

**INEQUALITY AND UNCONSOLIDATED  
DEMOCRACIES IN LATIN AMERICA: THE ROLE  
OF FLAWED JUDICIAL INSTITUTIONS**

by

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in Latin America: the role of flawed judicial institutions**

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## **ABSTRACT**

Latin American democracies are characterized by three traits – illiberalism, inequality, and weak judicial institutions – which are connected to each other through a complex system of mechanisms. Flawed judiciaries diminish both the capacity of the state to guarantee constitutional rights and the ability of democracy to empower marginalized citizens. These trends contribute to systemic bias and discrimination, the criminalization of the poor, and the private administration of justice. Reforming judicial institutions to increase the strength of the judicial branch and enhance horizontal accountability has the potential to dismantle structural inequality in Latin America and contribute to the deepening and consolidation of these democratic regimes.

**Keywords:** Latin America; Democracy; Inequality; Judicial systems; Democratic consolidation; Accountability

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## CHAPTER 1: INTRODUCTION

*“ [D]emocracies appear in the long run to respond better to the needs of the poor and the marginalized because they enable such groups to organize and mobilize within the political process.”<sup>1</sup>*

The appearance of a strong relationship between democracy and the improved welfare of the underprivileged may be an illusion. Nowhere is the ability of democracy to empower and mobilize the poor more in question than in Latin America. Between 1978 and 1992, nearly every country in the region made the transition to democracy, making Latin America one of the world’s largest clusters of democratic systems. Yet, in spite of these broad movements toward democracy, the region exhibits the greatest difference between the “haves” and “have-nots” of anywhere in the world. And although it is not the world’s poorest region, Latin America is home to some of the globe’s most unequal nations including Bolivia, Colombia, and Paraguay, which rank among the top ten most unequal countries on earth.<sup>2</sup>

On the surface, an assessment of political regimes suggests that democracy has little impact on the socioeconomic characteristics of societies. After all, many democratic nations are far less unequal than those in Latin America. Peering below the surface of these political systems, however, reveals that the region’s democracies exhibit conspicuous similarities that may explain

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<sup>1</sup>Diamond (1999), p. 7

<sup>2</sup>World Bank, World Development Indicators (2007)

decades of yawning gaps between elite and subaltern actors. Close analysis of what Guillermo O'Donnell calls the "intermediate dimension" reveals a complex relationship between the political regimes and the broad socioeconomic characteristics of the region's countries. O'Donnell argues that this relationship is made evident by *the effectiveness of the rule of the law or the extent to which encompassing citizenship is achieved by the entire adult population, particularly in regard to the rights and protections afforded by the state.*<sup>3</sup> Many political institutions comprise this intermediate dimension of democracies, but the judiciary is the focal point. More so than any other institution, it embodies the ways in which a given country's political, economic, and social systems promote encompassing citizenship and support the rule of law.<sup>4</sup>

The World Bank reports that 60% of the income gap between Latin America and southern Europe can be accounted for by the weak rule of law, corruption, and ineffective public administration.<sup>5</sup> In these ways, judicial dysfunction helps to explain widespread poverty in the region, however flawed judiciaries contribute to inequality to an even greater degree. Problematic judicial systems reduce the effect of economic growth on the poor and underpin bias, discrimination, and criminalization that disproportionately affect marginalized populations. Inadequate court systems also diminish the security of citizens' rights and contribute to more general democratic dysfunction, particularly in

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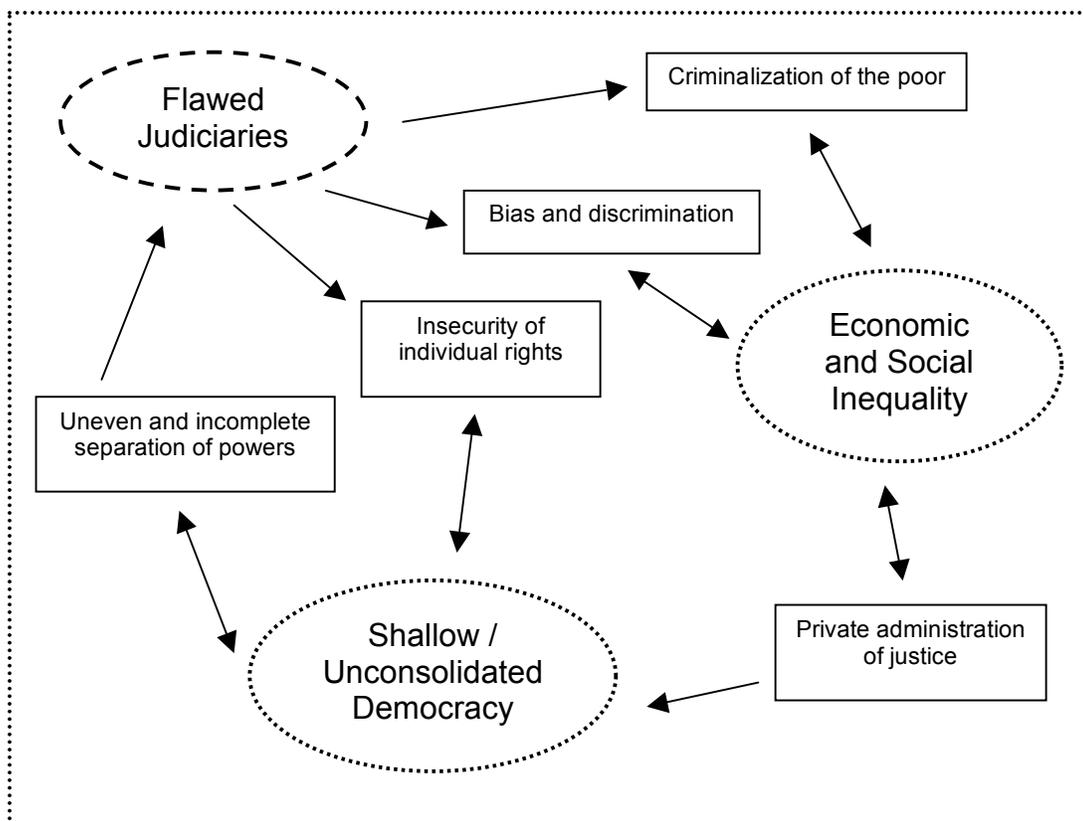
<sup>3</sup> O'Donnell (1999c)

<sup>4</sup> O'Donnell (1999c)

<sup>5</sup> Calleros (2009). The method by which the World Bank reached this conclusion is a point of contention among social scientists. The income difference between the developed states of Southern Europe and developing states of Latin America can also be partially explained by contrasting the patterns of the two regions' integration into the global economy and the characteristics of their middle classes.

regard to the uneven separation of powers among different parts of the state. As a result, despite the progress of the 20<sup>th</sup> century, most Latin American democracies are shallow and unconsolidated (see Figure 1.1).

**Figure 1.1 Connecting the Three Dimensions**



### Major Research Questions & Project Outline

Problematic judiciaries and shallow democracies cannot explain the whole story of Latin American inequality, which after all has been a distinguishing feature of the region for centuries. Many political institutions, including the judiciary, are replete with corruption and driven by patronage. For example,

clientelistic political parties encourage private sector elites to engage in rapacious behavior to a degree that would not be possible in developed countries, such as those of Southern Europe. Additionally, complex domestic and international forces of the present as well as the distant past have helped to shape the pattern of development in Latin America. The role of the military in political affairs, the shadow of the Cold War, U.S. foreign policy, and the impact of pro-market neoliberal policies on investment and resource allocation are just some of the complex forces at play in Latin America. It would be foolish to ignore their impact. But Kelly Hoffman and Miguel Angel Centeno have shown that the shape and scope of political systems do impact the pattern of development. States that reduce the participation of subordinate actors in the political and/or social spheres induce growth in the informal economy and undermine attempts to achieve reallocation of resources, either through redistributive policies or economic growth.<sup>6</sup> The remainder of this paper outlines the connection between one aspect of these political systems, judicial institutions, and the socioeconomic characteristics of Latin America's shallow democracies.

Two main questions guided the design of this project.

1. *Shallow democratic systems and socioeconomic inequality are pervasive in Latin America. What is their relationship to each other?*
2. *Can deepening democracy contribute to reducing inequality?*

Chapters 2 and 3 illustrate that democracy's intermediate dimension, the judiciary and rule of law, helps to explain both the socioeconomic characteristics

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<sup>6</sup> Hoffman and Centeno (2003)

of Latin American societies and the shallowness of the political systems in the region. Chapter 2 examines social and political features of 17 nations in Central and South America. The very high levels of economic and social inequality evident in each country in the sample group have a major impact on human welfare. At the same time, the welfare of society is impacted by the insecurity of individual rights, a glaring characteristic of the region's political systems. Assessing the level of freedom protected by and exercised in each country reveals that Latin America is a region of illiberal democracies, and that there is a broad correlation between inequality and the insecurity of rights.

Chapter 3 explains that making democracy more rights-protective (liberal), enhancing constitutional order, and expanding and deepening citizenship would have a wide set of implications for the region's societies and states. Deepening democracy could reduce inequality, as well. However, this process would also introduce a new set of tensions and challenges. By eroding relationships of deference and domination that underlie social hierarchies, deepening democracy may lead to new kinds of violence, injustice, and impunity.<sup>7</sup> The democratization of shared social space can also induce the withdrawal of elites and lead to the walling of cities and criminalization of the poor.<sup>8</sup> These tensions, however, can be reconciled by increasing the power of the judiciary.

In order to design judicial reform that contributes to continued democratic development and reduces inequality, it is important to understand the current state of the region's judicial institutions. Chapter 4 shows that the public has far

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<sup>7</sup> Holston (2008)

<sup>8</sup> Caldeira (2000)

less confidence in the judiciary than in the president and even the armed forces.<sup>9</sup> This distrust has many implications, yet it is underpinned by just four basic institutional flaws. Inefficiency, inaccessibility, interference, and corruption contribute to income inequality, social injustice, and the insecurity of individual rights. In other words, these common flaws help to explain both the social and political characteristics that are shared by many countries in the region.

Chapter 5 suggests priorities for future judicial reforms. Modification of judicial institutions can contribute to reducing inequality by making society more democratic and by stopping vicious cycles of crime and violence that disproportionately affect the poor. Guided by the work of Teresa Caldeira and James Holston, Chapter 5 shows how illiberal judiciaries contribute to the private administration of justice, and in combination with an ineffective public judicial apparatus, create and reinforce inequalities while undermining the legitimacy of democratic institutions (ergo public opinion's low regard for judiciaries).

The final chapter explores how demands for judicial reform will likely emerge from the bottom-up. To reduce inequality, increase freedom, and consolidate democracy, reform must incorporate several key aspects. Chapter 6 outlines the proper role of international actors, the importance of designing

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<sup>9</sup> The only public institution with confidence ratings as low as the judiciary is the legislature. Two-thirds of the public, on average, hold *little to no confidence* in either institution according to the Latinobarómetro surveys from 2007. This fact reveals how, despite decades of authoritarianism, Latin Americans still trust the executive more than the other two branches of government. This trend fits into Guillermo O'Donnell's framework for understanding many of the region's political systems as "delegative democracies." Since my aim is to explore the intermediate dimension of Latin America (namely, the judiciary), analyzing the impact of delegative democracy on the legislative and judicial branches is beyond the scope of this paper. For further reading on this topic, see O'Donnell (1994) "Delegative Democracy," *Journal of Democracy*, Vol. 5, No. 1 and O'Donnell (1999a) and (1999c).

reform in consultation with those affected by it, and the necessity of taking a synergic approach to modifying judicial institutions. While summarizing the conclusions of each of the previous chapters, the final chapter also suggests that an expanded understanding of the legacies of authoritarianism and the relationship between judicial institutions and informal markets would further contribute to reform that reduces inequality and deepens democracy in Latin America.

## **CHAPTER 2: A TWO-DIMENSIONAL ANALYSIS OF LATIN AMERICA**

One way to understand Latin America is to analyze the characteristics of its societies and political regimes. Although these traits differ from country to country, analysis of the sample group reveals striking similarities across the region. High levels of inequality and the insecurity of individual rights are evident in nearly every country. The first part of this chapter focuses on analyzing these traits and their implications. In the second part, scrutiny reveals a broad correlation between these two aspects of Latin American democracies, underscoring the need to further explore the intermediate dimension that lies between the socioeconomic and political characteristics of the region.

### **Socioeconomic Characteristics**

The levels of misery and poverty in Latin America would be reduced more substantially by redistribution of resources than by economic growth.<sup>10</sup> This dramatic degree of inequality has major implications for the health and welfare of society because of the strong relationships between inequality and access to educational and health services. It is no coincidence that Uruguay and Costa Rica, which exhibit some of the lowest levels of inequality in the region, have well-developed and effective systems of public healthcare and education. Moreover, Latin America illuminates the complex relationship between inequality

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<sup>10</sup> Hoffman and Centeno (2003)

and violence. Although violence can serve as a mediator between weak and strong groups in a society, its significance varies depending on who commits the violent acts.<sup>11</sup> When strong groups commit violence against weaker groups, violence can become the institutional norm (such as within the Brazilian police) and come to constitute the social order, which challenges the security of individual rights. This pattern forces societies to face a paradox: endemic violence inhibits the integration of liberal ideas into social, legal, political, and other institutions at the same time that it generates a need for greater rights protection.<sup>12</sup> Inequality can lead competing factions to use violence as a mechanism of mediation between opposing interests, but violence also reinforces and generates inequalities. The paradox of rights protection and the two-way relationship between violence and inequality underlie the depth and persistence of economic and social disparities in Latin America.

Hoffman and Centeno argue that no single formal institution is the source of inequality.<sup>13</sup> Economic structures that do not provide for an equitable distribution of income lie behind this socioeconomic characteristic. However, the administration of justice and the relationships between the political forces (people and interests) within the judiciary are closely related to the structures that determine the distribution of income.<sup>14</sup> At the same time, corruption, violence, and the incomplete consolidation of democratic power produce and reproduce inequalities. Additionally, the relationship between society and the state, which

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<sup>11</sup> Caldeira (2000)

<sup>12</sup> Caldeira (2000)

<sup>13</sup> Hoffman and Centeno (2003)

<sup>14</sup> Przeworski, et al (2000)

underpins inequality,<sup>15</sup> is affected by the tenuous rule of law and the insecurity of political and civil rights. Therefore, while it is not the only source of inequality, the foundational institutional framework of a country, particularly in regard to the judiciary, impacts both socioeconomic variables and the development of the political system.

### **Economic Inequality**

The reality of the experience of the individual in Latin America cannot be understood without an appreciation for the magnitude and depth of income inequality. The Gini coefficient measures the degree of inequality in a given society by placing it on a scale (usually from 0 to 1) and is the most commonly used measurement of income inequality. A Gini coefficient of zero indicates perfect equality (a society in which each household earns the exact same amount of income). The highest score indicates perfect inequality (a society in which one household earns all of the society's income). Latin America, exhibiting a regional Gini index of .51, is the most unequal region in the world. Despite some variation, every country exhibits more inequality than is typical of richer nations. Of the 17 countries selected for this study, Nicaragua is the most equal, with a Gini index of .43.<sup>16</sup> Bolivia ranks as the most unequal nation, with a Gini

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<sup>15</sup> Hershberg and Rosen (2006)

<sup>16</sup> The Gini coefficient is not a perfect measure because it can convey an illusion of equality when in fact poverty, instead of equality, is the defining socioeconomic characteristic. For example, although Nicaragua is the most equal nation in the region, it would be an error to assume this suggests the general well being of the public is better than in other countries in the sample. Rather, income "equality" in Nicaragua is a function of its widespread and profound poverty. It is also important to recognize that although Nicaragua exhibits less income inequality than any other country in Latin America, its Gini coefficient is still above the average for richer nations.

index of .60. Table 2.1 displays the level of income inequality for each country in the sample.

**Table 2.1 Income Inequality in Latin America**

<b>Country</b>	<b>Gini index</b>
Nicaragua	0.43
Uruguay	0.45
Mexico	0.46
Venezuela (B.R. of)	0.48
Costa Rica	0.50
Argentina	0.51
Peru	0.52
El Salvador	0.52
Ecuador	0.54
Honduras	0.54
Chile	0.55
Guatemala	0.55
Panama	0.56
Brazil	0.57
Paraguay	0.58
Colombia	0.59
Bolivia	0.6
<i>Regional Mean</i>	<i>0.51</i>

**Source: World Bank, World Development Indicators, 2007.**

Gini coefficients illuminate the degree of inequality that pervades in the region, but they do not show the way in which incomes in Latin America are additionally concentrated among the richest decile of the population, a unique feature of Latin American societies. In the region, the top 10% earns nearly half of all income, while in rich countries the top 10% usually earns less than one-

third of all income.<sup>17</sup> Table 2.2 displays the ratio of the income earned by the richest 10% to that earned by the poorest 10%. Nicaragua, the most equal nation, exhibits the least income concentration. Meanwhile, Bolivia, the most unequal nation, exhibits far more income concentration than any other country in the sample.

**Table 2.2 Income Concentration in Latin America**

<b>Country</b>	<b>Ratio of richest 10% to poorest 10%</b>
Nicaragua	15.5
Uruguay	17.9
Mexico	24.6
Peru	30.4
Chile	33.0
Honduras	34.2
Costa Rica	37.8
Argentina	40.9
Ecuador	44.9
Guatemala	48.2
Venezuela	48.3
Brazil	51.3
Panama	57.5
El Salvador	57.5
Colombia	63.8
Paraguay	65.4
Bolivia	168.1
<i>Regional Mean</i>	<i>49.4</i>

**Source: World Bank, World Development Indicators, 2007.**

The huge concentration of wealth at the top of Latin American societies paints a picture of a distinct form of Latin American inequality. Even though Bolivia

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<sup>17</sup> Reygadas (2006)

(168:1) exhibits a much higher ratio of income concentration than Nicaragua (15.5:1), the regional trend is clear: when compared to the rest of society, the rich are much richer in Latin America than any other region.

Interestingly, the income disparity between the middle and lower classes of most countries in the sample is not much different than that in the United States and other rich countries. If the top 10% of income earners are removed for analysis, the Gini coefficients for most Latin American countries are comparable to OECD countries.<sup>18</sup> Thus, Latin American inequality is best explained not by the persistence of poverty but by the persistence of extreme wealth. Luis Reygadas argues that globalization, and a variety of mechanisms associated with it, are linked to this persistent wealth among top income earners.<sup>19</sup> In the context of capitalism, those who start out with greater wealth are able to take greater advantage of the opening of trade and financial markets, but other issues that are not related to globalization also underpin the persistence of extreme wealth in Latin America. Political institutions that favor the wealthy and other elites *combined* with the forces of globalization can better explain Latin American's unique pattern of income inequality. Analysis of these institutions (see Chapter 4) shows why the subaltern cannot gain ground in the fight against the disproportionate power exerted by elites. Bribery and other forms of corruption, discrimination against marginalized groups, and the tendency to use violence as a means of mediating opposing interests between elite and subaltern actors contribute to judiciaries that favor the rich and reinforce existing economic

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<sup>18</sup> Reygadas (2006)

<sup>19</sup> Reygadas (2006)

injustice. These institutional flaws also contribute to the creation and reinforcement of social inequality.

### **Social Inequality**

Economic indicators do not fully illuminate the characteristics of Latin American societies. Race, class, and other socially constructed categories also create divides within mass society and even within groups of elites. The incidence of social inequality shows how in all societies, different individuals struggle against uneven access to opportunity and public services due to stereotypes, assumptions, and discrimination. Social inequality is inherently a function of the way socially constructed groups (like race and class) are defined and interact with each other, but there is no quantifiable measure for understanding this dynamic. Yet because social inequality is an outcome of the way individuals perceive themselves and others, this type of inequality can be understood by examining how members of society perceive differences among individuals. Public opinion surveys, such as those conducted annually by Latinobarómetro, reveal the common attitudes and perceptions that underlie social inequality in the region.

Latinobarómetro researchers ask a number of questions related to social inequality. Three of the most relevant are:

- To what extent is the equality of life chances regardless of origin guaranteed in your country?
- How much trust do you have in an indigenous person?
- How much trust do you have in a poor person?

Survey data indicate a broad consensus regarding the belief that equality is not guaranteed to any significant extent by the government or political system.<sup>20</sup>

Costa Ricans perceive the greatest guarantee of equal life chances, with more than 50% of survey respondents reporting a *complete or fair guarantee* of such equality. The greatest inequality is perceived in Ecuador, where more than 70% of people interviewed reported *little or no guarantee* of equality. On average, respondents in the sample countries report that the equality of life chances is *less than fairly guaranteed* at a rate of about 56%. Public perception clearly indicates widespread inequality in terms of social mobility and individuals' life potential.

One social construct that underlies the perception of this inequality is race. In Latin America, the economic and social divides between indigenous and non-indigenous peoples reflect a pattern of endemic racial discrimination. Throughout the region, indigenous peoples are by far more likely to live in poverty, suffer from malnutrition, and be illiterate than their non-indigenous counterparts. To understand the relationship between these circumstances and the perception of indigenous peoples in Latin American societies, Latinobarómetro researchers ask respondents how much they would trust an indigenous person or how much confidence they have in indigenous people. About half (51%) of all respondents reported *little to no confidence* in indigenous people.<sup>21</sup> Such a high level of discrimination reveals and contributes to the systemic nature of inequality in Latin America.

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<sup>20</sup> Latinobarómetro (2007)

<sup>21</sup> Latinobarómetro (2007)

Another aspect of structural inequality is the way that the poor are discriminated against throughout the region. Socioeconomic class has major implications for the way individuals are perceived by their peers. The public holds little confidence in poor people, although respondents tend to place slightly more confidence in the poor than they place in indigenous people. Especially where urban space has been democratized, the poor are often viewed as the cause of increasing crime rates and violence, although the withdrawal of elites from shared social space and the impunity of the police and other institutions of order actually underlie these trends.<sup>22</sup> Even so, because almost 40% of Latinobarómetro interviewees report *little to no confidence* in the poor, inequality in Latin America is a self-perpetuating characteristic of society. If living in the shadow of extreme wealth is not burden enough, the poor must also contest with the discrimination and distrust of the public.

Although one may expect to see evidence of a relationship between income and social inequality, there is very little indication that such a correlation exists in the sample countries. Neither the Gini coefficient nor the indicator for income concentration predict or explain social inequality in Latin America in any significant way. However, income inequality does appear to have a close relationship with another characteristic common among Latin American countries – constrained individual rights and civil liberties. The insecurity of rights also underlies social inequality, as the rights of those who are discriminated against can be easily taken away without institutional guarantees of protection.

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<sup>22</sup> Caldeira (2000)

Discrimination and inequality tend to be self-perpetuating because the people most likely to be discriminated against are caught in economic traps and grouped into socially constructed categories that are defined by traits beyond the control of individuals. Nonetheless, the ability to transcend class barriers and achieve a significant degree of socioeconomic mobility has recently emerged in some places as an aspect of the Latin American reality. The rise of leaders like Evo Morales in Bolivia and Luiz Inácio Lula da Silva in Brazil show that the public has become increasingly receptive to leadership from individuals from traditionally marginalized groups. However, the experience of these political figures remains an exception rather than the rule. Even if the ability of subaltern actors to permeate the ranks of the political elite is increasing, it is not evident that the region's leaders have given greater priority to the protection of rights, even where inequality has been recognized and challenged. Yet, inequality and the insecurity of rights go hand-in-hand. Amartya Sen concisely points out that restricting basic liberties reinforces the poverty of those who are already poor.<sup>23</sup>

### **Characteristics of Political Systems**

The only country in the region with an unbroken history of liberal democracy is Costa Rica, since the conclusion of its brief civil war in 1948. For most countries in the sample, the last several decades have been characterized by free electoral systems (in which anyone can participate) that are only

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<sup>23</sup> Sen (1981)

intermittently fair (anyone can win).<sup>24</sup> By the beginning of the 21<sup>st</sup> century, nearly all Latin American countries had completed the transition to free and fair elections, but these electoral systems do not indicate the consolidation of democracy. The rule of law remains tenuous at best, and the state continues to repress and violate the political and civil rights of individuals.

O'Donnell observes that the U.S. constitution (which has served as a model for most constitutions in Latin America), was conceived to allay fears concerning the concentration of political power in the legislative branch. However, both in the U.S. and throughout Latin America, it is the executive that has most often overstepped his bounds.<sup>25</sup> Although constitutions in the region were designed in recognition of the threat of excessive executive power, none of them compensate for it by properly guaranteeing the strength and autonomy of the judicial branch. This trend results in several outcomes; those regarding political and civil rights are outlined below. Other implications of the imbalance of power within democratic political systems are explored in the following chapters.

## **Political and Civil Rights**

Table 2.2 shows the rankings for political rights and civil liberties for the sample countries. Freedom House explains each of its rankings on its website.<sup>26</sup>

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<sup>24</sup> Colombia and Uruguay have also had substantial experience with liberal democracy. However, endemic violence and growing concerns over the concentration of executive power undermine the protection of rights in Colombia. Moreover, elections that were once thought to be valid are being re-assessed in light of the *parapolitica* scandal. Uruguay's experience with liberal democracy is more genuine, however the nation experienced a 12-year authoritarian reversal that ended in 1985, recovery from which required significant institutional reform and the reconsolidation of democratic power.

<sup>25</sup> O'Donnell (2007)

<sup>26</sup> Freedom House (2009)

For Political Rights, a rating of 1 is reserved for countries that come closest to ensuring free and fair elections, with evidence of competitive political parties and meaningful opportunities for minorities to participate in the government through informal consensus. A rating of 2 is given to countries exhibiting political corruption, violence, political discrimination against minorities, and foreign or military influence on politics that weakens the quality of freedom. Ratings of 3 and 4 signify the same conditions that undermine freedom in countries and territories with the previous classification, but in addition, there are other damaging elements such as civil war, heavy military involvement in politics, unfair elections, and one-party dominance. However, states with these ratings may still offer some elements of political rights, including the freedom to organize quasi-political groups, reasonably free referendums, or other significant means of popular influence on government.

Civil Liberties are also assessed in Table 2.2. A rating of 1 is reserved for countries that protect freedom of expression, assembly, association, education, and religion as well as an established and generally equitable system of rule of law. A score of 2 is given to countries with deficiencies in a few aspects of civil liberties but that are still relatively free. Ratings of 3 and 4 are given to states that are in at least partial compliance with the standards for freedom but also exhibit a certain level of oppression. This oppression may manifest itself as censorship, political terror, and/or the prevention of free association. These countries may

also have groups opposed to the state that engage in political terror and undermine other freedoms.<sup>27</sup>

**Table 2.3 Freedom in Latin America**

Country	Political Rights	Civil Liberties
Chile	1	1
Costa Rica	1	1
Uruguay	1	1
Panama	1	2
Argentina	2	2
Brazil	2	2
El Salvador	2	3
Mexico	2	3
Peru	2	3
Bolivia	3	3
Colombia	3	3
Ecuador	3	3
Honduras	3	3
Nicaragua	3	3
Paraguay	3	3
Guatemala	3	4
Venezuela	4	4

**Source: Freedom House, Freedom in the World, 2008.**

None of the countries in Latin America exhibit the worst Freedom House rankings for either political rights or civil liberties. The scale used by Freedom House extends to 7, where rights are the most restricted. The fact that in both categories no country ranks higher than a 4 suggests that even shallow democracy may guarantee a certain level of freedom. However, Latin American

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<sup>27</sup> Freedom House (2009)

democracies exhibit a lower degree of rights-protection than one would expect from consolidated democracies, particularly when it comes to the protection of civil liberties. Although a few countries score well (such as Chile, Costa Rica, and Uruguay) this does not diminish the fact that most countries in the sample are plagued by inadequate rights protection despite constitutional guarantees of political and civil liberties. In fact, these three countries also exhibit levels of income inequality that are *below* the regional mean, which underscores the existence of a relationship between freedom and equality. The “Latin American legal paradox,” in which rights are granted but not secured for all, may be rooted in a historical pattern of judicial insulation from the people, as some have argued, or it may be a function of more explicit forms of class contempt and discrimination, which also underlie inequalities.<sup>28</sup>

### **Income Inequality and Individual Freedom**

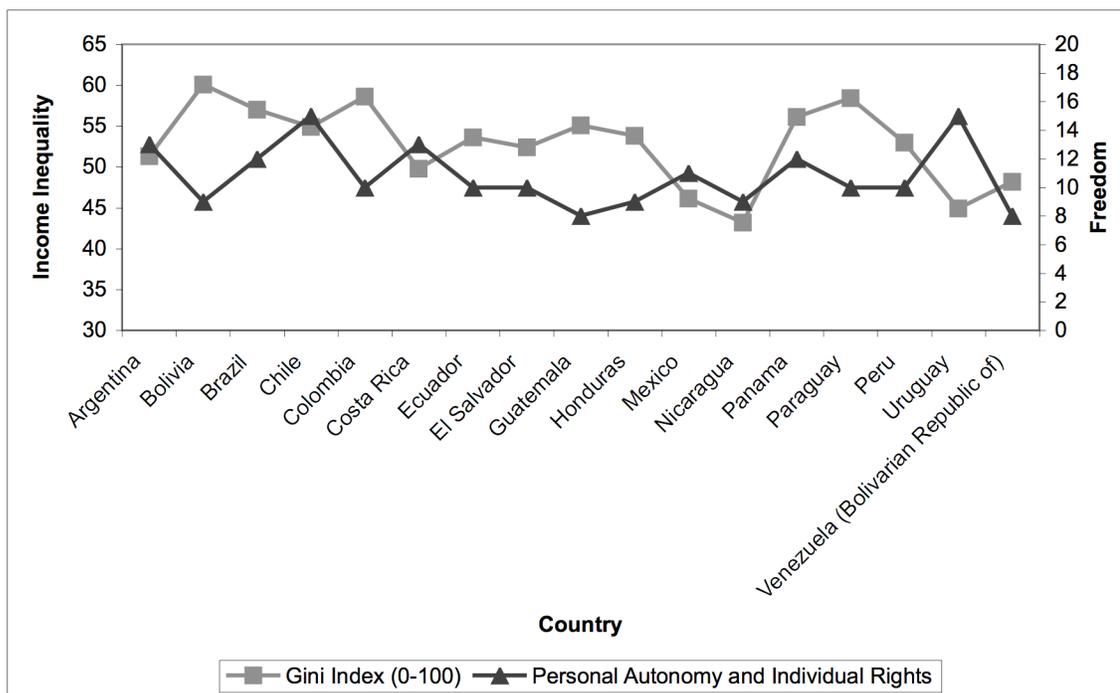
Figure 2.1 compares income inequality in the sample countries to the levels of individual freedom (a component of the civil liberties ranking) measured by Freedom House. Interestingly, where income inequality is greater, individual freedom is more constrained. In this figure, the Gini indices have been adjusted to a scale of 0 to 100 in order to accentuate the differences among the various nations and ease the comparison between levels of inequality and levels of freedom. The inverse correlation between inequality and freedom suggests that a common causal factor, judicial institutions, may contribute to the two most

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<sup>28</sup> Gargarella (2008)

common characteristics of Latin American democracies – economic inequality and inadequate rights protection.

**Figure 2.1 Income Inequality and Individual Freedom**



**Sources: World Bank, World Development Indicators, 2007; Freedom House, Freedom In the World, 2009**

Public opinion surveys revealing low levels of confidence in political institutions support O'Donnell's theory that problems in the "intermediate dimension" are at the heart of the relationship between undesirable socioeconomic characteristics and shallow political systems. That public confidence especially lacks in regard to the judicial system (see Chapter 4) further underscores the centrality of the courts in this dimension. Inadequate judicial reform has led to the failure of democratic consolidation and vice-a-versa. Moreover, there is a reciprocal relationship between underdeveloped judiciaries

and the ineffectiveness of certain mechanisms for enforcing constitutional guarantees. Making changes to the courts is therefore a crucial component of deepening democracy, but this is a broad concept. To stimulate the development of successful policy to reform the judiciary, the concept of deepening democracy needs to be clarified. Reform must anticipate the effects of institutional changes, including the introduction of new contradictions and tensions. In the following chapter, these aspects of deepening democracy are explored and expanded upon.

## CHAPTER 3: DEEPENING DEMOCRACY

The normative perspective from which this paper emerges is that democracy is the best type of political system for achieving the commonly desired aspects of political and social life, including representation, accountability, participation, dignity, and even equality.<sup>29</sup> Moreover, democracy is understood as the type of regime most likely to fulfil John Rawls' principle of "justice as fairness".<sup>30</sup> However, disregard for political rights, civil liberties, and constitutional constraints undermine the procedural consensus that underpins democracy<sup>31</sup> and illuminate why illiberal democracies tend to suffer from high levels of political gridlock. Furthermore, in the context of discrimination and insecure political and civil rights, the principle of majority rule is not truly democratic.<sup>32</sup> Electoral democracies that disregard rights protection are unproven in their ability to respond to the needs of the marginalized, whose rights can be easily taken away. Although these "acute problems and vulnerabilities" common in many Latin American democracies "could extinguish democracy altogether,"<sup>33</sup> shallow democracy has endured in many places even amidst difficult circumstances like economic hardship and social instability. Yet these shallow systems have not developed into deeper, consolidated democratic systems that

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<sup>29</sup> Przeworski, et al (2000)

<sup>30</sup> Calleros (2009)

<sup>31</sup> Diamond (1999)

<sup>32</sup> Calleros (2009)

<sup>33</sup> Diamond (1999), p. 64

dismantle structural inequality. To understand this pattern, it is important to first delineate the meaning of deepening democracy.

Fareed Zakaria understands democracy as a political system that incorporates two institutional pillars. *Electoral democracy* represents the institutions and practices that foster free and fair elections, while *constitutional liberalism* refers to the formal structures that safeguard against government infringement on civil liberties and human rights.<sup>34</sup> While electoral democracy rapidly spread throughout the 20<sup>th</sup> century, the extension of constitutional liberalism lagged behind, particularly in developing countries.<sup>35</sup> Zakaria views electoral democracy and constitutional liberalism as distinct components of a democratic system, but the two democratic institutions are inextricably linked.

People without political liberty or civil rights... are deprived of important freedoms in leading their lives and are denied the opportunity to take part in crucial decisions regarding public affairs.<sup>36</sup>

Following this argument, constitutional liberalism is essential to the functioning of the electoral system. Larry Diamond similarly argues that “free and fair elections inherently require certain political rights of expression, organization, and opposition.”<sup>37</sup> For this reason, electoral democracy should be understood as a shallow system, and only with the inclusion of liberal ideals (in the sense of rights-protection) can democracy deepen. In Latin America, most countries have adopted rights-protective constitutions, often with a set of amendments that

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<sup>34</sup> Zakaria (1997)

<sup>35</sup> Zakaria (1997), Smith (2005)

<sup>36</sup> Sen (1999), p. 16

<sup>37</sup> Diamond (1999), p. 3

closely resemble the United States Bill of Rights. However, for various reasons this aspect of the constitution is often overlooked in the region (a topic I will return to later). In light of this contradictory reality, the terms *liberal* and *rights-protective* should be reserved for describing the applied practice of Zakaria's concept of constitutional liberalism.

Maxwell Cameron argues that deepening democracy incorporates three components. A deepened democratic system balances elections, constitutional order, and citizenship. These three dimensions exist within an "ecological system" that involves complex mechanisms for feedback – mechanisms that can either accelerate collapse or restore balance.<sup>38</sup> Cameron argues that electoral interference, the erosion of the separation of powers, and the politicization of the judiciary threaten the deepening of democracy in Latin America. Where these trends are most evident, the three dimensions are most out of balance. Under the leadership of Hugo Chavez, the electoral component and the independence of the judiciary in Venezuela appear most threatened. Colombia also presents a worrying case. The *parapolitica* scandal revealed systemic interference in the electoral dimension; violence reduced the ability of some would-be candidates to run for office and the ability of many citizens to vote freely. Without the implementation of policy to correct these flaws and the institutionalization of balance between the three dimensions, the shallow democracies of Latin America cannot be deepened.

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<sup>38</sup> Cameron (2009)

Both Zakaria and Cameron acknowledge that liberal legal frameworks are only effective when the rule of law is established and citizens are free and empowered to voice their demands and hold their government to account for its actions. Therefore a concise conceptualization of deepening democracy emphasizes making government more rights protective, with the purpose of enhancing the political voice of the underprivileged and marginalized and strengthening mechanisms of accountability.

### **Contradictions and Tensions**

Although deepening democracy is an important aspect of rectifying the most glaring issues in Latin American societies and political systems, it is not a straightforward solution to these problems. In fact, deepening democracy may introduce and underscore another set of issues. Scott Mainwaring debates the implications of enhancing political accountability, pointing out that boosting accountability between different parts of government (increasing accountability between state actors) may wrest some authority from the sovereign decisions of the people. In other words, accountability may to a certain degree undermine the democratic principle of “rule by the people.”<sup>39</sup> Such an incongruity can reduce the degree to which the rule of law itself is democratic and corrode the political system, particularly in the context of criminality and ineffective systems of justice.<sup>40</sup>

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<sup>39</sup> Mainwaring (2003)

<sup>40</sup> Holston (2008)

Holston also argues that democracy erodes existing categories of domination and deference that give the everyday a sense of order and security, leading to new kinds of violence, injustice, and impunity.<sup>41</sup> These problems take root in the convergence of several forces, most notably a climate of fear, the criminalization of the poor, support for police violence and human rights abuses, and the abandonment of public spaces (often made evident by the fortification of upper class residences). Holston calls the close relationship between the erosion of social hierarchies and increasing insecurity a perverse paradox of democratization but points out that “contradictions characterize modern citizenship everywhere”<sup>42</sup> often because “equalities of democratic citizenship always produce new inequalities.”<sup>43</sup> Teresa Caldeira’s concept of “disjunctive democracy” also emphasizes the way that liberal democracy can reinforce systems of inequality.<sup>44</sup> As subaltern actors gain full rights to engage in shaping their future and their environment, elites may withdraw from shared social space. This physical and social isolationism on the part of the members of the upper class, which occurs in response to the diffusion of political power to lower classes, may reduce the degree to which economic growth benefits the poorest members of society, and thereby contribute to (rather than reduce) existing inequalities.<sup>45</sup>

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<sup>41</sup> Holston (2008)

<sup>42</sup> Holston (2008), p. 14

<sup>43</sup> Holston (2008), p. 273

<sup>44</sup> Caldeira (2000)

<sup>45</sup> Caldeira (2000)

However, scrutiny of these disjunctions must be made in relation to the expansion of democracy.<sup>46</sup> There is a complex and indirect relationship between deepening democracy and altering the socioeconomic dimension of Latin American democracies. Enhancing freedom may coincide with the production and reproduction of inequalities. Nonetheless, liberal institutions are necessary in order to improve the accessibility of mechanisms by which the underprivileged can influence public policy and secure their freedom from undue influence by the state in their personal lives. Shallow democracy has not reduced inequality in Latin America, yet nor have violence and injustice prevented democratic progress. Although deepening democracy may introduce contradictions, some of which may increase income inequality in the short term, it has the potential to dismantle the structures that reproduce inequalities over the long term.

Deepening democracy could have other positive effects, as well. As explained at the beginning of this chapter, shallow democracies suffer from political gridlock because they lack the procedural consensus that underpins efficiency and productivity. Deepening democracy will contribute to achieving broad and deep legitimation such that all political actors believe democracy is not just the most right and appropriate system, but also better than all imaginable alternatives.<sup>47</sup> The advent of such a routinized commitment to democracy could generate greater procedural consensus, and thereby reduce gridlock. Second, the protection of individual rights (and the deepening of democracy implied by such protection) may improve the performance of government projects. Even in

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<sup>46</sup> Holston (2008)

<sup>47</sup> Diamond (1999)

non-democratic systems, rights protection better predicts the success of projects, based on economic return and achievement of goals, than any other variable.<sup>48</sup>

Third, deepening democracy goes hand-in-hand with strengthening the rule of law. Inadequate public institutions, such as those pertaining to security provision and the administration of justice, are plagued by corruption and inefficiency. One symptom of these flaws is the prevalence of law enforcement and judicial system personnel who discriminate against the underprivileged and contribute to violent vigilantism and bloody uprisings. Together, these circumstances create an environment of systemic abuse. By deepening democracy, Latin American nations can empower public institutions to improve the human rights situation in the region, which in many places failed to improve during the transition to democracy.

Although enhancing the liberal aspect of democracy may introduce a variety of tensions, the preceding analysis suggests that the disadvantages of deepening democracy are offset by the benefits of this process. However, an additional source of tension warrants extra attention as it presents a particularly tricky problem.<sup>49</sup> O'Donnell explains that liberalism requires a clear delineation between the public and private spheres. Its emphasis on *private* or civil freedoms induces the entire system to rely heavily on the exercise of heavy protection by the state and depend on a complex network of institutions to resolve conflicts over private rights and between individuals in the private and public spheres. In

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<sup>48</sup> Pritchett and Kaufmann (1998)

<sup>49</sup> For further reading on other inherent tensions in democratic political systems, see O'Donnell (2007), particularly the chapter entitled "Horizontal Accountability: the Legal Institutionalization of Mistrust."

short, liberalism requires that citizens endow the state with great powers. In the context of post-authoritarianism, recent tyranny, fear of state intrusion in the private lives of individuals, and general mistrust, endowing the state with these powers is not an easy task. And in those Latin American countries in which the state has these powers, authority tends to lie in the hands of the executive.

Unfortunately, the executive does not serve to safeguard the liberties of private individuals, and in many cases has repeatedly violated this very principle. The judiciary, however, is designed specifically to safeguard the security of citizens' rights. Observing the inherent tension between decisive political power and demands for a controlled state actually underscores the need for empowered judiciaries and improved horizontal accountability within the state. Once again, correcting the flaws of the judiciary appears to be the essential first step to negotiating the complex relationship between the public and private spheres while improving the welfare of society and the capacity of the state.

## CHAPTER 4: THE INTERMEDIATE DIMENSION

### A Crisis of Confidence

Leonardo Franco argues that “the judiciary is often the focus of citizens’ aspirations or frustrations and acts as the barometer of progress in the process of societal reform.”<sup>50</sup> If this is the case, then many Latin American countries are in a dire situation. Political institutions suffer from low levels of public confidence throughout the region. However, the judiciary suffers more for lack of public confidence than any other major public institution, including the church and armed forces.<sup>51</sup> More than two-thirds of survey respondents have *little to no confidence* in the judiciary, while only 5.4% of those interviewees reported having “a lot” of confidence in the judicial branch. More than twice as many people have “a lot” of confidence in the government, about 15% place as much confidence in the president and armed forces, and the church enjoys the confidence of more than 40% of the public.<sup>52</sup> Low levels of confidence in the judiciary are especially disturbing because, more so than other institution, the judicial branch ultimately

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<sup>50</sup> Franco (1999)

<sup>51</sup> In some Latin American countries, dwindling confidence in the legislature is also a major issue. Weak mechanisms of representation constitute another major threat to the deepening of democracy in the region. For an interesting discussion of this topic, see the volume edited by Scott Morgenstern and Benito Nacif entitled *Legislative Politics in Latin America*, Cambridge University Press, 2002. As I will explain in forthcoming sections, however, addressing the judicial aspect is most crucial for consolidating democracy and reducing inequality because of its close ties to vicious cycles that underlie obstacles to consolidation, the implementation of redistributive economic policies, and pro-poor growth.

<sup>52</sup> Latinobarómetro (2007)

depends on the confidence of the people to be effective in creating and sustaining the rule of law.<sup>53</sup>

Roberto Gargarella argues that the judiciary has been intentionally insulated from the people and that this pattern is at the root of both the inaccessibility of justice and the insensitivity of judges toward disadvantaged people.<sup>54</sup> The top-down manner in which many Latin American judiciaries were designed created an uneven relationship between judges and the public. Judges and courts were placed close to the capital and in major cities, meaning that people have to “come to justice” rather than the other way around. Moreover, following the tradition of James Madison in the *Federalist* papers, the framers of many Latin American constitutions used the “principle of distrust” to justify the isolation of judiciaries from the masses on the basis that it contributes to impartial decision-making. One result of this pattern is the existence of a large social distance between judges and the people, which underlies judicial bias and contributes to the reinforcement of inequalities.

## **Systemic Problems**

The degraded nature of public opinion toward the judiciary suggests that democratic consolidation may be inhibited or altogether halted by problematic judicial branches. Increasing public confidence in the judiciary is necessary if Latin American democracies are to become more equitable and rights protective. Justice must not only be done, but also be *seen* to be done if the public is to trust

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<sup>53</sup> Calleros (2009), also see Stepan (1985)

<sup>54</sup> Gargarella (2008)

the judiciary.<sup>55</sup> Without trust, courts cannot be effective in curtailing the patterns that underpin problems like inequality, unfreedom, and injustice.

Poverty and inequality are social stresses that feed into criminal activity and violence and generate a greater need for effective systems of justice. But the public cannot trust the courts to resolve underlying social tensions or appropriately respond to threats or acts of violence when those institutions disrespect rights. Tension and distrust lead to the anticipation of crime and the fear of victimization, which in turn lead to the criminalization of the poor, in whom the public already places little confidence. This pattern discredits the whole justice system and can threaten the entire democratic project,<sup>56</sup> particularly as it pertains to the democratization of social space. One analysis of Latin American democratic transition that emphasizes the problematic nature of the judiciary concludes that there is a “structurally biased court system against the poor, indigenous populations, and the underprivileged (women and the young population included) firmly in place.”<sup>57</sup> This bias reflects the public’s discrimination against these same groups.

While they are indeed ailments, discrimination and bias are not the core deficiencies that plague Latin America’s judiciaries. Rather, discrimination and bias are symptomatic of several underlying problems. Understanding the issues that contribute to judicial prejudice is necessary if effective reform is to be formulated and implemented throughout the region. In the model of democracy

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<sup>55</sup> Dodson and Jackson (2003)

<sup>56</sup> Holston and Appadurai (1999)

<sup>57</sup> Calleros (1999), p. 158

embraced by most countries in the sample, an inefficient and inaccessible judicial branch is plagued by executive interference and corruption, reducing public support for both the judicial system and the wider concept of democracy itself. Diamond explains that endemic political corruption erodes democracy's legitimacy and fosters a sense of resentment among the public, reducing respect for the law and political institutions in general. While even the most liberal democracies suffer from corruption, favoritism, and unequal access to power, the high degree of these afflictions apparent in Latin America dramatically undermines mechanisms for political accountability and the enforcement of formal rules.<sup>58</sup>

In fact, in most Latin American countries the judicial system is grossly overburdened, backlogged, slow, unreliable, inefficient, under funded, and lacking in public faith and credibility. It is also typically heavily politicized, intimidated by powerful establishment or insurgent forces, poorly paid and trained, lacking in transparency and secure tenure, and thus corrupt and dispirited. As a result, the poor have slight access to justice (with little in the way of legal assistance or effective public defenders), and state officials have rampant impunity not only for past human rights violations but for ongoing crimes and abuses.<sup>59</sup>

Diamond's analysis emphasizes the complex nature of the judiciaries' problems, but there are essentially four major flaws prevalent among Latin American judicial branches: inefficiency, inaccessibility, interference, and corruption. Examining each of these afflictions helps to give insight to the weak mechanisms of accountability that reduce public confidence in judicial

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<sup>58</sup> Diamond (1999)

<sup>59</sup> Diamond (1999), p. 44

institutions. Chapter 6 outlines how judicial reforms designed to correct each of these flaws will have several developmental implications.

### **Inefficiency**

Throughout Latin America, a huge backlog of criminal cases is evident. Judges are burdened with enormous caseloads. This problem is by far the worst in Brazil where for every one judge there are 4,850 pending cases.<sup>60</sup> Poor training, inadequate staffing, limited financial and material resources, and incompetent administrators contribute to inefficiency that plagues every sector of the population. Elites and the masses both suffer from slow and inadequate judicial responses. However, judicial inefficiency tends to work especially against marginalized groups because it often leads to the uneven application of the rule of law.<sup>61</sup> Moreover, inefficient judiciaries are incapable of reviewing and revising laws biased against minorities.

### **Inaccessibility**

When justice is inaccessible to the masses, even the most right-protective legal frameworks offer nothing more than nominal rights. Liberal democracy requires the accessibility of the courts. Latinobarómetro tracks the degree to which people feel the justice system is accessible in their country. The accessibility of justice and the capacity of the judicial system are two distinct features of the judiciary. Public opinion illuminates the *perception* of judicial development, not the level of development itself. However, because the perception of the accessibility of justice (not just the capacity of the courts)

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<sup>60</sup> Calleros (2009)

<sup>61</sup> Calleros (2009)

underlies the public's motivation to utilize and respect institutions of order, this analysis illuminates the need to enhance public opinion of the judiciary as well as enhance its capacity to enforce the rule of law without bias or discrimination.

Researchers in each of the sample countries ask whether or not equal opportunities to access justice exist. On a regional level, the results are dismal. Three-quarters of the public feel that equal opportunities to access justice *do not exist at all*. In many countries, the facts are even more discouraging. Table 3.1 shows the survey results for each of the sample countries. In general, the public perception of equality appears greater in Central America than in South America, despite the fact that Central American judiciaries are among the least developed in the hemisphere. This pattern suggests that access to justice and the development of the judiciary may not always progress in tandem and that public opinion is not a perfect indicator of institutional capacity.

Inaccessibility and the perception thereof are widely rooted in geography and language. Too few rural courts mean that citizens in small and isolated communities face a physical obstacle to accessing the judicial system. This may partially explain why citizens in the larger countries of South America perceive greater inaccessibility than those in smaller Central American nations, where communities are often less isolated. Speakers of minority languages also struggle to comprehend both the meaning of laws and the protocol for accessing and utilizing the judicial system. In combination, geographic and linguistic hurdles most affect indigenous communities, but the poor, illiterate, and disabled also face numerous obstacles to accessing the courts.

**Table 4.1 Public Perception of Opportunities to Access to Justice**

Country	Equal Access to Justice Does Not Exist*
Peru	89.9
Argentina	89.2
Brazil	88.7
Paraguay	86.4
Chile	83.4
Ecuador	81.2
Bolivia	78.7
Colombia	76.8
Mexico	72.6
Costa Rica	69.5
El Salvador	69.5
Uruguay	68.3
Honduras	67.6
Panama	66.8
Nicaragua	65.3
Guatemala	59.9
Venezuela (B.R. of)	57.5

Source: **Latinobarómetro (2007)**

\*Percent of survey responses

Practices designed to intimidate judges and prosecutors contribute to the inaccessibility of justice. Excessive formality means that cases are often won on the basis of technicalities and loopholes, rather than fair deliberation and assessment. Meanwhile, violence and the threat thereof undermine constitutional guarantees for fair trials and compromise the integrity of the criminal justice system, which further reduces the ability of the state to bring perpetrators to justice. The region also suffers from too few public defenders, which creates an obstacle to guaranteeing a fair defense for those charged with crimes, especially for already marginalized actors. Insecurity, formality, and delays also increase

the cost of a fair trial such that justice is often made inaccessible to the poor due to economic factors.

### **Interference**

Direct interference in the judiciary from the executive branch is a major source of judicial dysfunction in Latin America. One of the legacies of many authoritarian regimes is the tendency of the executive to use the judicial system to advance his own political agenda. Advancement through the ranks of the judicial system is rarely merit-based, often instead serving as a tool of political favoritism. The political dependency of judges contributes to “a culture of legal passivity” in which laws are often ignored or enforced only as convenient.<sup>62</sup> Moreover, Latin American judiciaries tend to avoid ruling on highly politicized cases, and when they do, the decisions are overwhelmingly in the favor of the executive or her political party. Executives also often use special courts like *ad hoc* tribunals to bypass the protections found in the ordinary court system and prosecute people before a special tribunal on their own terms.<sup>63</sup>

Contradictory laws and practices constitute a second type of interference that is evident among Latin American judicial systems. While the court system often appears rights-protective, many secondary laws effectively undo this protection. Moreover, delays in issuing laws can deny the practical application of constitutional protection during litigation. Juan Carlos Calleros points out the irony of the fact that the reversal of secondary laws often requires an

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<sup>62</sup> Gargarella (2008)

<sup>63</sup> Calleros (2009), also see Shetreet and Deschenes (1985)

independent and strong judiciary – the very existence of which is denied by the inconsistency of the law itself.<sup>64</sup>

### **Corruption**

The three endemic judicial flaws discussed previously are closely related to the fourth and final major issue that plagues Latin American judicial systems, and by extension, Latin American democracies: corruption. O'Donnell explains that in the context of liberal democracy, corruption is best understood as the processes by which state actors aim to secure unfair or undue advantages for themselves.<sup>65</sup> Rent-seekers also contribute to corruption by taking advantage of their privileged access to state resources.

If corruption persists within an electoral democracy, its corrosive effect will work along with patron-client relations and patrimonialist networks to impede the completeness of the rule of law, so maintaining low quality democracies...<sup>66</sup>

The prevalence of side payments and patron-client networks also contribute to the inefficiency of the judiciary. Judicial personnel often delay court cases in efforts to draw in bribes. Moreover, bribes are often made with the specific intent of delaying the administration of justice. Interference by private actors and public officials contribute to the low rate of trial and conviction for highly politicized cases. Corruption takes still other forms in judicial system personnel (especially judges) who aim to preserve their careers by avoiding controversial rulings or selecting which cases they hear based on prestige.

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<sup>64</sup> Calleros (2009)

<sup>65</sup> O'Donnell (1999)

<sup>66</sup> Calleros (2009), p. 45

## CHAPTER 5: REFORMING THE JUDICIARY

Judicial reforms can reduce inequality in Latin America in two broad ways. Deepening and consolidating democracy will help dismantle political structures that contribute to inequality. At the same time, judicial reforms can reduce economic and social inequalities by interrupting vicious cycles of fear, crime, and violence.

### Deepen and Consolidate

Deepening democracy means not only increasing the protection of citizens' rights, but also enhancing the political voice of the marginalized and strengthening mechanisms of accountability. Public influence and direction of the output of political institutions is the basis of democracy. This requires that the formal political structures are liberal, accountable, responsive, and representative.<sup>67</sup> The entrenched legitimation of an intricate network of such institutions constitutes democratic consolidation.<sup>68</sup> René Antonio Mayorga points out that democratic consolidation, however, is not necessarily a linear process: it must encompass several areas (such as party systems and civil and economic society), which strengthen each other, as well as enhancing the rule of law and citizenship.<sup>69</sup>

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<sup>67</sup> Diamond (1999)

<sup>68</sup> Linz and Stepan (1996)

<sup>69</sup> Mayorga (2005)

The judicial system will be the cornerstone of deepening and consolidating democracy in Latin America because it has primary responsibility for creating and enforcing limits on state authority in all sectors, enforcing the rule of law, and protecting citizens' rights. However, only when consensus about the importance of limitations on power is achieved will actors become self-interested in adhering to the rules of the game, thereby making the rules self-enforcing.<sup>70</sup> Robert Dahl argues that institutions are not enough to ensure this kind of democratic consolidation; in addition, citizens must embrace democratic values. For this embrace to occur, the public must take a more positive view of its relationship with the state. Public preference for democracy is necessary for the continued evolution of the system, but Latinobarómetro surveys repeatedly show that support for democracy in Latin America is much lower than one would expect in consolidated regimes. Yet, even if Dahl's emphasis on the public's values is accepted, the role of institutions in generating movement toward this outcome cannot be neglected. Because "deep and continuous confrontation and ambivalence" among institutions, elites, and the public is not conducive to democratic consolidation,<sup>71</sup> altering the relationship between the judiciary and the other branches of government as well as the relationship between the judiciary and the public (that is, reforming institutions), is necessary for the region's continued advancement toward democratic consolidation.

Successful judicial reforms should improve public perception of these political institutions by enhancing equality and freedom and boosting institutional

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<sup>70</sup> Diamond (1999)

<sup>71</sup> Linz and Stepan (1996), p. 4

legitimacy. Increasing institutional coherence, capacity, and autonomy will contribute to a more genuine rule of law and the achievement of political accountability, and thereby reduce inequality by dismantling the structures that underpin it. But without reform, the inconsistent and often contradictory nature of Latin American law will contribute to democratic decay, especially when the law is replaced by unwritten discriminatory rules.<sup>72</sup> Successful reforms must target two aspects of the region's judiciaries: judicial strength and horizontal accountability.

Andreas Schedler argues that power is a relational property that is difficult to measure across different sectors. Therefore the strength of the judicial branch is best indicated not by comparing its ability to influence the legislature and the executive, but rather by assessing the autonomy of each branch.<sup>73</sup> Reducing interference in the judiciary is a necessity. At the same time, however, too much separation of powers could inhibit proper checks and balances. The judiciary must be capable of restraining the other two branches of government from overstepping their bounds, but reforms must not inhibit the legislature and executive from checking the actions of the judiciary. Therefore, preserving and enhancing horizontal accountability is the second essential component of successful reform.

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<sup>72</sup> Calleros (2009)

<sup>73</sup> Schedler (1999a)

## Judicial Strength

The relative weakness of the judicial branch is a “betrayal of democracy”<sup>74</sup> because it reduces judicial independence and compromises legitimacy and accountability.<sup>75</sup> Greater strength will contribute to enhancing judicial impartiality, but greater power is also necessary for the judicial branch to properly serve as the protector of individual rights and the enforcer of limits on state authority. Every country in the sample (except Costa Rica, and perhaps Chile and Uruguay) exhibits a pattern of disrespect for the rights-protective component of consolidated democracy.<sup>76</sup> In most countries, elections and periodic transfers of power have not led to an improvement in the quality of democracy experienced on a daily basis by the majority of citizens.<sup>77</sup> Moreover, the current shallowness of democracy contributes to widespread human rights abuses and the tenuous rule of law, while the weakness of the judicial branch limits its ability to condemn harmful acts. Diamond argues that by committing, condoning, or excusing unlawful and harmful activities, the state turns even relatively petty actions into political acts, diminishing the quality of the political system.<sup>78</sup>

Throughout the 20<sup>th</sup> century, Latin America experienced widespread attempts to reform and enhance the strength of the judicial system. The first

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<sup>74</sup> Calleros (2009)

<sup>75</sup> Independence refers not only to autonomy from the influence of the other branches of government (although in Latin America it is executive influence which is of the greatest concern) but also insulation from public opinion, which is most often conveyed by the mass media.

<sup>76</sup> Although today Chile and Uruguay exhibit levels of rights protection similar to Costa Rica, impunity toward human rights abuses committed under the authoritarian regimes of the past continue to mar the rights-protection record of these political systems.

<sup>77</sup> Diamond (1999)

<sup>78</sup> Diamond (1999)

rights-protective constitution in the region was Mexico's of 1917, which placed emphasis on labor and social security issues. After that, many countries either revised or rewrote their constitutions to make them more liberal including Chile in 1925; Uruguay in 1932; Peru in 1933; Brazil in 1934; Nicaragua in 1939; Paraguay, Cuba, and Panama in 1940; Colombia, Bolivia, and Guatemala in 1945; Haiti in 1946; Ecuador and Venezuela in 1947; and Argentina in 1949.<sup>79</sup> By the late 20<sup>th</sup> century, many countries had adopted additional measures to guarantee the rights of indigenous peoples. These changes were a good start for obtaining better court systems, but the rights protected on paper have not been guaranteed in practice. Closing the gap between the written law and the law as it is practiced will require "further and deeper reforms... to make the judiciary capable of contributing decisively to democratic consolidation."<sup>80</sup> Providing guarantees for minority rights is irrelevant if the institutional capacity for enforcement is absent.

Enhancing the capacity of the judiciary to enforce rights-protective legal frameworks will help rectify each of the four main flaws that plague Latin American judiciaries. Stronger courts will contribute to the proper organization and regulation of the legal system and provide relief to judges who are bogged down by case overload. A robust judiciary will also garner greater financial and material resources, the scarcity of which contributes to the inaccessibility of justice. Applying constitutional guarantees of political and civil rights in practice

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<sup>79</sup> See Gargarella (2008) for a more complete summary of liberal amendments to legal frameworks in Latin America.

<sup>80</sup> Calleros (2009), p. 48

will also reduce excessive interference by the executive in the courts and society. Finally, strengthening the judicial branch will reduce the amount of space for corrupt activity within the political and social spheres.

### **Horizontal Accountability**

Systems of delegative democracy continue to predominate in Latin America, where executives have often retained exceptional degrees of power despite the transition away from authoritarianism. These delegative systems exhibit the absence of accountability among the three branches of government, making for erratic and unsustainable policy that fosters corruption and prevents proper checks and balances.<sup>81</sup> In most Latin American countries, the executive exerts undue and unreciprocated influence on the judicial branch. Although the executive and the legislature often share a mutual ability to influence and check each other's activities, in most countries the legislature interferes in the judiciary and undermines judicial independence. Thus, the courts often suffer the greatest damage in delegative democracies.

In this context of this uneven and incomplete separation of powers, O'Donnell contends that accountability *to the people* is insufficient for the consolidation of democratic regimes.<sup>82</sup> He argues that accountability among the three branches of government, fostered by the separation of powers, is essential. Thus, judicial independence is a necessity for the functioning of mechanisms of accountability. Yet, following O'Donnell, the partial overlap of authority among the

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<sup>81</sup> O'Donnell (1999a) and (2007), Diamond (1999), Levitsky (2005), Mayorga (2005)

<sup>82</sup> O'Donnell (1999b)

various branches of government is actually the true genius of democracy. The overlap of authority is what allows different state actors to check and balance each other's actions.<sup>83</sup> And mechanisms of intrastate accountability are necessary for the avoidance of the "paradox of democracy." Because all democracies must contend with the risk that the public will democratically elect leaders who implement policies that dismantle democracy itself, to a certain degree each branch must remain vulnerable to interference by the other two in order to protect democracy from self-destruction.<sup>84</sup> Therefore, in enhancing judicial independence, decisionmakers must be cautious not to overstate the importance of the separation of powers. The aim should be to achieve the optimum degree of separation, not the maximum.

O'Donnell explains that horizontal accountability refers to the

existence of state agencies that are legally enabled and empowered, and factually willing and able to take actions that span from routine oversight to criminal sanctions or impeachment in relation to actions or omissions by other agents or agencies of the state that may be qualified as unlawful.<sup>85</sup>

This definition limits the scope of horizontal accountability to the state because non-state actors are not legally enabled to enforce sanctions on state actors. International agencies and non-governmental actors play a significant role in the administration of justice in Latin America, but they do not fit within the framework of horizontal, or as it is sometimes called intrastate accountability. Actions taken by non-state actors, while serving an important role in Latin American

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<sup>83</sup> O'Donnell (1999b)

<sup>84</sup> Schmitter (1999)

<sup>85</sup> O'Donnell (1999a), p. 38

democracies, are not sufficient for deepening or consolidating democracy. NGOs, media watchdogs, and international human rights agencies are necessary and effective but not a substitute for a proper court system.<sup>86</sup> The only way to actually achieve the deepening and consolidation of democracy is by implementing major reforms that alter the operation of the judicial branch and the way that other two branches of government relate to it.

Although horizontal accountability is primarily a characteristic of the political system, it is not isolated from the social sphere. In addition to enhancing transparency, such accountability contributes to the solidification of “robust norms of reciprocity” which are essential to the development and consolidation of democratic culture. Because there is a reciprocal relationship between civil society and political society, by increasing horizontal reciprocity (accountability) in the political system, there will be an increased demand for horizontal reciprocity in civil society. One result of this would be a more democratic civil society and the further deepening and consolidation of democracy.<sup>87</sup> These trends will serve to reduce social prejudices that contribute to inequalities, particularly as they relate to the talk and fear of crime. A more comprehensive discussion of this aspect follows in the next section.

Marc Plattner takes exception to O’Donnell’s emphasis on horizontal accountability, however. He argues that it understates the importance of accountability to the people.<sup>88</sup> Because people cannot rule themselves directly,

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<sup>86</sup> Calleros (2009)

<sup>87</sup> Diamond (1999,) O’Donnell (1999a)

<sup>88</sup> Plattner (1999)

particularly in large systems that depend on representation, accountability to the people is the cornerstone of modern liberal democracy. For more stable, sustainable, and acceptable policy in Latin America and in order to achieve more balanced and representative democratic systems, all three branches of government must be made more accountable and responsive to citizens' demands.<sup>89</sup> However, O'Donnell argues that any unilateral assertion of the pre-eminence of a single dimension of accountability is likely to be made in poor judgment. Accountability to the people has not been shown to be sufficient for the consolidation and deepening of democracy. Under the conditions that prevail in many Latin American democracies (including the volatility of voters and parties, poorly defined public policy issues, and the frequency of sudden policy reversals), the effectiveness of such accountability diminishes.<sup>90</sup> Moreover, elections – which are the main mechanism of vertical accountability – occur only periodically and do not *guarantee* that political leaders respond appropriately to citizens' desires, particularly when elections take place in an atmosphere of endemic corruption.

The links between accountability to the people and horizontal accountability are such that non-electoral mechanisms of the former (such as social mobilizations, *exposés*, and legal actions) can enhance the latter by generating demands for transparency. Non-electoral accountability to the people (sometimes called societal accountability) demands that the majority of policy

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<sup>89</sup> Diamond (1999)

<sup>90</sup> O'Donnell (2007). Nonetheless, O'Donnell still stresses the importance of vertical accountability, particularly as it is organized outside of regular elections.

decisions be made publicly. Transparency contributes to each branch's ability to check and balance the others.<sup>91</sup> Therefore, both kinds of accountability are clearly essential. However, because of the endemic problems of Latin American judiciaries, greater emphasis must be placed on the importance of horizontal accountability when designing institutional reforms.

Increasing horizontal accountability requires navigating once more through contradictory circumstances. Foremost among these contradictions is the fact that a highly professionalized, well-endowed, independent judiciary is essential to enhancing horizontal accountability in general,<sup>92</sup> yet dysfunctional judiciaries undermine the ability of governments to demand a response from and enforce sanctions against state actors who commit unlawful acts. Accountability at any level of government cannot be improved without first reforming and improving the ability of the judicial branch to demand that the executive and the legislature account for their actions. In other words, the judicial branch is the fulcrum of movement toward increased accountability.<sup>93</sup>

Effective horizontal accountability is the product not of isolated institutions but of networks of institutions that include at their top... courts (including the highest ones) committed to such accountability.<sup>94</sup>

In Latin America, where judicial systems are weak and lack autonomy, under the best scenario this presents a major obstacle to deepening democracy. In the worst case, the situation represents a paradox. The judiciary cannot improve

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<sup>91</sup> O'Donnell (2007), also see the work by Catalina Smulovitz and Enrique Peruzzotti, "Societal Accountability in Latin America," *Journal of Democracy*, Vol. 11, No. 4, October 2000.

<sup>92</sup> O'Donnell (1999a), O'Donnell (2007)

<sup>93</sup> Calleros (2009)

<sup>94</sup> O'Donnell (2007), p. 62

horizontal accountability without autonomy, but such autonomy is tricky because it requires the judiciary to retain “accountability of its own to other powers in the state and in society.”<sup>95</sup> Strengthening the judiciary in relation to the other branches is also complex because the very actors who stand to lose power and influence by this process must realize the necessity of reform and enforce it. Such changes are unlikely to emerge from Latin America’s weak and inadequate judiciaries. Therefore, citizens must demand that their representatives (in both the legislative and executive branches) carry out sweeping reforms to strengthen the judicial branch and enhance intrastate accountability (see Chapter 6).

## **Reduce Inequality**

The shallow and unconsolidated nature of Latin American democracies is made evident by the inability of these political systems to apply the law evenly and impartially, particularly in disregard of socioeconomic status. O’Donnell calls resolving this trouble the “hardest problem of all.”<sup>96</sup> Shallow democracy exacerbates inequality, a trend more evident in Latin America than anywhere else. If the demand for reform arises from the masses, the advancement of judicial reform in Latin America could signal a watershed moment in the history of the region’s societies. Social stratification and economic inequality can be reduced with the use of several tools, including investment in human capital and redistributive systems of taxation. But sweeping changes in the judicial system

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<sup>95</sup> O’Donnell (2007), p. 68

<sup>96</sup> “In societies marked not only by pervasive poverty but also, and even more decisively for our theme, by inequalities, how do we ensure that the weak and the poor are at least decently treated by those officers [of the state]?” [O’Donnell (2007) p. 68]

will have a most powerful impact on the ability of marginalized actors to articulate their demands and on the capacity of the state to enforce rights-protective constitutions throughout the region. In addition, the very emergence of reform from the masses could signal the unravelling of structural inequality itself.

Previous judicial reforms have done little to improve the situation of the underprivileged and marginalized sectors of the population. The unfortunate fact is that the least successful reforms have been those that attempt to make changes to the public defense system. Their failure relates directly to issues of structural inequality; if those charged with crimes cannot defend themselves equally before the law there is little hope of achieving wider social equality.<sup>97</sup> Moreover, the lack of independence of the judicial branch has led to the oppression of segments of the population through assorted interpretations of the law, enforcement of the law by convenience, and the criminalization of opponents. Throughout the region, most evident is the

undeniable bias of the Latin American judicial systems against the poor and the underprivileged, defenceless in practice... Equality in law is not a reality... being vulnerable to unfair trials and abusive deprivation of their liberty<sup>98</sup>

The tenuous nature of the rule of law in Latin America contributes to relatively high levels of crime throughout the region, which in turn is related to inequality. Diamond observes that the magnitude and intensity of crime, violence, and fear is often larger in unconsolidated democracies than in consolidated

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<sup>97</sup> Calleros (2009)

<sup>98</sup> Calleros (2009), p. 143

systems.<sup>99</sup> Successful judicial reforms and wider reforms to institutions of order that contribute to democratic consolidation should result in a higher conviction rate and a decrease in the incidence of crime. Reducing crime would in turn contribute to decreasing transaction costs rooted in the current insecurity of property, which reduces growth and exacerbates income inequality. Furthermore, reducing crime would lead to increased respect for the law by both state and non-criminal elements among the public, thereby contributing to the broad legitimation of democracy.<sup>100</sup>

### **Vicious Cycles**

The talk and fear of crime leads to prejudices related to such talk, increasing the separation of social groups and amplifying the tensions and suspicions related to the conception of the “other,” which sparks a vicious cycle of fear, crime, and violence. Teresa Caldeira explains how

in the context of increased suspicion and fear of crime, and preoccupation with social decay, residents show no tolerance for people from different social groups or interest in finding common solutions to their urban problems.<sup>101</sup>

This intolerance is exacerbated by inefficiencies of the judicial system that create citizen exasperation, expressed through vigilantism and lynching.<sup>102</sup> This ugly cycle of crime and privately administered justice diminishes the quality of public space.<sup>103</sup> Violence and widespread misery provoke elites and professionals to

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<sup>99</sup> Diamond (1999)

<sup>100</sup> Diamond (1999)

<sup>101</sup> Caldeira (2000), p. 254

<sup>102</sup> Calleros (2009)

<sup>103</sup> Caldeira (2000)

isolate themselves from wider society, increasing the secular social distance between various groups.<sup>104</sup> At the same time, economic growth tends to exacerbate these issues. In Brazil, the upper class has demonstrated disgust about working class incorporation into consumer society, furthering the separation of classes and enhancing the perception of inequality, which feeds back into the vicious cycle of crime.<sup>105</sup> Caldeira contends that a strong democratic will is necessary, but not sufficient for creating a society that respects human rights and reverses the pattern of abuse that leads to the private administration of justice and reproduction of inequalities. Judicial reforms are also necessary in order to dismantle the complexities of structural inequality.

State weakness and corruption, made evident by inconsistent judicial practices, produce and reproduce inequalities. The misapplication of the rules reveals the shortcomings of judicial systems. For example, extrajudicial executions carried out by the Brazilian military police while off duty are rarely prosecuted (the conviction rate is between 5% and 8%).<sup>106</sup> These informal executions and the impunity of the police contribute to the unrule of law and expose the judiciary's inability (and frequent refusal) to guarantee the protection of citizens' rights and enforce constitutional law. The broad correlation between judicial inadequacies and human rights violations by the state is evident throughout the region. In Mexico, the inability of the government to protect citizens from common crime is made evident by high urban crime rates and

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<sup>104</sup> Hoffman and Centeno (2003), Holston (2008), Gootenberg (*forthcoming*)

<sup>105</sup> Caldeira (2000)

<sup>106</sup> Calleros (2009)

widespread interference in the state by criminal networks. In Venezuela, fundamental rights protection has deteriorated under the presidency of Hugo Chavez, despite a rights-protective 1999 constitution, because of repeated interference in the judiciary and repression of the opposition. Unfortunately, even where the state has attempted to crackdown on human rights violations, such as in Brazil and Colombia, there is the “paradox of having judiciaries powerful enough to overrule governmental decisions [that violate human rights] but incapable of satisfying basic citizens demands.”<sup>107</sup>

The failure of justice systems is also made evident by social trends such as the privatization of justice, the walling of cities and neighborhoods, and the destruction of public spaces.<sup>108</sup> The breakdown of institutions of order (such as the police and courts) and attempts to enforce the law reveal the relationship between the growth of violence and inequality. Growing activity in the informal sector among the police and courts undermines the sense of community structure and contributes to violence and the destruction of public space. This type of crime disproportionately affects the poor, while poverty itself reproduces victimization, criminalization, the lack of access to justice, and the general disregard for the rights of the underprivileged. These trends reinforce the subaltern placement of certain groups in the social hierarchy and the unequal guarantees of individual rights evident throughout Latin America.

In all societies, the police and the courts reinforce and reflect underlying social processes that contribute to crime (such as violence, illegality, and

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<sup>107</sup> Calleros (2009), p. 150

<sup>108</sup> Caldeira (2000)

bypassing the criminal justice system<sup>109</sup>). In Latin America, the relationship between these institutions of order and the public is largely one of violent repression rather than safeguarding civil rights. One result of this trend is the privatization of security, but this not only feeds into a vicious cycle of crime and inequality, it also creates a challenge to policing by nurturing a large illegal market. Yet, because the approach institutions of order take to their relationship with the public has a close connection to the tendency of the public to take justice in its own hands, dismantling this aspect of structural inequality is particularly difficult. Changes to the judicial system must address the isolation of the courts from the people in order to make the judiciary better reflect the values and priorities of the public. Reform must also alter the relationship between the police and the public. Despite several rounds of reform, there has been no significant effort to guarantee social diversity within the courts, which helps to explain why discrimination and bias persist. Correcting this flaw would be a good starting point for reforming institutions of order.

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<sup>109</sup> Caldeira (2000)

## CHAPTER 6: THE PATH TO REFORM

Schedler explains that four arenas that could generate pressure for institutional reform exist in directional relation to each other; reform may come from outside, inside, above, or below.<sup>110</sup> Actors on the outside (international actors) can play a role in sparking movements and political pressure, however, the involvement of external actors in judicial reform can compromise national sovereignty. Moreover, when international actors are seen as the prime movers of change, reform tends to be fragile and reversible.<sup>111</sup> Nonetheless, international actors can and should help “diagnose” inadequacies in the judicial system, assist in training judicial personnel, help finance the construction of justice centers in geographically remote communities, and support human rights programs. At the same time, international financial institutions like the IMF and World Bank should continue to make development assistance available specifically for reforms and capacity building within the judiciary, as well as promote the strengthening of civil society and improve public understanding of the role of horizontal accountability. It is of the utmost importance that the host country, not the donor, determines the priorities of external assistance for judicial reform by democratic means. Moreover, these reforms should be designed in consultation with those affected by them and aim to conform to international human rights standards.<sup>112</sup>

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<sup>110</sup> Schedler (1999a)

<sup>111</sup> Schedler (1999a)

<sup>112</sup> Brody (1999)

On the inside, “moral actors” and “agents of change” could emerge, although judicial personnel are typically seen as resisters or obstacles to reform. Nonetheless, history reveals an inexplicable trend of insiders generating pressure for and demanding change. Schedler points to the paradigmatic case of a handful of young judges who catalyzed judicial reform in Italy. However, while unique individuals such as these can battle corruption within the judiciary, they would have a harder time addressing issues of inefficiency, inaccessibility, and interference. Decisionmakers at the top are better positioned to address these issues. They may find the institutionalization of self-restraint and enhanced accountability to be in their self-interest, so reform could emerge from above. Macroeconomic benefits, electoral success, and the crosscutting and intertemporal nature of institutions (the expectation that accountability could hurt political adversaries and restrain successor governments) are some of the reasons that Schedler argues reform may be demanded and implemented from the top-down. Yet extreme inequality contributes to the ability of elites to retain disproportionate political power and reduces the likelihood that reform to empower marginalized groups will emerge from above. Sustained and visible demand from civic associations and other elements of civil society will play a critical role in safeguarding judicial independence.<sup>113</sup> Reform will not be designed and implemented without pressure from below.

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<sup>113</sup> Schedler (1999a)

## From the Bottom-Up

Circumstances demand action by civil society if hopes for judicial reform are to be realized. Pilar Domingo emphasizes the fortunate fact that the convergence of several forces throughout the region generates growing demands for judicial reform within the social sphere.<sup>114</sup> Following Domingo, democratization led to an expansion of voting rights and advanced a more developed notion of citizenship and civil society. This led to numerous changes in society, which actually increased social fragmentation across the region (this trend is also emphasized in Caldeira's concept of disjunctive democracy). As a result of social fragmentation, Latin American societies exhibit a growing demand for a rights-protective state, which clearly goes hand-in-hand with a stronger and more accountable judicial branch.

Domingo also identifies several other sources of demand for judicial reform in Latin American societies. The retreat of the state that occurred during the era of neoliberal macroeconomic policy contributed to a generalized feeling of loss and growing dissatisfaction with the status quo. In the post-neoliberal context, in which the growing presence of leadership from the Left has revitalized the scope and capacity of public policy and institutions, conditions for reform are ripe. Moreover, concern with law and order and increasing levels of public insecurity are responsible for generating growing demands for changing the way political institutions relate to society.<sup>115</sup> The increasingly complex and urbanized societies of Latin America also require more effective and fairer mechanisms for

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<sup>114</sup> Domingo (1999)

<sup>115</sup> Domingo (1999), Caldeira (2000)

the settlement of disputes, making the need for a reformed judiciary quite evident. Moreover, Domingo emphasizes the ways in which capitalist interests generate demand for reform: a strengthened legal framework for private property and contract enforcement is essential for investment. The inadequacies of the judicial system have been noted as a major constraint on private sector development.<sup>116</sup>

Despite the common characteristics of judicial inadequacies throughout the region, it is imperative to recognize and respect the country-specific conditions that generate demand for reform and affect the way reform may be enforced. This paper has taken a generalized approach to understanding the relationship between inequality and judicial inadequacy in the shallow and unconsolidated democracies of Latin America. However, the specific requirements for meaningful and lasting reform vary from country to country, and even from city to city. As Domingo explains, “substantive changes in political culture, values, and expectations of a society and political class” will impact the initiation and implementation of meaningful reforms, especially given the complexity of Latin American societies.<sup>117</sup> This complexity will only increase as traditional social barriers breakdown because of rural-urban migration, continued industrialization, and economic hardship. Meanwhile, elites and professionals may erect new social barriers, further marginalizing underprivileged sectors of society and increasing the perception and reality of economic and social inequalities. Therefore, successful reform will require a thorough understanding

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<sup>116</sup> Domingo (1999)

<sup>117</sup> Domingo (1999), p. 165

of the relationships between the various social and political actors in each country.

## **Conclusion**

To combat inequality, Latin American countries must reform the “intermediate dimension” of their political systems – particularly judicial institutions. Judicial reform in Latin America will contribute to the deepening of democracy and political consolidation, thereby dismantling structures that underpin inequality. Judicial reform can also have a more direct influence on inequality by effectively putting an end to vicious cycles of crime, violence, and victimization that result from the private administration of justice and widespread discrimination. Future reform “must take a synergic approach, in order to strengthen simultaneously the crucial aspects of independence, access, and efficiency of the judicial sector.”<sup>118</sup> Other essential mechanisms must control corruption, restructure the criminal defense system, protect human rights, prevent circumvention of the law, and protect judges and prosecutors from intimidation and violence. Partial reforms will be unsatisfactory due to “the close links between every part of the rule of law jigsaw puzzle.”<sup>119</sup> Moreover, successful policy requires a greater emphasis on and understanding of the close relationships between inequality and the weak institutions prevalent throughout Latin America. Analysis of these relationships illuminates the ways that deepening democracy is contingent on the enforcement of rights-protective

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<sup>118</sup> Calleros (2009), p. 176

<sup>119</sup> Calleros (2009), p. 184

constitutions. Latin American democracy is characterized by three traits – illiberalism, inequality, and weak judicial institutions – none of which can be understood outside of the context of their relationships to each other.

Civil society must play a major role in organizing for and demanding reform, while decisionmakers must recognize that they would benefit from embracing self-restraint, judicial autonomy, and horizontal accountability. The three defining features of 21<sup>st</sup> century political systems – democracy, capitalism, and the territorially-based state – all require the assumption that individuals are to a certain degree autonomous and responsible.<sup>120</sup> The reality of Latin America, however, underscores the ways in which individuals are neither perceived nor treated equally, compromising both autonomy and individual responsibility. To reduce inequality, enhance confidence in political institutions, and expand the capacity of the state to enforce rights-protective constitutions, Latin America needs to experience a new kind of democratic wave. This wave will encompass widespread judicial reform and alter relationships within the state and between the state and society.

Reforming judiciaries and making democracies more rights-protective will improve the capacity of the poor and marginalized in Latin America to organize and mobilize within the political process, thereby improving welfare across Latin American societies. To design reform that is effective and capable of withstanding the multiple pressures exerted by international, national, and sub-national actors, a deeper understanding of the intermediate dimension is

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<sup>120</sup> O'Donnell (1999c)

necessary. As O'Donnell, Hoffman, and Centeno have observed, large informal markets undermine democratic development. They foster illegality and create obstacles to the political, economic, and social integration of marginalized actors. Moreover, they make difficult the implementation of redistributive policies, either through taxation or economic growth. Therefore, future research should seek to determine whether there is a link between the judiciary and informal markets. If such a link exists, judicial reforms must address the need to encourage the formalization of irregular economic activity while protecting the rights of those whose economic activities primarily occur within the informal realm.

Secondly, in analyzing the intermediate dimension and other aspects of the post-transition period, it is a mistake to neglect the legacies of authoritarianism. As O'Donnell has recently observed, authoritarian regimes in Latin America often took root in the deep economic and social inequalities that have not yet been alleviated by democracy.<sup>121</sup> Often, authoritarianism also contributed to these inequalities by taking away opportunities for the poor and marginalized to voice their demands through the political process. In the context of asymmetrical power exertion by elites, the political process is the best – and sometimes the only – opportunity for subaltern actors to have a voice, particularly one loud enough to be heard by and warrant a response from elites. Moreover, as O'Donnell observes, authoritarianism introduced the socially privileged to the fear of victimization, humiliation without the chance to protest, and even the fear of fear itself. These fears feed into vicious cycles that underpin inequality and the

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<sup>121</sup> O'Donnell (2007)

shallowness of the region's democracies. Although history cannot be undone and reconstructed to benefit the present, it is important to recognize these legacies of authoritarianism in Latin America for two reasons. First, without an understanding of the root of problems like inequality and fear, there is little hope for finding a remedy. Second, understanding the residual impacts of authoritarianism reveals the imperative need to prevent future authoritarian reversals and promote the deepening and consolidation of democratic political systems.

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