"Too far removed from the people"
Access to Justice for the Poor: The Case of Latin America

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Abstract

This paper discusses access to justice for the poor in Latin American countries. It takes its cue from the 'Latin American legal paradox': provisions for economic and social rights are generously incorporated into the legal framework of most countries, yet they score poorly in terms of accommodating those rights for the poor. The author enumerates the problems facing the poor when seeking redress through the court system: lack of information; high costs; corruption; excessive formalism; fear and mistrust; inordinate delays; and geographical distance. While acknowledging the significance of these obstacles the author goes on to discuss the very structure of the judiciaries, deliberately insulated from the populace. He points to the lack of representation on the bench of significant minorities – especially the underprivileged – and to the fact that the judiciary is basically a 'reactive' institution, which has frustrated social activism through its rulings. The final part of the paper reviews 'informal' mechanisms of justice at the local level and the gradual acknowledgement of such approaches by formal legal institutions.

Introduction

This paper examines the factors that obstruct access to justice for the poor in Latin America. Its point of departure is what might be called the "Latin American legal paradox". Latin American countries have some of the most generous legal systems in the world, which incorporate numerous social and economic rights, yet they rank very low in terms of securing those rights for all, particularly for the poor. In order to examine the gap between the prescriptions of the legal rules and what people actually obtain I want to focus mainly on the organization and functioning of the Latin American judiciary.

Most investigations on access to justice focus attention on what the legal system *lacks* (e.g. free legal services for the poor), or what the victims of injustice *lack* (e.g. legal information and money). These studies, however, do not pay sufficient attention to the very nature of the legal system – its structure and the consequences that stem from this structure. In my analysis, I will show that one of the main reasons why the underprivileged find it difficult to access the legal system is that, since its origin, the judiciary has been placed "too far removed from the people" (Madison 1988: Ch. 49). I believe this constructed "distance" has made it more difficult for poor people to be confident in or feel part of the judicial system, and has discouraged judges from developing sensitivity towards the disadvantaged. An important consequence of this judicial insensitivity has been the evolution of a well-established series of rulings that has been hostile to the implementation of social and economic rights and restrictive of

[1] I want to thank Carolina Garber for her friendly assistance.

popular activism. The problem of legal access is thus exacerbated by the very judicial decisions that the legal system makes as a matter of routine.

Most of the constitutions created since the late 18th century included civil and political rights – what we today recognize as individual rights. The first important constitution to include new social rights was the Mexican Constitution of 1917. It incorporated a long list of norms related to labour and social security issues. For example, specific references were made to the maximum duration of the working day; specific rights for pregnant women; the right to a minimum wage; workers' right to share in the profits of enterprises; procedures for the dismissal of workers; numerous clauses regarding labour contracts; rights to recreation; the workers' right to organize to protect their common interests; and the workers' right to social security.

Many Latin American countries followed suit, either by amending their existing constitutions or by writing new ones. Chile's Constitution of 1925 included differing "Constitutional Guarantees" and Peru's Constitution of 1933 had a specific chapter on "Social and National Guarantees." Uruguay changed its constitution in the same direction in 1932; Brazil did the same in 1934; Colombia in 1945; Nicaragua in 1939; Paraguay, Cuba and Panama in 1940; Bolivia and Guatemala in 1945; Ecuador in 1947; Haiti in 1946; Venezuela in 1947; and Argentina in 1949.

In the late 20th century, there was another wave of constitutional reform in the whole region, which reinforced the sections on social rights. Most of the new Latin American constitutions incorporated participatory rights into their texts. Some went as far as to include the right to carry out "popular legal initiatives". In addition, many of them adopted rights for indigenous peoples, recognizing the "ethnical and cultural preexistence of the indigenous people" (Argentina, 1994; Paraguay, 1992); the "multiethnic and multicultural" character of the State (Bolivia, 1994; Colombia, 1991; Ecuador, 1998; Mexico, 1992; Peru, 1994); indigenous people's rights to develop their own identity and culture (Nicaragua, 1995); or the need to recognize and respect the existence of indigenous people (Panama, 1994).

The first part of this article discusses the factors usually mentioned in explaining the incapacity of the poor to assert their social and economic rights. The subsequent two parts explain how and why the judicial system was detached from civil society. The fourth part reviews the kinds of judicial decision that the legal structure tends to generate, and the way in which these judicial decisions reinforce the existing distance between the people and the judiciary. The last part of the paper explores different alternatives for guaranteeing the poor better access to justice.

What prevents the poor from accessing justice?

Given the importance assigned to social and participatory rights in Latin American constitutions, it may seem surprising that the poor find it so difficult assert them. Below I refer to some factors that have traditionally been used to explain the gap between law and social practices. The most important factors are the following.

Lack of information. Among the many obstacles to justice, lack of information always ranks top. For example, in his classical study on the topic, Mauro Cappelletti referred to what he called the problem of "legal poverty" and considered it one of the most important obstacles to legal access. The disadvantaged, he affirmed, lack basic information about their legal rights. The general problem of lack of information encompasses many subsidiary ones: not knowing what rights one has; not knowing where to go and what to do in order to demand one's rights; not knowing the legal language and the legal procedures, etc. According to Edgardo Buscaglia's work on access to justice in Colombia, 66% of the people considered that their lack of information about their rights and obligations is a serious obstacle to accessing justice. About 24% of the people considered this factor the main obstacle. To this should be added another 22% who consider lack of basic information about the initial procedures to be the main impediment (Buscaglia 2001).

Economic costs. At least as important as the information problem are the economic costs of justice. In principle, these difficulties appear in all countries and affect all kinds of people. However, these problems are more serious in poor countries and for poor people. Poor countries tend to have more problems in guaranteeing decent minimum social protection and good education for all. At the same time, poor people are more likely to be unable even to initiate a legal process, let alone carrying it through. First of all, they have to afford the high costs of paying a good lawyer and the court fees.[2] It must be taken into account that without a good lawyer the chance of succeeding in a lawsuit is drastically reduced. Judges have to adjudicate in numerous cases that clearly exceed the capacity of even the most committed magistrate. In addition to the direct economic costs, there is a myriad of smaller costs that all poor clients have to meet. They need to travel long distances to the cities where the courts are normally located and "survive" there while completing the formalities; they need to pay to obtain basic documents; they need to make photocopies and phone calls. These items may not count as obstacles for most people but could represent serious barriers for the poor. According to a survey undertaken by the Inter American Bank of Development in seven Latin American countries in 2000, "the first conclusion of all local investigations shows that the economic factor is central when explaining whether people [take their legal problems to the courts, or not]" (Thomson 2000: 415). Not only is the economic problem perceived as an insurmountable obstacle, it often is.

Corruption. Justice is costly in many different ways, but particularly in an economic sense. However, economic costs are not only those normally associated with setting the machinery of justice into motion. It is a widespread perception in Latin America that justice is costly because it requires *additional* money to "guarantee" a favoured outcome. This perception leads many people to think that justice can only be obtained by rich(er) people; wealth and justice become closely associated. In this regard, for example, 66% of Peruvians believe that the legal system is ineffective or very ineffective, and almost 40% of them believe that this ineffectiveness is due to corruption. Similarly, 91% of Ecuadorians believe that the greatest problem with their judicial system is its corrupt

[2] It is important to note, in this respect, that in most countries access to justice is simply dismissed when one's demands are not backed or directly advanced by a lawyer.

character (Thomson 2000: 74–5, 254–60). In Colombia, 96.8% of the people believe that judges are "bought" by rich claimants, and 93% assert that the social position of the claimant influences the outcome of the judicial process (Herrera Mercado 1999: 346–7). According to another important study among poor people in Chile, almost two-thirds of the underprivileged (63.5%) believed that judges treated rich and poor differently and 88.7% considered that there was one type of justice for the poor and a different one for the rich. Only 26.3% of them believed that judges were immune to bribery; 90% affirmed that lawyers took them more seriously the more money they paid, and only 17.4% believed that lawyers were more interested in achieving justice than in obtaining money. Moreover, 77.8% agreed with the notion that lawyers were corrupt and that they delayed the settlement of cases to extract more money from their clients. Jorge Correa Sutil points out that in poor countries poor people stand a lesser chance of legal redress than do rich people, given the way in which the legal process is organized. Rich litigants, Correa maintains, make it more difficult for the poor to obtain justice, because the latter "are unable to accede to diligent lawyers or to ensure the informal payments that are necessary for speeding up the legal steps of the cases" (Correa Sutil 2000: 303).

Formalism. The administration of justice is distinguished by excessively formalistic and bureaucratic procedures that transform justice into something exclusive, which only "experts" can understand. The legal language is so complex that even well educated people find it difficult to understand. This fact not only excludes most citizens from the legal world but also reinforces existing inequalities in various ways, making it mandatory to pay for an experienced lawyer. Clearly, within this formalistic context, a lawyer will perform better when he or she knows how to deal with these complexities and how to exploit them to his or her advantage. Therefore, the outcome of a case commonly depends not on questions of substantive justice but rather on procedural matters and formal subtleties. A criminal may be released or a debt forgiven owing to the clever exploitation of formal details. To understand the depth of this problem, however, one should not reduce it to a matter of language. The formalities of justice transcend legal rhetoric and extend to the way in which lawyers and justices dress or behave, even to the structure and architecture of the courts themselves, which are commonly known as "palaces of justice". Ultimately, all these formalities contribute to establishing barriers against the people and to reinforcing the perception that justice is not for all (Thomson 2000: 425).[3]

Fear and mistrust. Other important factors bearing on the reluctance of the poor to litigate in the courts – very much connected with the previous two – include fear and mistrust of the justice system. The poor are inclined to fear different kinds of abuse of authority. Some public officers may use the presentation of the poor in the courts as a pretext for prosecuting them; others may take the opportunity to humiliate the poor during trial; some judges may opt to rule against the poor out of sheer class prejudice. On this basis, the poor may reasonably conclude that to bring a case before the tribunals may not be a good idea. It might be wiser for them to remain quiet, acquiescing in their fate.

[3] Often, these types of problem are more than "symbolic" because, for example, the buildings tend not to provide physical access for handicapped people.

Court delays. One of the most common answers to questions about reluctance to go to court is inordinate delay. The courts – it is commonly claimed – take a lifetime to decide a case. Court delays derive from numerous circumstances, some of which are understandable in principle, while others are not. For example, it is true that on many occasions, particularly in poor areas, there are too few judges, whose workloads are too heavy; they lack both adequate equipment and assistance in their work. It is also true, however, that on other occasions judges simply do not care about the urgent needs of poor claimants, or prefer to direct their attention to other cases, which may be more important in terms of prestige, power, or illegal benefits. Whatever the reasons, court delays discourage people who are in need of help from seeking redress and aggravate their situation.

Geographical causes. In Latin America, the courts are normally located in the centre of the capital city or other cities. Thus, those living in less populated areas – usually in rural districts – or in the periphery of the main cities, do not have easy access to the tribunals. These geographical obstacles often take on major proportions, because travel costs are significant and need to be paid repeatedly, whenever the legal process requires. Also, one has to take into account that for many people the trip downtown is emotionally taxing: the city is an unfamiliar environment and arriving there may become a problem in itself. This point is particularly important because it suggests how the judicial system was originally conceived. The underlying idea was not to develop it from the people to the judges, quite the opposite. Even worse, the idea was not to spread the tribunals throughout the country in order to reach all the people, particularly the weakest segments of the population. Rather, it seems that the tribunals were "planted out there," just for those who are able to reach them.

A judicial system detached from the people

Undoubtedly, the obstacles so far examined represent significant barriers for the poor and seriously obstruct their access to justice. However, those obstacles constitute only one part of the story and neglect what might be deemed the primary cause of the legal difficulties facing the poor. The conventional list of obstacles does not address the difficulties created by the very structure of the existing judicial system. Therefore, I maintain that some of the main problems the poor have to face in seeking justice stem not from lack of information or motivation, but rather from the very "nature" of the judiciary itself. The judicial system was created as an "uncontrolled controller," capable of controlling the "excesses" of the people but resistant to all types of controls upon its members.

In order to understand the institutional place originally reserved for the judiciary, it is important to situate it within a broader schema. The judicial branch represents the main controlling device within a complex structure of "endogenous" or "internal" controls that each branch of government is supposed to exercise over the others. These controls are supplemented, at least in theory, by other "exogenous" or "popular" ones, which are reserved for the people at large. The "framers" of the American constitutional system did not consider that all types of control were equally important. Rather, they showed a

strong preference for "endogenous" controls over "popular" controls. In practice, this preference implied that popular controls were reduced to a minimum. The people were left only with the voting device, to be exercised periodically, while "internal" or "endogenous" controls were multiplied, particularly through the judicial machinery.

To this end, the constitutional "framers" provided those who administered each branch of government, particularly the judges, with the necessary "constitutional means" and "personal motives" for becoming the guardians of the public interest (Madison 1988: Ch. 51).[4] I will examine here the "constitutional means" and the "personal motives" designed for those in charge of judicial tasks.

The judiciary was originally conceived of as a body firmly "separated" from the people. Judges, the "framers" considered, ought to have no contact with the people and the latter ought to have access to the judges only with difficulty. Most precisely, the "framers" believed that poor people – those who lacked property, those with less education, the debtors, the majority of the population – should have less access to the judges (Madison 1988: Ch. 10). This reasoning was not based exclusively on "class contempt" but originated rather in certain peculiar assumptions about the requirements of an impartial decision-making process. It was founded on a *principle of distrust* of the political and intellectual abilities of common people to take care of their own affairs.

In order to analyze the content and value of this approach it may be useful to begin examining one key paragraph written by James Madison with regard to the organization of the judicial system. In *The Federalist* no. 49, Madison affirmed that judges "by the mode of their appointment, as well as by the nature and permanency of it, [would be] *too far removed from the people to share much in their prepossessions (...) Their connections of blood, of friendship and of acquaintance, embrace a great proportion of the most influential part of the society*. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people. With these advantages, it can hardly be supposed that the adverse party would have an equal chance for a favorable issue."[5]

Like many of his contemporaries, Madison believed that without this social "distance" between the judges and the people, the former would make their decisions with an eye on the people's most immediate and unreasonable claims. If judges, like politicians, depended on the popular vote to be reelected, they would forget about justice and the constitution and only think about how to satisfy the preferences of the populace. They

[4] In this paper, Madison wrote that "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary *constitutional means, and personal motives*, to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." Emphasis added.

[5] Italics added.

would therefore cease to be independent. For this reason, the "framers" believed that judges should be detached from the people, particularly from the lower classes – those with greater but less controllable and less rational appetites. Of course, this argument depended on a peculiar conception of independence, of how the poor tended to act, and of what justice required.

In order to ensure the independence of the judges, the "framers" of the American Constitution designed multiple institutional instruments. First, they guaranteed the judges life tenure. In *Federalist Paper* no. 78, Alexander Hamilton asserted that life tenure "[in a monarchy is] an excellent barrier to the despotism of the prince: in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to ensure a steady, upright and impartial administration of the laws." In addition to life tenure, the "framers" sought the total independence of the judges through other means, such as their economic independence and their selection through indirect mechanisms. The selection process in particular, was the subject of debate. The final decision gave the Senators a key role in the selection process: "as a less numerous and more select body" – Madison asserted – the Senate "would be more competent [for this task]" (Farrand 1937: vol. 1, 120).[6]

To guarantee what they believed to be the best conditions for deliberation, the constitutional "framers" avoided the option of broad judicial bodies. In their opinion, the making of impartial rulings required the decision-makers to be insulated from external influences.

In the same way as the Judges were placed "too far removed from the people," the people were situated *too far removed from the judicial system*. To get a better appreciation of the basis of this decision, it is worth looking at the jury system. At one point, jurors were called in all type of cases (criminal, civil or constitutional) to decide on all the merits of the cases at hand, even with the right not to enforce a law they considered unjust (Abramson 1994).

It is worth noting, in this respect, that Alexis de Tocqueville considered the jury system of primary importance for democracies. He dismissed the importance of the jury as a judicial institution but underwrote, instead, the *political* significance of juries, particularly in civil cases. In Tocqueville's opinion, the juries were a school of democracy and, more than any other alternative, favoured the people's integration into and identification with the legal system. He affirmed that:

> the jury, though seeming to diminish the magistrate's rights, in reality enlarges his sway, and in no other country are judges so powerful as in those where the people have a share in their privileges. Above all, it is the jury in civil cases that enables the American bench to make what I have called the legal spirit penetrate right down into the lowest ranks of society. The jury is both the most effective way of establishing the people's rule and the most efficient way of teaching them how to rule (Tocqueville 1996: 276).

[6] In his opinion, election by the legislature would immediately become vitiated by "intrigue and partiality." Ibid., p. 232.

Contrary to Tocqueville's expectations, however, during the constitution-making period the jury system was undermined, restricted in its functions (e.g. by reducing its task to the evaluation of facts rather than legal assessment) and limited in its scope (e.g. by confining it to criminal matters).

The question of "presence"

The constitutional "framers" not only wanted to insulate the judicial institutions from popular pressures, but also to fill most judicial seats with particular kinds of people. In other words, they were convinced that judicial positions should not be available to "all" kinds of person. Arising from the above-mentioned *principle of distrust,* the "framers" designed the judicial positions in a peculiar way so as to make them available to an elite. This is what Madison meant to say when he stated: "[judges'] connections of blood, of friendship and of acquaintance, embrace a great proportion of the most influential part of the society." To put it bluntly, the "framers" wanted to reserve the judicial positions for white, wealthy, and well-educated people. These objectives were achieved through various mechanisms, among them indirect elections, which prevented the people from selecting those with whom they identified as judges, and tough educational requirements (e.g. being a lawyer with years of experience in litigation).

Admittedly, the above is a crude reading of the original approach to the judicial functions, even though it easily finds support in the texts from the period. It is possible to refute this reading by stating that the stipulated requisites did not unreasonably exclude anyone from becoming a judge; that it was impossible at the time not to think about the judiciary in that way; or that one should not stick to the original understanding in order to evaluate the present organization of the judiciary. On the other hand, even if we accepted all these reservations there would still be one point to make against the legacy of the constitutional "framers": *neither in the past nor at the present do we find significant efforts towards guaranteeing social diversity within the courts.*

Is the demand for pluralism in the judicial system reasonable? Some would say that justice should be administered above all interested parties; that achieving justice has nothing to do with diversity of representation; that judges should be colour-blind; and so forth. Again, there are sound justifications for building pluralism into the court system. First of all, one could point to the difficulties we all have in empathizing with other people, that is, to understand properly others' needs and demands. If a judicial body fails to include "representatives" of the most significant social minorities among its members, its chances of deciding fairly with regard to those groups would be significantly diminished, because it would be hard to understand critical features of the culture of minority groups. Impartiality requires a proper understanding of the interested parties and the legitimacy of their claims. At first glance, this assertion may seem odd. But the truth is that we actually care about "interest representation" within the courts, particularly within the Supreme Courts. In effect, when we detect that a court is composed only of men, or that a court is totally "white" in a society deeply marked by racial problems, we all tend to think that the process and outcome is unlikely to be fair one way or another.

Second, the claim that justice should always be above particular interests ignores the fact that, in good or bad faith, this goal is far from being realized. In most countries the incumbents of the majority of top judicial positions are white, well-off men. In other words, disadvantaged groups are largely excluded from important judicial seats. In Chile, for example, the percentage of women working at an inferior judicial level had reached 60%. At the intermediate levels their share was reduced to 55%, and to 31% when ascending to the Courts of Appeal and similar judicial offices. At the Supreme Court level, women were completely absent (Correa Sutil 2000: 294). The situation is much worse with respect to the participation of minorities such as indigenous groups. To deny, then, that the "presence" of a variety of societal groups may have a significant impact on the outcome of real cases seems either cynical or naïve. In the worst of cases, judges tend to rule in the interest of their own class, racial, or particular social group. In the best of cases, they make extraordinary efforts to evaluate properly the viewpoints of people so distant from them in terms of culture and daily experience. It is arrogant to believe that middle and upper class judges will not have serious problems understanding the viewpoint of large parts of society.

In view of the above facts and reasoning members of disadvantaged groups may justifiably feel mistreated by the most powerful strata of society. This might hold true even if the letter of the law does not prevent the underprivileged from getting a place in the tribunals. In multi-ethnic or multi-linguistic societies, such as Ecuador, Peru and Guatemala, the problems of "representation" may explain why people face difficulties in accessing justice. At the most basic level, the fact that significant minority groups do not share basic linguistic and cultural tools with the majority may well put them beyond the reach of a judicial system rightly perceived to be alien to their practices. At another level, some of these groups actually had the opportunity to access the courts but declined to do so because they mistrusted a judiciary largely composed of members of a different race. Finally, members of disadvantaged groups may actually have gone to court but were not treated impartially owing to the judges' cultural, class, or racial biases. In the Dominican Republic, for example, where judicial reforms obtained an exceptionally good response from the people, a majority of 53% still believes that justice is not served on an equal basis for black and white people (Thomson 2000: 355). In sum, it is difficult to deny the bearing that the "presence" or "absence" of minority groups in the judicial system has on the actual administration of justice.

We now need to address one final important consideration, which would take us beyond the scope of this paper. The legal problems of the underprivileged are not restricted to the judicial sphere – their problems neither begin nor end there. Many of the difficulties the poor face originate in the very laws that apply to them through the judiciary. Some of these laws may be overtly biased against the poor; others may simply neglect their interests; and yet others may take their viewpoints into account but ultimately misunderstand their needs and demands. Therefore, in many cases judges may rule against the poor not out of personal prejudice but rather because the laws they have to apply are inherently biased against the poor. For that reason, judicial reform, aimed at providing the poor with better legal representation and impartial judges, could still be totally inadequate. As Alejandro Garro puts it, reforms are "unlikely to have an overall

impact on shaping the rules of law or the purpose of increasing the legal bargaining power of the poor. (…) Some other kind of 'legal service' is required to change the rules and responses which operate against the interests of the poor." In the end, he concludes, the aim of enhancing access to justice for the poor may require much broader institutional reform (Garro 1999: 286–7).

The judiciary as a "reactive" institution undermining legal activism

Courts are essentially reactive institutions, in the sense that they tend not to act on their own accord. The victims of an injustice seek out judges and activate the judicial machinery. If cases were not brought before the courts, grievances would be left unattended. For this reason, it is of primary importance to examine whether the context of the courts is conducive to legal activism by the people.

People in general, and poor people in particular, may find it unattractive to present their cases before the courts. This unfortunate attitude derives partly from their lack of identification with public officers and partly from the hostility that they encounter with the latter. But I want to examine a different factor explaining why people feel prevented from seeking redress through the courts. I want to direct attention to the judicial decisions that contribute to creating a context unfavourable to legal activism. I maintain that the bulk of the courts' decisions have undermined the people's will to claim their rights. The courts have favoured decisions ruling out certain basic social claims and penalizing social activists, limiting their freedom of expression, or hindering their right to petition.

The first types of decision are based on judicial judgements against social rights. In effect, in America, as in most other regions, judges have refused to implement social rights. This has happened in the US, where social rights are not explicitly included in the constitution,[7] and in most Latin American countries, where the constitutions are more open to social rights. In the US, many lawyers and academics still insist on social rights, arguing that they were implicitly recognized in the constitution, both in the Due Process and the Equal Protection clauses. In "Dandridge v. Williams,"[8] however, the Court limited those claims by using a debatable federalist argument. The Court claimed on that occasion, that "the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." By doing so, the Court made it more difficult for disadvantaged groups to turn to the tribunals in search of their social rights.

In Latin America, the situation evolved in a similar vein, even though the context differed markedly. Most Latin American countries include a long list of social rights in their constitutions. However, in most cases judges have decided not to implement those rights by arguing that social rights are *not judicially enforceable*. The usual judicial reasoning is normally grounded on the idea that individual rights are substantially different from

[7] It is also worth noting that the US has not acceded to the International Convenant on Social, Economic, and Cultural Rights.
[8] 397 U.S. 471 (1970).

economic and social rights. According to most judges, individual rights are judicially enforceable because they do not require "positive" action by public authorities and because their implementation does not require state expenditure. By contrast, social rights do require "positive" action and expenditure by the state in order to be judicially enforceable. Judges have also maintained that the enforcement of social rights would require them to adopt "political" decisions they are neither prepared nor authorized to do.

In spite of the currency of these arguments, they are not particularly convincing when examined in detail. In fact, individual civil and political rights, on the one hand, and economic, social and cultural rights, on the other, have more in common than meets the eye. Even the most basic individual rights require state expenditures and "positive" action in order to be implemented. The implementation of the right to vote, for instance, demands large amounts of money; the right to due process calls for the creation and maintenance of a costly judicial structure. Moreover, it is not necessarily true that, to enforce social rights, judges are forced to adopt "political" decisions. Judges do not need to design a housing plan to recognize the right to a decent dwelling. There are many intermediate ways to uphold the right in question. For example, they could remedy the question by directing the political authorities to act in accordance with the constitution. Also, they could order the appropriate political authorities to satisfy particular demands within a certain period of time, or simply declare that a right is being violated, thus opening the way for sanctioning public officers responsible for that violation.

The second type of decision includes judicial rulings that undermine social protests and/or the status of social activists. Such decisions have been very common throughout the history of the Americas. In the US, they are found in numerous cases against anarchists and other political activists, particularly since 1919. For at least 50 years thereafter the Supreme Court systematically prosecuted those who adopted radical discourses or means in their confrontation with the government. In cases like "Debbs,"[9] or "Schenck,"[10] the Court decided to ban certain speeches that allegedly threatened national war objectives. Judicial decisions recognizing the validity of "yellow dog contracts" – contracts that include a written promise not to join a trade union as a condition of employment – also contributed to undermining social protest.

In Latin America, similar rulings have been all too common during the past centuries. This practice stems particularly from the *politically dependent* character of the judiciary in the whole region. With the partial exception of Chile, Uruguay, or Costa Rica, political dependency has always been a problem for Latin American people, particularly the underprivileged.[11] Political dependency has been promoted by very powerful executive branches of government using or abusing their authority to change the composition of the main courts, or to "remove" or "promote" judges considered a nuisance to them. These

[9] 249 U.S. 211 (1919).
[10] 249 U.S. 47 (1919).
[11] The relatively "successful" story of countries such as Chile, however, should not make us blind to the fact that Chilean justice has always been deeply marked by a "class" bias. Its judiciary has probably been more "class" biased than those of most other countries in the region.

hyper-powerful presidents always wanted to rule the country with discretion and impunity.

In those contexts, the politically dependent and usually wealthy judges have been ready to respond to the needs of the government and the dominant sectors of society. This posture undoubtedly accounts for many of the questionable rulings during recent decades (e.g. prosecuting social activists and undermining social protest), as well as for many significant omissions. Latin Americans are yet to write the history of how judges accompanied and buttressed the power of authoritarian regimes – particularly during the last wave of dictatorships. To say the least, in most countries the judiciary has not taken the necessary steps to provide redress for the relatives of those who were killed or disappeared, nor for those who presented *habeas corpus*.

In the new democracies, most judges followed the same pattern of political dependency. They have aligned with the ruling coalitions and been at their service. They have legitimated the executive's most questionable measures (e.g. expanding the legislative powers of the executive),[12] and usually restricted the rights of social activists and the main opponents of the government.[13] By virtue of these decisions the judges have contributed to the creation of a culture of legal passivity. Along with Amartya Sen, the conclusion is close at hand that these restrictions of basic liberties always end up reinforcing the poverty of those who are already poor (Sen 1981).

Opportunities for improving access to justice for the poor?

Our analysis suggests that most poor people are facing and will continue to face problems when seeking justice. This disconcerting scenario, however, does not mean that the poor have no alternative means of confronting the violation of their rights. In this section I will discuss both "informal" and "formal" legal approaches.

By "informal" approaches I refer to means not provided by the central administration, but used by the underprivileged in order to prevent or remedy the violation of their rights. By contrast, "formal" approaches include those offered and administered by the state. "Informal" approaches have been adopted in many different countries, either due to the incapacity of the state to administer justice in certain areas, to the "absence" of the state, or to the people's dissatisfaction with the ways in which the state was administering justice.

Among many "informal" alternatives, an example from Peru is instructive. Many Peruvian peasant and indigenous communities have tended not to use the public system

[12] See, for example, the "Peralta" case in Argentina (CS, diciembre 27-990).

[13] In Peru B.I. Bronstein was deprived of his ownership of the national TV channel, n.2, because of his opposition to President Fujimori's regime (*Expediente n. 112-98-AA/TC*, April 24, 1998). In Argentina, the unemployed were prosecuted for "cutting the roads" in certain areas of the country in order to express their demands. At the present moment, in Argentina, there are more than 5000 social activists under judicial process.

of justice, which they found too expensive and unreliable.[14] However, that discouraging situation did not mean that they had no problems to solve or that they did not seek redress. Rather, poor Peruvians, facing multiple legal problems, many of them related to issues of property and payment of debts, appealed to "non-official" authorities. They sometimes appealed to the president of their community or other lower-level local authorities (e.g. the chief of the local police). In some cases, they required help from the General Assembly of the community. In other cases they used the so-called "Rondas Campesinas." The "Rondas" started in the department of Cajamarca, as a way of dealing with petty robbery (e.g. cattle rustling) that the state authorities were unable to contain. The "Rondas" were neighbourhood groups organized during the night with a view to guaranteeing the peace and security of their quarters. According to their established practice, when the "ronderos" found the culprit of a crime (e.g. stealing an animal belonging to the community) they returned what had been stolen to the victim and meted out a sanction for the wrongdoer. In this way, the "Rondas" soon achieved remarkable success as a local and popular method of achieving justice, and spread to many other regions of the country. At present there are about 3,500 "Rondas" throughout Peru. In addition, the "Rondas" have extended their functions to include adjudication in cases involving debts, family disputes, and property rights.

In Bolivia a similar situation evolved with so-called communal justice. Bolivia has more than 12,250 communities with less than 250 inhabitants, in which the state is virtually absent. Again, many of these communities settle their judicial problems in their own ways – normally departing drastically from those of "formal" justice (Infante 1999). Similar situations obtain in many other Latin American countries, such as Colombia and Ecuador.

The relative "success" of these "informal" systems of justice provides lessons as to how existing systems of "formal" justice can be improved. These experiences underscore the importance of constructing a system of justice that is close to the people – socially and geographically. People tend to feel closer to the judicial system when the judges understand their problems and inspire trust.

Fortunately, many Latin American countries have begun recognizing the importance of such experiences, and left behind the erstwhile hostile attitudes to "informal" systems of justice. Colombia, Bolivia, Peru and Ecuador have changed their constitutions to include explicit clauses recognizing the value of alternative ways of conflict resolution. These constitutions acknowledge that indigenous communities may resolve conflicts in accordance with their own practices and traditions. On most occasions, however, they concede such "permission" as long as the "informal" mechanisms of the indigenous communities do not affect "the laws of the country or the rights of individuals."

[14] Recent surveys in a particular peasant community in Peru show that 35.29% of the people do not use the "official" judicial system because they believe it will cost them too much money; 23.53% because they believe they will not get just decisions; and 20.59% because they think that it is too slow (Revilla 1999: 317).

Very slowly, "official" courts have begun to be more receptive to the decisions of local, indigenous courts. So far, however, the only important court to adopt such a progressive stance has been Colombia's Constitutional Court, which recognized in 1996 the constitutional validity of the indigenous communities' judicial decisions. For example, it recognized the right of indigenous communities to adopt their own judicial decisions within their jurisdiction according to their own norms. This decision, like others that followed, was very rich in terms of its openness to issues of ethnic and cultural diversity not previously accepted within the "formal" legal world.[15]

In recent years, we find somewhat more "formal" but still interesting experiences of alternative conflict resolution – sometimes by non-governmental organizations and sometimes by "formal" authorities. In Brazil, for example, public authorities have been using "special tribunals" since the late 1980s, dealing mainly with minor civil and criminal cases. In these cases, the judges are assigned additional powers, including ample procedural freedom and wider discretion when deciding on the cases. For example, judges may decide more freely what evidence to allow and what principles to invoke in order to settle the cases. In criminal cases, the judges are allowed to negotiate a solution with the opposing parties, akin to American plea bargaining. Since their creation, the new "special tribunals" have increased enormously in popularity. In the state of San Pablo, for example, the tribunals tried 1,736 cases in 1988 and settled 1,135 of them. By 1993 they had tried 37,418 cases and settled 36,955 of them, and by 1997 the number of cases had reached 164,146 and the number of settled cases 154,934 (Nalini 1999). In Ecuador, non-governmental organizations have been grappling with different forms of "mediation" processes and have achieved considerable success (Vintimilla 1999).

Similar private or mixed experiences have been noted in many other countries. Among these experiences, it is worth mentioning some from the Dominican Republic; the work of NGOs in Nicaragua with the "Comisarías de la Mujer"; in Guatemala with the "Bufetes Populares"; the "Programa de Apoyo Jurídico a los Indígenas" in Costa Rica; and the "Centro de Defensa del Consumidor" in El Salvador, etc. (Thomson 2000).

There are also interesting stories about the so-called "juzgados de paz" – courts created to deal with minor and local affairs. In many countries, these "juzgados de paz" are as old as the independent country itself. Having lost much of their initial attractiveness, they have recovered part of their appeal in recent years. Their "renaissance" probably relates to the increasing influence of "informal" judicial systems. According to Alberto Binder, the "justicia de paz" gained legitimacy and importance when it began to recognize the merits of "informal" systems of justice. In his opinion, those tribunals "gain[ed] in strength when they abandoned the formal methods of administering justice" at the same time as the plaintiffs "obtained a victory" when "formal" justice abandoned "the rigidity and centralism that always characterized the inquisitive system" (Binder 2002: 410). Binder believes that the rejuvenated "juzgados de paz" may become excellent intermediary bodies between the existing organs for the administration of justice and the communal indigenous devices.

[15] See, for example, decisions T-523/97 or T-344/98.

Presently, we find renewed efforts for recreating the "juzgados de paz" in several countries such as Ecuador, Colombia, Peru, Venezuela, or Bolivia (Gálvez Moya 2000). In Peru, where a large majority express their distrust of "formal" judges, 64% of the people stated that they were satisfied with their "jueces de paz," and 66% believed in the honesty of these judges (Gálvez Moya 2000: 271–2).

I believe all the efforts accounted above represent small moves in the right direction. However, throughout this paper I have stressed a different point, which should be highlighted by way of conclusion. I believe that the system of "formal" justice does not need to be "complemented" by a new one, it rather needs to be replaced gradually by a different one. The "formal" system is responsible for a good part of the problems that large segments of the population are facing when seeking justice. It is also partially responsible for the social and geographical "gap" between legal authorities and the citizenry. The fact that judges are respected and even admired in other contexts is merely coincidental. The present structure of the judicial system is designed to "separate" the people from those who administer justice. Even worse, such conditions lead to highly questionable judicial decisions that debase the whole process. In my opinion, the lack of identification of the judges with the disadvantaged makes it very difficult for the former to understand the needs of the latter and to make impartial decisions. This lack of identification is reflected in a majority of judicial decisions, particularly those undermining the status of social protesters, which makes social activism more difficult. If the judicial system is a "reactive" system, the questionable judicial decisions continuously undermine the fairness of the system. For these reasons, future studies on access to justice should focus attention not only on what the victims of injustice lack (e.g. information, legal knowledge, free legal services), but also on the obstacles that this very system has created and is reproducing every day.

My analysis suggests that the difficulties we find in bridging the gap between the economic and social rights enshrined in our constitutions and actual practice are due in part to the very "nature" of our judicial system. To remedy the present problems of access to justice old structures need to be dismantled and new legal tools created. However, pending a thorough overhaul of the legal systems of Latin America – a major, long-term proposition indeed – their current deficiencies can to some extent be redressed by improving the knowledge of the poor, providing better legal aid, etc. Lasting long-term solutions and short-term partial remedies should not be mutually exclusive.

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