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The Vision for Reform and Its Potential for Success

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In Latin America, we have been working for the last fifteen years on the intense process of reforming the justice system. This is something that is quite unusual in our history because traditionally the justice systems in our countries functioned in the same manner as they did when they were formed back in the colonial days. During the independence process of our countries, the idea of forming justice systems that were democratic was a subject that was very central in the discussion, but in practice the changes were actually very minor or practically nonexistent. Why, then, in the last fifteen years do we have this intense phenomenon of judicial reform? I do believe there are many reasons and some of them have come up here during the debate. There is no question the main reason has to do with the democratization process that most of the countries in the region are experiencing, getting out of military dictatorship. Civil wars have ended. The advance that goes hand in hand with that process is the development of international human rights procedures.

But there are other reasons that have been mentioned. The reform in the economic systems during the 1980s. Our judicial reform coincides with the globalization of Latin America and the new roles that are assumed by the market as the government steps aside. We are beginning to provide legal systems according to our new economic systems. We must see the explosive increase in the cases that arise in the courts in order to explain this great pressure that the new economic situation caused. In Brazil, where we have seen some incredible figures, but also in every country in Latin America, the number of civil cases have tripled in the last fifteen years. But I think also that we have to look at another facet of the impact of the economic transformation and the judicial reform. Not only do we have new systems with new demands, but there is also a connection, a very close connection between growth, economic growth, and legal judicial systems. They will become more efficient and more appropriate to solve conflicts.

This is not a trivial subject. I do not want to make a mathematical connection between the two, but I do wish to raise some questions concerning how long can we possibly maintain the reform process that

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is in many ways associated with economic growth when, at this moment, Latin America's economic situation is quite the opposite. We have a very serious economic crisis and in some cases we have negative growth. But the trouble is not only limited to the civil and commercial spheres. We have an explosion in lawsuits, but also there is a new phenomenon for us in Latin America that is very intense and it has to do with citizens feeling insecure. At this moment the crime figures are very high, higher than anywhere else in the world. The rate of crime growth in Latin America is greater than anywhere the world over. This is a period of great changes, radical social changes that are very important. It is curious how we have the players who traditionally were key in solving many relevant conflicts in our countries, conflicts that were solved by the family, or ended in the hands of the political authorities, or the different political parties, or the government, or entities such as the unions, abandoning their previous roles. In the last decade we have a crisis, a radical crisis, in our countries and, therefore, virtually overnight we began to see these types of social conflict that are very complex develop, regarding what movies we can see, what can we do, things that traditionally did not reach the courts in our countries. Now they are being seen or being solved by the courts. At the same time that we have this phenomenon that one can interpret as an increase in power, strength, importance, and legitimacy of the judicial system, but conversely less trust. If one analyzes the surveys, such as one done many years ago by the LatinoBarometro, year by year the level of trust of the people have in the judicial system has been dropping. This is part of a general problem of lack of confidence in the institutions in our different countries. In particular, it is very clear that they have greater distrust of the legislature and the political parties. Only those two surpass the judicial.

Besides these factors, we must also mention that as a forum for international cooperation, this Panel has a very important task. The international community is involved in the area of judicial reforms. They have not done so before, but now they have a very important role in setting the agenda and the reforms to which I want to turn next. If one had to do a very brief synthesis of the reform process with all of the different — and perhaps arbitrary — psychologies which have guided it, there have been five large lines of reform of the justice systems in Latin America in the last fifteen years. I am referring now only to the institutional reforms of the judicial system, and leaving aside the police, because I do not know whether they should be included in the judicial system or not. I am referring now to the judiciary, to the public

ministries, and so on. One of the reforms that has been analyzed here was the constitutional jurisdiction, the role that our constitutions play in our countries. The diagnosis was that basically the constitutions were declarative texts, but applied only to the organization of the government and the public institution — they had nothing to do with the daily life and the rights of the people. The reforms necessary to establish the resources to make or modify the constitution are in the hands of all the citizens, as can be seen in Mexico. At the same time, we made efforts to create constitutional courts. These courts should have oversight of the constitutionality of the different legal rules that were approved by the legislature. The implementation of this reform was quite simple. It was not necessary to make a big change and we did not have to go through big training processes, but it was a reform in which all the players were internal players. The political parties and the legal community handled this reform. The international community did not have a very important role in this process. These were quite inexpensive reforms, I would say, in political terms, and in terms of the capability to create a consensus they were relatively peaceful.

A second line of reform had to do with the organization of the legal system, of the judicial system. Starting from my diagnoses, though, there were serious, severe problems of lack of independence, lack of control in the judicial system, and lack of leadership. This was regularly attributed to inadequate judicial systems. There was lack of high quality public servants. There was a high degree of personalization of the responsibility concerning independence. What did we do with this line of diagnoses? Basically, we established systems. We tried to make them more transparent. We created judicial training schools or colleges. One of the things we emphasized was the issue of financial self-sufficiency. Many countries made huge efforts to develop self-sufficiency so the courts would not depend on the incumbent parliaments or congresses for their income. They would have sufficient and adequate budgets. We found that the legal instruments were quite appropriate. There was no need for huge efforts in implementation. The professional legal community took charge of implementing it. It is hard to say whether these reforms were expensive or inexpensive because that depends on the amount of investment each country did. In this area of self-sufficiency one noted that the budgets of the judiciary increased remarkably, court budgets increased, and salaries and wages of judges and court staffers also increased. I do not think we came to the best situation but I think that the potential for success has been considerably improved. Consensus behind these reforms was also variable. In some

cases the justice council promoted intense debates that are still ongoing. Curiously enough, the first country in setting up this justice council, Venezuela, was the first in abolishing them. In Colombia, too, this institution is being strongly questioned.

A third line of reform is primarily focused on the improvement of judicial institutions. And here the prognosis indicates that laws are not the main trouble. You have got laws for everything and you can develop all kinds of laws. The problem here is enforcement. Laws are not being enforced. The system is operating inadequately. It is functioning as it was created to function five hundred years ago; however, technology has advanced. The judiciary has been lagging behind in this whole process. The principal reforms were new organizational design, a restructuring of the court administration for the professional training of court staffers. There is a great emphasis on computer systems as the most visible phase of this reform. As I already indicated, the tools the judiciary used were very effective and they tried to discuss the need for legal reform, but legal reform was only introduced in the most essential cases. Players in these cases are different. They are within these judicial institutions and they were a part of the hierarchy thereof; in other words, the players in developing judicial institutions were the leadership of those institutions. We also have a very strong presence of international cooperation as a major component of the reform. Interestingly, we are finding new people involved in this process of legal reform and it has ceased being the matter for lawyers only. As you know, this is a very expensive exercise and requires increased budgets.

Consensus was another problem in which we have seen mixed results. This is one of those issues that will always encounter the most resistance and controversy because it implies many changes of our administration and these are some of the oddest things about the justice systems in Latin America. For instance, it is not hard for a judge to delegate on a lower officer to draw up a sentence, but he would never delegate powers for the purchases needed for court administration.

There is a fourth line that relates to access to justice. This is a highly controversial and exclusive area and it is arguably indicated that it is a problem for only one sector of the population, the poor people who have no access to courts. In this area, reforms are proceeding on two tracks. On the one hand, we are strengthening our court systems, and on the other, we are introducing alternative dispute resolution mechanisms. In this case the players are a lot more varied. International cooperation is also one of the components of it. Other players will also be involved; the local community and civil society will start working and

contributing to the reform. Implementation will have varying costs. Countries that show a more serious interest in this will invest more and others will get a different, more equitable formula. Overall, however, I would say that, by and large, these changes have been quite peaceful.

Finally, there is procedural reform. But changes here are mostly focused on the criminal area and I think we have covered those grounds sufficiently. I think that the analysis here is not so much related to efficiency but to constitutional issues — the need for guarantees for the fundamental rights of people. I think that these reforms have been labeled — for example, as reform headed towards an adversarial system. This labeling only introduces confusion because it tends to create a judgmental discussion. Whether we are going to follow a more German or American type of judicial system is not the question. We just wanted to promote a discussion about systems we wanted to adopt in our countries. There were no trials. It was just an exchange of papers, a morass of bureaucratic red tape without a real trial occurring. The mass community was always fascinated by the need to exercise their rights to have their cases heard. When individuals looked at trials, they assumed that trials were like those they watched in movies. When they came to one of these trials, they would get frustrated because they would see that reality did not coincide with what they thought. Many of these reforms were initially very confrontational, involving those that have vested interests in the existing judicial systems. The largest part of the community, however, has tried to support procedural reforms. Again, the costs are variable, depending on who will deal with this reform, and whether they will deal with it in a serious way or not.

In terms of constitutional reforms I think that the positives have been a lot greater and the impact on the judicial function is very visible today. Today we look at courts solving the most complex cases and those that have a great social impact. We had forgotten about our constitution, but the constitution once again emerges powerfully when these cases are dealt with. Previously, it would not be used when it should have been. Now, lawyers sometimes have to invoke the constitution and this impacts positively the prosecution of any case.

Historically, the most expeditious actions have been favored by litigants, and as a result the system collapsed. We have already heard about the Mexican amparo or protection of rights recourse and we have seen how the number of cases that come to courts will create a huge backlog, a backlog impossible for court administrators to resolve. I would say further that the quality of the process is also not so good. In many systems, many cases are being resolved according to their own

inherent justice rather than what the constitution indicates. The constitution must be more than a message about the rights of people that will require a certain prescription; it must be possible to put together a persuasive case based on those constitutional rights. So we do not have much predictability as a result of this and there is certain degree of politicization of justice, particularly in Argentina in recent years. This has been very problematic because we have weak courts and they are often unable to deal with that kind of pressure. The other issue is that unfortunately our judges do not have a very wide panoply of tools to deal with all the problems they face. The economic issues are among these. The outlook the judges have is sometimes a bit too narrow-minded, and they do not understand that some economic decisions have a bearing on their cases.

As for the judicial system in Argentina specifically, I think the results have been quite positive. There has been great concern about strategic planning components that have been built into the current system. We have a chief justice that will be supportive of new concepts for streamlining our system of justice. We have also created judicial colleges and a greater emphasis is being laid on the quality training of judges and judicial staff. There is greater job security for the judicial staff. What are the problems we face? Justice councils have showed that they are not really so effective. They do not make an effective contribution to the functions of the court because they are too politicized and they have a great variety of functions. It is impossible for them to make effective administrative decisions and it is actually very complex to handle that kind of council for the judiciary.

In terms of the judicial career, there are many issues like incentives and salaries for judges. Training is a very significant concern because we are trying to embark on a new approach which departs from the classical training of judges. It would appear that training is unconnected to other developments, proceeding toward a curriculum that has been developed by people who are not involved in the reform process. Those who are responsible for the reform and those responsible for curriculum development are not really connected to each other. Most of the resources that have been allocated to the courts have been used for paying better wages and, therefore, have not been concentrated on improving quality of justice. I think that these developments have not been accompanied by real accountability or the need to account for the resources given to them. I do not believe in guaranteed appropriations given to an entity. I am for arguing before congress for the resources you are given.

These positive effects have encouraged further innovative ideas. This has been very important. Simply put, these reforms did not exist before. Not only did they not exist, our systems were very conservative; now I believe this is changing. Now there is a greater overlap with other disciplines. This is very valuable. I also think that we have seen greater degrees of efficiency in specific areas, in geographic distribution of the courts. However, we still have acute problems. The biggest problem we have is the management of our institutions and the fact that they are not connected to the reforms. One can manage an institution in a very efficient way, but that is of no value if the basic product is not satisfactory. Unfortunately, the substantive reforms each have gone their own way. Not many reforms have been embraced by the different institutions for their benefit, and most of the resources have gone to benefit those who are those in the institution rather than the citizens. This has strengthened the hierarchy within the legal system. One of the problems we have is that our institutions are very vertical organizations. Many of the problems that we have revolve around technical independence. The chiefs tell the people below them how they have to respond to a case.

What cost us ten, now costs us a hundred. There are a lot of consultants. There is a lot of money running around. We have had a lot of problems in going beyond the pilot plans. Many of the reforms have been abandoned, and died in the pilot plan, and never happened. We have a pilot plan on top of another pilot plan that already existed. We put pilot program on top of pilot program. But there are positive aspects to these reforms; more people have access to justice and we have managed to create a system that will answer to them. There are different doors. Not everybody has to be the same way. This makes things more efficient and we handle our resources in a better way. But we still have not developed a satisfactory system. The problems are now in trying out different models. But clearly our overall advance has not been very great. There is a possibility of giving legal aid to everybody but we cannot do it. Regarding alternative dispute resolution, we have made a great advances in that area, but such methods are nonetheless quite marginal. We basically have second class justice. We are unable to give first class justice. We are still trying different conflict resolution processes. A workable form has been very difficult to establish in our countries.

Nevertheless, I think there has been a real reform. We have had a lot of attempts at reform that have not accomplished anything. Justice, however, is changing. Our citizens can tell you that. This is something

that is quite significant. The role of the victim, the role of the citizen has changed, and their perceptions have changed. These reforms have strengthened the legal community, as I said at the beginning, and I believe that the capacity for learning that the members of our profession have is very positive. They are capable of improving, overcoming the problems that they had at the beginning. We had a lot of problems. Curiously, we always thought that reforms would be very complex because we imagined there were a lot of people that were going to oppose reforms. We have realized that the most complicated problem has been not the enemies, but rather the friends of reform, because those who believe in our reforms do not know how to act within the new system. Even when they act with the best faith possible, what they do is many times exactly what should not be done in, for example, an oral system. We have given examples here this morning concerning the lack of training that we have in that area. The reality is that we do not have many oral systems. A few cases go to trial, and the rest of the cases in our courts are still done in writing. We have not improved things and this, I believe, is absolutely critical for us to resolve. The different public ministries in our country have demonstrated that they want to organize things and they want to see how the judges function. It has, in general, been very difficult to establish that system. We have to rationalize the process of how to use our resources, where resources are not being used appropriately. The deficiencies in our system are quite ambiguous. We do not have the methodology to measure them appropriately.

I believe in all of this, the international community has played a very important role beyond providing financial and human resources. Contact with international organizations has been very important for us, especially at the court level. International cooperation has had the virtue of putting subjects on the agenda and encouraging discussions such as this one. Our judiciary systems are political institutions within our countries. In an ideal situation, when people have nothing to gain politically by these reforms, the discussion can then proceed on a technical level which is much more productive. But there have been a lot of problems. We have to keep them in mind because international cooperation sometimes comes with an agenda. International organizations often have their own agenda, and fail to establish a dialogue with the countries. We have had a lot of problems of conflicts between these agencies because of their differences and because of the money that comes with these agencies. The money is very useful, but it should be spent wisely. Failure to do so causes problems.

Unfortunately, people have bad memories. We do not learn from our own history because people change. We do not think back to what happened before, and the information and experience that has been gained from the cooperation of these agencies is reduced. What we need, more than just international cooperation, is to work at the regional level with more actors. We have to do a process similar to globalization. Globalization tends to unify many things, but it also generates processes that are antagonistic to each other. We realize that within our countries, there is lot more independent movement. Something similar is happening with the justice system. We have advances and reforms but this does not mean that the situation is the same in every country. We have to know about the reality of each country. There are countries in which, for example, the indigenous people are a key factor, and that situation changes the logic completely. Even though such a country might implement the same reforms as the country next door, the situation is quite different. Therefore, we have to have greater uniformity, but at the same time we must appreciate the greater complexity that it brings. That is why the effort that must be put forward by anyone who wants to work in this area is considerable; the system has become very sophisticated, very complicated. We have seen today there are many subjects that can be discussed but there are many points on which we differ. There are many players that have a completely different vision — the more academic vision from the scholars, the more practical vision from the users.

