending solely on socio-economic status, language, race, ethnicity, gender, and other personal traits. "Party capability," which is "the notion that certain kinds of parties... enjoy a set of strategic advantages,"[1] is a recognized and fundamental aspect of judicial access. Along with the procedural dimension, this socio-economic dimension brings in many further issues, which will be explored below. Relations and imbalances among societal sectors and judicial procedures, for example, greatly affect each other. It is a failure of access if neither the prosecution nor the defense in a case has access to legally-obtainable information; But it is far worse for the defense if only the prosecution has access.

"Access to What?", secondly, requires a greater understanding of how justice is handled in a particular country. Within the judiciary itself, there is differing levels of access to different procedures and needs. Access by defense attorneys to documents during the investigatory process, access by a defendant's family to legal support, and access by a community to knowledge of environmental protection laws that could be used to protect their health, are necessary but often very separate within the judicial system. But courts, of course, are by no means the only institution that dispenses justice. Non-judicial state agencies (both those with and those without formal judicial functions), along with non-state institutions such as political parties, often have a great deal of power. Within the state, access to police forces, public administrators, oversight commissions, and other agencies may be a key part of judicial access, and will vary in different parts of these institutions. Likewise, non-state institutions often have a critical role in judicial access, and access to political parties, non-governmental organizations, and other groups can significantly increase or decrease access to judicial mechanisms.[2]

"Access for what?", finally, brings in one of the more difficult issues in judicial access and the rule of law in Latin America: remedies. Access to justice means little if it does not result in remedies or solutions that are enforced and carried out. Courts (in addition to non-judicial state agencies) impose solutions to conflict or grievance resolution, but the effectiveness of their resolution often depends on the type of conflict or resolution involved. There are six general kinds of conflicts or grievances involved: conflicts or grievances between citizens, between citizens and private enterprises, between citizens and state agencies, between groups of citizens and private enterprises, between groups of citizens and state agencies, and over legal questions involving a laws' constitutionality or meaning. Lower level courts may be effective in enforcing small claims, for example, but superior courts may be very ineffective in bringing restitutions by the state against wronged citizens. A lack of access in one of these ways then makes the problems even worse, complicating access reforms and possibly jeopardizing entire judicial mechanisms.

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[1]Galanter, Marc, "Afterword: Explaining Litigation," in 9 *Law and Society Review,* 347, 360 (1975)

[2]Further complicating the picture are different access levels on different rights. While associated with basic civil and political rights such as the freedom of association, access cannot avoid questions regarding social and economic rights such as regarding health and education, which have been given prominence by international and national laws since the 1940s, nor regarding rights relating to issues such as the environment, which have been receiving increasing attention since the 1980s. How to determine if a judicial system is "accessible" on these rights must be addressed even in regions such as Latin America that are still struggling to reach an acceptable standard of protection on civil and political rights.

"Judicial access," in short, involves these three broad areas, which intermix and combine in numerous ways. Access to, by, and for can mean any combination of these dimensions of the law. It is as much about a language minority bringing a suit against a state agency, for instance, as it is about a business suing a citizen or a groups of lawyers questioning the constitutionality of a law.

Judicial Access:

Access By	Access To	Access For
Procedural:	*Judicial Mechanisms and Procedures:*	Citizen-citizen conflict/grievance
Individual citizens	Information	Citizen-private enterprise
conflict/grievance		
groups of citizens	Adequate Legal Defense	Citizen-state conflict/grievances
Defendants	Due Process/Fair Trial	Group-private enterprise conflict
Social-Economic:	*Non-Judicial State Institutions:*	Group-state conflict/grievances
Gender	Police/Security Agencies	Resolution of Legal Questions
Class	Ministries/Public Administration	
Employment status	Oversight agencies	
Ethnicity	*Non-State Institutions:*	
Language	Political parties	
	Non-governmental organizations	

All three areas of judicial access, of course, exist within the wider context of political, social, and economic conditions and change. There are three specific aspects of this wider context that most directly affect judicial access: strains from economic and political hardship that in part gets transformed into resentment over "justice," the effectiveness of remedies and anti-remedies within social and political development, and public confidence in judicial institutions.

There is often great reluctance, first of all, to explore how economic and other strains among a population becomes transformed into resentment articulated as a problem of "justice," primarily because such a "transformation" is impossible to quantify or prove. But such ideas are common in literature on violence and regime change. Gurr, for example, says that violence results from an anger based in "relative deprivation:" when the separation grows between what people feel entitled to and what they actually receive.[3] Others, such as Tilly, argue that violence comes from political conflict between groups vying over a set of resources.[4] In contemporary democracies, such resentment or conflict may not necessarily result in violence or revolution, particularly when they do not entail issues of survival or when the means for upheaval are not available or are recognized as worse than not taking

[3]Gurr, Ted Robert, *Why Men Rebel,* (Princeton: Princeton University Press, 1970), pp.3-4, 334-47.
[4]Tilly, Charles, *From Mobilization to Revolution* (Reading, MA: Addison-Wesley, 1978)

action. At the same time, they do not necessarily die out once a country makes a transition to democracy. In many instances, they get transformed into beliefs and demands of justice. In Latin American democracies, a part of political instability comes from a perception among the population of a lack of justice in dealing with prior abuses, on the distribution of power and wealth, or the impunity of state officials. With discredited militaries and general support for democracy, that resentment does not get transformed into mass violence, but instead into diffuse expressions of discontent and a withdrawal from formal means of conflict resolution. When resentment of justice begins to play a role in the politics of a country, then access to justice invariably plays one as well.

The experience of Venezuela since 1989 demonstrates the effects of popular ideas of "justice." With the collapse of the economy in the 1980s, citizens could no longer ha the benefits of generous state services. But the implementation of a strict neo-liberal policy in 1989 by a newly elected President associated with populism and state services fed an anger and sense of betrayal that led to mass national riots. Three years later, growing resentment among the lower ranks of the military over the higher ranks' privileges led to two nearly-successful coups attempts. As exposures of corruption increased - from the trial of ex-President Perez's over use of a $17 million discretionary fund supposedly to a judge who tossed thousands of bolivars out of the window - corruption became the central issue in political discourse and was often articulated as much a matter of justice as an outgrowth of state and political policies. With 40% of laborers working in the informal sector and 70% of families unable to afford the *canasta básica de bienes*, the injustices of officials' use of money were no longer tolerated; the successful Presidential campaign of Rafael Caldera in 1993 campaign was based on the mass' lack of tolerance for such injustices. The issue was further fueled in 1994 after the country's top banks collapsed and their directors fled the country with over $7 billion dollars, an amount equal to about 45% of annual national income.[5] In just "the first half of 1994, half of Venezuela's banks ended" up being maintained by the government, in a a $6.1 bailout.[6] Eighty to 90 percent of the banking industry involved in one way or another, while Banco Latino alone had 1.2 million depositors - about 10% of the country's adult population. While The $105 billion saving and loans bailout represented 1.6 percent of U.S. gross domestic product and about 7 percent of the 1995 Federal budget, Venezuela's $6.1 billion bailout represents 11 percent of the country's GDP and 75% of the government's budget."[7] Among the causes of the failure were are deregulated interest rates and nearly non-existent government supervision.

Judicial remedies and anti-remedies are a related and also overlooked part of judicial access. Remedies are actions of a court takes to enforce a ruling, while anti-remedies are actions to force a remedy or correct an inadequate one. Desegregation of schools in the United States was a remedy, for example, while the civil-rights movement that pushed for such rulings were an anti-remedy to the previous upholding of racist laws by state courts. There are three basic kinds of remedies: injunction, damages, and restitution. An injunction "directs the defendant to act, or to refrain from acting in a

[5]Estimated as half the country's annual earnings of oil sales, which is 90% of national income.

[6]$3.3 billion, more than the $2.8 billion it put into Banco Latino.

[7]*New York Times,* May 16, 1994

specified way, and it is enforceable by the contempt power,"[8] the "damages remedy is a judicial award in money, payable as compensation to one who has suffered a legally recognized injury or harm,"[9] while restitution is "a return or restoration of what the defendant has gained in a transaction."[10] Together, remedies an anti-remedies are central to a country's political development by being the manner in which society and the state engage in conflict and eventual agreement over the meaning and application of the law. In the United States, the back-and-forth of remedies and anti-remedies was essential not only to the protection of civil rights, but to other matters such as labor rights and working conditions.[11]

Given this role, remedies clearly can be a crucial part of countries' efforts to consolidate their democracies and to build protection of basic rights. Rights, indeed, do not mean much without remedies. But many countries, "while occupied in defining rights, given insufficient attention to the absolute necessity for the provision of adequate remedies by which the right they proclaimed might be enforced,"[12] while histories of authoritarian rule have often destroyed much of the legal basis for basic rights that may have been formulated in early constitutions.[13] One the one hand, courts are responsible for deciding on the legitimacy and applicability of laws as well as on numerous long-simmering and often-explosive social and political matters, but often lack the needed independence and support of past jurisprudence to make and enforce effective remedies. On the other hand, much of civil society is often occupied organizing itself - while many political parties are too concerned with patronage and power - and thus are unable to engage in anti-remedies that successfully implement working remedies. In Argentina, for example, the only efforts to publicize judicial nominations an to document police violence are put out by a tiny non-governmental organization (NGO) that must rely for its information entirely on unscientific and irregular media reports.[14] Among the population, furthermore, a lack of education, separation from formal economic and political institutions, high rates of illiteracy, linguistic differences, low levels of understanding of judicial structures, and control by local powers also makes grassroots action difficult or impossible. The cycle of remedies and anti-remedies critical to developing a democratic rule of law, thus, faces many obstacles in Latin America.

Another part of judicial access' socio-political context is the level of public confidence in the judiciary. While high confidence leads to greater participation in judicial process and

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[8]Dobbs, Dan, *The Law of Remedies: Second Edition,* St.Paul: West Publishing Co., 1993, §2.9(1)

[9]ibid., §3.1

[10]ibid., §4.1(1)

[11]For example, the 1894 Pullman strike helped lead to rulings in favor of labor. Remedies and anti-remedies also pushed forward the Dombrowski suit, which charged that "prosecutions [were] used systematically, not in expectation of securing conviction but as a means of harassing political opponents." ibid., §7.3(5).

[12]Parker, Kellis, "Remedies as a Jural Concept," p.4

[13]*Civil Society* is "that arena where manifold social movements (such as neighborhood associations, women's groups, religious groupings, and intellectual currents) and civic organizations from all classes (such as lawyers, journalists, trade unions, and entrepreneurs) attempt to constitute themselves in an ensemble of arrangements so that they can express themselves and advance their interests." *Political society* is "that arena in which the polity specifically arranges itself for political contestation to gain control over public power and the state apparatus" -- that is, the grouping of political parties, interest groups, and other groups participating directly in politics. Stepan, *Rethinking Military Politics,* pp.3-4

[14]This organization is the Centro de Estudios Legales y Sociales, begun during the 1976-1983 dictatorship, and has a staff of less than ten.

acceptance of its resolutions, and thus generating even high levels of confidence, a low level of confidence leads to greater disengagement from judicial processes and a greater willingness to resort to non-judicial solutions, often bringing down confidence levels even further and entrenching the judiciary's existing exclusionary tendencies. The extremely and persistently low levels of confidence in the judiciary points to such patterns. Throughout Latin America, confidence in the judiciary is extremely low, and has never been recorded as above 60%. In Chile, poor people with no experience with judicial mechanisms have about a 20% rate of confidence in the judiciary, while those with experience have higher rates of confidence.[15] In one survey in Argentina, a full 80% cannot find anything positive to say about the judiciary. 40% consider administration of justice to be only fair, while 49% though it was bad or very bad; 65% though the judicial system to be is unjust, partial, slow, biased in favor of the right, corrupt, above the law, politicized, and prone to personal favors; 45% were unaware of any alternative means to solve conflicts outside the courts.[16] In a September 1996 nationwide poll, the judiciary was, except for the unions, the least trusted institutions in the country.[17] In Venezuela, there is an almost complete lack of confidence in all public institutions, including the judiciary. In an April 1995 poll, 92% of respondents said that they did not believe that the nation's leaders or institutions had any ability to solve the country's crisis.[18] As with perceptions of justice and the ability to require the enforcement of remedies, the level of public confidence show the need to incorporate the characteristics of society in any look at judicial access.[19] As seen in the development of judicial access in both history and contemporary democracies, the role of society plays a central role in the level of judicial access.

II Historical Development of "Judicial Access"

The idea of a full access to justice - that there be a uniform body of norms to be equally applied and accessible to all citizens - is one that developed only within the past century. But rules determining the relationship between the law and citizens go back to the beginning of the government. In nearly every society, there was a basic assumption that citizens were divided by class and other groups, and a person's status in those divisions would determine their access to available judicial institutions and recourses. The law itself was also divided, with institutions such as the Church given full power to implement a range of statutes for those under its authority. Many of these divisions have lasted until

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[15]Dakolias, Maria, "The Judicial Sector in Latin America and the Caribbean: Elements of Reform," Washington, DC: The World Bank, 1996, p.361

[16]Gallup Institute, Argentina, March 1994. For some of the implications of the poll, see Alvarez, Gladys Stella, "Alternative Dispute Resolution Mechanisms: Lessons of the Argentine Experience," pp.78-87, in *The World Bank, Judicial Reform in Latin America and the Caribbean,* Technical Paper 280, (Washington, D.C.: the World Bank, 1995).

[17]Respondents were asked about their trust in nine instituitons and social sectors; Public schools enjoyed confidence from 56% of respondents, the press from 53%, the church from 42%, the military from 25%, Congress from 20%, the business sector from 14%, the police and the judiciary from 13%, and the unions from 7%. Estudio Graciela Römer y Asociados, reported in *La Nación,* November 17, 1996, p. 24

[18]Poll by Conciencia 21 and the Konrad Adenuaer Foundation, reported in *El Globo,* April 3, 1995, p.7

[19]A related approach focuses specifically on the strength of social networks and society's abilities and customs of resolving disputes itself. Mobilization of law (that is, use of formal legal meachnisnms) is expected to be "infrequent in...'multiplex relations,' meaning relations that are intimate in terms of duration, frequency of interaction, intensity, interdependence, and multiple-interactional dimensions."Black, 1976, pp.40-46. Societies based on communitarian organization, thus, would be expected to have less channels of judicial access than societies based on individualism, since most conflict would be resolved within socially-based mechanisms. Similarly, corporatist and statist societies would be expected to have less judicial access than contractual societies, since appeals to the common good and hierarchal organization would likely damper citizens' use of the judiciary to challenge state officials.

very late: in Russia, there were special courts for peasants from the year the serfs were freed, 1864, until 1912; in England, merchant laws and courts did not merge with the common law until the 18th Century. Such divisions were strong in Iberia, which transported them to its colonies as *fueros* for settling institutions such as the military and religious missions. In all these countries, access was considered only as a formal right within a laissez-faire and individualistic philosophy of government. Citizen liberties were confined to "negative" liberties of freedom which required from the state only an absence of interference. "Such factors as differences among potential litigants in practical access to the system or in the availability of litigating resources were not even perceived as problems."[20] With the vast majority of the populations in most countries shut out of the political system, questions of "access" had no place in state or social structures.

After the French and American revolutions and the beginnings of the modern State, however, countries began to adopt constitutions and legal structures which recognized the centrality of citizen rights and the need for *action* by the state to put those rights into effect. European codes began to be formed at this time, with law now increasingly defined by "interrelated notions of neutrality, uniformity, and predictability."[21] Access to mechanisms for conflict and grievance resolution began to be institutionally recognized through "an affirmative commitment by the state."[22] With basic citizen rights now including both "negative" and "positive" rights," effective access to justice was seen "as the most basic requirement...of a modern, egalitarian legal system which purports to guarantee, and not merely proclaim, the legal rights of all."[23]

While this development increased judicial access by a growing middle class, it weakened many alternative mechanisms of the poor. Most of the use of the courts, in fact, was against the lower classes in civil and criminal cases usually dealing with payments of debts; court records in most countries in the 18th and 19th Century show that the most defendants were servants and workers. As court costs rose, furthermore, access was increasingly difficult for those who could not afford it. In Spain, for example, litigation declined markedly as the society modernized.[24] Court costs increased because governments realized that litigation tied up resources and was a serious damper on economic activity. At the same time, however, debt collection was the most serious problems as urbanization and other developments increased the use of credit and impersonal economic relations. The result was that judicial access increased primarily for middle-class merchants. In Latin America, with the continuing dominance of the oligarchy until the 20th Century, these developments were not as pronounced, and the legal separation of institutions like the Church and the military became even more pronounced.

But such commitment has gone through many subsequent and not always progressive stages. Overall, there have been three separate stages of support for judicial

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[20]Chayes, "The Role of the Judge in Public Law Litigation," 89 *Harvard Law Review,* 1976.

[21]Unger, Roberto M., *Law in Modern Society,* (New York: Free Press, 1976), pp.176-77

[22]Claude, R., "The Classical Model of Human Rights Development," in *Comparative Human Rights,* 6, 32 (Baltimore: Johns Hopkins University Press, 1976)

[23]Cappelletti, Mauro, and Bryant Garth, "Access to Justice: The Worldwide Movement to Make Rights Effective. A General Report," in Cappelletti, M., editor, *Access to Justice, Book 1,* (Milan: Dott. A. Giùffre Editore, 1978), p.9

[24]See Toharia, José Juan, *Cambio Social y Vida Jurídica en España,* (Madrid: Edicusa, 1974)

"access" in history:[25] the development of legal aid, the demand for the representation of diffuse interests and class actions, and, most recently, the pressure for mass accessibility to judicial mechanisms. In contemporary new democracies without this staged history, all three demands may build up together and rush in simultaneously during the relatively short time of democratic government. Given the organizational limitation, economic instability, and societal unrest of many new democracies, many of these multiple demands cannot be met, which only heightens the pressure for them even more.

II Reforms under Democratic Regimes

All types of judicial reform potentially increase judicial access. In general, judicial access reforms fall into four main categories, according to each's specific approach and objectives.[26] First are alternative dispute resolution mechanisms - procedures such as mediation - that are more accessible and less costly ways of resolving disputes within the state system. Second is improvement of legal defense. With the majority of people in Latin America unable to afford private legal aid, there have been efforts to improve public defense, primarily in criminal cases for indigent defendants. A third area of reform is to establish legal aid centers to dispense advise and information, either through government agencies or private professional associations. The most sweeping and controversial type of judicial access reform, though, is that which sets up entirely separate procedures of conflict and grievance resolution. Such procedures include the creation of neighborhood *jueces de paz* (judges of the peace) to handle everyday complaints and disputes.

Reforms: Judicial Access and Citizen Confidence

1. Adequate legal defense
2. Legal aid and information support centers
3. Parallel judicial structures
4. Alternative dispute resolution mechanisms

As with other judicial reforms, one of the primary motivations for political actors to support these policies has been the clear failure of existing mechanisms. When combined with a public consensus for improvements, the clear need to relieve pressure from below, and uncertainty by political officials on the political impact of this problem on them, the failure of existing mechanisms creates incentives for implementing change. In Argentina, even with generally higher rates of legal mobilization than other Latin American countries, the experience of the *Proceso* created a new political and popular consensus around the importance of functioning channels of judicial access. The debate then formed around which reforms would be most appropriate and not harm other needs such as combatting crime and maintaining stability. In Venezuela, the exclusion of 85% of the population from judicial mechanisms, combined with widespread disillusionment with political actors and

[25] See especially Cappelletti, Mauro, general editor, *Access to Justice,* Volumes I and II (Milan: Dott. A. Giuffrè Editores, 1978)

[26] Other reforms that would increase judicial access are those intended to increase judicial efficiency. Such proposals include more specialized and efficient courts, and changes in the laws. The oral courts established in Argentina in 1992 help speed the judicial processes, for example, while the new juvenile courts for youth under 18 years of age also helps to more appropriate decisions.

state structures, led in the 1980s and 1990s to both new reforms and to reforms bolstering mechanisms created during the transition to democracy thirty years earlier.

Legal Defense One of the most critical aspects of judicial access is access by the accused of crimes to legal defense. With the prisons of Latin America bursting with inmates waiting years just for a trial - over 50% in Colombia and Chile, over 70% in Venezuela, Argentina, Uruguay, and El Salvador, and up to 90% of Perú and Paraguay[27] - the need for this types of access has in many countries led to massive violence and reached the status of a national emergency. Reforms to improve legal defense of detainees have concentrated on the state Public Defense agencies and Public Defenders, who are responsible for providing legal defense in criminal, civil, commercial, labor, housing, and other types of conflicts to those who can't afford it. Throughout Latin America, there are too few public defenders, and each has far too many cases to be effective on any of them.[28] There are only 21 public defenders in all Ecuador,[29] and only 14 in Buenos Aires; Venezuelan *defensores* take on an annual average of 291 cases, and in some states up to 381,[30] even though over 85% of all inmates required a public defender.[31] *Defensores'* roles are often unclear and politicized, furthermore, and have little institutional support, professional stability, or coordination among themselves or with other governmental bodies. *Defensores* usually have far less experience than the *fiscales*,[32] (who prosecute crimes, representing the state) and they often pressure detainees to confess in the first round, reducing their chances for appeal. In Venezuela, a Public Defender Institution code to establish professional norms was proposed in the 1980 Judicial Career Law but has never been formulated, leading to a complete lack of clarity over defenders "obligations and duties."[33] They are paid much less than most other lawyers, are subject to little oversight or accountability, and do not receive bonuses or promotions for efficiency. In many countries, as a result, most reforms in this area of judicial access have focused on increasing the number of defenders and rehauling the laws pertaining to them. In Argentina, for example, a new law has established a *Defensor General*

[27]See Observatoire international des prisons, *Rapport 1995,* Lyon: 1995; Reuters, "Peru admints jails packed with unsentecned inmates," April 24, 1996. In many countries, inmates wait over two years for trial; In Venezuela, some wait up to eight years - many detainees are left unidentified for months, records are lost, and only this year did the ministry complete a full penitenciary census after a request of over ten years ago. (Mirna Yépez, Interview, April 20, 1995). With Over 24,000 inmates are held in Venezuela's 15,600-capacity system, riots and violence are commonplace, with 437 prison deaths in 1994 alone, 354 of them in violent incidents (The General Inspector of Prisons, *Informe Anual, 1994.)* Inmates of all ages are placed together, must fight for space floor space to sleep, and depend on family for food. Health problems - including typhus, cholera, tuberculosis, scabies and numerous other viruses - run rampant. In Argentina, a third of inmates have HIV, the virus that causes AIDS, and receive inadequate care. In some countries, some prisoners are transferred to prisons far away from the courts and judges who had their case, and even prisoners who remain in one spot may sometimes wait up a year for transportation to the courthouse. In Uruguay, the police is also the penitenciary body, the trial process is written, and the Penal judge is the same one for instruction and for sentencing. These three conditions contribute to problems in the prisons.

[28]See Mantellini González, Pedro J., "La Vigencia del Ministerio Público," in Carrillo Batalla, Tomas Enrique, ed., *Contribución al Estudio de la Ciencias Jurídicas y Sociales: Ciclo Ordinario de Conferencias de la Academia Años 1981-1983,* (Caracas, Venezuela, 1983) and Pérez Perdomo, Rogelio, *Justicia y Pobreza en Venezuela,* (Caracas: Monte Avila Editores, 1985)

[29]World Bank, *Ecuador: Judicial Sector Assessment,* (Washington, DC: The World Bank, August 10, 1994).

[30]*Memoria y Cuenta del Consejo de la Judicatura,* Dirección de Planificación, Consejo de la Judicatura.

[31]90% of those sentenced are for crimes against property. Of them, 95% were defended by a public defender. Good private criminal lawyers is hard to find or afford: most lawyers are in civil and business law and few have criminal expertise, and a private defense costs around $5,000 - partly because of the due to the criminal process' duration - a sum not any where in reach of the majority of the population.

[32]There is only one public defender for every three *fiscales* in Buenos Aires.

[33]María Antioneta Acuñade V., President of the Public Defenders Association of Venezuela; Interview, May 22, 1995

de la Nación, created new *defensores* who specialize in different areas, and created a new professional codes.[34]

Legal aid and information support centers Most countries have both government and private legal aid programs and centers that reach out to low-income citizens, laborers, youth, and other groups with traditionally low access to judicial mechanisms. These centers often are a crucial link for people who cannot afford legal advice or defense lawyers, much less initiate a civil or commercial suit. In Bogotá, for example, to pay for four hours of the least expensive private attorney's time, a service sectors workers would have to work 4.4 days, agricultural workers 4.3 days, and laborers 4.0 days.[35] When low-income clients do retain the services of a private lawyer, their contact is usually very superficial and often limited to a completion of documents. Retaining the services of a good lawyer often requires the personal contacts that most people do not have. Any program that provides such services, therefore, is a significant channel for judicial access. In addition to government assisted and assigned-counsel/judicature programs, most Latin American countries have centers run by law schools, bar associations, unions, law firms, and NGOs. Colombia has established a set of *Pro-público* law firms modeled after public interest law firms in the United States, for example, while México, Perú, Chile, and the English-speaking Caribbean have similar "popular" law firms. Chile requires law students to receive training in legal support offices, in addition, while Perú offers it as an option. In Venezuela, legal aid clinics are operated by the Ministry of Justice, the government of the Federal District, the Venezuelan Federation of Lawyers and other professional organizations, labor unions, the Central University of Venezuela (UCV), and of the Catholic University Movement. There has been greater importance attached to these services, but they remain inadequately funded because their structure and mechanisms often depend on labor for law students and so there is little incentive to significantly raise funds.

Most such measures, however, do not address the fact that far more than the poor functioning of judicial mechanisms themselves, poor judicial access results primarily from popular alienation and court treatment of citizens. Even when they are reformed, many existing structures and rules in Latin American judiciaries are not tailored to a citizenry that does not have the means or capabilities of utilizing them. Existing structures tend to view low-income and other marginalized people as "rich without resources," that is, once they "recognize their problems, they have no geographic or cultural obstacles to visit a lawyer's office and state their case and maintain an adequate relationship with the lawyer."[36] These structures also isolate individual cases rather than place them within the larger social problem, such a inadequate housing or services, of which they are a part. Concrete expression of such discrimination are examinations, monetary courts charges and fee for litigants, which make access prohibitive for the vast majority of the population, even with

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[34]María Fernandez Lopez, Defensor before the Supreme Court of Argentina; Interview, December 17, 1996

[35]Lynch, Dennis O., *Legal Roles in Colombia* (Uppsala: Scandinavian Institute of African Studies, 1948), p.99. In Venezuela, the least expensive consultancy fee is equivalent to one day's income for an *average*-income family - and this does not include the "personal" fees charged at the courts by judicial administrators in addition to those of the Judicial Tariff Law. Pérez Perdomo, Rogelio, "Asistencia Jurídica y Acceso a La Justicia," in Pérez Perdomo, Rogelio, ed., *Justicia y Pobreza en Venezuela* (Caracas: Monte Avila Editores, 1985).

[36]Pérez Perdomo, Rogelio, "Acceso a La Justicia en la Sociedad contemporánea: Un análisis de derecho comparado," in Pérez Perdomo, Rogelio, ed., *Justicia y Pobreza en Venezuela,* p.71

exemptions for the poor in certain cases. In Mexico, high examination standards prevent widespread use of the courts; in Ecuador and Perú the number of notaries is limited by law and have a monopoly of high fees; under Venezuela's newly *reformed* Judicial Tariff Law of 1994, the price of transferring a document of evidence rose from 60-70 Bólivars to 250.[37] A hefty chunk of these fees makes its way into the pockets of administrators, who complement them with their own "personal" fees.[38] These limits of formal judicial institutions has led to a new kind of judicial access reform - namely, those that go around formal mechanisms to resolve conflicts and grievances with quicker, more appropriate alternative procedures.[39] As with the development of judicial systems in Europe, the state is not inclined to open up the courts to laborers who make up the majority of the population.

Alternative Dispute Resolution The main types of such reform are alternative dispute resolution (ADR) mechanisms. ADR mechanisms can be annexed to the courts, and be either a voluntary or mandatory option for parties in a court case,[40] or be private mechanisms run by chambers of commerce, non-governmental organizations, or international mediators. In both systems, ADR is based on one or more of three techniques: negotiation, conciliation, and mediation. *Negotiation* is a purely voluntary approach taken on by and limited to the parties in a case, while *conciliation* and *arbitration* are run by a neutral third party who attempts to bring the two sides to a mutually acceptable solution. Each of the three approaches usually get its start in special tribunals, such as labor courts, but increasingly are being brought into the regular courts. Not only do such approaches avoid legal costs and save time, but are far more accessible to the parties involved, because it is those parties themselves who decide the terms and the language involved.[41] More importantly, such methods emphasizes the formulation of solutions that both sides find satisfactory over the zero-sum and often antagonistic nature of regular court processes. In countries that exclude certain issues from the courts - such as in Ecuador, where immediate family members may not legal actions against each other - mediation can cover these areas. Friedman, Bierbrauer, and other analysts write that while regular courts concern past events and reduce problems with roots in larger social conflicts into narrowly factual and individual matters, ADR mechanisms are oriented toward the future and focus on creating more harmonious relations through allowing parties to a conflict to bring in any and all legal and non-legal issues related to the dispute.[42]

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[37]See the *Ley de Arancel Judicial,* enacted June 23, 1994. The new charges, including the one on transferring documents, are outlined in Article 17.

[38]"Many bailiffs charge you according to how far they have to take a document, as if they were taxis," complains one civil lawyer waiting in line to the Palace of Justice in Caracas, April 20, 1995.

[39]Judicial access may be most usefully measured by rates of *legal mobilization*, which is the extent to which citizens utilize judicial procedures such as lawsuits and denunciations "as a form of political activity by which [it] uses public authority on its own behalf." But most forms of legal mobilization are not recorded in Latin America, and in any case most disputes in society never actually reach the already-overwhelmed courts. This lack of engagement is what also has led to new forms of resolution that do not require formal judicial processes. See Zemans, Frances Kahn, "Legal Mobilization: The Neglected Role of the Law in the Political System," *The American Political Science Review,* Vol.77, 1983; see also and Giles, Michael and T. Lancaster , "Political Transition, Social Development, and Legal Mobilization in Spain," *The American Political Science Review,* Vol.83, No.3, 1989

[40]In Ecuador, for example, the Labor Law obliges collective labor disputes to go before the Ministry of Labor's Conciliation and Artibration Tribunal.

[41]In El Salvador, mediation is set up to be conducted without a lawyer and within a time frame of two months. Dakolias, 1996, p.37

[42]See especially Friedman, Lawrence M., "Access to Justice: Social and Historical Context," in M. Cappelletti, *Access to Justice,* Vol.II, Book I, p.25; and Günter Bierbrauer, et al, "Conflict and its Settlement," in the same volume.

Although often initially resisted by lawyers and judges who fear a loss of control over judicial mechanisms, ADR provides them with the benefits of removing complex or repetitive cases from their dockets.[43] Long supported in the United States and other countries, ADR is considered particularly effective for dealing with Latin America's more polarized societies and cumbersome bureaucracies. Often for the first time, they give people a sense of empowerment, and sense of using the system to work for them. Colombia began employing ADR techniques in 1983, and in 1991 set up a pilot program under Presidential decree[44] which allows judges to delegate stages in the judicial process to conciliation (Decree Articles 2-10) or to arbitration (Articles 11-20). In El Salvador, there are mediations that allow parties to settle disputes within two months and without a lawyer.[45] Argentina has established arbitration tribunals for economic, industrial and other associations, and in February 1994 its Supreme Court created a pilot mediation center for the civil courts.[46] In most Latin American countries, ADR is being encouraged by the private firms and lawyers' associations that provide legal support to the poor, while many ministries and social agencies have their own aid and arbitration programs. Mediation has been very successful except in cases where a judge or other judicial official takes the places of a neutral mediator, where ethical questions and a lack of openness by the parties has led to poor results.[47] ADR approaches are also effectiveness in addressing sexism in the judiciary and the greater lack of access by women to the courts. In Ecuador, for example, ADR is the only justice available to most women, and family-related cases are its second-largest area of work.

Argentina's experience with its Community Justice Centers, which emphasize mediation, reveals the ability of ADR mechanisms to address issues not being handles by the courts.[48] In February 1995, the Ministry of Justice set up these centers in eight of the Federal District's poorer neighborhoods. These centers' cases reflect the juridical concerns facing citizens: in Argentina's case, labor problems. Over the past two years, Argentina's working classes have faced the brunt of one of Latin American's strictest neo-liberal economic programs, with services severely reduced and unemployment reaching unprecedented levels. The courts, occupied with issues such as privatizations and the president's economic decrees, have little opportunity to handle "minor" disputes involving working conditions, employment, and wages. These centers, however, are at least entertaining these issues, and with high rates of success: in the center in the working class Once area, 92% of the cases had resolutions.[49]

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[43]For example, 69.1 of Brazilian judges interviewed in a study said that the administration of justice would improve with a broadening of extra-judicial conciliation procedures. From Maria Terez Sadek and Rogerio Bastos Arantes, "The Crisis of the Brazilian Judiciary: The Judges' Perspective," paper presented at the XVI World Congress of the International Political Science Association 9, August 21-25, 1994.

[44]Decree 2651, promulgated on November 25, 1991

[45]In El Salvador, the mediation mechanisms in the office of the *Procuraduria* on child support and alimony cases settles 90% of these cases within two months.

[46]The effectiveness of this program is measured by the fact that when judges send to it cases that have been in the judicial system for five to eight years, those cases have had a success rate of approximately 65%. Family and patrimony cases have a 70% success rate.

[47]This approach's success rates, such as in the Argentine province of Tucuman, are only around 20%.

[48]Graciela Benin Chirico and Mario Carlos Tarrio, Program Directors,; Interview, December 2, 1994 and November 28, 1996

[49]Miguel Unamuno, Coordinator of the Once Centro Jurídico Comunitario; Interview, November 28, 1996

Labor Issues	45%
Family Disputes	13%
Conflict between Neighbors	8%
Rent Conflicts	7%
Contamination	5%
Preventative Measures	4%
Sucesos.	3%
Commercial Disputes	2%
Administrative Matters	2%
Criminal Matters	2%
Other Issues	9%

Source: Ministerio de Justicia de la Nación, "Estadística Correspondiente a La Actividad y Servicion Que Brindan los Centros de Atención Jurídica, en Relación Con los Meses de Julio, Agosto y Septiembre de 1996," Buenos Aires: Ministerio de Justicia, 1996

Parallel Judicial Structures The importance of informality underlies the most radical reform to improve judicial access: that which avoids established structures altogether. Building on ADR mechanisms' procedural advantages and stemming from the courts' infrastructural inability take on most conflicts that arise in society, the most common and successful of such reforms is the *Justicia de Paz* ("Justice of the Peace"). It is comprised of *jueces de paz* elected by neighborhood residents to settle the multitudinous disputes that arise at the family and community level. Receiving little or no remuneration, and with no professional requirements to meet, the jueces de paz are intended to be respected, well-known neighborhood leaders who can be trusted by citizens to resolve disputes in a way appropriate to the community and acceptable and understandable to each party. By sidestepping problems within the judiciary, avoiding confrontation with vested powers, and forming parallel judicial structures instead of challenging existing ones, the Justice of Peace attempts to create a sense of confidence among citizens while relieving stress on the regular judiciary. Because of these benefits, the Justice of the Peace has enjoyed sufficient political backing in two countries - Colombia and Venezuela - to be implemented into law recently.[50] Other countries - Perú, Mexico, Argentina, and Uruguay - long have had judges of the peace, though, with the exception of Perú, on a more limited basis. Bolivia is beginning preliminary studies for these justices, with plans to establish them in approximately 40% of its municipalities by the end of June 1998.[51] And as burdens on the courts and doubts over judges' honesty grow throughout the region, this option is likely to be adopted elsewhere as well.[52] In most of Latin America, however, proposals to improve judicial access are in still their preliminary stages. Costa Rica just established an Alternative Conflict Resolution Program in 1994; in Ecuador arbitration was introduced in 1991 on a very limited basis within the labor tribunals. Brazil so far has so introduced "special" courts that operate at night and handle a wide range of misdemeanors.

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[50]The judges of the peace in Colombia were created in the 1991 Constituiton. Judges of the peace have been eliminated at the federal level in Argentina, but are still used in some provinces. While in most countries the judges of the peace do not have to have legal training, In Mexico and Uruguay they do.

[51]The World Bank, *Staff Appraisal Report: Bolivia Judicial Reform Project,* (Washington, C: March 24, 1995)

[52]These two issues - the work burdens on judges and the honesty of judges - were two of the biggest impetuses to approval of the Organic Law of Courts and Procedures of Peace in Venezuela. In that country, there are currently 1,400 denunciations against the currently-presiding 1,240 judges nationwide. Not only does this amount to over one denunciation per judge, but with this number of judges, the country has one judge for every 15,000 citizens, far below the United Nations recommendation of one for every 4,000. Source: Ministerio de la Familia de la Nación, Venezuela, Office of Social Services Coordination

The hopes for the Justicia de Paz - that it will bring a method of resolution appropriate to each community, create a sense of citizen confidence among citizens, and relieve stress on the regular judiciary - have been buoyed by a high level of acceptance and use in the areas where they have been elected. The most promising signs come from Perú, the only country with an extensive system of judges of the peace that has long experience with them. In a society characterized by deep economic, cultural and linguistic divisions, the jueces de paz have been able to customize justice to the norms and languages of each community, which are often very different from those of mainstream society. The laws that create and regulate the jueces are partly responsible for the success. As in other countries, the judges do not have to be lawyers (in Perú about 70% are not[53]) and to ensure that they have community support and are free of corruption, the jueces are elected into office, get only basic material support, and may not continue in any official positions with a political party. They do not have to base rulings on any legal code (Article 66), furthermore, but of course must comply with the law and are empowered to refer to the courts cases that they cannot resolve. At the same time, in specific cases they continue to propose solution until the parties agree, a procedure which leads to high rates of compliance.

More importantly, most *jueces* have grown into their roles as conciliators. Cases that come before them, which range from petty disputes among neighbors to jealously in marriages, are seen not as zero-sum games with a clear winner and loser, but as searches for the underlying cause of the problem with the ultimate goal of creating harmonious reconciliation. To achieve this broader goal, jueces can take unconventional measures such as conducting extended discussions or postponing hearings indefinitely.[54] Despite the uncertainties involved in such an approach, surveys in Perú show that about 63% of minor cases in the country are resolved by jueces de paz, and that 51% of Peruvians prefer them over formal courts in minor disputes.[55] In Venezuela, with the *jueces* just beginning to be implemented, there is hope that the jueces de paz, following the first elections this year, will hold the long-elusive ability to turn around deep popular distrust in government and judicial procedures, and build momentum for other needed changes.[56]

In Venezuela, the first year of the Justice of the Peace has been similarly promising. Although the Justice of the Peace Law (*Ley Orgánica de Tribunales y Procedimientos de Paz*) was enacted into law in September 1993, the first judge was not elected until August 1995.[57] But in August of 1996, 85 more judges were elected in municipalities around the country, while three months later 172 judges were elected in a municipality in the state of Miranda, while over 73 municipalities in 14 states are planning to initiate the program with elections of 1600 judges in 1997. Preliminary studies of the first 85 judges show that the judges have wide

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[53]There are both law-trained and lay justicesof the peace in Perú. Brandt, Hans-Jürgen, "The Justice of the Peace as an Alternative: Experiences with Conciliation in Perú," in the World Bank, *Judicial Reform in Latin America and the Caribbean,* Technical Paper No.280, p.93; and Brandt, *In the Name of Communal Peace,* Lima: Friedrich Naumann Foundation/Centro para Estudios Judiciales de la Corte Suprema de la República, 1990

[54]In one dispute over ownership of a chicken, a judge resolved the case by putting the chicken between the houses of the two parties and gave it to the owner of the house to which the chicken walked.

[55]Brandt, in *judicial Reform in Latin America and the Caribbean,* p.95

[56]After many delays, the first set of elections for judges were set for August 1995, but only a handful of them actually took place.

[57]In the barrio *El Placer de María* of the Caracas municipality of Baruta.

popular support, having received up to two to three times the amount of votes that receive mayors and city council members. The total of 3,500 cases they have resolved so far, furthermore, underlie the importance of the Justice of the Peace because those cases more accurately reflect citizens concerns than do the regular courts, which are filled with civil and commercial suits. reflect the main societal concerns.

Type of Conflict	
Family Violence	46.5%
Violence Between Neighbors	13.4%
Bothersome Noises	14.0%
Problems concerning minors	12.0%
Environmental Problems	8.1%
Solid Wastes	3.0%
Consumer Protection	3.0%

Source: Borges, Julio and Adriana Lander, "Un Año de la Justicia de Paz,"*Revista SIC,* Año LIX, No.589, Nov. 1996

Most specifically, the judges of the peace deal with the two most overwhelming social problems in Venezuela today: violence and economic strains.[58] In one typical poll in Venezuela, 43% of respondents said that crime was the country's most serious problem, while only 18% cited unemployment 15% said it was the cost of life. Between 1984 and 1993, the number of homes "in poverty" jumped from 36% to 62%, and among them those "in critical poverty" from 11% to 33%.[59] Since 1990, the rate of murder has risen by 73%, battery by 16%, and robbery by 26%.[60] In one national poll, 43% said that delinquency was their top worry, with the cost of living following in a distant second at 15%.[61] In a reflection of the lack of confidence in the state's ability to reduce crime and violence, in one poll 69% of those surveyed said that it was "probable" that they would be assaulted or robbed within the following two months, with 65% of them believing it was "probable" that the attacker would be a police officer.[62] An more gruesome indication of the connection between violence and lack of confidence in official institutions is the growing phenomenon of

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[58]Murder Rates per 100,000 population in Latin America:

Country	Late 1970s-Early 1980s	Late 1980s-Early 1990s
Colombia	20.5	89.5
Brazil	11.5	19.7
Mexico	18.2	17.8
Venezuela	11.7	15.2
Perú	2.4	11.5
Panama	2.1	10.9
Ecuador	6.4	10.3
United States	10.7	10.1
Argentina	3.9	4.8
Uruguay	2.6	4.4
Paraguay	5.1	4.0
Chile	2.6	3.0

(Source: World Bank)

[59]p.23, *Venezuela ante la Cumbre Mundial Sobre Desarrollo Social,* the Minister of the Family, March 1995.

[60]Cuadro 631-04, pp.799-800, *Annuario Estadístico de Venezuela, 1993,* Oficina Central de Estadística y Información, Presidencia de la República

[61]Marcanalisis 21, January 1990

[62]Cosultores 21, January 1990

lynching suspected criminals by both organized and spontaneous groups. While there were just a couple of lynchings in the country in 1994, this year there has been about one every week. In a poll last year, 57% of respondents said that they favored lynchings.[63] In this dismal context, it is clear that judges of the peace - as, to a lesser extent, the Community Justice Centers in Argentina - are the only institution with broad support and the ability to at least handle disputes at the level where they matter most. In many ways, a relatively new democratic regimes in Latin America are following patterns of judicial access seen in the West in the last century, with new openness and institutions not reaching the most disadvantaged in society. These parallel systems are a way of making up for this gap.

Obstacles after Enactment Like more traditional reforms, however, even these alternative access reforms face serious obstacles after they are enacted. Those obstacles are rooted in the fact that while most measures do address the causes of poor access, they neither confront much of the societal context of those causes nor do they fully substitute for the state's formal structures and powers. While the Justice of the Peace may be a parallel to existing institutions, for example, it is not isolated from them; the most serious problems for the vast majority of Latin Americans are not fights with family members or neighbors, but severe social, economic, and political hardships. Outside a narrow area of adjudication over minor conflicts, therefore, adequate judicial access requires an ability to affect government policies and the state structures that implement and enforce them. To be effective in the long-term, judicial access reforms need to make significant headway in enabling citizens to challenging those policies and hold those structures accountable. And it is those structures and powers, reluctant or unable to adopt change, that cast a wary eye on access reforms. This is the other side of judicial access: in a period of change and democratization channels to the courts are not viable in the long term without access to state institutions which affects the full range of citizen rights. Specifically, those institutional barriers are: 1. Powers of executive agencies such as the police; 2. A court system in functional disarray that had not resolved key constitutional questions; and 3. Political interference. Over time, inaccessibility to these structures and powers may whittle away at judicial access reforms in most of Latin America.

Executive Authority On issues of law, order, and justice, first of all, many judicial access reform come into confrontation with executive-branch policy and action. This can happen in at least two ways. In many of the urban shantytowns of Latin America, first of all, many community leaders are involved with organized crime such as drug trafficking. This is especially true in large cities like Mexico City, Caracas, Rio de Janeiro, and Bogotá, where such figures provide social services and protection for the community. The outcome of elections for jueces de paz, therefore, may be to place such individuals in positions of authority, which would put them at odds not only with neighborhood affairs that affect their "business," but with state officials and national law as well.

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[63]*El Nacional,* March 14, 1995; *El Diario de Caracas,* March 15, 1995, p.2. In an example of its lack of policy and coordination, Cabinet ministers have both condemned and tacitly supported these vigilante "community efforts." But judges and state officials with judicial functions have not done much better. There have been no investigations or prosecution of vigilante groups, no revealing the extent to which the judiciary's weakness, along with a legal disarray marked by a lack of jurisprudence on this matter, have prevented effective responses to even such an alarming activity.

More seriously, access reforms may run up against the police, the executive-branch agency responsible for enforcing the law and the executive's criminal policies. In marginalized areas where the jueces de paz are designed do most of their work, for example, the police are a power unto themselves and are responsible for serious repression and abuse. In Caracas, the Metropolitan Police carries out mass arrests and arbitrary detention on a regular basis, while the intelligence police are empowered by the law to carry out many judicial functions such as criminal investigation. These forces have wide leeway over the Caracas' poorer neighborhoods, home to 70% of the city's population, where they trade in weapons and drugs and rival criminals as the main source of citizen insecurity. On the rare occasions that citizens do challenge police policy or the actions of specific police agents, it is unlikely the police will submit to the *jueces de paz* or to ADR mechanisms. On the other hand, the regular courts, with a low degree of independence, has always favored police agents. More effective public defense or better legal aid clinics are unlikely to make a dent in that bias. In fact, of the many charges of rights abuse surrounding the estimated 1,000 people killed during the national riot of February 1989,[64] only three sentences were passed down against security agents, two of which were later absolved and the third led to early release from prison.[65] In Buenos Aires, the directors of the Juridical Service admit the most of their clients' problems stem from confrontations with and abuses form the police,[66] while in other cities the situation is similar.

Judicial Disarray Although many access reforms attempt to sidestep problems in the existing judicial structures, they must still act within the law and require at least the implicit backing of judicial officials and institutions. Such support is needed not just in handling citizen actions, but in resolving the larger constitutional and legal questions that frame these actions. But neither kinds of support has been forthcoming; for example, in many countries, such as Ecuador and Perú, judges refuse to accept - and are not required to accept - mediation agreements, arguing that it is their responsibility to resolve conflicts. Just as important for citizens as the resolution of minor issues is an overall sense of a rule of law resting on a clear and understandable court interpretation and treatment of basic rights. Anger and disputes among neighbors often spring out of a larger insecurity and frustration about the protection of basic rights and the state's commitment to them. The success of many judicial access reforms require an alteration of this pattern, but those reforms cannot alter it themselves; the change must instead come from within the judiciary. Moreover, situations that require justice and resolution occur not only between individual citizens, but among citizens, groups of citizens, private enterprises, and the state. In all but the first case, larger regulations and control over bigger powers come into play, requiring a more universal and consistent legal action beyond improvements in legal aid and ADR mechanisms. Even in disputes just between citizens, the issues involved often include those that elude simple settlement without reference to broader legal questions or political forces. Property rights, disturbances, and domestic violence are some example of "minor" conflicts

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[64] Then-President Pérez's lateness in declaring a state of emergency when the trouble started is considerable one cause for many avoidable deaths. In the aftermath of the riots, furthemore, the President's failure to build channels with the poor demonstrates the lack of connection between the regime and its citizens. Instead, Pérez blamed "subversives" for the rioting, and recommendations of the special presidential commission appointed following the violence went unheeded.

[65] According to the Committee of the Families of the Victims of February-March (*Comité de las Familias de las Víctimas de Febrero-Marzo - COFAVIC).*

[66] supra, note 12

that may need more than just immediate arbitration. The judiciary, clearly, needs to be reformed itself to establish adequate levels of access. But it has trouble doing do because of the institutional disarray and certain patterns of action. Specifically, many judiciaries are are infrastructural chaos, are entrenched in many discriminatory practices, are inconsistent in its rulings, and are stuck in legal formalism which undercuts its links with society.

Many Latin American judiciaries, first of all, are plagued with so many infrastructural problems that they can barely function at all. Trials take an excruciating amount of time, in many cases up to 12 years. In Paraguay, the average duration of a civil trial is over five years and a labor trial 3.5 years; in Bolivia, the first instance of a civil procedure lasts 3.5 longer than required under law; In Venezuela and Argentina, the average time for criminal trials is around 4.5 years. Backlogs constantly worsen. In Brazil, only 58% of the 4 million first-instance cases filed in 1990 were resolved in the same year; in 1993, Ecuador, about 500,000 cases were pending in Ecuador and 4 million in Colombia; in Argentina, there are about one million pending cases. In Venezuela, as in many other countries, there is a great lack of judges. With 1,240 judges and 1,264 courts, an amount which has not risen significantly over the past 40 years, Venezuela's average of one judge for every 15,000 people is far below the United Nations' recommended minimum of one for every 4,000. While in 1958 the country has seven million people and 700 courts, in 1995 it had 20 million people and not just over 1200 courts.[67] Courts lack basic office supplies, telephone, and computers. The structure of many courts also slows down the judicial process. The Tribunal Superior de Salvaguarda del Patrimonio Público, for example, handles the majority of corruption cases but depends on auxiliary organisms like the PTJ for information and lacks its own division of substantiation, which would permit it to directly take in cases under its jurisdiction. Since its inception in 1982, in fact, the TSS has passed down very few sentences. With such infrastructural problems, access by the population is not only difficult, but discouraged for fear of making the delays and bureaucracy even worse.[68]

Second, there are many types of discrimination in the judicial system that are difficult to uproot. A study of Bolivian courts handling with narco-trafficking,[69] for example, shows that the implementation of the 1988 anti-trafficking Law 1008 has caused strong patterns of discrimination in arrests and prosecution against primarily young, male, migrant agricultural workers of mostly indigenous ethnicity while leaving intact the networks and the heads of the drug trade.[70] Those requiring legal defense face the most discrimination.

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[67]Echeverría, Juan Martín, "Preguntas a la Justicia," *El Universal,* March 19, 1995

[68]Such problems cause other perversions in the judicial system. In most Latin American countries, for example, *amparo* is the emergency recourse to challenge the legality of an action that may violate a citizens' constitutional rights. In Venezuela, the stipulation that judges must decide *amparos* within 48 has led to extreme overuse of this measure. The resulting "amparicitis" has drained the recourse of its intended effectiveness and has led to the outright dismissal of nearly 90% of filed amparos, sometimes years after the initial filing. This important route of access to the judiciary, as a result, is cut off.

[69]Laserna, Roberto, "Las Drogas y La Justicia en Cochabamba: Los 'Narcos en el País de Culpables,'" XVIII International Congress of the Latin American Studies Association, March 10, 1994

[70]Other countries which are stepping up their own fight against drug trafficking in the 1990's demonstrate similar patterns in anti-drug prosecutions. Few of these countries keep statistical records on anti-narcotics prosecutions, but most judges believe that drug laws discriminate against the poor.

In Venezuela, eligibility for free legal services often requires a "declaration of poverty," which is itself a small trial.[71] It can be challenged by any other party in the case (often giving that party an advantageous knowledge of the person) and requires travel to distant locations to complete necessary paperwork. As a result, this declaration is used very rarely. The support given to criminal defendants by public defenders, moreover, is often inadequate. In Venezuela, usually the first point of contact is at the time of the detainee's investigative declaration, which states their version of events on the charges. The Criminal Trial Code establishes a maximum of 46 days between arrest and the declaration, yet the average is 285 days.[72] At that point, defense options such as appealing the detention orders or even challenging the charges, are no longer available. Sometimes the contact is so quick that many detainees' cannot identify their own lawyer at the time the declaration is taken. Although *defensores* are required to visit their clients at least once a week in jail, in one study 66% of prisoners said they had not been visited at all.[73] In most countries, in addition, a dependence on written procedures and limited availability by defendants to documents severely restricts access.[74] In Argentina, "lawyers are provided almost no opportunities to raise, prior to or during the trial, issues dealing with procedural problems."[75] "Voluntary" statements by defendants made during the pre-trial processes are accepted by the court and may be a basis for a final judgement, "in spite of the fact that they have been carried out without any degree of control by the defendant, and without much judicial supervision."[76] Procedural objections can only be made after the case has been assigned to a judge, who is reluctant to rule in favor of such objections because, by law, such rulings nullify *all* aspects of the investigation. Habeas corpus, a linchpin in the rule of law, *cannot* be use to challenge the "existence of 'probable cause' allegedly supporting a police arrest," or after the arrested person "is placed at the disposition of the judge."[77] In Argentina, as a result, "there have been almost no cases in which a writ of habeas corpus has actually led to a judicial decision freeing someone illegally arrested."[78] Therefore, "even in the event of a police arrest that was totally devoid of any justification," the arrested person has no legal channel for contestation against the state. [79] Combined with other practices, such as transferring prisoners away from the courts that are handling their cases, these pre-trial procedures and

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[71]This provision appears to be more enforced in certain states and municipalities than in others.

[72]Van Groningen, Karin, *Desigualdad social y aplicación de la ley penal,* Caracas: Editorial Jurídica Venezolana,

[73]Torres, Arístedes, "Los Pobres y la justicia penal," in Pérez Perdomo, Rogelio, editor, *Justicia y Pobreza en Venezuela,* (Caracas: Monte Avila Editores, 1985), p.90

[74]In Venezuela, because the initial judicial procedure against a detainee, the *sumario,* is carried out in secret, even in the best of circumstances lawyers have difficulty forming an adequate defense.

[75]Carrió, Alejandro, *Criminal Justice in Argentina,* (Buenos Aires), p.7

[76]Carrió, ibid., p.43. Judges deciding the final verdict may be the same one who was in charge of the initial investigation of the crime, often biasing the trial against the accused.

[77]Carrió, ibid., p.113

[78]Carrió, ibid., p.119

[79]Carrió, ibid., p.113. The US State Department and independent organizations have documented a rise in this practice over the past ten years, blaming this type of corruption for the fact that a majority of killings by security forces in in most countries are "not investigated by judicial authorities." United States State Department, *Annual Report on Human Rights*, February 1990. The Venezuelan judiciary also denies that the law allowing for 8-day detentions without charge violates habeas corpus, despite indications from the Inter-American Court that it is.

mechanisms are clearly inaccessible to most citizens[80] and lead people to not want any access to the system at all.

Third, access and demands for access are dampened by rulings inconsistent with or unsupportive of constitutional rights. Such patterns can be seen, for example, through the judiciary's long history of not clarifying when the constitution can or cannot be suspended. In Argentina, the Supreme Court recognized the new *de facto* governments after each of the six times that the military has overthrown a democratic regime this century, insisting on the protection of constitutional rights while watching those rights and their own power be systematically eliminated. In Venezuela, the democracy that has existed since 1958 has suspended basic guarantees dozens of times, freezing fundamental rights such as inviolability of the home and the freedom of association. In that country's most recent suspension, in force between June 1994 and July 1995 and based on the shaky grounds of the financial emergency generated by the collapse of the country's top ten banks, the Supreme Court rejected a petition to restore the rights on the even shakier grounds that it did not necessarily have the jurisdiction to do so.[81] If the Supreme Court refrains from its constitutional authority to defend the constitution, then why would society want or trust in access to the judiciary? In such circumstances, alternative measures such as the Justice of Peace is limited in their link to societal needs.[82]

Finally, the judiciary also undercuts judicial access through excessive attachment to legal formalism, which Latin America inherited with the European continental legal tradition. Basing court decisions on the explicit guidelines and standards of the law is necessary, of course, for judicial access; but an exclusive attention to the semantic form of the law may frustrate the larger purpose and "spirit" for which the law was created, unjustly applying or unfairly interpreting it in concrete cases. This danger is particularly high within a legal system full of obsolete laws and contradictory legal structures. In September of 1990, for example, the Venezuelan Supreme Court rejected an *amparo* action by the Kari'ña indigenous people against a local government that declared them extinct and confiscated their land, arguing that the Kari'ñas' delay in taking action implied their consent with the extinction measure.[83] A consequence of such formalism is that rulings have little effect on the real-world problem they are intended to ameliorate. Many constitutional cases, for example, cede judicial authority to non-judicial parts of the state because they are interpreted as administrative rather than constitutional questions, and therefore belonging to the discretion of state officials rather than that of judges. While such an approach is often desirable by giving decisions to democratically-elected representatives, it is not when it

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[80]Throughout Eastern Europe, for example, new constitutions do not guarantee defendants the right to automatic legal representation. Gaps in the exclusionary rule, among other matters, loosen the constitutional accountability and increase the potential for political abuse by the courts.

[81]Supreme Court Magistrate Alirio Abreu Burelli says that the high court is primarily a tribunal of first instance and should not normally rule directly on petitions such as this one. Interview, May 31, 1995

[82]A related example of the lack of respect for constitutional guarantees regard the due process of law. Although national and international laws require that trial of detainees take place within a "reasonable period," over 70% of prisoners in Latin American prisons have waited over two years for trial (in some cases up to eight) and in many countries the amount of time for a criminal trial is over four years.

[83]In 1989, a labor court rejected a petition brought by street merchants against a forcible eviction on the grounds that the workers were unprotected by labor laws since they were not engaged in "real" work, despite being the among the 40.8% of Venezuelans in the informal economy.

comes to basic rights. In Venezuela, for example, the military-era *Ley de Vagos y Maleantes* which allows for the arrest of people based on nothing more than their appearance and considered unconstitutional by the Inter-American Court of Human Rights and nearly every lawyer in the country, has been dismissed by the country's Supreme Court as a law to be interpreted and utilized solely by the nation's governors.[84] The courts, many assert, use "premeditatively impenetrable language"[85] to cover over its inability to deal directly with issues. "The use of very archaic expressions, such as excessively technical, the inconsistent use of terminology, the exasperating casuistry...in certain normative aspects, and the mysterious silence in others, the presence of unrigorous syntactical constructions, the lack of symmetry and of systemacity in the exposition of thought, makes comprehension of legislative" impossible for the majority of people.[86] As with bureaucracy, discrimination, and rulings inconsistent on or unfavorable of constitutional rights, such formalism undermines all aspects of judicial access.[87]

Political Party Interference All types of judicial reform proposals deal either directly or indirectly with the external interference in judicial functions, pervasive in Latin America. Measures such as opening up the nomination process and tightening discipline of judges would make judges less susceptible to meddling from non-judicial actors;[88] administrative decentralization and modernization would make judicial officials more effective and accessible; and legal reforms would make the law responsive more to constitutional rights than to political interests. Without such changes, the interests which have long dominated the judiciary will continue to limit access by ordinary citizens. On the economic side, interests ranging from big businesses to well-connected laws firms called *tribus* (tribes) use money and connections to affect judges' actions and rulings. On the political side, the executive and legislative branches have wielded many controls over the judiciary. But beyond the formal institutions of government, it is political parties that may be the biggest source of influence on the judicial system. As the main form of political orientation in both society and the government, the parties are at the center of the organization and goals that are followed by officials from the executive down to neighborhood level. In many Latin American countries, in fact, party objectives and party alliances are what determine much of the behavior of state officials, and party interests dominate the use of resources and patronage. Mexico is an extreme example of this pattern, followed by countries such as Venezuela and Argentina, where party identification is the most important part of an officials' identity. In countries like Brazil and Perú, the parties importance has been shaken

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[85]Bielsa, Rafael, *Transformación del Derecho en Justicia: Ideas para una Reforma Pendiente,* Buenos Aires: La Ley, 1993, p.19

[86]ibid., p.82

[87]In Venezuela, for instance, the judiciary "cannot do the two things that any judiciary in the world does," says Julio César Fernández Toro, Executive Secretary of the Presidential Commission for State Reform (COPRE), an independent body which has no formal political authority, to "determine if acts of the Legislature, the Executive, violation any citizen rights, and, if so, to nullify the acts and restore the previous juridical situation which had been violated." The second is "resolution of conflicts between individuals, socials sectors, employers and workers, organizations, criminal matters, etc."

[88]In May 1994, just a few days before the Supreme Court was to rule on the petition to restore constitutional rights, the President threatened Court members by asserting that some of them wanted to destroy national political institutions and "equilibrium."

up in the 1990s by major political re-alignments. In Venezuela, for example, those in Congress "are too political and not very legislative. So when there is advocacy to support some kind of reform, they see that there's a political problem, and for them that takes priority, and so they take a long time and postpone any legal reforms....There is little political will in the Legislature."[89] Parties can become so dominant over reforms, in fact, that they limit the space for civil society to engage productively in engaging directly with the state and judiciary on the remedies and anti-remedies that they want.

For these reasons, access reforms must keep party activity especially in mind. With strict limits on "campaigning" for the judgeship positions, for example, the Justice of the Peace tries to minimize political interference. But given the role of money and connections in Latin American politics, it will be hard for it to resist parties' encroaching powers. To do so, access reforms must include mechanisms with separate power bases and control over their own instruments of action. Of all the agencies the deal with juicial matters in Venezuela, the *Consejo de la Judicatura* (The Judicial Council, responsible for the initial selection of judgeship nominees and for discpline of judges on the bench) probably has the highest degree of independence, for example, because it has formal control over most disciplinary tools, enjoy support from a strong constituency of officials, and because its members are appointed from all three branches. Reforms such as the Justice of the Peace and community mediation centers, operating in poor neighborhoods and without control over any formal mechanisms, might have a harder time resisting the efforts of parties building up their networks and controls.

In Perú, in fact, many complain that while nearly all jueces de paz begin as respected and independent community leaders, many do not continue that way because of outside influence and a lack of independence from it. In Venezuela, vociferous political opposition to the Justice of the Peace has exposed potential hazards for the project from party-centered interference. The original bill's architects[90] had to navigate years of negotiation and a treacherous political course to win its approval in 1993, aided by the rare circumstance of a provisional President not entrenched in any of the main parties.[91] Many ministers and members of Congress, however, argued among other things that non-lawyers should not be making judicial decisions. José Guillermo Andueza, Minister of Decentralization and a top Presidential advisor, warned that the jueces de paz may "the best political leaders of the community" but not have the very different background necessary for a good judge.[92] Regarding the bill's provision that the jueces de paz will receive a compensation no smaller than that of a member of the Parochial Council, Deputy José Antonio Adrián said that counterproductive rivalries and other problems would ensue.[93]

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[89]Magaly Delgado de Zeigler, President of the Federation of Associations of Judges of Venezuela; Interview, March 29, 1995

[90]Julio Borges, an official in the Ministry of the Family, was one of the designers of the Justice of the Peace bill who helped attain needed political support for it.

[91]Ramón J. Velásquez took over the Presidency after the impeachment of Carlos Andrés Pérez on charges of corruption.

[92]Transcript of the debate of the Ley Orgánica de Tribunales y Procedimientos De Paz, Congreso de la República, Cámara de Diputados, Comisión de Desarrollo Regional, 1993, p.23

[93]ibid., p.27

Many of the opinions against the bill were certainly legitimate and not threatening party manipulation, but the lack of real understanding in Congress of the alienation that the Justicia de Paz is trying to address may leave the project to follow the descent into party manipulation taken by other government programs. While the volatile political mood of Venezuela's poor eventually did led to approval of the measure, the level of doubt and politicization over it show that the regime may be unwilling in the long run to defend the Justice of the Peace's non-political nature. Citizen vigilance may result in a different outcome, but most signs at this point indicate otherwise. One of the intended objectives of the program, for example, is greater legal education for citizens, but the law contains no provision to increase *jueces'* or citizens' ability to attain to the information that does exist. Without any indication of the rates of "legal mobilization," for example, it will be difficult to assess in what regions the Justice of the Peace is needed most and in which areas of conflict resolution. As Venezuela's most ambitious and controversial judicial reform since the country's political crisis broke out in the late 1980s, the Justice of the Peace is being watched as one of the best hopes to counter the pervasive sense of injustice that triggered the crisis. That watch will have to continue for more time that expected: after many delays, the first set of elections for judges were set for August 1995, but only a handful of them actually took place at that time.

Some of the weaknesses in the Justice of the Peace, of course, could be ameliorated through legal aid centers. In practice, though, In Venezuela, these centers have not been particularly accessible. The Ministry of Justice's clinic feels "abandoned" by the Ministry because of its skeletal budget, for example, while the guards at the door frequently employ their ample discretion to turn people away. The clinics run by universities, meanwhile, are always low on resources and do not provide students who work there with transportation and other work-related costs. Whole areas of most countries - and of the most marginal areas of the capital - lack any clinics whatsoever. Ecuador, for example, does not provide any transportation for its indigenous population; in Venezuela, about half of all those services are concentrated in Caracas (home to about 19% of the population), and 67.6 % of all lawyers live there.[94] There is no information service about available legal services in the country, and many of the operating clinics limit their publicity for fear of being inundated with cases. The university clinics, though, do generally receive better evaluations by those who use them. ADR mechanisms, for their part, are used in only a small percentage of the time.

While the democratic regimes of Latin America have made important strides in judicial access, it is clear that the effects of their histories, structures, and societies create serious obstacles to both reform proposals and enacted reforms. While democratic opportunities and the clear failure of institutions to provide access have led to a real push for reforms, those reforms themselves are undermined by histories of authoritarian rule, limits on society's ability to organize and engage in anti-remedies, bureaucratic problems in the judiciary, and power relations within the government and the political parties. But because judicial access itself is made up of a set of relations and issues, it must deal with these larger obstacles in order to improve in the long run.

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[94] Pérez Perdomo, Rogelio, 1993, p.33