

# **POLITICAL WILL, CONSTITUENCY BUILDING, AND PUBLIC SUPPORT IN RULE OF LAW PROGRAMS**

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## **ABOUT THIS SERIES**

This study is part of a series of four papers dealing with practical lessons from USAID's experience with justice reform projects in Latin America. These papers are intended to assist with strategic design and, in particular, with the integration of specific activities that most reforms involve. As such, they are directed at reform managers, evaluators, and other participants. The other three papers in this series are: *Institutional Strengthening and Justice Reform* (PN-ACD-020), *Judicial Training and Justice Reform* (PN-ACD-021), and *Code Reform and Law Revision* (PN-ACD-022). These documents can be ordered from USAID's Development Experience Clearinghouse (e-mail: docorder@dec.cdie.org or fax: 703/351-4039).

## **ABOUT THIS PUBLICATION**

The focus of this paper is the "demand-side" model of administration of justice/rule of law (AOJ/ROL) reform as developed by USAID and increasingly adopted by other donors. It explores the basic arguments as they have been presented in USAID documents, compares them with actual experience of Latin American projects, and suggests some lessons to be incorporated in a revised theory of "demand-side" reform.

The views expressed in this document are those of the author and do not necessarily reflect U.S. Government policies. Comments regarding this study should be directed to:

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## **ABOUT THE DEMOCRACY FELLOWS PROGRAM**

Since 1996, USAID's Center for Democracy and Governance has provided funding to World Learning, Inc., to implement the Democracy Fellows Program. To date, Democracy Fellows have been placed in a variety of locations including the U.S., Indonesia, Chile, Eritrea, the Czech Republic, and South Africa. Objectives of the program include (1) providing field experience to individuals committed to careers in international democracy and governance, and (2) promoting the development of democratic institutions and practices in developing countries and transitional or emerging democracies.

## SERIES PREFACE

This volume is one of a series dealing with practical lessons derived from USAID's experience with justice reform<sup>1</sup> projects in Latin America. The works were originally called "manuals," but I suspect that is a misleading title. They are not intended as blueprints or guides for designing or implementing projects. They offer some of that, but will be a distinct disappointment to anyone expecting step-by-step instructions for setting up a judicial school or revising a procedural code. I think of them more along the lines of those self-help books, often entitled something like "So you're thinking of (buying a car, becoming a veterinarian, or moving to Alaska)..." As such they begin with basic questions like why one would want to undertake an activity, what objectives have most often been pursued, and what major problems and obstacles most often encountered, and proceed to a discussion of major variations in interventions and their planned and unplanned results. Although the series is organized by types of activities, paralleling those laid out in USAID's strategic paper,<sup>2</sup> a principal theme in all of them is the necessity of embedding each activity in an overall reform strategy. If these works serve no other purpose, they may reverse a recent tendency to think that code reform or judicial training is *the* answer.

The papers' intended audience is project<sup>3</sup> designers, managers, evaluators and other reform participants. They are directed at those with little or no experience in justice reform, but it is hoped they will also be helpful to individuals who have worked in reform projects in one or two countries, or whose participation or background is limited to a more specialized aspect of reform. Justice reform is an expertise learned through experience; there is no single discipline or profession that covers all the angles. Moreover, each legal tradition or individual country always poses new problems and challenges. Undoubtedly some of the generalizations offered here are

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<sup>1</sup>The agency's preferred term for these reforms has changed over time. In Latin America they were called "Administration of Justice" projects. In the early 1990s, the term "Rule of Law" was introduced; more recently, those working in other regions have suggested "legal reform" as a more appropriate title. Although the shifts are intended to denote different emphases, I believe these are vastly overrated. All "justice reforms" target the same set of institutions and utilize similar mechanisms regardless of the specific problem (e.g. increasing access, reducing impunity, curbing human rights violations, or handling commercial disputes more efficiently) addressed. Furthermore, wherever they started, reform objectives have converged over time; Latin American projects which began with criminal justice have expanded into commercial and administrative law, while those in the ENI countries have moved from commercial into criminal areas. Whatever the political utility of the constant relabeling, it has tended to exaggerate methodological and technical differences and discouraged the exchange and accumulation of knowledge.

<sup>2</sup>Blair and Hansen.

<sup>3</sup>Because these are also intended for an audience beyond USAID, I will speak of projects and programs, not results packages and strategic objectives, on the assumption that the former terms are more widely understood.

already being disproved, perhaps even in the countries used as examples. The lessons, it should be stressed, are generalizations. They are not intended to make novices into experts in any of the areas covered, but rather to make them more educated consumers of expertise. USAID staff, and most contracted project managers (myself included) are not expert court administrators, prosecutors, or code drafters. However, they must oversee projects where these and many other expertises must be selected and coordinated. I believe they can only do their job well if they have an understanding of how all the pieces fit together, and the part played and limitations and problems posed by each one. In this sense, project managers are like a motion picture producers; they can't act, direct, do stunts, design costumes, or feed the crew, but they have to ensure that those who can are the best available and that they perform to their maximum abilities without interfering with each other.

As a final note, I would offer a brief explanation of the methodology used. The basic framework is institutional analysis, not as USAID understands it, but as more commonly used in the social sciences. This is an approach where one gets inside an organization (or a project) to understand how and why it functions as it does.<sup>4</sup> Getting inside, it should be stressed, also means understanding the influence of external constraints and pressures, the environment in which the organization operates. Although only one of the papers deals with institutional strengthening, this institutional approach informs all of them. In as much as justice reform or even justice systems are not yet a hot topic for academic research, there is little else in the way of scholarly theory to guide the analysis.

In collecting the data and case studies, I have relied on observation, informant interviews, USAID documents, and general academic studies of justice sectors (but not of their reform). Thanks to a fellowship from the Global Center for Democracy and Governance, I have been able to enrich my own on-the-job experience with field visits to almost every USAID project in Latin America. I have also benefitted from continued contacts with many participants, some of whom also made available their own published and unpublished work. Except for those who probably would prefer to remain anonymous I have tried to cite all contributors in the footnotes. If justice reform is learned on the job, it is also a discipline that requires continual education and evaluation. Many informants have been particularly generous in offering criticisms of their own past work. We are all learning together and I hope that these volumes, rather than being accepted as an attempted

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<sup>4</sup>The term first originated in economics where its proponents offered an alternative to the mainstream “predictive” approaches, emphasizing understanding and “storytelling” instead. Its emphasize on low level generalizations which are difficult if not impossible to falsify made it unpopular there, but in the softer social sciences it may well be the most appropriate approach. See Blaug, pp 126-7 and Mercurio and Medema, Chapter 4 for discussions. More recently, the institutional approach (what Mercurio and Medema call neo-institutionalism) has had a comeback in economics thanks to the work of Douglass North and others. It should be noted that all these approaches differentiate “institutions” (the rules of the game) from organizations (groups of actors pursuing a common objective), a conceptual distinction I flagrantly violate, as does USAID.

final word on the subject, are the beginning of a longer discussion and debate.



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## EXECUTIVE SUMMARY

**Introduction:** The present work focuses on the “demand-side” model of AOJ/ROL reform as developed by USAID and increasingly adopted by other donors. It explores the basic arguments as they have been presented in USAID documents, compares them with actual experience in Latin American projects, and suggests some lessons to be incorporated in a revised theory of “demand-side” reform.

**The Demand-Side Model of Reform:** The emphasis on political will, constituency building, and public support was a late addition to donor assisted justice programs. USAID’s early Latin American efforts paid little explicit attention to the concepts which received their first definitive statement in USAID’s ROL strategy document,<sup>5</sup> published in 1996. The document expresses a concern that USAID’s efforts were too focused on the supply side, that is to say on building and strengthening public institutions in government-to-government programs without wider citizen participation. It also suggests they were too technical and not sufficiently political -- thus potentially serving elite as opposed to popular interests. USAID uses “demand” in at least three senses -- as expanding access to marginalized groups, using existing and new institutions to advocate for popular interests and rights, and as the social and political pressure needed to overcome resistance to change. It is this third sense that is relevant here.

The basic demand-side model usefully reintroduces the political element to reform. However, it requires further elaboration and some adjustments if it is to guide future activities or adequately explain past programs. One obvious problem is its inadequate development of such key concepts as political will, constituency or even public support. Another is posed by its sequencing of inputs, which readers may have interpreted more rigidly than the authors ever intended. Finally, for a political model, it is remarkably short on political details, especially as regards the process of defining, mobilizing, and introducing individual and group interests into the policy process, or identifying how this may vary among different political systems or types of issue. In this third area, it might be usefully complemented by decades of research and speculation on models of individual and collective decision making, interest group theory, and more recent comparative work on the policy process in Third World countries.

**The Demand Paradigm in Latin American Experience:** The introduction of the demand-side paradigm has had less impact on the real conduct of Latin American projects than might be expected -- in part because they were already doing more with demand than they admitted, in part because the model’s adoption has sometime been only a justificatory relabeling. Aside from the frequent observation that high visibility projects get placed regardless of the recipient’s will or commitment, the Latin American experience also suggests a much more complex interplay of reform politics and implementation.

**Political Will and its Place in Latin American Reforms:** Latin American projects have always

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<sup>5</sup>Blair and Hansen.



dealt with the challenges subsumed in the term political will -- however, for all donors, the project approval process usually discourages admitting it is anything but adequate and thus explicitly discussing how implementors propose to deal with this factor. In effect, in Latin America it is difficult to identify one government which demonstrated a major interest in reform predating a donor decision to sponsor one. The two possible exceptions -- Colombia and Peru -- have demonstrated will, but in forms not always congruent with USAID's purposes. Donor projects and some national initiatives (e.g. Costa Rica<sup>6</sup>) have more often benefited from initial elite apathy, which allows them to take shape without much elite interference. In the larger projects (El Salvador, Panama, and possibly present-day Guatemala), donor resources and presence have substituted for local will. This has produced considerable change, but does raise questions as to sustainability, especially when long range operating costs are likely to exceed local resources.

Sometimes the necessary "will" has been that of a few members of the political or institutional elite. In Latin America, for a variety of reasons, Supreme Courts, the usual judicial governing body, have rarely been major reform allies. Where they are not opposed to or ambivalent about reform, their collegial organization makes a more dynamic role difficult. However, justice sector institutions must eventually buy into and cooperate with the reform, and in other regions, they may conceivably become its leaders. Willing allies may also opt for less productive or misguided programs; reforms may thus work on augmenting will over time and redirecting it. Much of this will building is less effectively accomplished through isolated dialogue. Some of the biggest changes have been leveraged by well chosen demonstration or pilot activities, training, and regional exchanges, measures often equated with sheer "institution building."

Despite the warnings that justice reform should not be attempted until "will" is adequate, Latin American projects have managed to make progress by building will as implementation proceeds. Their experience suggests another reason for not delaying reforms -- the potential for introducing counter-hegemonic changes (especially as regards heightened judicial independence and professionalism) before elites realize their full implications. Over time, experience with reform and a changing political situation have increased the political relevance of Latin America's judiciaries. This may make future change more controversial and increase efforts to manipulate it to purely partisan ends.

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<sup>6</sup>This is the foremost Latin American example of a reform initiated by the judiciary, but it also benefited from the political elite's apparent distraction by other concerns and from earlier constitutional changes which gave the judiciary greater control over its own actions, and a guaranteed percentage of the national budget. Such budgetary earmarks may not be a good idea from the standpoint of rational economic planning, but in the Costa Rican case, the consequences for judicial development were generally positive.

**Experiences with Reform Constituencies and Constituency Building:** . USAID's notion of reform constituencies privileges advocacy and civic interest organizations which it assumes are more amenable to the counter-establishment change needed to accomplish real reform. Its Latin American programs have not often relied on these civil society groups as principal reform allies. Evident problems, hardly unique to Latin America, are the groups' frequently conflictual or even competitive relationship with state institutions and with each other, and their more partisan or ideological than technical focus. This makes it difficult for them to form broad alliances, to move beyond criticism to the formulation of reform programs, or when they do, to draw targeted institutions into the process.

As in the case of political will, Latin American projects have done more constituency building than they have reported or observers have recognized. Much of this has been directed at increasing interest and knowledge among members of the legal community, rather than strengthening or creating specific civil society organizations. While it encompasses some demand creation, its predominant impact has been to fortify an indigenous reform movement and to familiarize other participants with proposed programs and so prevent negative reactions. The indigenous movement, which provided key local allies, was never an organization, nor did it become one. It consisted of a few private and public sector actors who were already discussing needed change, but who had previously lacked resources and a concrete plan of action.

Often overlooked or discounted by observers is the vast amount of support-building activity within public institutions, whose conversion to the reform cause is a major accomplishment. By equating members of these institutions with governmental elites, the demand-side model ignores the potential for turning their implicitly different interests into explicitly distinct ones as a means to and objective of sectoral reform.

If less use has been made of the classic CSOs (advocacy and good government groups) it is not only because of the immediate focus on state institutions. The existence of an indigenous reform movement, and its furtherance through regional programs, obviated the need for the demand creation with which such organizations are often charged. Where they were used for this purpose (Ecuador and the Dominican Republic) their politically or institutionally based efforts to monopolize the program posed additional problems.

Latin American CSOs may be better suited to the still overlooked need for monitoring reform progress, detecting emerging problems, and helping citizens adapt to changes in sectoral operations. This will require a change of attitude from one of independent confrontation to collaborative cooperation, as regards both the sector and other civil society groups. Two areas worthy of further effort are their use to draw citizens more directly into specific reform activities (and thus not just to generate protests), and the development of their own capacity for more specialized research and program design.

**Public Support:** The involvement of the public in justice reform programs is far more complex than the term “public support” implies. The most obvious implication, that reform originates in public demand and that public pressure is desirable and necessary to push it through, rarely matches reality. Although projects have increasingly attempted to incorporate these and other forms of public engagement, the conceptual and technical frameworks guiding their actions have not been adequate to the task. As the publicity budgets and activities of private companies, lobbying groups, and political parties indicate, this is no place for amateurs or token efforts.

In so far as most justice reforms have been negotiated and initiated without public involvement, attention and technical input might be more fruitfully invested in deriving information to guide reform design and in educating potential users as a reform is implemented. The exceptions to this rule are issues (usually those more peripheral to the core reforms) which automatically attract public attention, or political systems where even the core, highly technical questions become enmeshed in broader power struggles -- both for their symbolic value and for the concrete resources their resolution will provide to political factions. Where the public becomes involved in the details of its initial design, reform is likely to be delayed, less fundamental, and less practical. This may be unavoidable, but it probably should not be encouraged.

Nonetheless, limited public relations campaigns may be useful, not to secure public commitment, but rather to ensure that of political elites. Increased media coverage may serve a comparable function, raising the issue to the attention of elites and the public alike, and thus encouraging elite response. Public support has yet to make a difference for a Latin American reform, but the fear of public failure has undoubtedly helped keep allies pushing for their success.

**A Revised Demand-side Model of Donor Assisted Justice Sector Reform:** Like any reform, justice reform is a process-- both the formulation of its content, and the mobilization of political resources to permit its enactment and implementation occur over time. Managing the process requires finding openings and using them to leverage still greater changes. While it is often easy to define what needs to be done -- where a justice system must be fixed -- it is the political aspect which determines whether it is possible and with what chances of sustainability. The initial political setting is not immutable, but it sets important constraints on what can be accomplished and how much and what kind of resources will be required. The demand-side model of donor-assisted reform has increased sensitivity to these issues, but as argued here, it requires further elaboration if it is to guide program design and execution.

1. In developing a reform strategy, several elements are essential: a definition of the objective situation (a problem statement) and of the desired improvements; a determination of local resources (technical, financial and institutional) and thus of the potential for sustainable change; an estimate of the resources donors are prepared to place; and an assessment of the political environment -- how the political factions line up initially, and how such factors as issue salience, downstream effects and linkages, and the mobilization of additional support and opposition are likely to affect future developments. The problem and resources are to some extent givens; the political environment is less immutable. The ease of and scope for its transformation will also be

conditioned by such macro characteristics as system openness and stability.

2. Departing from this initial analysis, the decision to undertake a reform hinges on an assessment of risks and potential pay-offs. Success is never absolutely impossible nor absolutely guaranteed, and it will obviously be affected by the level of resources, quality of the strategy, the skills of the implementers, and sheer luck. Where risks and uncertainties are high, the assessment may indicate the desirability of partial measures, aimed at placing a marker, testing the waters, or altering the political environment. While these measures may be described as demand creation, they include activities extending far beyond the usual reliance on building nongovernmental constituencies.

3. Reform is a highly political process, both in its impact and in the means by which it is affected. While most participants in it act rationally, theirs is a bounded rationality. Their understanding of what will happen and their appreciation of how it will affect them is based on incomplete information, partial and sequential evaluations, and often prioritizes interests and concerns that to the “objective observer” might seem entirely peripheral.

4. The consequent variety of payoffs and values reform signifies for the potential universe of players means that their activation and participation almost never derive from a single, comprehensive discussion of the pros and cons. An acceptance of this fact is the key to successful alliance building. The reformers, those most directly interested in reform, must learn to work within this mixed calculus, to recognize the disparate interests of active and potential stakeholders, and to deal with them on their own terms.

5. Donors and planners tend to overemphasize initial plans, agreements, and strategies, pay far too little attention to how they all develop over time, and overlook the potential for changing perceptions and positions and for accelerating or delaying discussion of critical details so as to better control the outcomes.

6. The political calculus changes over the course of a reform; what is needed to get approval, obtain ownership, secure passage, and work implementation are all different. Some support is permanent or can be made so -- leadership's public commitment to reform may extend to subsequent measures not initially anticipated. Opposition fluctuates more than believed --once a change seems irreversible, former opponents often shift strategies to make the best of it. Also some opposition is based on fear, which proves unrealized once programs go into effect.

7. While elite support appears helpful, the benefits can be overstated. In the early stages of donor-assisted (and some indigenous) programs, acquiescence may be more useful because it allows reformers to develop their proposals and build secondary coalitions (constituencies) around them.

8. The role of constituencies is highly variable and very situation dependent. They almost always hold a narrower view defined by their specific interest, and consequently must be managed if they are not to pull a reform apart. Except in the rare cases of institutionally initiated reforms (Costa Rica) they are usually less critical to initial approval, but may help overcome opposition (Panama, El Salvador); and keep reform on track (maintain pressure to do what was promised, monitor change). The general rule is to keep the supporting coalition as narrow as possible in the early stages, and broaden it gradually as the reform enters implementation. At that stage, building support within the affected institutions and among their users is essential.

9. Demand, like political will, may be an overrated commodity. It is different from dissatisfaction and may also originate in a perceived opportunity. Widespread complaints about the quality of justice often go nowhere, whereas a small group which sees a chance to act may be sufficient to initiate a major change. In this sense a concrete proposal or plan of action is an important asset in its own right. Donors may help develop that plan or simply supply resources for its execution.

10. Public dissatisfaction never directs a reform, but it can provide impetus for change and be used by reformers to overcome opposition to their specific proposals. Strong public pressure was instrumental in pushing through the 1991 constitutional reform package in Colombia, but it also justified Alberto Fujimori's highly controversial actions in post-1992 Peru. Because public involvement can be used to such disparate ends, its activation is always risky.

11. Reform's educational effects are not all positive. With time, actors become more aware of its real threats to their interests and its potential for advancing unrelated and possibly undesirable political projects. Thus, while implementation necessarily proceeds slowly, there are advantages to getting elite commitments, however symbolic, to fundamental change early on -- before their real significance is recognized by those best positioned to manipulate outcomes.

Most judicial reforms fail, or are disappointing, because they are not based on adequate study of the conditions in which they are expected to operate or because they are adopted without adequate comparison with the experiences with similar attempts, or finally because they lack the support of the moral force of the community.<sup>7</sup>

## INTRODUCTION

The present work explores the “demand-side” model of AOJ/ROL<sup>8</sup> reform as developed by USAID and increasingly adopted by other donors. This model is best summarized in the CDIE strategy document<sup>9</sup> on ROL programs. It also can be inferred from the repeated admonitions in policy documents, “project”<sup>10</sup> descriptions, and evaluations to seek political will and build constituencies before undertaking sectoral reforms, and in the frequent explanation of failed reforms as a consequence of not having just that. The following discussion acknowledges the importance of putting these political elements back into reform, but argues that the model requires further elaboration if it is to provide an adequate explanation of past programs and a sufficient guide for future ones. By contrasting the demand-side approach with USAID’s Latin American experience it proposes to address these gaps.

Echoing and elaborating on Justice Stone’s earlier statement, USAID documents on democracy

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<sup>7</sup>Justice Harlan Stone (1940) cited in McKay, p. 115.

<sup>8</sup> As explained in note 1 above, I will use these terms interchangeably to denote programs dealing with reform in the justice sector (those public and private institutions involved in conflict resolution and legally based social control). Part of the lingering debate over their usage appears to be semantic -- a tendency to interpret them too literally. Just as rule of law does not imply an exclusive concern with changing laws, administration of justice was far more than court administration -- both in fact have been minor elements of their respective programs. Another part is a tendency to equate an approach (a set of mechanisms for producing change) with its narrower, historic application (the specific changes sought). Both ROL and AOJ programs have tended to emphasize criminal justice and human rights; however, as approaches, they also can be applied to changes in other substantive legal areas -- for example commercial or economic law. Whether they in fact constitute two distinct approaches (or just two applications of a single approach) I leave to others to decide.

<sup>9</sup>Blair and Hansen.

<sup>10</sup>As with AOJ and ROL, I am sticking with more conventional usages. USAID now refers to results packages rather than projects, but the terminology is cumbersome and confusing to outside readers.

programs and especially rule of law are filled with references to political will, public support, and reform constituencies. Their presence is seen as vital to success (the CDIE study in fact warns that without political will a program should not be attempted) and programs are frequently criticized for neglecting them. Rather curiously, however, in the choice of countries for ROL programs, the agency and many other donors, seem not to have heeded this advice. The selection often follows from broader foreign policy considerations, and not only the location of programs but also their size seemingly have little to do with political will, except our own. In some cases, this has worked; in others it has clearly failed or it is too early to tell. One tentative conclusion is that in going against our stated principles we are not necessarily in error. Conceivably the immediate need is to readjust our principles to reality.

In setting demand -side preconditions for reform, one evident problem is the lack of more explicit guidance as to what is required. Not only do we not know how much is “sufficient” -- except in the tautological sense that if it failed, a program must have had insufficient support -- most of the key terms are not defined at all. Consequently, those attempting to apply the recommendations to real projects immediately run up against an endless stream of practical questions. What is political will? Will we really know it when we see it? How does it differ from the kind of advocacy associated with supporting constituencies? What is public support and how is it related to such factors as popular criticism of or discontent with how justice systems operate? Do the latter constitute demand for change, or is something more needed?

A second problem relates to the model’s sequencing of inputs. Evaluated against existing support for reform at the time of their initiation, most Latin American projects accomplished more than might have been expected. However, interest in and attention to reform appears to have grown over time in all of the project countries, suggesting a more complex interaction with the process of implementation. There were also visible changes in the sources and focus of support, either as cause or consequence of programs’ advances and entrance into new areas.

Finally, to be useful the model requires a better explanation of how will, demand, and support come into play in the reform process, in general and in specific political systems. The answers may seem self evident, but experience proves otherwise. The history of justice and other reforms is replete with examples of proposals with substantial elite and popular backing which never went anywhere, or which produced anything but the “willed” results. A part of the explanation lies in poor technical design or the strength of opposition. However, it also is found in the difficulties of translating a general desire or even a specific plan into a concrete series of actions, each of whose parts must also be “willed” into effect. Any discussion of the reform process must grapple with some underlying problems of collective, complex actions. It must avoid the dangers of over aggregating individual and organizational behavior, ignoring competing agendas, and understating the difficulties of sustaining “will” or demand over time. In some sense failure can always be blamed on insufficient will, but this explanation obscures more than it reveals.

The present review of these questions and the broader issues behind them is developed in three parts. The first explores the basic arguments as they have been presented in USAID documents.

The second looks at actual experience in projects -- how the “theory” has born out in fact. The third suggests some lessons, both positive and negative, to be incorporated in a revised theory of “demand side” ROL reform. Two further comments are necessary as to the wider relevance of this discussion. First, the experience is drawn from one cultural tradition with its own historical, political and sociological idiosyncracies. Latin America actually provided a relatively positive political environment for justice reform, with a number of potential allies and considerable pre-existing interest in the theme. While it offers positive and negative lessons in how to manage reform politics, it does not, CDIE comments to the contrary, provide a case where “will” was so lacking as to make reform unthinkable. Fortunately, (or unfortunately) there are extra-regional examples which can be used to broaden the discussion.

Second, because of its reliance on largely Latin American data, and the interests of those who developed it, the model’s substantive focus is criminal law and human and legal rights. Nonetheless, the processes it describes are equally relevant to other legal areas -- for example, commercial and economic law. The specific actors and the objectives may change, but the dynamics of reform remain eminently political whether one is trying to reduce impunity, increase access for the poor, or facilitate commercial transactions. In fact, much of the relevant literature on the reform policy process comes out of other areas, which may explain why so little of it informs the USAID model. Since the following discussion attempts to enrich the model and the empirical observations with these sources, it is intended to apply to all ROL programs, and not only those explicitly treated here.



## A DEMAND SIDE THEORY OF REFORM

The emphasis on political will, constituency building and public support was a late addition to donor assisted justice programs. USAID's early Latin American efforts paid little explicit attention to the concepts, apparently assuming that they posed no problem,<sup>11</sup> or that objective need and external pressures and resources would be sufficient to move the projects ahead. As applied to ROL programs, the concepts received their first definitive statement in the CDIE team's review of USAID's early experience and a concern, which predates and thus informs the team's field work,<sup>12</sup> that the experience had been too focused on the "supply side," that is to say on building and strengthening public institutions in government-to-to-government programs without wider citizen participation. This was accompanied by a perception that the programs were too "technical" and not "political" enough -- and that they might consequently serve elite as opposed to popular interests. The linking of the supply side metaphor with a concern about elite biases thus led to CDIE's emphasis on access-creating mechanisms (the provision of public defense or alternative dispute resolution) which would expand services to the poor.<sup>13</sup>

The CDIE arguments rest on two undebatable observations. First, in Latin America, the benefits of existing institutions, including those of the justice sector, not surprisingly accrue to the establishment. In the case of justice, actual services (which must be distinguished from overall impact) have a middle class bias. As one Peruvian observer<sup>14</sup> noted two decades ago, justice in Latin America has never been for the upper classes, who don't need it, or for the lower classes who can't afford it. What this means is that for many services, marginalized groups in particular depend on informal, alternative mechanisms or do without. When they are forced into contact with the formal system (through law suits or criminal charges) they are often disadvantaged because they cannot afford counsel, and furthermore because their ignorance of its workings makes them vulnerable to fraud and manipulation.

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<sup>11</sup>In the now obsolete logframes, a "maintenance of elite support" or interest occasionally figures as a critical assumption.

<sup>12</sup>The team presented their supply -demand side arguments at a 1991 LAC AOJ conference which preceded their first field trip. The basic concepts were already being applied by others to judicial reform programs, although at least some of them believe the CDIE version may have taken them to "a mutually exclusive extreme." Personal communication from Erik Jensen, the Asia Foundation (Pakistan) to Rick Messick, the World Bank, January, 1998.

<sup>13</sup>It is still not clear why the provision of new institutions is any less "supply" oriented than is the strengthening of existing ones. To be completely accurate, any good economist would cringe at USAID and the present author's use and misuse of "supply" and "demand," but the metaphors were probably never intended to be technically accurate, and always had a more political than economic cast.

<sup>14</sup>Pásara, p. 206.

The second observation comes from more general development literature: a program's sustainability is negatively affected where a sense of ownership is lacking or the content fails to coincide with users' real needs, values, and behavioral practices. The clear implication is the need to draw beneficiaries or organizations representing them into the reform process as early as possible. However, ownership and appropriate design are conceptually distinct, and their creation may involve different groups and different types of activities. They also differ from demand creation or a reliance on popular support to promote reform. As we will see in the Latin American programs, the source of support for reform was often different from groups whose cooperation was needed to implement it, and they in turn were less than the universe of those who would be affected -- at times were not even the primary targets or beneficiaries. When these distinctions are not recognized, support seeking and participatory measures are less effective.

The model that emerges from these considerations treats demand in three senses. The first, referring to the direction of reform, equates demand (or a demand-side approach) with increasing access to the poor, usually by the addition rather than the reorientation of sector institutions. "Demand" here is patently a misnomer, but since the usage has been embraced by the donor community, it is not worth debating. The second stresses utilizing existing and new justice institutions to further the individual and collective interests of marginalized populations. This "counter-hegemonic rights strategy"<sup>15</sup> is less concerned with reforming sector institutions than with their immediate use to work wider social and political change. Not surprisingly, it emphasizes advocacy groups and other organizations as a means of representing the poor's rights in legal conflicts. While "demand" is used here more appropriately, this is only marginally a ROL strategy and is arguably more adequately subsumed in the sector (agriculture, health, education) in which the contested rights are located. In any case, because both of these definitions appear to limit the model's applicability, they will not be treated in more detail. Obviously, AOJ / ROL programs have additional substantive objectives -- for example, facilitating economic growth or containing societal conflict. The fundamental question is not how to produce any particular change, but rather how sectoral transformations in general can be accomplished.

The third definition -- and the one of most interest here, deals with demand in the more conventional political sense as the social and political pressure needed to overcome resistance to change. Drawing on the above observations, it stresses that such change must counter inherent institutional biases and assumes a certain stake in the status quo on the part of establishment actors. To achieve ROL reform, there must be sufficient political backing -- a mixture of elite commitment (political will), organized lobbies (constituencies), and public support. Apparently, political will is the essential element, and where it does not exist, efforts must focus on building or using constituencies and public support to create it before reform is attempted.

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<sup>15</sup>The term comes from neo-Marxists debates regarding the use of the existing "hegemonic project" to undercut the power structure which it supports. Where rights are promised, however symbolically, the strategy takes them at face value to defend the interests of subordinate classes. See Alan Hunt, pp. 241-5.

The basic model does look to features the early programs had left unstated. Its principal shortcomings arise in its or its interpreters insufficient exploration of the details and implications of this new emphasis. As suggested above, one obvious problem is the inadequate development of the key concepts. Another, which may partly originate in what others have read into it, is the strict sequencing -- the authors in fact added several caveats in this regard, which are usually ignored. Finally, although this is a political model, it is remarkably short on political details, especially as regards the process of defining, mobilizing and introducing individual and group interests in the policy process. It also makes no mention of how this might vary among different political systems nor among different kinds of issues. Before turning to an examination of the Latin American experience, and to how the model might be adjusted, these three interrelated elements require further examination.

### **The Conceptual Framework:**

*Political Will:* This is the slipperiest concept in the policy lexicon. It is the *sina qua non* of policy success which is never defined except by its absence. It thus becomes the explanation for every policy failure despite the fact that so many programs are undertaken where it certainly does not seem present. Assuming that it is true, and not just a truism, that policies will not succeed without political will, there remain the questions of 1) what is it? (so we may recognize it) 2) whose political will? (assuming that these are complex countries where political elites may differ as to desires ) and 3) how much is enough? It is only easy to identify situations where there is no political will to act -- i.e. where all strategically located political groups are actively opposed to reform. Identifying and quantifying its presence is far more difficult. Does this mean that someone in a position of power endorses a proposed reform or perhaps works for it actively? Generally, even in the most retrograde country there are individuals who will endorse just about anything, and whose chances of making it succeed are enhanced by outside support. Alternatively, does political will mean formal statements and acts by the government of the day -- for example signing of international conventions, the formation of reform commissions, etc? Or does it mean efforts, however ineffectual, to do something? Perhaps the best sign of political will is devotion of funds to reform, regardless of their efficacy. Or perhaps will is indicated by discussion and criticism of an existing situation.

A further problem is that “will” cannot be separated from its content or referent (what is willed or supported) or from the capacity to enact it. Reform can mean many things -- some undesirable, some just impossible. One of the functions of external assistance is to help reorient and reconcile the initial understandings. This does not mean imposing a vision. It may involve asking the right questions or presenting alternative means for reaching a desired end. Whatever “will” is, it seems doubtful its presence can be inferred from some objective system characteristics -- the presence of habeas corpus or the extent of existing corruption.<sup>16</sup> Although systemic vices may serve elite

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<sup>16</sup>Blair and Hansen (p. 10) do make this suggestion. While generally disagreeing with their argument, I will suggest one example where it may be correct -- the “willingness” of a government to provide an adequate budget and most of all, adequate salaries. Whether this is a

interests (and thus discourage commitment to reform), assuming this is so imposes a high degree of functional determinism. It also makes reform logically impossible. We know from experience that is not the case.

Despite its frequent appearance, “political will” is more a rhetorical than an analytic concept. It can thus be suggested, as pursued in more detail below, that rather than political will, reform strategists focus on the relevant elements of the political environment -- these might include such factors as:

- the salience of sectoral operations for core elite interests (this is where the questions of habeas corpus and corruption enter -- does the elite benefit directly and substantially from unreformed practices?)

- whether elites already have a position on reform, and if so what it is, and how strongly held

- divisions within the elite which might make reform more interesting to some faction

- whether, within the elite or outside it, there is criticism of the existing system, on what basis, and whether this has been articulated as a demand for change

- the identity and political resources of the promoters of reform

- the identity and resources of the likely opposition and the connection of the proposed changes to their core interests

- and the possibility of linking sectoral change to certain high priority issues (attracting foreign investment, reducing crime, creating a more favorable international image, reducing social inequities)

This exercise is similar to the stakeholders analyses utilized in some USAID projects. It expands on them by considering such factors as issue salience, the intensity with which positions are held, the possibility of changing both to positive or negative ends, and the potential implications of the differing agendas and secondary interests of those providing support or opposition to a program. It takes into account not only elite disposition to cooperate, but what they will be required to do to effect the proposed change. As the CDIE study notes in a section overlooked by most readers, a program can go much further with much less “will” where donors provide resources and remain involved. The question is whether “will” can eventually be leveraged by the donor intervention. Political will in short is too simplistic a concept to capture a far more complex process of reform

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question of will or just governmental poverty, it seems doubtful that much improvement can be asked of judges who are paid below the poverty line, or not paid at all.

“mongering.”<sup>17</sup> Unless that complexity is taken into account, one is likely to find that few countries, even those where reform has progressed, had “political will” to start.

**Constituency Building:** At some point, political will becomes difficult to separate from that of reform constituencies --formally organized or ad hoc groups with a stake in reform and some capacity to promote it actively. Especially as one drops the notion of a monolithic political elite whose will is needed to move reform ahead, then elite factions themselves may be constituencies. Constituencies may also exist within the public sector, in the affected institutions. In fact, these institutional constituencies may become the strongest supporters of reform, and must eventually be mobilized, if reform is to succeed. Nonetheless, most discussions of constituencies seem to envision civil society organizations, which is to say groups outside the political elite and outside government institutions. Commonly three types are included: civic action groups (those working for good government); advocacy groups (less concerned with transforming the existing system than with using it to produce immediate changes in client welfare); and interest lobbies like chambers of commerce or bar associations (whose potential involvement stems from a more direct stake in likely outcomes).

Whether or not one accepts this limited definition of constituencies -- extragovernmental groups actively promoting reform -- their actual role in the process requires explanation. Presumably, because of the admonition to shift to constituency building if political will is inadequate, they may pressure the government to act on reform. However, the form and thus terms of success for this pressure are less evident. It might work directly by convincing political elites of the wisdom of the change, or threatening them with repercussions (violence, appeals to international allies, withdrawal of electoral support) if they do not comply. It might also work indirectly, by mobilizing public support which in turn could apply the direct pressures. Although CDIE’s general<sup>18</sup> and ROL specific work on reform constituencies provides numerous examples of group involvement in reform programs, it is less explicit as to their contribution to advancing their own or others proposals, how it was effected, and any system characteristics that condition their success. Just because a group promoted a change, we cannot assume they were instrumental in securing it. Nor can we assume the same strategies will work across systems or issues.

Constituency groups also have their own agendas. Although references to “building constituencies” suggest the attraction of allies to an existing proposal, their potential for adding substantial modifications begs for further exploration as does the manner for dealing with constituencies whose private agendas are in conflict, immediately or over the longer term. In short, although the term constituency is less immediately problematic (except for its limitation to nongovernmental groups) than political will, its apparent simplicity conceals a similar number of operational complications.

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<sup>17</sup>This term was first used by Albert Hirshman almost three decades ago, but it still is a apt metaphor for the reform process.

<sup>18</sup>Hansen, *passim*.

**Public Support:** Like constituencies, public support is easy to envision. It still requires more explanation if it is to be usefully incorporated in a strategy. Public support also suggests a seamless monolith where in reality an almost endless variety exists. Clearly there are many publics, with as many potential appreciations of the benefits and costs of ROL reforms. Similarly these many publics will have varying degrees of relevance to the political elite and varying capacities to make their demands and wishes known. The questions here are thus not only what public, but how to mobilize them, and how to ensure that this mobilization will have the desired impact on the actions of political elites. The obvious caveat is that mobilization of the public could go against reform or could take it in unintended directions. There is no reason to believe that opposition groups will sit by and let proponents have their way with the public. In fact, in several Latin American countries, bringing the issues under public scrutiny gave the opposition a new lease on life and endangered reform movements either by threatening their last minute rejection, or pushing them in directions the reformers had never wanted. If the reformers hold the stage alone, they can probably present a one-sided version of the benefits of their action, but the public, with or without help, may still recognize the disadvantages as well.

Any reform will have negative and positive effects on different sectors of the public. In the long run, the global benefits should outweigh the losses. However, in reacting to a proposal, individuals are likely to take the immediate, partial view.<sup>19</sup> In the short run, a move to protect defendants' rights may look negative to those who see themselves as potential victims of crime. The expansion of access (and removal of extra legal ways to get attention) may further increase delays and worsen the situation of traditional clients. Latin Americans have a saying -- better a known evil than an unknown good -- which summarizes the reactions of many publics to open-ended "reforms." This combined with an often well founded distrust of the public sector increases skepticism about the reformers' promises. With more time to consider the consequences, it could make a mobilized public a debit rather than an asset. In addition, many justice sector issues are very specialized, hard to explain, and easy to misinterpret.<sup>20</sup> Just as blanket promises of improvement are likely to be met with cynicism, overblown explanations may lose their audience. Finally, while everyone complains about the justice sector, it is only in unusual times that it becomes a salient issue, one more deserving of attention than constants like the economy, the costs of "normal" public services, or health and education. Lengthy public debates can lose the opportunity for change when other issues again come to the fore. Real politics almost always manipulates public support. The blind faith that a mass education campaign will attract public backing on the program's merits ignores the potential for distorting messages and the public's own tendency to focus on what they perceive as certainties in preference to abstract promises. It also begs the question of how public preferences reach and thus influence policy-makers

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<sup>19</sup>Which is why, when any reorganization is proposed, those being reorganized will first check to see where they are located in the new structure. U.S. citizens "demand" a simplified tax structure, but few will sacrifice the special deductions they currently receive. Free trade is fine, but not if it costs me my job. The examples are endless.

<sup>20</sup>See Daniels and Martin for a discussion in the context of U.S. debates on civil juries.

## Sequencing

From the start, this has been the most controversial aspect of the CDIE study. To be fair, its authors were less dogmatic about sequencing than is often supposed. Their reform decision tree was intended as an analytic aid to reform programming, not as a recipe for reform. Nonetheless, they did suggest that demand should come first, and that where political will for reform was lacking, reform might best be postponed in favor of activities to develop it. Obviously, a first problem is that of defining and identifying “adequate” political will. It is an observable fact, and one not limited to USAID programs, that when an assistance agency wants to do a reform project, it will discover that will exists. The greater danger may not be the immediate absence of will, but rather the assumption that it is taken care of -- as in the statement, made by a member of another assistance agency, that since “they signed the agreement, they must be committed.”

A second problem lies in designing activities to enhance political will. These will be different depending on whether one assumes they must precede other activities, or can occur simultaneously. Latin American projects seem to have created political will and support as a result of on-going reform efforts.<sup>21</sup> We have no successful examples of donors’ “will creation” in the abstract, presumably as the result of policy dialogue or constituency mobilization. This is not to suggest the latter strategy is impossible, or that the former could not be improved. Indeed, the entire process of building and cultivating demand requires more systematic study, and much franker assessments of the interests and perceptions of real and potential stakeholders.

A third problem lies in the observation, not recognized by most demand-side reformers, that the sources, targets, and extent of will vary over the course of a reform. What was adequate in the beginning may prove insufficient later on. Thus, a subsequent default on an apparently firm commitment to change may not be duplicity in action; the initial allies may not have anticipated the eventual costs. Since future requirements may be impossible to predict at the initiation of a reform, some support and constituency building will be required over its entire trajectory. At the very least this suggests an iterative sequencing -- with new levels of will created as new challenges emerge. It may also be conceptualized as a series of parallel, interrelated efforts, where demand and supply building activities interact with and reinforce each other.

## Reform Politics

To the extent the demand side strategy incorporates a model of the political process, it appears to combine rational decision making theory with a simplified vision of interest group politics. Politics provides a means for individuals to pursue their fundamental interests either by resolving problems or opening new opportunities. Because political resources are unevenly distributed, some will be more successful at this than others. Less powerful individuals may enhance their

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<sup>21</sup>Jensen, in the communication cited in note 12, references an on-going debate with the CDIE study’s authors over this same issue. While critical of exclusively supply-side strategies, he also stresses the difficulty and impracticality of trying to handle demand creation separately.

chances through collective action. Individual or collective actors confronted with a proposed program identify its effects on their interests and support or oppose it accordingly. In a similar fashion, their definition of their interests shapes their identification of problems and their search for solutions. Because any existing situation will always benefit someone, change requires mobilizing forces to overcome their resistance. Such mobilization is also interest based. If those promoting change do not have sufficient resources to effect it, they must enlist the cooperation of other potential beneficiaries.

This depiction of the reform process prioritizes broad discussion, analysis, and informed consensus prior to taking action. Empirical studies of specific policy decisions often stress the poor fit of such rational approaches to real cases. Recent experience in the United States with proposals on a national health plan, NAFTA, and tax reform are relevant in suggesting how information overload, intentionally distorted messages, uncertainty, emotional reactions, and conflicting secondary interests make it difficult for the public and elites to discuss their way to an acceptable solution to what all perceive as a problem. This is not to say that policy making is irrational, but rather that a strictly rational model oversimplifies the situation of both individual and collective actors. It over intellectualizes their participation, fails to take into account the variety of motives and agendas that account for their opposition or support, ignores the way in which priorities may shift as a reform evolves, discounts the costs and constraints on collecting and evaluating information, and overlooks the importance of emotion, confusion, and benign neglect.<sup>22</sup>

The model also condenses participation into a one-time taking of positions, ignoring how new information and initial changes may both provoke and require reevaluations. Studies and experience indicate that as programs evolve they need new kinds and levels of political backing, and that an initial decision to pursue a policy is rarely sufficient to ensure its full implementation.<sup>23</sup> One further reason for this is the complex chain of actions (and decisions) required for

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<sup>22</sup>For alternative models of decision making and public involvement in policy, see for example Lindblom, Allison, and Edelman. The first two suggest that even those charged with making decisions rarely follow a rational paradigm but rather use logical shortcuts and institutionally based procedures. While Edelman allows a rational, interest based model for a limited group of elites and publics, his argument is that for many who are distanced from the decision or its concrete impacts, taking of positions is better understood by “symbolic politics,” or affective and emotional reactions to the issues. These models are discussed in further detail in the Annex.

<sup>23</sup>For an interesting, early study of this phenomenon, see Pressman and Wildavsky. Their argument is neatly summarized in the sub title of their book, “*How Great Expectations in Washington are dashed in Oakland: or Why it’s amazing that Federal programs work at all, this being a saga of the Economic Development Administration as told by two sympathetic observers who seek to build morals on a foundation of ruined hopes.*”



implementation. Few if any justice reforms are “stroke of the pen” policies.<sup>24</sup> Here as in many types of reforms,<sup>25</sup> principles (decision makers) depend on agents (implementers) who may quickly discover that strict compliance compromises their own interests or is simply impossible. It is in the host of downstream details (the new laws and procedures, reorganizations, hiring and firing of personnel, redistributed resources and powers, and required coordination and cooperation) that reform programs encounter their most serious obstacles. Most of these details and the opposition they will generate are not evident at the start.

As described in the following sections, in the Latin American AOJ programs, more often debate followed action -- when the unanticipated consequences of change were realized; new oppositions emerged, and actors shifted positions or the strength with which they held them over the reform’s trajectory. Initial and later perceptions were frequently based on miscalculations, misunderstandings, and misapprehensions. A model of reform politics which puts all coalition building up front overlooks what may be far greater needs as the reform develops. .

## Summary

The demand-side model of the ROL reform process highlighted issues prior discussions of the programs had largely ignored. In effect, most programs dealt with these issues, but did not articulate them in their formal strategy. When USAID refers to ROL programs as “labor intensive” it is implicitly acknowledging the substantial political component required to make them work. However, the failure to make this explicit had the unfortunate consequences of overstating the ease of reform, discounting demand creation and support building as objectives and achievements in their own right, discouraging attention to the impact of the political environment on the chances of success, and ignoring the ways this environment can and must be reshaped to enhance sustainability.

Having reintroduced the political aspects of reform, the demand-side model still requires further refinement. The concepts of political will, constituency building, and public support are too broad and too vague to capture the complex interactions involved in transforming diffuse and poorly articulated complaints about system performance into a concrete program of action or in eliciting cooperation, overcoming opposition and realistic and unrealistic fears, and negotiating compromises among conflicting interests and visions of reform. Program designers need to be reminded that elite commitment is important; the concept of political will does little more than that. As presented it suggests that we are dealing with a monolithic elite, whose will, commitment, or interest is an all-or-nothing, one-time phenomenon. Reform constituencies or public support

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<sup>24</sup>Certain macroeconomic policies (a devaluation, exchange rates, or the elimination, but probably not the imposition of tariffs) are described as stroke of the pen reforms, almost self implementing. Most legal change, however, is not and requires substantial additional actions if it is to make a difference.

<sup>25</sup>These terms are best developed in North. Brautigam also offers a concise explanation.

may be easier to gauge, but their precise role in the reform process is far from clear. The assumption that they can be used to override elite resistance either by the strength of their arguments or threats remains to be tested. Many organized groups are so comfortable working in opposition to the status quo that it is difficult to imagine their shifting to the development of concrete, viable mechanisms to produce change. Advocacy groups use counter-hegemonic rights strategies to obtain small concessions for marginalized populations, not to reform the system. This kind of legal guerrilla warfare has a limited potential -- absent broader reforms, any more than token successes are likely to bring the system down on top of it.

The Latin American programs have produced systemic change. A large part of it has been in the form of increased attention, demands, and support for reform. The quantity of public complaints and accusations of malperformance has increased exponentially over ten years -- they have made reform an issue, and represent a marked improvement over a situation where no one cared or dared to offer criticisms. However, this increased interest has accompanied, *not preceded*, fundamental transformations in the structure and operations of the formal sector, the powers and identities of its basic institutions, the means by which incumbents are selected, and the rules guiding their behavior. At the very least, this raises questions about the current model's emphasis on building support first. While less change can be documented in the overall goals -- a reduction of human rights abuses, impunity, and systemic corruption, and an increase in access and equitable treatment -- even here there are success stories, and indications that over time, we can expect more.

Much of this change has come in systems where political will, by whatever definition, would have to be counted as negative when projects were initiated. Some of it has come in programs which had been regarded as failures. One obvious problem is the unit of analysis. A failed activity is not necessarily a programmatic failure -- it may have immediate systemic benefits or over time may produce results far beyond its narrower objectives. Likewise, a successful activity may lead nowhere. All of this is part of a reform strategy, and a major element of that strategy is the political process behind it. Since the basic demand model cannot account for these developments and achievements, the next step is to use its elements to revisit the Latin American projects and see how they have dealt with the political aspects of reform.

### **THE DEMAND PARADIGM IN PRACTICE: LATIN AMERICAN EXPERIENCE**

If USAID's demand side paradigm has not been well developed in theory, it has also been given only sporadic attention in practice. Prior to the appearance of the CDIE policy paper, project rarely were described in terms of political will, constituencies, and support. After its appearance there has been a conscious effort to use this language, but the activities it covers don't often differ from what went before. When they do, it is not evident that they represent much value added. Not unexpectedly, the language is sometimes no more than a justificatory relabeling. Sufficient political will and constituencies are simply declared in existence, thus allowing the next activities in the sequence. A fairly arbitrary number of "popular consultations" are presumed to take care of political support, while what are patently constituency building activities (e.g. trips and

conferences for judicial officials) are designated as institutional strengthening.<sup>26</sup> The practices have not done much damage. At least in Latin America, USAID's overly optimistic assessments of political will have not posed major impediments to program advances.<sup>27</sup> In most cases, those making them probably didn't believe them anyway and thus were prepared to continue their political campaigns. Broad consultations occasionally produce questionable modifications in proposed reforms. More often they have had no immediate impact, and in the long run may help prepare some members of the public for what is to come. The larger problem is that by paying lip service to the official model, program designers discourage efforts to test its validity and obscure the real course of events. Rather like the old joke about scaring off the elephants,<sup>28</sup> they may leave the impression that the purely superfluous is necessary and make the necessary invisible.

### **Political Will in Latin American Projects: Presence, Sequencing, and Process**

The challenges subsumed in the term political will are confronted by every project. However, in real life, they take a variety of forms, and have received an equal variety of treatments. Much of this is never explicitly dealt with in project documentation. Partly, this is because project implementors are too busy addressing the problem to assess it analytically. Partly, it is because USAID's approval process (and that of other agencies<sup>29</sup>) discourages admitting that the political environment is anything but promising. To do so would be to invite an often unproductive exercise of second guessing potential obstacles. In short, project staff deal with political will; they just don't report their dealings. It should also be reiterated that despite the CDIE admonitions, to the extent political will denotes active government interest in reform it is rarely a primary criteria for USAID's decision to place a project. This is especially true of the larger, more politically visible undertakings which originate in higher order political interests.

In Latin America, it is difficult to identify one government which demonstrated a major interest in

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<sup>26</sup>These examples are all taken from real proposals and strategy papers. I have not cited them specifically to protect the responsible parties, but I would hope they and others who have fallen into these practices will recognize themselves.

<sup>27</sup>The same cannot be said about World Bank and IDB programs. The critical difference is that USAID's use of in-country project managers allows continued attention to reform politics. Both banks have run into problems when political commitment was assumed, and projects were left on automatic pilot.

<sup>28</sup>For anyone who missed this shaggy dog story, it involves someone standing in as unlikely a place as downtown Manhattan, making odd noises. When asked, he explains he is scaring off the elephants. When the questioner says, "but there are no elephants here," he says "see, it worked."

<sup>29</sup>This is not limited to USAID. Pre-loan assessments and proposals for the IFIs also indulge in unduly rosy portrayals of the political environment. Rampant corruption and dubious government agendas are two frequent omissions.

justice reform predating a donor's decision to sponsor one. Many have complained about their judiciaries, but the complaints often led to political intervention, further erosion of judicial independence, and other actions hardly consistent with what is usually understood as reform. The one country which may constitute an exception is Colombia. Since the 1960s that nation's sectoral and political elites had been attempting a constitutional and legal reform aimed at restructuring its justice system. The effort was increasingly linked to long standing problems of civil violence and penetration by drug traffickers. This linkage also awakened broader popular demand for action,<sup>30</sup> helping to overcome the opposition posed by the Supreme Court and other sectoral institutions.<sup>31</sup> Ironically, because the GOC's definition of reform does not always coincide with the USG interest in fighting drug traffickers, this is the country most often accused of a lack of resolve. Still, if political will is signaled by a dedication of resources, drafting and passage of new legislation, and creation of the institutions it mandates, it existed in Colombia.<sup>32</sup>

Peru offers another example. Over the past thirty years, Peru's various governments have attempted justice reforms.<sup>33</sup> Unlike the Colombians, they have rarely been willing to devote the necessary funds, and have almost always succumbed to political expediency (the chance to replace judicial personnel with their own followers, either to extend influence over judicial decisions, or as often, as political patronage). For his first five years (1990-95) in office, President Alberto Fujimori appeared to be following this tradition. Even after his 1992 *autogolpe*,<sup>34</sup> in which judicial corruption was a major theme, the government's attention to the sector was sporadic and less directed at reform than at introducing parallel mechanisms (e.g. special antiterrorist courts with faceless judges) to compensate for what the existing institutions failed to do. Beginning in

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<sup>30</sup>This may be the one case in Latin America where popular demand pushed a reform forward. However, the pressure was brief if dramatic, and in no sense provided further direction for how improvements should be accomplished.

<sup>31</sup>This opposition was based on certain constitutional provisions (which the Court believed, accurately, that the political elites were attempting to circumvent) and on another, accurate, perception that the change would alter the terms of the judiciary's independence. For discussions, see Hammergren (1997)

<sup>32</sup>However, the example also demonstrates that will cannot compensate for poor design or bad implementation, problems which continue to inhibit the Colombian reform.

<sup>33</sup>*Ibid.*

<sup>34</sup>In April of that year, Fujimori staged what is called a self-coup or institutional coup, closing the Congress, temporarily shutting down the courts, and proposing to rule by decree until a new Constitution could be drawn up and a new Congress elected. The courts, whose corruption was used to justify the move, were reopened two weeks later, but have been subject to a series of irregular interventions. Following the Fujimori example, similar *autogolpes* were attempted, unsuccessfully, in Guatemala and Venezuela. For details, see Hammergren, 1997.

1995, the administration took a more active interest in the sector, pledging \$100 million to a judicial reform and modernization program, and placing trusted advisors with exceptional powers to plan and implement it. Although the program has “demand-side” elements in its creation of a human rights ombudsman, and certain access enhancement features (e.g. a provision for communities to elect justices of the peace, the creation of a corps of guides to help people locate services in the courts), its major emphasis is on institutional reorientation and modernization. Furthermore, both in its organization and thrust, it does not seem to count judicial independence as a goal. Here, even more than in Colombia, the direction the reform is taking is questionable, but the government’s willingness to undertake it is indisputable. These examples can be contrasted with the majority of countries where the interest of governmental or other political elites is much less apparent.

***Elite apathy as a facilitating condition:*** Elite apathy, what might be called the absence of political will, is not always a disadvantage. Arguably the most successful regional example of judicial reform is Costa Rica. Much of what occurred preceded USAID’s involvement, beginning in the late 1940s and accelerating after 1957 when a constitutional amendment earmarked six percent of the national budget for the judiciary.<sup>35</sup> While the Costa Rican Court used these resources to effect an extensive internal reorganization and expand its powers, the political elites can be more accurately characterized as apathetic.<sup>36</sup> In fact, on the one issue in which political leaders weighed in, the recent (1996) passage of a juvenile justice law, their influence is widely regarded as negative. Over the Court’s objections, the National Assembly rewrote the law to respond to popular pressures (to crack down on juvenile crime) and pushed it through without time for preparation or an adequate budget. Another case of Court leadership is Guatemala under a past Chief Justice who almost single-handedly promoted the drafting of a Criminal Procedures Code. Unfortunately, his interest seemed limited to enacting his code, and in any case, his term ended before implementation became a concern. Government apathy combined with out-and-out opposition from a new Court made the code’s implementation a hit-or-miss proposition. The signing of the peace accords and the interest of foreign donors may well force the changes dictated by the code. If this happens, political will is unlikely to have much to do with it.

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<sup>35</sup>In Costa Rica, this includes not only the court system, but public defense, public prosecution, and the judicial police. The Supreme Court, however, functions as the governing body for all these entities. The recent creation of two internal councils to handle administrative and personnel matters has not altered its leadership.

<sup>36</sup>The initial changes in the 1940s granting the court system more independence were motivated not by an interest in reform, but rather by the elite’s decision, in the aftermath of a brief civil war, to insulate the institution from partisan conflicts. Similar intra-elite pacts were effected in Uruguay, Chile, and Colombia, and in the former country eventually allowed the Court to sponsor its own reforms. In the other two, increased independence has been credited with increasing the judiciary’s conservatism, isolation from national political realities, and resistance to change.

As these and other examples suggest, political will, as the dedication of governmental or political elites to reform, has been the exception rather than the rule. Moreover, where it does exist, (Colombia and Peru), what the elites will may not be what the foreign donors want to support. Significantly, in these countries, external cooperation came late, and has been fraught with conflicts. In Panama and El Salvador, foreign donors have been more influential, in some sense substituting their own will for that of political elites. In these countries, neither among the elites, sectoral actors, nor the masses was there ever a viable demand for sectoral reform. The most that can be said is that political elites appeared uninterested, the public had a negative image of the sector, and sectoral leaders and membership, when they registered support or opposition, did this late and ineffectually. Even as the reforms have advanced and despite donor efforts to promote the cause, these three elements have not much changed. Post-invasion U.S. assistance in Panama rebuilt the national police force, introduced judicial training and some changes in internal judicial procedures and basic codes, and restructured the operations of the prosecutors and investigatory police. With its way eased by a massive injection of funds, it only encountered institutional resistance in the latter case and in the process of overcoming it, may have produced the most dramatic systemic changes.<sup>37</sup> While in El Salvador there is a growing public interest in crime prevention and control, the measures this seems to recommend run counter to those (due process guarantees) the initial reformers had promoted. However, in El Salvador, donors have been able to work changes with their own funds and by leveraging government cooperation.

***Political will of elite minorities:*** Another pattern found in Guatemala, El Salvador, and Bolivia is justice reform's adoption as the issue of a party, faction or individual. If this is "political will," it is that of only a portion of the governmental elite, has usually come after a project was initiated, and has an overtly opportunistic side. The possibility of alliances with resource-laden external donors is often an attraction. Additionally, the issue may be perceived, correctly or incorrectly as a career builder, an area where visible progress can be made and attributed to the individual sponsor. However, the value of opportunism should not be discounted. In Guatemala, the ex-Chief Justice's deep personal interest in his new criminal procedures code made him less amenable to external or internal alliances. This accounts for USAID's difficulties in advancing its own project, and for the rocky history of the code once he left office. In both Bolivia and El Salvador, the initial backer was a Minister of Justice with higher political aspirations who apparently saw the issue and the availability of foreign resources as a way of advancing them. These were strong willed leaders whose personal agendas did not hamper their availability as allies. Still, that they were able to push their minority positions was largely a function of the relative passivity of other elites.

Although sectoral reform often involves a lessening of executive power over the judiciary, USAID's governmental allies have more often been in the executive than the judicial branch (and virtually never in the legislature). Latin American Ministries of Justice typically have a small, and

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<sup>37</sup>This is discussed in greater detail Hammergren, "Institutional Strengthening." As the discussion also argues, the program appears to have had least impact on the courts, which accepted the largesse, but not the message on the need for further change.

decreasing role in directing the sector. However, in addition to El Salvador and Bolivia, ministers of justice were important backers of reform in Peru, Costa Rica,<sup>38</sup> Colombia, and Argentina. Significantly, the reforms they supported so reduced the ministries' power that their eventual disappearance has been suggested. For these reforms to advance further, they will have to be adopted by the judiciaries themselves, but with a few exceptions,<sup>39</sup> judicial leaders have not been in the vanguard (in fact have as often opposed change).

Several factors come into play here. First, because of excessive politicization, many Latin American Supreme Courts have become more of a problem than a potential solution. It is often easier to find reform allies at lower levels of the judiciary. Second, the Court's collegial organization works against a leadership role on two counts. When a few Justices are interested in reform, they are likely to be outvoted by nonreformist colleagues. Even if all are interested, the collegial organization tends to dilute any reform measure they propose. Costa Rica may be the exception which proves the rule, but it has taken fifty years to do so, a time most reformers are not willing to wait. Thus, although it is the traditional governing body for the Latin American judiciary, the Supreme Court has rarely initiated reform in the region and has been a less dynamic partner in reform coalitions it eventually joins. Nonetheless, in countries where its politicization and internal organization have not discredited Court leadership, a potentially more forceful role should not be discounted.<sup>40</sup>

The situation is sometimes more positive with nonjudicial institutions. In several countries, prosecutorial offices (Public Ministries) have become important reform proponents -- taking the lead in promoting changes where the Courts have been more reticent. Two factors account for this difference. First, Public Ministries are hierarchically organized, and where a leader wishes to promote change, he or she is not hindered by having to seek support from up to twenty or thirty colleagues. Second, the criminal code reforms increase the powers of the prosecutors who thus have an inherent interest in moving them ahead. Public defenders offices, where they exist, also can be allies of reform. However, their lesser powers and importance don't give them the leverage a committed Attorney General can exercise. The disadvantage of an alliance with a Public Ministry is that it is almost inevitably more subject to direct political control. When it

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<sup>38</sup>In Peru, this was Alan García's Minister of Justice who prior to his forced resignation in 1986 requested an AOJ project with the US Mission. The Costa Rican Minister later joined the Supreme Court and as President of the Constitutional Chamber continues to back reform. A later Minister of Justice in Costa Rica, while interested in the project, proved too difficult an ally for USAID, partly because of her clear desire to increase her importance vis-a-vis the Court..

<sup>39</sup>In addition to Costa Rica, Uruguay is another example. Its Supreme Court was instrumental in backing a reform of the civil procedures code.

<sup>40</sup>A number of African countries may offer this possibility. Although their judiciaries are hardly impervious to political pressures, they often enjoy a sort of bounded independence and at least at the upper levels, greater professionalization than was the case in many Latin American countries.

begins to threaten vested interests, it may be reined in by substituting another leader.<sup>41</sup> Similar problems, and frequently more extensive corruption, have hindered alliances with the administrative or judicial police. Nonetheless in some cases, they have been important institutional allies.

***Dilemmas of political will -- when allies diverge on reform content:*** The success of projects in the face of elite neglect -- either by providing limited resources to institutionally based reformers (Courts in Costa Rica and Uruguay, and the Public Ministry in Panama and Honduras) or working with a few elite allies and a massive injection of external resources (El Salvador, and if less conclusively, Bolivia, Panama, Colombia, Guatemala post 1995) -- does not cover all the Latin American cases. A review of some of them raises issues not contemplated in the CDIE model. One frequent dilemma occurs where reformers exist but have a different vision or different priorities from their external allies. With a massive injection of resources, conflicts can be avoided by doing everything. However, where resources are scarce or visions are truly incompatible, this is impractical. In recent projects sponsored by USAID and other agencies, two types of conflicts are common. One, neatly resolved for USAID by traditional policy guidance, is the institutions' frequent preference for funding infrastructure and equipment, meanwhile avoiding more critical reforms in internal procedures and tackling such delicate issues as corruption. This type of conflict is more characteristic of the development banks, which because of their operating procedures and the fact that they deal largely in loans (albeit with large grant elements) anticipate more country input to setting priorities. While it can be argued that a country is entitled to use its loans to fully equip and house unreformed institutions if it so chooses, the IFIs have obviously had some second thoughts here.<sup>42</sup>

For USAID, the dilemma is less dramatic, but it still persists when local reformers prioritize introducing, but not implementing new laws, setting up expensive training programs absent a reformed career system, or introducing other costly but ill-considered innovations. Obviously, it is not up to a donor to determine the shape of a country's justice system, even if it had (as none do) all of the answers. Alliances require compromises, and some apparently nonproductive investments may build interest in the overall process. However, resources are scarce, and over ten

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<sup>41</sup>This was feared in Colombia when Alfonso Valdivieso, the Attorney General famous for investigating the drug cartel's contributions to political campaigns (case 8,000), left office to run for the presidency. At this writing, it is too early to say whether the fears were realized.

<sup>42</sup>These apparently motivated the suspension of projects in Peru in mid-1997 and early 1998, continued delays in a World Bank project in Argentina, and slowdowns in one in Venezuela. Donors with little in-country staff have also financed equipment and infrastructure because they require less supervision. There are other arguments in favor of these programs -- usually based in the abysmal poverty and working conditions in the sector. Whether as an incentive to more fundamental reforms, or simply to ensure that staff have the basic equipment to comply with them, these programs are important. Their dismissal as "equipment drops" is overstated, but it does recognize the risk of driving out more fundamental change.



years of experience have provided some idea as to the relative utility, feasibility, or wisdom of a variety of measures. The problem is how to convey the lessons to local allies, who however well intentioned, may be inclined to repeat the same mistakes made elsewhere.

One obvious solution is for the donor to decide what it will finance, and offer it on a take-it-or-leave-it basis to local partners. Using this tactic, the German Naumann Foundation financed a ten-year program of training for Peruvian justices of the peace despite the Court's evident displeasure with the exercise.<sup>43</sup> Successes of this kind demand special circumstances. Aside from the donor's willingness to risk rejection, these include a program requiring the permission but no other cooperation from the unwilling elites, the availability of other allies (lower level judges) with whom to work, and the donor's ability to stay long enough to produce the desired impact with no expectation that the program will outlive their presence. Clearly, the foundation might have preferred the Court continue the work, but investments were not directed to this end (i.e. they did not involve infrastructure or permanent equipment), and observers concur in identifying lasting impacts far transcending the training of the 5,000 or so participants.<sup>44</sup>

A second solution uses a limited, mutually acceptable program to leverage broader interest in reform, in a sense reeducating political will. Many training and pilot programs have served this end. They are usually more successful in generating interest among lower level institutional members, and less frequently change the minds of institutional and political elites. However, momentum from the bottom has sometimes been sufficient to push further change. USAID's initial project in Colombia worked in this fashion, possibly unintentionally. A first \$3 million grant financed a series of experimental programs, jointly chosen by high level members of an intra-sectoral commission and managed by a local NGO.<sup>45</sup> Many of these programs produced larger follow-up activities, either under a second USAID project, or with local or other international financing. The project also trained individuals who have been active in promoting these same reform activities in Colombia and elsewhere. Interestingly, although USAID's strategy document<sup>46</sup> discusses this as an example of building political will and reform constituencies, it fails to note how the pilot activities focused the "policy dialogue." The \$3 million was hardly invested in just "talk," and the "talkers" were the least successful converts.

A third option is to adopt one of the "bad ideas" and attempt to redirect it as it is executed.

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<sup>43</sup>This program has been extensively described by participants and external observers. See for example, Brandt (1990 and 1987); Mejía; Chunga.

<sup>44</sup>The program attracted reform-minded judges from all levels and was an important focus for discussion of additional reform needs. Many of these individuals have been important participants in subsequent reform efforts.

<sup>45</sup>See below for further discussion of this entity, FES.

<sup>46</sup>Blair and Hansen, p. 20.

USAID's experience with code reform worked in this fashion -- local allies want to rewrite laws, but in the grand Latin American tradition usually assume implementation will follow automatically. In several countries, either through their own experience or by viewing that of others, they have been convinced of the need for greater attention to implementation, and projects have shifted from code drafting to code implementation. Implementation (i.e. the preparation and reorientation of institutions, their members, and the public) is a longer, more expensive, and more difficult process, but it is critical if legal changes are to take hold. In short, there is no single answer to the dilemma. What is clear is that content is as important as quantity in assessing the adequacy of political will. Just as an unreformed system does not imply a lack of will to change, a desire to change is hardly sufficient to produce real improvements.

***Dilemmas of political will -- assessing the sustainability of externally willed change:*** A second set of questions revolves around the efficacy of using external will and resources to leverage change not supported (but not opposed) but local elites. This is patently the concern of the CDIE document and the instance where USAID has most often violated its recommendations. In some cases, it appears to have done so successfully. El Salvador and Panama may not have "reformed" sectors, but the changes wrought by external resources have permanently transformed their operations, in most cases for the better, and have helped strengthen and broaden a group of local reformers who can be expected to continue the efforts as foreign funding and presence disappear. In Colombia, Bolivia, and Honduras, the changes are less complete, but probably as irreversible. Relative to the size of the problem, or just of the country, none of them has felt the same impact from foreign assistance. This in large part explains the difference. It also suggests a secondary hypothesis -- that the efficacy of external pressure and resources must be assessed not only relative to country size (i.e. \$10 million in Panama has a much greater impact than \$36 million in Colombia) but also to the country's financial and technical ability to support the reforms after the fact. Haiti offers the possible negative case here -- despite over \$50 million invested in creating a new police force, and \$18 million of USG funds alone for the rest of the sector, it is doubtful that the reforms can be sustained financially, politically, or technically without continued external support. In as much as we are likely to see more rather than fewer Haitis in the future, the issue deserves consideration. However, I would stress that it extends beyond political will to a question of capacity and as such should be factored into project design. If Haiti is unable to sustain the kind of justice system donors are designing, than perhaps the donors should scale down their aims.

Even including Haiti, there is no Latin American case where "political will" extends into the negative zones. For this, one must look outside the region. One example may be Cambodia, where the lack of will transcends justice reform to the whole of democratization. Here a multi-donor "democratizing" investment of over \$2 billion apparently came to naught in mid-1997 when the country's second vice president, Hun Sen, staged a coup and assume dictatorial powers. Still the impact of USAID's much smaller (\$18 million) investment in ROL activities remains unclear. It doubtless achieved some immediate good (especially though the provision of public defense services) and, like many of the other democratizing activities, may have created support or a base for some future reform. In fact, as a collateral beneficiary and then fatality of the broader political

situation, the program's fate suggests that it is the elite's wider values and interests, and not their stand on justice that merits most attention. Hun Sen never opposed justice reform; he just negated it by overthrowing the marginally democratic government. Such turns of events are never completely predictable, but where regime stability is so tenuous, this is the real limit on sustainability.

***Dilemmas of political will -- small programs and windows of opportunity:*** A third set of issues involves programs where both internal allies and external resources are scarce -- Ecuador, until recently Nicaragua and the Dominican Republic, Mexico, and possibly Argentina. This is a disparate group and could be broadened by the inclusion of other countries (e.g Honduras and Peru) at various stages in USAID's relationship with them. In all of them, USAID introduced small, focused activities, working with interested groups in the public and private sectors. These windows of opportunity were usually justified by their immediate impact on resolving discrete problems. They were also intended either as replicable pilots or as the beachhead from which to launch a larger reform. Programs often take and probably deserve credit for small improvements in sector operations, for increasing interest in reform, and for leveraging larger programs financed by other sources. One should be cautious as regards the last two results --given the growing regionwide interest in the theme, they might have been effected without country-specific activities. As for the small immediate improvements, sustainability, cost-benefit ratios, and opportunity costs are legitimate issues. However, the size of the investment is also relevant. Clearly, far less certainly should be required for a \$300,000 gamble than for \$30 million.

None of these efforts were entirely wasted; even abandoned pilot activities in Honduras, Colombia, and Peru were resurrected by other agencies or produced local reformers who have gone on to work in other sectoral programs. Still, where neither the initial investment nor the political environment makes radical change likely, objectives should be couched modestly and explicitly -- as a way to foment the exploration of reform alternatives and encourage indigenous support -- and specific activities designed accordingly. It is both senseless and counterproductive to encourage a local partner to attempt an impossible goal -- one promising nationwide impact with a minimal investment in a few year time frame. If donors are serious about the need for "political will" and reform alliances, they must accept their creation as results in and of themselves, and not make success contingent on the immediate replication of the experimental project or even worse, the achievement of systemwide reform. Given the foregoing comments about "misguided" political will, more care might be taken in selecting such small experiments. Some were less productive, and a few encouraged programs of highly dubious value.<sup>47</sup> Finally, it is worth reemphasizing that these were activities, not just discussions of reform. One of the greatest, if unintended disservices of the demand-side model, is its depiction of policy dialogue as a separate activity. Experience suggests that well-chosen action projects, which may be no more

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<sup>47</sup>Overblown training programs, endless code reforms, and a premature computer culture are examples. The activities are valuable, but might have benefited from closer attention to defining objectives and integrating them into an overall reform strategy. For a discussion see Hammergren, "Judicial Training," and "Institutional Strengthening."

expensive than endless conferences and meetings, are often more productive in moving reform ahead and in educating allies about reform possibilities.

*The politicization of reform and its implications for “political will:”* Ten years of reform efforts have produced some notable successes in Latin America. They have also been instrumental in changing the political environment for future endeavors. The most important changes are the greater attention to sectoral reform as a political issue and new forms of politicization of the sector itself. In Mexico and Argentina, the effect was earlier and largely independent of donor programs. Here USAID’s investment was never intended to be large, but it faced additional obstacles. Both countries have highly problematic sectors and many potential nongovernmental allies. They are also characterized by some active political opposition, as opposed to lack of will, to externally sponsored reforms. This is partly a function of national sensitivities, and partly of the more purposeful politicization of their sectors.

The demand-siders are correct in depicting the elite biases of the traditional Latin American justice sectors, but they inevitably err in overemphasizing their importance. Throughout most of the region, the courts and other sectoral institutions had become so marginalized as to make reform nonthreatening -- explaining why many reforms were able to promote changes clearly not in the interest of political or economic elites. In Mexico and Argentina, however, the elites’ more systematic and purposeful use of the sectors has made dysfunctionality functional, for both politicians and institutional members. Recent constitutional amendments in Mexico, giving the federal judiciary more independence, and escalating public complaints about poor performance may change this situation. Comparable if less dramatic changes may also be at work in Argentina. In both countries, at the federal level, budgetary resources do not pose constraints. Judges are well paid and there are monies for equipment and infrastructure. For this very reason, financial and technical assistance will have little impact unless carefully targeted. External reformers might be advised to use their investments and pilot efforts to cultivate allies in civil society and the institutions themselves who can push for reforms and generate concrete proposals as to how to produce them.

In Ecuador, the Dominican Republic, and other mid-range Latin American countries, constraints on reform are financial and technical as well as political, but as in Mexico and Argentina, the opportunity for surreptitious reform has passed. A delayed attention to sectoral reform means that it is now caught up in a process of political transition.<sup>48</sup> This has complicated reform initiatives by making their political ramifications immediately apparent (as they were not in countries where they began earlier) and linking the sector’s operations and control to the forging of new patterns of political competition. Elite disinterest is no longer the rule, and any effort to

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<sup>48</sup>Whether or not this is a democratic transition, I’ll let others decide. However, in these and other Latin American countries, the old party systems are visibly crumbling and with it their connection to the state and society. Consequently, the reform of all state institutions, including the judiciary, are raising issues about their functional and representational roles which the earlier reforms conveniently ignored.

change sectoral operations will be immediately evaluated for its effects on partisan resources.

This does not eliminate the opportunity for external assistance, but it does recommend more sensitivity to the political agendas of local allies because they indeed will have them. In this situation, it will be advisable to make alliances more inclusive, avoid reliance on a single political figure, faction, or group, and attempt to draw in the affected institutions earlier rather than later. New political developments have created opportunities for external programs (as in the electoral defeat of Balaguerism in the Dominican Republic or the ouster of Bucaram in Ecuador), but the interest and interests they attract will make it hard to set consensual objectives or to avoid proposals with patently partisan agendas. One lesson to be drawn from the experience, for application in other regions, is the desirability of introducing sector reforms earlier rather than later, so that institutional strengthening, and greater political independence, can be achieved before new forms of politicization take hold.

**Summary:** Latin American projects have had to deal with the concepts subsumed in the term “political will.” However, the issues and their solutions are far more complex than a simple presence or absence of governmental support and required a process of active reform mongering on the part of USAID and its allies.

First, the government or the political elite is hardly a monolith; there are important divisions of interest among its members, and a further important distinction between political elites and institutional leaders.

Second, the kind of will or cooperation needed to initiate a project is different from what may be needed as it evolves.

Third, substantial progress can be made where external will and resources substitute for that of internal allies (either in or outside the government). Although this is the usual pattern in high priority, high visibility projects, it poses longer term problems of sustainability which need to be considered in designing interventions.

Fourth, because of these considerations, project advances have been contingent on a continual process of political negotiation and alliance building.

Fifth, no matter how a project is initiated, the most important determinant of its ultimate success and sustainability is the development of commitment and capacity within the affected institutions.

In short, while the initial political environment is a critical factor in setting realistic objectives and designing strategies to meet them, altering that environment is itself a reform goal. Projects have far more latitude for doing that than is recognized, but a realistic assessment of the difficulties is vital to success.

### **Experiences With Reform Constituencies and Constituency Building**

USAID's notion of reform constituencies privileges advocacy and civic interest organizations which it assumes embody the counter-hegemonic principles needed to accomplish real reform. Anticipated actions include pressuring elites into initiating reform, informing and mobilizing broader publics, monitoring and forcing reform compliance, and directly implementing reform activities. As noted, the explanation of how these entities make an impact is sketchy.

USAID's Latin American programs have rarely relied on these civil society groups as principal allies. Ecuador and the Dominican Republic are two major exceptions. The broader omission can be attributed to a preference for a supply-side model, but it has additional explanations. Evident problems, hardly unique to Latin America, are the groups' frequently conflictual or even competitive relationship with state institutions and with each other, and their more partisan or ideological than technical focus. This makes it difficult for them to form broad alliances, to move beyond criticism to the formulation of reform programs, or when they do, to draw targeted institutions into the process. It also may impede their ability to widen their own support base or their contacts with and influence on policy makers. When specific political conditions (the electoral victory of partisan allies or as in Guatemala and El Salvador, the signing of peace accords) gave them a direct role in program design or implementation, their contributions have often been less than practical.<sup>49</sup>

In Ecuador, USAID until recently channeled its entire program through one local NGO, the Corporación Latinamericana de Desarrollo (Latin American Development Corporation or CLD). Although the corporation successfully sponsored the drafting and passage of constitutional amendments and laws aimed at reforming the sector, many observers believe that they would have benefitted, substantively and operationally, from involvement by the Court<sup>50</sup> (whose organization and operations they altered). Arguably, CLD's political skills exceeded its technical ones in these areas. CLD has evident political contacts which it used skillfully to manage the legislative approval of its proposals. It so far has escaped association with any political tendency. However, its unwillingness to share the stage with other NGOs has also been criticized. This may pose limits to its future success and clearly impeded a broader discussion of the package of reform laws. In the case of the Dominican Republic's NGO of choice, FINJUS,<sup>51</sup> partisan linkages were

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<sup>49</sup>In El Salvador, many of the sector specific contributions to the peace accords (e.g. the constitutionally mandated 6 percent of the budget reserved for the judiciary and the ambitious role for a new judicial council) were not well thought out and continue to pose problems.

<sup>50</sup>The CLD sponsored negotiations within the Congress resulted in political trade-offs which in retrospect appear ill-advised -- for example, the decision to increase the Court's size from twenty to thirty-one justices (sufficient to allow representation for all parties). In addition, the merger of the formerly separate administrative courts into the ordinary court system and the law of cassation appear to have been poorly thought through and as a result not entirely operational.

<sup>51</sup>FINJUS was an indisputably successful advocate for sectoral reform, putting the issue on the Dominican agenda and expanding the understanding of its problems. However, it was so

a problem from the start. Through a series of USAID-funded publications and conferences, FINJUS successfully strengthened interest in reform and in specific reform alternatives among the legal community and other opinion leaders. Although this led to the enactment of reform legislation, FINJUS' ability to maintain leadership in the movement or that of USAID to use it as a principal ally has been severely curtailed by its partisan identification.

Advocacy and public interest groups are less likely to pose these problems when used as in Colombia, Argentina, and Peru to develop parallel programs like ADR or legal defense, as an additional source of support for more specialized measures (e.g. a variety of Salvadoran NGOs which helped lobby for the passage of family and juvenile legislation), or as participants in consultations about proposed reform actions. At least in Latin America, their frequently limited technical capacities, difficult relationship with sector institutions and among themselves, and overt politicization has made them less effective as principal, permanent reform allies.<sup>52</sup>

***The origins of Latin America's reform constituencies:*** Nonetheless, reform constituencies have had an important role in the development of the Latin American projects, albeit not in the form implied by the model. The most important constituencies were not formal organizations, but rather individual lawyers, judges and concerned jurists, in both the private and public sector. In most countries, some of them were already linked to a loosely organized regional network seeking to reform and modernize the sector and the laws under which it operated. Latin America has a long tradition of this type of indigenous reform, and while it rarely succeeds in producing real changes in outputs, it has gradually reshaped the ways institutions operate. As USAID began its AOJ programs in Latin America, it found itself coinciding with the latest reform wave, much of it directed at reforming procedural codes to bring them into line with more recent trends in Europe and occasionally the United States. Although the local proposals often seemed more focused on form than substance,<sup>53</sup> they provided a base on which USAID's programs could be built. The agency's initial contribution was to provide these individuals with the means to develop and disseminate their ideas, expanding membership in the movement while giving a more concrete focus to their vision, and to offer the financial and political resources to turn these into government programs. Where such a movement does not exist or is only incipient, it may indeed be necessary to help create one. In most of Latin America, this was not the case.

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unmistakably linked with one party that its director was forced to resign in an effort to salvage the foundation's image. Had the party in question won the presidential elections and placed more candidates in congress, the identification might have been an asset.

<sup>52</sup>The one organization apparently escaping all these failings, Colombia's Fundación de Educación Superior (FES), still ran aground when the state entities it was coordinating rebelled against its direction. As the amounts of money involved grew larger, FES' position became untenable, and USAID eventually terminated its role in the project.

<sup>53</sup>See Hammergren, "Code Reform" for a more detailed discussion.

***The use of extra-national constituencies:*** Where it was necessary, USAID's Regional Administration of Justice Program helped prepare the way. Working through the Costa Rica based ILANUD (the United Nations Latin American Institute for Crime Prevention and Treatment of the Delinquent) the program sponsored hundreds of regional and national conferences, courses, and visits to develop interest in criminal justice reform and the introduction of human rights based procedural codes. In doing so, it drew in nationally based reformers and reform groups, many of them in the public sector, as well as many "reform-neutral" judicial leaders. Hence by the time bilateral projects were created, potential national participants were well acquainted with the specific activities to be undertaken. The results fell short of demand creation, but they did expand the number of local allies and undermined many sources of opposition. One further advantage of working regionally is the lesser danger of tapping nationally based partisan and ideological conflicts. An "eminent jurist," whatever his or her political connections back home, is more likely to be perceived as a neutral source of technical expertise in another country. The same advice, coming from a known local figure, may well be discounted by those who know and reject his or her political affiliations.

It is worth mentioning that efforts to involve ILANUD in the implementation of the resulting bilateral activities were less successful because it lacked the requisite technical skills and organizational strengths. Like many national NGOs it found it impossible to make the transition from advocate to technical executor -- USAID's insistence that it do so led to the institute's near collapse. One unfortunate consequence is a retrospective dismissal of the entire experience as a failure, thus obscuring the important role of this kind of regional support building effort.

***Using interest based constituencies to promote reform:*** Latin American provided another potential constituency arising in the sector's traditional middle class clients, as well as some nontraditional upper class users. Their interest is increasingly articulated as complaints about the quality of services ( corruption, slow justice, excessive political intervention, etc). These complaints have more recently been joined by lower class, marginalized groups -- some of whom have come to recognize and criticize the biases of the existing system, or to focus on its failure to provide specific services, for example protection against crime and violence or the enforcement of certain legal rights.<sup>54</sup> Often more a malaise than a demand, this is hardly the stuff of a mass political movement. In most countries, the escalating criticisms had brought few improvements or such logical first steps as higher budgets and salaries, a willingness to pay more for better justice. Furthermore, the complaints were rarely accompanied by specific ideas as to how improvements could be reached.

In a few cases this broader, unfocused concern, has been identified with more specific interests and tapped by governmental and nongovernmental groups. In Uruguay, jurists seeking reform of

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<sup>54</sup>Although some of these rights are those violated by abusive officials, others are "social rights" which become more important as citizens move to urban setting and lose the protection provided by traditional communities. These include things like rights to education, tenants rights, and child support for woman abandoned by their partners.



the civil procedures code sought and found backing within the Chamber of Commerce whose members were concerned about excessive delays in processing commercial cases. In Panama, members of the Public Ministry sought out professional and business organizations to educate them in proposed changes in the criminal code to help them override anticipated opposition from members of congress. In Colombia, a new NGO, the Corporación Excelencia en la Justicia, has amassed a \$1.8 million endowment from the private sector to support its efforts in developing sectoral reforms. In doing this, the corporation appealed to existing criticisms of corruption, delays, and political and criminal violence. In Argentina, Poder Ciudadano (Citizen Power) involved ordinary citizens in reporting the misconduct of judicial and other officials. In Colombia as well, an NGO-sponsored experimental program in the town of Itaguí elicited contributions directly from businessmen to finance a court modernization project. Although NGOs are often conceived as arousing citizens to pressure government for reform on the basis of more general complaints, what is most interesting here is their ability to involve citizens directly and actively in the reform process, often in a cooperative rather than confrontational mode. Such directly constructive citizen action is not a tradition in Latin America, where activism more often means demonstrations and protests. This is a different kind of constituency building and public support, but it is one which merits encouragement. It also is a way of building more direct contacts between citizens and their justice institutions, an important and often overlooked component of institutional strengthening.

***Insufficient use of NGOs:*** USAID projects have occasionally been charged with insufficient incorporation of NGOs in their efforts.<sup>55</sup> This sometimes occurs (e.g. El Salvador) even when reform progress has been substantial. The reasoning here is less the NGOs' potential contribution to reform, than their activation as opposition if that contribution is neglected. The phenomenon is often the direct result of USAID's oversight -- in El Salvador, a reliance on international consultants placed the NGOs in a decidedly secondary role. Although the consultants may have been more technically suited to the job, the resentment of local experts caused delays in the approval of reform legislation. In other cases, it is a consequence of the exclusionary practices of the NGOs themselves -- as noted, in Ecuador, USAID's NGO of choice has been criticized for monopolizing access to USAID assistance. Whatever the reason, exclusionary practices should be avoided. In the name of democratic principles or just to avoid unnecessary conflicts, where organizations believe they have a part in the reform, they should be included. On balance, their exclusion had more negative consequences than whatever the costs of adding unnecessary elements to an already adequate reform alliance and program

***Intra-institutional constituencies:*** Constituencies are not limited to nongovernmental groups; if a reform is to get very far, it must draw in institutional members. Because of a frequent tendency to see the government as a monolithic whole, the role of the affected institutions as a reform constituency has often been ignored or denied. Their portrayal as the chief beneficiaries of the existing situation, as part of the political elite which almost by definition must oppose reform, overlooks the fact that they are also victims of the status quo. Most judges and many police,

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<sup>55</sup>See Mudge et al.

lawyers, and administrators do not enjoy their reputation as agents of corruption and malfeasance or the low salaries, poor working conditions, and minimal institutional powers that it justifies. Many might willingly trade the illegal benefits of this situation for reasonable wages, a real career, and more public appreciation. Some were already advocating these changes before USAID arrived with its projects. Others were converted to the cause once the trade-off was explained in this fashion and some of their less realistic fears assuaged. Many of USAID's judicial training programs probably did more in this direction than they did in actual training, serving to create enthusiasm about the pending reforms.

There is another reason for promoting intra-institutional constituencies. Creating professional institutional identifications is a way of combating politicization of sectoral operations and providing a counterbalance to an executive centered state. The U.S. model of separation of powers may not be completely transferable to Third World environments, and even in its native setting may require further modifications for our own more complex society. Nonetheless, a greater differentiation and specialization of governmental institutions and with it, the termination of their control by the party in power, is an essential element in establishing juridic security and the rule of law. Countries will have to make their own decisions on how to deal with the inevitable interdependence and overlapping functions, but for most this will be accomplished more effectively where institutions already have some degree of autonomy. Thus creating institutional constituencies is not only a means for furthering reform; it is a reform goal in its own right.

One further obvious intra-sectoral constituency is the private bar. As the CDIE study accurately notes, bar associations have not been notable forces for reform in Latin America. There are some purely historic and structural reasons. They are frequently highly politicized, often plagued by internal conflicts or a difficult relationship with governmental institutions, and have traditionally served more as social clubs or representatives of guild interests than as promoters of higher order change.<sup>56</sup> This, along with resource considerations, has discouraged donor efforts to work with them directly. The few exceptions have produced still fewer successes -- or produced them far less rapidly than might be desired. Still, if the early neglect can be justified, ways must be found to draw the associations into the process once it is under way. Like Supreme Courts, bar associations may not be reform leaders, but if they are not engaged at some point, their lack of cooperation becomes an important passive obstacle.

***Use of CSOs to monitor reform progress:*** The emphasis on up-front coalition building (prior to a reform), like the conventional understanding of political will, tends to overlook the continuing and perhaps increasing need for support and political pressure as a reform is executed. The many false starts and the disappointing consequences of some Latin American programs suggest that CSOs may have a far greater utility here, in monitoring change, detecting emerging problems, and

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<sup>56</sup>Indeed they may oppose reform. Many individual lawyers and some of its bar associations opposed the passage of several of Salvador's reformed codes. In Guatemala (and Cambodia) bar associations have also resisted the growth of public defense offices which would obviously reduce their own business.

informing and mobilizing citizens so that they can access and demand the new services. The challenge is to convince them to do this in a constructive fashion, one which does not sacrifice the good for the unattainably perfect, which emphasizes cooperative relationships among institutions, and which introduces suggestions for practical improvements when problems are identified. It is the nature of many CSOs to be extreme, single issue actors, but real reform will require an ability to prioritize problems, accept incremental improvements, and organize their actions in a coordinated fashion. So far, USAID's Latin American programs have not had notable successes in this area, but many are recognizing the need to adopt new approaches, especially to the organization of private sector constituency groups. The alternative, apparent in Guatemala's emerging difficulties with a plethora of donor-supported legislation, is a virtual cacophony of competing complaints threatening to drive out much chance of real improvement.

***Enhancing the technical capabilities of reform constituencies:*** A final word should be said on think tanks, research institutes, universities, and public interest organizations. If civil society has contributed little to the formulation of Latin American reform programs, it is partly because of the technical weaknesses of NGOs. Despite Latin America's mid level of development, there are remarkably few researchers and even fewer institutions with skills which eclipse those of an already weak public sector. Legal education in Latin America remains traditionally focused on doctrine, philosophy, and the legal classics. Legal scholarship rarely recognizes other disciplines and often sees itself as the initial and final word on how society should be organized.<sup>57</sup> It is gradually changing, but the few research centers (CPU of Chile, the Instituto de Investigaciones Juridicas of Mexico; SER and the Corporación Excelencia of Colombia) which have struck out in new directions are still an exception. USAID and other donors have rarely sought out these groups, only infrequently used them in programs, and have made no attempt to create such a capacity in others.

In this regard, it is worth contemplating a remark made apropos of NGOs working in other substantive areas -- that their "prior roles of policy critic, popular educators and grassroots" mobilizers benefitted from general skills which may no longer be relevant, and that as programs move beyond mobilization of interests into action, more and different kinds of technical expertise are required.<sup>58</sup> In most of Latin America, justice reform has progressed into this stage. While general advocacy will always have a place, there is an increasing need for public and private sector entities which can transform general demands into concrete, realizable programs. These skills are also needed by organizations intending to monitor reform progress and compliance. In the process, support to many groups which like ILANUD cannot make the transition, will have to be

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<sup>57</sup>The following statement from a respected Mexican jurist is illustrative. "We consider that legal culture subsumes the most ample area of the humanities. No other discipline has a wider reach...Thus, the legal scholar, the "homo juridicus," as an ideal type is the wisest man, taking into account the tight and inevitable ties between Law and the other more specialized sciences..." Burgoa Orihuela, p. 38.

<sup>58</sup>Bebbington and Thiele, p. 141.

decreased or eliminated. This will, as in the past, bring conflicts and charges of ingratitude. An awareness of the how an evolving reform changes the role of allies may at least hold down unrealistic expectations.

**Summary:** As in the case of political will, Latin American projects have done more constituency building than they have reported or observers have recognized.

Much of this has been directed at increasing interest and knowledge among members of the legal community, rather than strengthening or creating specific civil society organizations. While it encompasses some demand creation, its predominant impact has been to familiarize participants with proposed programs and so prevent negative reactions.

Often overlooked or discounted by observers is the vast amount of activity within public institutions, whose conversion to the reform cause is a major accomplishment. By equating members of these institutions with governmental elites, the demand-side model ignores the potential for turning their implicitly different interests into explicitly distinct ones as a means to and objective of sectoral reform.

If less use has been made of the classic CSOs (advocacy and good government groups) it is not only because of the immediate focus on state institutions. The existence of an indigenous reform movement, and its furtherance through regional programs, obviated the need for the demand creation with which such organizations are often charged. Where they were used for this purpose (Ecuador and the Dominican Republic) their politically or institutionally based efforts to monopolize the program posed additional problems.

Most Latin American NGOs have proved constitutionally and politically ill-suited to the emerging need of designing viable reform activities, or, with the exception of Ecuador's CLD, lacked the political skills and resources required for their effective promotion. They may be better suited to the still overlooked need for monitoring reform progress, detecting emerging problems, and helping citizens adapt to changes in sectoral operations. This will require a change of attitude from one of independent confrontation to collaborative cooperation, as regards both the sector and other civil society groups.

Two areas worthy of further effort are their use to draw citizens more directly into specific reform activities (and thus not just to generate protests), and the development of their own capacity for more specialized research and program design.

### **Public Support in the Latin American Reform Process**

If Latin American projects have accomplished more with political will and constituency building than either they or their critics recognize, their work with public support has been less fruitful. While most involve some sort of public relations, support building, or popular education component, this often is the residual category. Its inclusion reveals little basis for determining

what to expect, how much is required, or in what form to have any returns. This is most apparent in the way programs are budgeted and their targets and indicators set. Often the funding and targets appear highly arbitrary. Programs are aimed at reaching x number of families and having z percentage effects on popular attitudes or knowledge. There is never any explanation of why x should lead to z or indeed why z can be expected to have an impact on citizen or elite behavior. Most of the targets are set by project staff with no particular expertise in public education and marketing. Conceivably both the design and outcomes would be improved with more (some?) technical input. The sort of social marketing studies utilized in population and health programs are never used in justice, and if a specialized firm is hired, it is only to design publicity. More importantly, efforts are rarely if ever informed by an analysis of the role of public input in a particular political system. So far, impact has not been evaluated to test whether even by sheer luck, things turned out as posited.

***Types of activities:*** Public support building usually means setting aside funding for NGO programs and conferences or publicly sponsored local consultations. Some of these are intended to increase citizen understanding and support. Others aim at pulling NGOs and opinion leaders into the reform constituency. The latter efforts have probably been more successful although it is impossible to say whether the monies could have been more efficiently used or how decisive their impact has been. Apart from its visible aim of complying with agency guidance, the component is often driven by the additional agendas of local allies. When political elites endorse a reform program, they usually want to earn some political mileage in terms of increased support for their own careers. Thus publicity and informational campaigns may be as much directed at the other interests of allies as at the official outcomes. USAID in El Salvador, for example, had to cancel payment for a number of television commercials publicizing the new family and juvenile jurisdictions when it became apparent they were intended as campaign propaganda for the upcoming presidential elections. Had the commercials been more informative and placed the sponsoring party in a less prominent position they might have been acceptable. As designed, the target of the intended support was less the laws than the candidates. While this is a particularly exaggerated example, many “support building” mechanisms feature such dual purposes and as a result may be less effective in attracting reform allies. As we will see, they may have other unanticipated positive effects.

***The multiple meanings of public support:*** Efforts are also hindered by a tendency to mix various kinds of activities directed toward the public and to commingle the types of responses sought. Among the usual objectives are:

- mobilizing public pressure for reforms,
- collecting information relevant to their design,
- developing a positive attitude toward proposed changes,
- educating the public to use reformed services more effectively.

Different kinds of information exchange are needed for each of these functions. Trying to address them all through a single activity will not serve any of them adequately. Publicity campaigns and popular consultations are often proposed as this sort of multi-purpose activity; at most both appear to generate a vaguely positive disposition toward pending changes, but not enough to either mobilize active support (to pressure for their passage) or to inform sufficiently for future use. Campaigns about pending family legislation in El Salvador left both the general public and private attorneys unclear as to the changes, produced a four month lapse in filings once the laws went into effect, and left numerous women perplexed about the benefits they thought they would receive. Consultations have rarely been effective in engendering in depth discussion and citizen input about proposed reforms -- even legal professionals seem reluctant to ask central questions, and often limit their remarks to prepared speeches intended to demonstrate that they were there.

Most of these activities are designed abstractly, with little reference to what specific information is needed on either end of the transfer. Whether one is trying to educate citizens or obtain information about them, working in a knowledge vacuum is not helpful. This is most obvious where the aim is to provide them with information -- discussions focusing on the furtherance of the rule of law (“*estado de derecho*”<sup>59</sup>) or other themes near and dear to the hearts of legal scholars are not likely to impress laymen. Information intended to reduce popular fears about an impending change is not always what is needed by potential users. Publicity campaigns stressing defendants’ rights in El Salvador and elsewhere strengthened the impression that new legislation was soft on crime, although it obviously would be needed by defendants once legislation went into effect. However, even information collection, to help design programs, is often hampered by a failure to come to grips with the local milieu. Without understanding current use patterns and their cultural basis, one is likely to ask the wrong questions of the wrong clients, and at best resolve nonexistent or secondary problems. This has been a frequent obstacle in designing programs to combat familial violence, provide aid to single mothers, assist “at risk” juveniles, or accommodate plural legal traditions. Here even citizens of the same nation may not fully understand what matters to those from a different cultural or socioeconomic background.

***The media and public support:*** Throughout Latin America, the past ten years have seen a growing public awareness of sectoral weaknesses. The most important indicator of this phenomenon and possibly the principal influence on its development is found in the media. Donor programs have included some attention to media coverage of judicial affairs, but they can hardly take credit for the enormous change. In fact, the change is so substantial as to make any single factor explanation unlikely -- it stems from a combination of more open governments (and thus fewer restrictions on the press); greater political competition and a more active NGO community; a more problematic sector (and thus more events to report); the media’s own development (with a little help from donor programs); and the reform process itself which has created its own reportable events. There is a certain chicken-egg dilemma here -- whether public discontent has encouraged media coverage, or media coverage has fed public complaints. In any case, both the

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<sup>59</sup>I use this because it was the subject of intense debate in El Salvador’s public information campaigns.

quantity and quality of media coverage has increased dramatically, and have been linked to a greater public attention to sectoral problems. As has been stressed throughout this section, there is an enormous gap between mere discontent and demand or support for reform, and an equally great one between demand or support and a mandate for specific kinds of change. However, media attention and the public reaction it either recognizes or creates has made sectoral performance an issue, increasing the likelihood that political actors will attempt to address it in one form or another. Hence to the extent donor programs can encourage more and better media coverage, they can promote an environment more conducive to the reforms they wish to introduce.

***Public support in the political process:*** Adjusting a popular outreach program to prevailing political practices is arguably the central problem. As has been suggested, the implied model tends to ignore or contradict some fundamental understandings about the policy process in general and in Third World countries in particular. Its preference for deliberative or participatory democracy is laudatory, but promotes an ideal which has not been realized anywhere. In cultures where most policy is negotiated among elites, party members, and a few organized interests, an effort to force wider popular involvement in as esoteric a topic as justice reform seems highly quixotic. To do so is to attempt two major transformations simultaneously -- one the concrete issue they hope to have approved and the other in the approval process itself. It is swimming up two streams at once.

Fortunately for the first end, the efforts to open the policy process have usually been insufficient and reform design and passage are left to the usual restricted negotiation. Where active popular involvement has been attained, either through the project efforts or by an agile opposition, the consequences for reform have not been positive. In early 1998, the Guatemalan public was in an uproar over a new juvenile justice code, which, it was charged, threatened the integrity of the family, violated the constitution, and as usual, was designed for another national reality. The code's design is faulty, but it also threatened a number of vested interests which are believed to have manipulated the public reaction. As with two other laws (transit code and property tax law) coming under debate at the same time, it seems doubtful that the current controversy will result in any immediate real improvements. All three laws could have been improved by better information on the public and a drafting to national realities. However, this might have been done without an open public consultation. Some of the conflict might have been avoided by prior consultation with directly interested groups, and if the latter seemed inclined to pose further problems, by a subsequent public information campaign. Guatemala, it should be noted, poses a particularly difficult case because of the on-going political transition, the influx of enthusiastic donors, and the expectations raised by the peace accords. It does not provide answers as to how to deal with public involvement, but it does demonstrate that widespread public discussion has its down side.

As much as it contradicts the deliberative ideal, a discontented, but otherwise passive public like an apathetic elite, has often been an asset in initiating a justice reform. Public involvement is necessary later if legal changes are to become fact. Public support to force approval has been rare, and efforts to encourage it not notably successful. It is probably fair to say that while public discontent can make justice reform a viable issue, a mobilized public has not been instrumental in initiating or advancing any Latin American program. However, inadequate information on the public, miscalculation of public interests and reactions, and a failure to publicize changes as they occur have slowed or undermined implementation. Although this may be most apparent in situations like present-day Guatemala, where the reformers have little control over the activation of public debate, it can be equally if less dramatically destructive even where the public remains quiescent.

The general truth is the need for more attention to the public in designing justice reforms, not necessarily as open consultations, but at least as an informed consideration of their needs, likely



reactions, and required downstream cooperation. Reformers should also note that the advisability of prior consultation will vary by political system and the specific issue. Guatemala's (and El Salvador's) juvenile code, because of its content, aroused a degree of conflict never seen in proposed changes in judicial organization or appointment systems. If reformers thought they could secure its approval as easily as they did that of the latter, they misread both intrinsic public interest and the changed nature of Guatemalan politics. The different outcomes, and the more fundamental changes accomplished with the earlier legislation, suggest the need for a more complex model of public involvement in reform, one which recognizes that more is not always better; that it, like many other aspects of reform is neither a one-time occurrence nor a unidimensional phenomenon; and that to the extent reformers can control or anticipate its activation, they should factor this into the type and amount of change they are attempting.

***The overlooked consequences of public campaigns:*** "Support building activities" may have their most important impact in a wholly different realm -- that of securing elite commitment to reform. As discussed, political elites often favor public campaigns because of their personal benefits. Backing a justice reform, especially one with donor financing, is frequently perceived as a career builder, but to have this effect, it needs publicity. Although USAID has discouraged the most overtly opportunistic campaigns, it may be overlooking one important side effect. Once a leader, faction, or party puts its name on a reform, it may be buying into more than it anticipates. They now have a stake in making that reform work. This first means ensuring the law or proposal is approved, but beyond that will involve protecting the process of implementation and whatever additional changes are required to make that successful. It is likely that many of USAID's political allies, figures who became the national champions of the reform movement, never had any idea when they accepted the role how long or how difficult a process this would be. Had they intuited this, they might well have selected another cause. Opportunism in short works in both directions -- and a certain amount of self promotion is a small price to pay for what may be a major, if initially unsuspecting ally.

***Summary:*** The involvement of the public in justice reform programs is far more problematic than the term "public support" implies. The most obvious implication, that reform originates in public demand and that public pressure is desirable and necessary to push it through, rarely matches reality.

Although projects have increasingly attempted to incorporate these and other forms of public engagement, the conceptual and technical frameworks guiding their actions have not been adequate to the task. As the publicity budgets and activities of private companies and political parties indicate, this is no place for amateurs or token efforts.<sup>60</sup>

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<sup>60</sup>If USAID missions really have a way to meet some of their targets (e.g. increasing public support for reform measures by 50 percent over a three year period) on the normal shoe string budgets, they could sell the technique to Coca Cola or the Republican or Democratic Party, and never have to request another cent for foreign assistance.

In so far as most justice reforms have been negotiated and initiated without public involvement, attention and technical input might be more fruitfully invested in deriving information to guide reform design and in educating potential users as a reform is implemented.

The exceptions to this rule are issues (usually those more peripheral to the core reforms) which automatically attract public attention, or political systems where even the core, highly technical questions become enmeshed in broader power struggles -- both for their symbolic value and for the concrete resources their resolution will provide to competitors. Where the public becomes involved in its initial design, reform is likely to be delayed, less fundamental, and less practical. This may be unavoidable, but it probably should not be encouraged.

Nonetheless, limited public relations campaigns may be useful, not to secure public commitment, but rather to ensure that of political elites. Increased media coverage may serve a comparable function, raising the issue to the attention of elites and the public alike, and thus encouraging elite response. Public support has yet to make a difference for a Latin American reform, but the fear of public failure has undoubtedly helped keep allies pushing for their success.

## **A REVISED DEMAND-SIDE MODEL OF DONOR-ASSISTED JUSTICE SECTOR REFORM**

“If gaining a place on the policy agenda requires changing the way people think about an issue, then the devices and strategies used to accomplish this merit examination.”<sup>61</sup>

Like any reform, justice reform is a process-- both the formulation of its content, and the mobilization of political resources to permit its enactment and implementation occur over time. Managing the process requires finding openings and using them to leverage still greater changes. This is true whether a reform is locally initiated and implemented or is the result of donor involvement. However, a donor's presence does change the political calculus, and thus the following comments should be interpreted in that light. Purely indigenous reforms, attempted without the benefits of external financial and political resources, would clearly require a different kind of power base and quite probably could not be so cavalier about discounting elite support and the mobilization of a wider number of public constituencies. Donor-assisted reform must work within the national political process, but it does not face the same constraints as does a strictly internal issue.

While it is often easy to define what needs to be done -- where a justice system must be fixed -- it is the political aspect which determines whether it is possible and with what chances of sustainability. The initial political setting is not immutable, but it sets important constraints on what can be accomplished and how much and what kind of resources will be required. The demand-side reform model has increased sensitivity to these issues, but as argued here, it requires further elaboration if it is to guide program design and execution. The following suggested adjustments draw both on the Latin American experience and on more general literature and theory on policy-making. As regards the latter (reviewed in more detail in the annex), the most important points are the addition of decision-making models which depart from the simplified “rational paradigm” and which emphasize the particular constraints posed by complex, collective agenda setting; a consideration of the changing roles of interest groups in Third World environments; and selected findings on the impact of system characteristics and different issues on policy-making styles. Before turning to these adjustments, there is a final consideration on the overall constraints posed by systemic characteristics.

### **Macro Systemic Characteristics:**

There are aspects of the political setting which are far less manipulable, and which over the short to medium run should be treated as constants. Because of their lesser variation in contemporary Latin America, little has been said about regime types and the more conventional distinctions between open (democratic or democratizing) and closed (authoritarian or oligarchic) or more or less stable systems. These macro-distinctions do not alter the general principles of reform

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<sup>61</sup>Daniels and Martin, p. 29.

management, but they comprise the parameters within which it operates, affecting the availability of potential allies, the extent of feasible change, and its chances of sustainability. From the reformers' standpoint, the systems of choice are those with a relatively stabilized democratic opening -- the majority of Latin American countries -- where there is a greater choice of potential allies and more opportunity for fundamental change. Ironically, closed, but stable systems offer some advantages, because they make it easier to identify durable alliances and assess the limits of sustainable change. Obviously, closed systems offer the least possibility for fundamental reform, but where ruling elites feel secure enough in their positions, they may be willing to allowing modernizing, professionalizing change in areas that don't appear to affect their core interests. So long as reformers don't believe they are further entrenching elite control, programs here may help establish independent professional identifications, within and outside the public sector which can build a basis for future reforms.

The most difficult situations are unstable (i.e. transitional) systems. Here any reform faces one or more threats to success -- being caught up in the struggle to define and consolidate power (where both the objectives and the means of justice reform become potential resources for the competitors, a phenomenon not unknown, but evinced to a lesser degree throughout Latin America), being negated by a sudden regime shift (Cambodia with the Hun Sen coup, Peru in any number of prior reforms), or being sustainable only with continued massive donor support (present day Haiti). While these are the very systems most needful of an enhanced rule of law, they are also those where efforts to promote it withstand the most risks. Since a closed system may evolve through a lengthy, unstable transition, it implicitly poses similar risks and caveats for would-be reformers. Thus, although differences in regime type and stability do not usually preclude any reform whatsoever, they place constraints on what can be achieved, at what cost, and with what chances of sustained improvement. Like the more politically neutral limits posed by financial and technical capacity, they must be considered in determining whether the effort is justified by the likely results. Justice reform, like all development policies, is essentially a question of probabilities -- skillful players can improve the odds, but can never eliminate the risks and uncertainties

### **The Politics of Justice Reform: General Conclusions**

With these general cautions in mind, the Latin American experience (most of it in regimes which appear to have stabilized in a quasi-democratic mode) and the additional insights on policy making suggest a series of further conclusions:

1. In developing a reform strategy, several elements are essential: a definition of the objective situation (a problem statement)<sup>62</sup> and of the desired improvements; a determination of local

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<sup>62</sup>I will not get into the poststructuralist debate as to whether a "problem" can ever be objectively defined. Obviously, problems are socially constructed (Daniels and Martin, especially Chapters 1 and 2), but planners must reach some intersubjective agreement on what they are attempting to change if they are to develop adequate technical and political strategies.

resources (technical, financial and institutional) and thus of the potential for sustainable change; an estimate of the resources donors are prepared to place; and an assessment of the political environment -- how the political factions line up initially, and how such factors as issue salience, downstream effects and linkages, and the mobilization of additional support and opposition are likely to affect future developments. The problem and resources are to some extent givens; the political environment can be manipulated. The ease of and scope for that manipulation will also be conditioned by such macro characteristics as system openness and stability

2. Departing from this initial analysis, the decision to undertake a reform hinges on an assessment of risks and potential pay-offs. Success is never absolutely impossible nor absolutely guaranteed, and it will obviously be affected by the level of resources, quality of the strategy, the skills of the implementers, and sheer luck. Where risks and uncertainties are high, the assessment may indicate the desirability of partial measures, aimed at placing a marker, testing the waters, or altering the political environment. While these may be described as demand creation, potential activities extend far beyond the usual reliance on building nongovernmental constituencies.

3. Reform is a highly political process, both in its impact and in the means by which it is affected. While most participants in it act rationally, theirs is a bounded rationality. Their understanding of what will happen and their appreciation of how it will affect them is based on incomplete information, partial and sequential evaluations, and often prioritizes interests and concerns that to the “objective observer” might seem entirely peripheral.

4. The consequent variety of payoffs and values reform signifies for the potential universe of players means that their activation and participation almost never derives from a single, comprehensive discussion of the pros and cons. An acceptance of this fact is the key to successful alliance building. The reformers, those most directly interested in reform, must learn to work within this mixed calculus, to recognize the disparate interests of active and potential stakeholders, and to deal with them on their own terms.

5. Donors and planners tend to overemphasize initial plans, agreements, and strategies, pay far too little attention to how they all develop over time, and overlook the potential for changing perceptions and positions and for accelerating or delaying discussion of critical details so as to better control the outcomes.

6. The political calculus changes over the course of a reform; what is needed to get approval; get ownership, get passage, and work implementation are all different. Some support is permanent or can be made so -- a public commitment to reform may extend to subsequent measures not initially anticipated. Opposition fluctuates more than believed --once a change seems irreversible, former opponents often shift strategies to make the best of it. Also some opposition is based on fear, which proves unrealized once programs go into effect.

7. While elite support appears helpful, the benefits can be overstated. In the early stages of reform, acquiescence may be more useful because it allows reformers to develop their proposals

and build secondary coalitions (constituencies) around them.

8. The role of constituencies is highly variable and very situation dependent. They almost always hold a narrower view defined by their specific interest, and consequently must be managed if they are not to pull a reform apart. Except in the rare cases of institutionally initiated reforms (Costa Rica) they are usually less critical to initial approval, but may help overcome opposition (Panama, El Salvador); and keep reform on track (maintain pressure to do what was promised, monitor change). The general rule is to keep the supporting coalition as narrow as possible in the early stages, and broaden it gradually as the reform enters implementation. At that stage, building support within the affected institutions and among their users is essential.

9. Demand like political will may be an overrated commodity. It is different from dissatisfaction and may also originate in a perceived opportunity. Widespread complaints about the quality of justice often go nowhere, whereas a small group which sees a chance to act may be sufficient to initiate a major change. In this sense a concrete proposal or plan of action is an important asset in its own right.

10. Public dissatisfaction never directs a reform, but it can provide impetus for change and be used by reformers to overcome opposition to their specific proposals. Strong public pressure was instrumental in pushing through the 1991 constitutional reform package in Colombia, but it also justified Alberto Fujimori's highly controversial actions in post 1992 Peru and threatens some aspects of reform in contemporary Guatemala. Because public involvement can be used to such disparate ends, its premature or unnecessary activation is risky.

11. Reform's educational effects are not all positive. With time, actors become more aware of its real threats to their interests and its potential for advancing unrelated and possibly undesirable political projects. Thus, while implementation necessarily proceeds slowly, there are advantages to getting commitments, however symbolic, to fundamental change early on -- before their real significance is recognized by those best positioned to manipulate outcomes.

### **A Revised Supply Demand Side Model of Justice Reform**

The supply-demand distinction remains useful in discussing reform strategies. However, the elements and sequences require some realignment. An effective reform requires a constant interaction of the two sides; whether supply or demand changes come first, if they are not quickly complemented by the other half, progress will be halted. Thus, rather than a sequence, the overall process is more like a series of expanding circles. On the supply side, two types of changes are essential: normative and structural changes, affecting institutional mandates, relationships, and powers; and institutional strengthening, the provision of skills, attitudes and organizational resources to allow institutions and their members to respond to their new roles. Sometimes an adequate normative and structural framework already exists and only institutional strengthening is required, but without both elements, change is not likely. Like supply and demand, the relationship between normative change and institutional strengthening is iterative. Despite a

frequent preference for setting the normative aspects first, Latin America's historical gap between legal and practical reality suggests this may not be the best way of ensuring real change. Since these more technical elements of reform are addressed in the other manuals, they are not discussed further here. However, the supply side, technical design, is no less critical than demand in producing improved outputs.

On the demand side, are the intra- and extra-institutional pressures to encourage or force new behaviors. What is specifically required is highly system dependent, but whereas reform often can be initiated with a small supporting alliance, it usually needs increasing and different types of political input as it evolves. Its introduction and initial support may be based on a very specific demand, a generalized but unfocused malaise, or a window of opportunity (often provided by external resources or examples) -- what these have in common is their ability to establish reform as a viable political issue. This point of entry does not necessarily delimit the reform objectives or those of the supporting allies (who may use it as a pretext for forwarding aims that are narrower, broader, or almost unrelated).

The issue must evolve into a policy and plan of action. The details and even the feasibility of this first plan are probably less important than its statement of overall objectives and its definition of some first, concrete steps. In fact oversimplification may be an asset at this stage, postponing conflicts over the variety of interests that will eventually be affected. Donor assisted justice reform resembles what Brautigam and others call "insulated policy making," where decision making authority is delegated to "units within the government ... insulated from routine bureaucratic processes, from legislative and interest group pressures, and even from executive pressures."<sup>63</sup> Since government often lacks the skills for (or sometimes the interest in) this kind of policy, its actual planning is often done by nongovernmental experts, either by delegation or preparatory to its presentation.

The reform goals and the further process of promoting them are both dependent on the characteristics of the surrounding society and polity. While the ideal targets may always be the same, they will have to be adjusted to system capabilities. Inspired by the prospects of external funding and political pressures, both domestic and foreign reform planners frequently propose unrealistic, unattainable, and unsustainable targets. This is the danger of insulation. It can be countered by providing additional information and asking the right questions. A realistic analysis of available financial, human, and institutional resources is desirable as early as possible. Reformers must realize that a society cannot invest resources it does not have, or even a good share of those it does possess on improving justice. Compromises may be extreme.

Planners must remember that justice reform is not revolution. Public discontent is a good incentive, but realistically, support must be sought among those who already have power, and thus represent some version of their interests. Those interests can be educated, but absent a broader political revolution, a reform which pits mass interests against those of the elites will not

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<sup>63</sup>Haggard and Webb, p. 13, cited in Brautigam, p. 9.

succeed. The best strategy appears to be a combination of subterfuge (introducing counter-hegemonic changes elites do not notice) and the education of elite perceptions (convincing them that small sacrifices are in their longer term interests -- or linked to more highly valued goals). Here initial demonstration or pilot activities may be far more convincing than talk - - carefully chosen, they can help eliminate unrealistic fears, suggest that changes are possible, and give wary allies some immediate show pieces to pique their interest.

Over the short to medium term, donor resources and will can substitute for all but the most minimal local constituencies and allies. Potential stakeholders should be identified early as their entrance will be critical to further design and effective implementation. These allies should include some members of the political, socio-economic, or institutional elites. However, unless elites pose considerable opposition (in which case a reform may be impossible) a few supporting members (a Minister of Justice, a Supreme Court president, or a few economic leaders) may be all the "political will" that is needed at the onset.

So long as it does not lose touch with national realities, a high level of insulation is helpful at the start. As Brautigam notes of economic reforms, it "'may be less helpful or even dysfunctional' while reforms are being consolidated."<sup>64</sup> Because of their narrower direct impacts, justice reforms do not require the mass education campaigns of economic programs. They do, however, require that those most directly affected -- judges, police, private lawyers and other system incumbents -- be converted to the cause, and that potential users (at least parts of the broader public) be educated in the new procedures and convinced of their benefits. Prior to and during implementation, the activation of special interest constituencies (public interest NGOs, human rights groups, economic lobbies, associations of lawyers) may also be useful, although this is highly contingent on the "normal" policy process. Where such groups have not had a long tradition of political engagement, or where they are more attuned to international than domestic constituencies, their involvement in the early planning stage may introduce issues and conflicts which are not amenable to compromise solutions. They are, however, essential to such activities as monitoring progress and detecting problems, both on their own and through their involvement of the broader public, and to the conduct of public education campaigns, the provision of assistance to citizens, and downstream reform planning and implementation. The latter may include such complementary activities as those through or with bar associations and public and private universities.

In summary, justice reform requires continual political management, not the one-time mobilization of will and support. Both technically and politically it progresses in stages, although its advance will be aided by a good initial diagnosis of the full range of technical and political constraints and opportunities. If there is a sequence, it is best envisioned as an expanding network of change initiatives and the formation of the political conditions to enact each of them. Although the supporting alliance will expand, specific members may enter and exit as their resources and interests gain or lose relevance. In very closed, centralized, and static political systems, the

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<sup>64</sup>Brautigam, p. 9. Internal quotation is from Nelson (1993, p. 438) as cited by Brautigam.



support or acquiescence of a few key actors will remain critical. More open, fluid (but not unstable) systems, provide the opportunity for changes even among central allies. In highly unstable systems, the process is complicated by often unpredictable shifts in the relative power and concern of all alliance members, for whom political survival must remain the priority dictating all of their actions. Here, unless donors intend to remain a major presence for some time, their aspirations may have to be limited to affecting events at the margins.

The following illustrations represent the process of identifying a reform program and designing a strategy. As opposed to the existing reform decision-tree, they separate the two tasks. I believe some of the confusion about demand side reforms and especially about sequencing originates in an effort to translate the analytic stages to implementation.

## **ILLUSTRATION 1: THE REFORM STRATEGY**

## ILLUSTRATION 2: IDENTIFYING A REFORM PROGRAM

### A. Assessing the Situation

#### 1. Problem statement: Real and ideal situation and the intrinsic importance of closing the gap

This is the conventional sector assessment focusing on the existing situation and the particular problems it poses for higher order goals. It may include some of the following elements, but has been separated for analytic purposes -- to highlight the importance of addressing them in their own right.

#### 2. Technical resources and constraints

Institutional resources: strengths and weaknesses of existing institutions, institutions that may have to be created, external and internal obstacles to their effective performance

Financial resources (domestic and external): what is being spent on the sector, and what resources will be available for initial investments and long term operations

Technical resources: includes human resource base both within and outside sector, the availability of technical solutions and models for problems identified

#### 3. Political resources and constraints

The initial line-up -- is there interest in, demand for reform?

Downstream allies and opposition -- who will be affected by the proposed changes and when are they likely to be activated

Potential for alliance building, linking or delinking issues, leveraging cooperation

### B. The Analysis

Point 1, the problem statement, defines the potential benefits. Points 2 and 3 define costs, risks and uncertainties. The analysis is a comparative judgment. Its goal is to select a reform objective (derived from elements of the problem statement) with the highest potential benefits relative to costs times risks. Since the elements can hardly be reduced to fixed quantities, this is a fairly subjective process. However, an effort to document it may cut down on nasty surprises.

## **ANNEX: OTHER APPROACHES TO PROBLEM SOLVING AND POLICY MAKING**

The above discussion has repeatedly referred to the inadequacies of USAID's implicit policy making model and recommended attention to some alternative approaches. The following summarizes some of these other theories for those interested in more details. It is suggested that not just the ROL strategy, but the Agency's entire approach to participation might benefit from a consideration of the arguments in this broader literature.

### **Alternatives to the rational decision making model**

The USAID approach implicitly uses a rational decision-making model to explain how reform policy is derived and how actors come to support or oppose it. For at least three decades, researchers have contested this model, as applied to individual and collective (i.e. organizational) decision makers, and to their public audience, arguing not that actors are irrational, but rather that reality demands shortcuts and problem solving protocols. These determine not only what is decided but whether a decision in fact is taken. In conjunction the various approaches imply a bias for the status quo (because of the costs of accumulating information on alternatives and the difficulties of dealing with uncertainties and risks), a limited search for alternatives (Lindblom's<sup>65</sup> "muddling through" in which actors confronted with a problem test options sequentially, not simultaneously, and usually settle for the first one which seems to represent an improvement), a preference for established practices and procedures even in the design of new policies (Allison's<sup>66</sup> organizational and bureaucratic models of decision making); and the fact that in collective decision making actors may be resolving different problems and pursuing different partial goals (Simon's<sup>67</sup> side payments, the individual benefits actors derive from collective action where the common goal may be so distant as to affect none of them directly). Not discussed in this literature but familiar to participants in the policy process are variations like the "problemless" or opportunistic solution -- a proposal occasioned by a problem-solving exercise but seemingly entirely driven by such organizational or individual agendas as a desire to utilize idle resources, expand an institutional mandate, or place a personal marker.<sup>68</sup>

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<sup>65</sup>Lindblom

<sup>66</sup> Allison's two model combine the idea that organizations use the tactics with which they are most familiar and that they also strive to defend organizational interests even as they are addressing broader problems. If to the man with a hammer, every problem looks like a nail, this is partly because he knows no other solution, and partly because "non nails" exclude him from the process.

<sup>67</sup>Herbert Simon

<sup>68</sup>Such proposals are readily identified by their greater attention to what the mechanism will look like than to the problem it resolves. The perennial suggestion that donors create a Latin American judicial school (to train all Latin American judges) is one example. While proposals

There are in addition, studies which emphasize less “rational” elements of the policy process. Murray Edelman’s<sup>69</sup> work on symbolic politics is a case in point -- he argues that in much policy making, only a portion of the participants are pursuing concrete ends. For much of the public, outcomes are so distant and difficult to determine that their involvement and taking of positions may be more emotional or symbolic. Edelman’s prime example of symbolic politics was foreign policy, but domestic issues like justice reform are also likely candidates.

As applied to the justice sector and the furtherance of justice reform, these approaches suggest obstacles transcending the usual explanations of cumulative vested interests. The difficulties of promoting change do not lie only in what the powerful derive from the status quo. They also include the costs and challenges of envisioning and agreeing on a course of action to improve it. Even as actors agree on the need to change an existing situation, differences in their short and long term goals, perceptions and definitions of what is wrong, and preferences for certain routine practices may put them in conflict and will prevent the formation of a specific plan of action unless compromise solutions can be reached. Such compromises rarely represent the most “rational” remedy, but they guarantee a little satisfaction for everyone. They also suggest the inherent disadvantages to beginning reform design with the broadest possible public discussion of the issues. This approach, by attempting to address all views and interests at the start, may force unnecessary compromises and introduce issues that if attended later might prove irrelevant. Deciding which views should be included is both a political and technical determination. However, the answer usually is less than the universe of possibilities.

### **Interest group theory**

The literature on problem solving and decision making has implications for the activities of organized constituencies or interest groups. Another body of writings addresses their specific role in the political process, a role which is far less obvious than it appears. Although in some sense interest groups are what politics is all about (“when the groups are adequately stated, everything is stated”<sup>70</sup>) what is most relevant for present purposes are those empirical studies attempting to determine what specific groups really do. Because these are usually case studies, findings vary and can hardly be summarized here. The variation itself is important, belying the conventional wisdom that these groups’ dominant function is to aggregate the interests of their members or those they represent and communicate them to policy makers to influence the latter’s

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have specified locations, available buildings, and even directors, they have never explained what this costly and logistically complicated mechanism adds to that already done by existing national training programs. A recent work on justice reform in the U.S. discusses the phenomena as a major impetus behind these programs -- “agendas and solutions seeking problem.” Daniels and Martin, p. 30.

<sup>69</sup>Edelman. See also Gusfield.

<sup>70</sup> Bentley, p. 208.

decisions.

As regards the relationship with policy makers, early U.S. based studies<sup>71</sup> (from the 1950s and 1960s) often showed interest groups focusing their activities on those predisposed to agree with them. They provided information and other resources to advance a shared policy interest, but were less engaged and less effective in converting the opposition. As regards the public, the relationship was still more complex. First, interest groups have their own organizational interests, which at least transcend and may coincide only imperfectly with those of their members or of the public they represent. Second, as in the case of dealings with political elites, their messages tended to be directed at and attended by individuals already sympathetic to their position. They thus might strengthen the resolve of those predisposed to agree with them, but were less effective in changing minds. Interest groups clearly increased attention to an issue, strengthened the resolve of sympathizers, or formed opinions where none existed previously. However, where their perspectives and agenda differed from those of the public, there were questions as to how this affected their ability to shape opinions or actual policy.

Over the last twenty years, interest group organization and activities in the U.S.(and elsewhere) have altered significantly, as has the literature attempting to describe and explain them<sup>72</sup>. In the U.S. alone, the number and resources of interest groups have increased dramatically, the nature, purpose, and focus of their contact with the policy making process have become more variable, and the means through which they operate have changed radically. While there is still much of the “old-breed” insider lobbying (i.e. providing support and supporting information to sympathetic policy makers), interest groups spend as much time informing themselves on policy as attempting to influence it; have expanded their role in electoral politics through the adoption of direct marketing techniques to raise funds and mobilize voters; have become active in state and local ballot initiatives and referenda and in the selection of candidates, especially at the national level; “pursue grass roots lobbying with a vengeance,”<sup>73</sup> often defining and shaping rather than aggregating interests; cover issues ranging from the traditional local “pork barrel” to those with a truly national scope; and have developed a coalition building politics among themselves. Most of these operative changes are linked to transformations in the structure of US society, the broader policy making process, and not incidentally, in communications technology. The more fundamental questions, still under debate by observers, are whether the increase in types and level of activity has radically altered the influence of organized interests on policymaking, has correspondingly changed the impact of specific interests and publics, and has transformed both the way interests are defined and the process through which conflicts among them are resolved.

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<sup>71</sup>The classic work here is Bauer, Pool, and Dexter.

<sup>72</sup>After years of inattention, scholarly interest in the topic has boomed. Two overviews, indicative of current arguments and with extensive bibliographies are. Petracca and Herson, et al.

<sup>73</sup>Petracca, p. 21.

As regards interest group activity in Third World countries, the US based findings are relevant but hardly directly transferable. For better or worse, they may indicate future trends, but they are a poor guide to understanding contemporary processes. While the practices and even the messages of some US lobbies have been imitated by their Third World counterparts, they are being applied in radically different social and political settings. A middle class based, communication technology rich society offers opportunities for organized group activity only beginning to appear in much of the Third World. Among and within all levels of government, the US political system continues to expand the points at which outsiders may access policy makers. In most Third World countries, decision making remains highly centralized, territorially and within the legislative and executive branches of the central government. In many, the formal policy-making apparatus is secondary and the most important decisions continue to be made through unofficial negotiations among top level elites, most of whom hold their power directly (i.e. because of their control of economic or political resources) not through organizational representation. In all branches of government, technical staff remains in short supply, reducing opportunities for staff-to-staff exchanges of information. In short, whatever the influence of organized interests in shaping policy in the US or other developed countries, Third World settings do not yet afford the social and political infrastructure for a comparable role.

On the other hand, interest associations and lobbies in the Third World enjoy certain unique advantages which augment their influence in specific areas. The shortage of professional staff in public organizations encourages reliance on outsiders (including representatives of organized interests) to draft legislation or develop proposed programs. In some countries,<sup>74</sup> a limited number of officially recognized, economically and functionally based groups have direct access to policy makers, a pattern more reminiscent of European corporatism than of US practices. While such “coopted” organizations are frequently accused of under- or misrepresenting their members’ interests, they at least have been assured of consultation on issues affecting them. Other groups, more identified with opposition causes, have access to another political audience -- in international organizations and foreign governments. Here their role in calling attention to problems and promoting new policies may be far more important than their direct impact within the national arena. Organizations of all types have also shown a remarkable ability to get members and sympathizers into the streets to express support for their causes. This usually elicits some response from government, but it is often repressive, transitory, or highly symbolic. In the extreme, civil society groups have been credited with leading resistance to and bringing down repressive governments in Eastern and Southern Europe and parts of the Third World.

There are signs, however, that these and other “traditional” means of influence are losing force in the face of more fundamental regime change. Observers frequently note the weakening role of

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<sup>74</sup>Examples include labor, business, and peasant organizations allied with the ruling party, PRI, in Mexico; peak business organizations in several countries, and labor unions with partisan affiliations, when their party is in power. In addition “social forces,” like the military or the church are often important behind the scenes interest groups.

the more successful protest groups and movements as more democratic systems emerge.<sup>75</sup> Where these organizations substituted for political parties, they may lose members once the latter (re)emerge. Potential discrepancies between their ability to form international opinion and that of their own elites and publics are a growing source of friction. Their reliance on external funding, while guaranteeing them a presence, is inappropriate or simply insufficient to give them more than a toehold in domestic electoral politics. Their situation is complicated by their visible difficulty shifting from an opposition role to one of negotiation and cooperation. Regime transformation poses other problems for coopted organizations. More open competition and the emergence of a democratic opposition has threatened their privileged position and their monopolistic claims to represent certain social and economic interests. In short, the well defined if frequently limited powers of Third World civil society organizations are being affected by the wider political change many of them sought to introduce. Over the long run, the transformation is inevitable and desirable. Over the shorter term it poses obvious problems for these organizations and for those attempting to work through them to influence policy makers and the public.

To the extent civil society organizations and reform constituencies function as interest groups to promote ROL programs, they have not escaped these effects. Although most are relative new comers, they arose during a time of political flux and have adopted methods of operation that may be quickly outdated by further changes. In most cases, they operated like the old breed insider lobbies, providing informational resources to the converted, and strengthening the resolve of these same groups. By relying on contacts with a few strategically located international or local allies, they shaped outcomes by redefining issues, but were less effective in forcing decisions or substantially altering public and elite preferences. When they have done either it has usually been through recourse to international audiences rather than to broader national ones. However, their historic origins have made it difficult to shift from a politics of confrontation to one of democratic give and take, to form effective alliances, to develop relationships with a wider number of decision makers, or to build a resource base with more relevance in an era of electoral politics. In short the easy assumption that interest groups, even those purporting to represent the public interest, can be used to promote justice reform by raising levels of political will and mobilizing public support overlooks a number of pitfalls and uncertainties along the way.

### **Policy process**

There is a third body of literature which addresses these questions from another direction, focusing not on group activities but on how actual policies are made in Third World settings. ]Much of this has been addressed to economic reforms<sup>76</sup> or foreign policy.<sup>77</sup> The literature, which

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<sup>75</sup>For a discussion of this phenomenon in Chile, see Oxhorn.

<sup>76</sup>For a recent overview with a list of references, see Brautigam.

<sup>77</sup>See Hey.



builds on a much older and larger body of work on policy making in the U.S.,<sup>78</sup> is both descriptive and prescriptive -- an effort to determine why some countries have been more successful in enacting and implementing reforms and to provide recommendations for future policy makers. Among the general findings are the differences dictated by particular political systems (and such factors as their socio-economic base, levels of competition and inclusion, and how participation is normally channeled), the type of issue, and the nature of the stakeholders. In regard to economic and other domestic policy, findings also indicate that the breadth of involvement or participation may vary at stages of the reform -- planning and enactment may require little participation, but implementation may require far more. The emphasis is on management of reform process and of participation in it as the key to success. "Economic policy reform is a highly political process, affected by state capacity, international pressures, domestic interests, and the institutional legacies of previous choices. Policy-makers must walk a fine line between insulation/autonomy and participation."<sup>79</sup>

Because so much of this literature focuses on economic and similar issues with far reaching consequences for a variety of social groups, translating its lessons to justice reform requires some modification. Justice reforms usually have a less immediate impact on all but a small portion of the population. This is both an advantage, because it requires dealing with a smaller group, and a disadvantage, in allowing room for the entrance of emotional, symbolic issues. When the public becomes enraged about corrupt judges or crime, they may base their reactions and their solutions on extremely limited understandings of the underlying problems. Firing all the judges or locking up all criminals are never feasible policies, but they frequently attract a backing. Also unlike economic reforms, mechanisms for consultation and participation, even by those directly affected, are rarely present. This is likely to bias consultations, limiting both the views represented and the objections heard. It can distort input into reform, and create obstacles to support building after the reforms begin -- when broader cooperation and understanding are vital to effective implementation. It suggests that however a reform is initiated, and whoever takes part in the initial planning and enactment, more thought is needed as to the eventual incorporation of additional stakeholders, whether they be agents (reform implementers), traditional clients, or new users. Coalition and support building thus may become more rather than less important as the reform progresses, and the compromises and modifications it introduces will be a constant rather than a one-time theme.

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<sup>78</sup>See Rein for an overview and other references.

<sup>79</sup>Brautigam, p. 5.

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Rule of law, the mechanism, process, institution, practice, or norm that supports the equality of all citizens before the law, secures a nonarbitrary form of government, and more generally prevents the arbitrary use of power, which is typical of despotism, absolutism, authoritarianism, and totalitarianism. For instance, a typical rule-of-law state will institutionalize some means of shielding legal officials from interference, political or otherwise, that threatens their independence. Accordingly, the institutional separation of the judiciary from other branches of government is commonly thought to be an important feature of rule-of-law states. Other measures to ensure fair access to legal institutions may also be important for rule-of-law regimes. Political will, constituency, building and public support in rule of law programmes. <http://issat.dcaf.ch/content/download/2200/19056/file/Hammergren%20Political%20Will.pdf>. 3 Malena, C. 2009. From political wont to political will: building support for participatory governance. [https://styluspub.presswarehouse.com/resrcs/chapters/1565493117\\_excerpt.pdf](https://styluspub.presswarehouse.com/resrcs/chapters/1565493117_excerpt.pdf). Generating political support for anti-corruption reforms in situations like these is extremely difficult because public officials benefiting from corrupt deals will resist the call for more transparency and accountability. 9 Brinkerhoff, D.W. 2010. "Unpacking the concept of political will to control corruption", U4 Policy Brief, Bergen: Chr.