



## INTERNATIONAL SUPPORT FOR JUSTICE REFORM: IS IT WORTHWHILE?

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*ABSTRACT.* Over the last twenty-five years, a number of justice reform projects funded by international actors have been implemented in Latin America. No less than 2 billion US dollars were disbursed for this purpose. Several questions on this issue are addressed in this article: How does international aid work in the field of justice and what is the rationale used? What is the relationship between and the dynamics of the actors who participate in international aid? What are the results of the funded projects and what limits have been encountered? Has international support for justice reform been worthwhile? The author elaborates on the central argument that international actors underperform their role mainly for two reasons. One, the approach used in the recipient country seriously restricts the proper comprehension of the root causes of the problems country faces. Two, international actors lack serious interest in learning. In the predominant approach, bureaucratic criteria prevail: projects are designed and promoted according to the aid agency's blueprint, evaluation is usually poor and money is readily available. If in a given country there are no strong national actors, international agencies establish asymmetrical relationships with their counterparts, tend to import recipes that hardly suit the conditions in the country, and impose paths to reform that are difficult for local actors to appropriate. Cooperation agencies have disseminated an ideological construct based on a non-proven causal relationship between justice systems and economic growth as the driving force for reform. International actors could do better were they to develop a capacity for learning, but this goal seems difficult for them to reach.

**KEY WORDS:** *International cooperation, justice in Latin America, justice reform, development projects.*

**RESUMEN.** *En los últimos 25 años se han ejecutado en América Latina proyectos de reforma de la justicia auspiciados por la cooperación internacional que superan el monto de dos mil millones de dólares estadounidenses. Al respecto,*

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*varias cuestiones se plantean en este artículo. ¿Cómo opera la ayuda internacional en el área de justicia y cuál es su lógica? ¿Cómo es la relación y la dinámica entre los actores participantes en la cooperación internacional? ¿Cuáles son los resultados de los proyectos así financiados y qué límites han encontrado? ¿Cuál es el valor del apoyo internacional para la reforma de la justicia? El argumento central que el autor elabora es que los actores internacionales alcanzan un desempeño insatisfactorio en su papel, debido a dos razones principales: una es que el enfoque usado en el país beneficiario les restringe seriamente una comprensión de las raíces de los problemas que enfrentan; otra es que los actores internacionales carecen de un interés serio en aprender. En el enfoque predominante prevalecen criterios burocráticos: los proyectos son diseñados y promovidos según el modelo de la agencia cooperante, la evaluación usualmente es pobre, y el dinero fácilmente disponible. Si no hay actores nacionales fuertes, las agencias internacionales establecen relaciones asimétricas con sus contrapartes, importan recetas inadaptables a las condiciones nacionales e imponen caminos de reforma que dificultan la apropiación por actores locales. Las agencias de cooperación han diseminado una ideología basada en una relación causal no demostrada entre sistema de justicia y crecimiento económico como fuerza conductora de la reforma. Los actores internacionales podrían desempeñarse mejor si desarrollaran una capacidad de aprendizaje, pero esta meta parece difícil de alcanzar.*

PALABRAS CLAVE: *Cooperación internacional, justicia en América Latina, reforma de la justicia, proyectos de desarrollo.*

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#### I. INTRODUCTION

In several Latin American countries, justice administration and its reform have entered the public agenda through actions taken by both international actors and those that could be termed “internationalized” actors, that is, citizens working in their own country, but using a conceptual and operational framework largely established by international aid agencies. This crucial contribution and the work carried out through reform projects make inter-

national support for justice reform a key element of the process, however insufficiently analyzed.

In the last two and a half decades, the expansion of international cooperation was accompanied by the rapid increase of a broader “internationalization” taking place in the field of justice. International observation of justice systems all over the Third World began by assessing the enforcement of human rights and later expanded under the umbrella terms of “governance” or “good government” —inadequately or ill-defined concepts. During this process, an increasing number of “indicators” for allegedly “measuring,” “comparing” and “certifying” justice performance in each country were developed, which in turn opened the way for the indexes of justice that are now employed all over the world. Points and scores are assigned to courts despite the fact that in most cases the bases for these figures are very weak: opinions gathered from “experts,” practitioners or “special” users of the system — mainly people who are well known in the business world. No real systematic analysis of the performance of justice systems has been carried out during the “internationalization” process.

International support for justice reform efforts in Latin America started in the 1980s. “In 1983, the State Department created an interagency working group on the administration of justice in Latin America and the Caribbean.”<sup>1</sup> The following year, the Bipartisan Commission on Central America recommended that “the U.S. should encourage the Central American nations to develop and nurture democratic cultures, institutions, and practices, including strong judicial systems to enhance the capacity to redress grievances concerning personal security, property rights, and free speech.”<sup>2</sup> Also in 1984, the U.S. Agency for International Development (USAID) launched its first judicial reform project in Latin America with active international support. El Salvador was the country in which institutional reforms were meant to replace —or at least counterbalance— military support for the government. In 1985, the U.S. Congress passed legislation authorizing justice reform programs for the region and “USAID created an administration of justice office in its Latin American and Caribbean bureau and started to provide assistance to other countries in the region.”<sup>3</sup> From the beginning, emphasis was placed “on human rights and criminal justice issues” and in 1986 the program was extended to encompass South America. “By the early 1990s, the rule of law had been established as an important element of most USAID country strategies in the region.”<sup>4</sup>

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<sup>1</sup> Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AMERICAN JOURNAL OF COMPARATIVE LAW, 617, 648 (2007).

<sup>2</sup> REPORT OF THE NATIONAL BIPARTISAN COMMISSION ON CENTRAL AMERICA 51 (1984).

<sup>3</sup> Langer, *supra* note 1, at 649.

<sup>4</sup> US AGENCY FOR INTERNATIONAL DEVELOPMENT, ACHIEVEMENTS IN BUILDING AND MAINTAINING THE RULE OF LAW. MSI'S STUDIES IN LAC, E&E, AFR AND ANE 2-3 (2002).

Over the next 25 years, millions of dollars have been spent in a variety of justice reform projects. Many of them received international funding that mainly derived from three sources: the World Bank (WB), the Inter-American Development Bank (IDB) and USAID. While USAID donates resources, International Financial Institutions (IFIs) generally provide funds for this purpose in the form of loans. Thus, these contributions become part of the recipient country's public debt which must be repaid. Given the amount of funding provided, IFIs may be considered the principal actors behind international cooperation for justice reform.<sup>5</sup>

According to the figures available for the last two decades, the WB has earmarked more than 305 million dollars for projects related to justice reform in Latin America, while the IDB has been an even stronger supporter, providing more than 1.2 billion dollars to this sector (Table 1).

TABLE 1. FUNDING FOR JUSTICE REFORM PROJECTS IN LATIN AMERICAN COUNTRIES, FINANCED BY THE WORLD BANK AND THE INTER-AMERICAN DEVELOPMENT BANK, IN US DOLLARS\*

<i>Country</i>	<i>World Bank (1992-2011)</i>	<i>IDB (1993-2011)</i>	<i>Total</i>
Argentina	5,410,000	451,150,000	456,560,000
Bolivia	11,000,000	3,150,000	14,150,000
Chile	944,400	1,343,000	2,287,400
Colombia	47,379,000	113,785,000	161,164,000
Costa Rica	---	32,225,000	32,225,000
Dominican Republic	---	285,000	285,000
Ecuador	12,874,000	227,312	13,101,312
El Salvador	18,200,000	---	18,200,000
Guatemala	33,096,000	30,531,020	63,627,020
Honduras	15,000,000	41,350,000	56,350,000
Nicaragua	---	1,669,626	1,669,626
Panamá	---	57,470,000	57,470,000
México	30,000,000	---	30,000,000
Paraguay	440,000	42,918,000	43,358,000
Peru	96,210,000	251,554,638	347,764,638

<sup>5</sup> ALBERTO M. BINDER & JORGE OBANDO, DE LAS 'REPÚBLICAS AÉREAS' AL ESTADO DE DERECHO. DEBATE SOBRE LA MARCHA DE LA REFORMA JUDICIAL EN AMÉRICA LATINA 742 (Ad-Hoc, 2004).

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<i>Country</i>	<i>World Bank (1992-2011)</i>	<i>IDB (1993-2011)</i>	<i>Total</i>
Uruguay	300,000	42,500,000	42,800,000
Venezuela	34,700,000	132,160,000	166,860,000
Regional Projects	---	2,581,400	2,581,400
<i>Total</i>	305,553,400	1,204,899,996	1,510,453,396

\* Data compiled by the author from World Bank and Inter-American Development Bank sources.

Of 1.51 billion dollars committed by the WB and the IDB to justice reform programs during the last two decades, 96% of the amount consisted of loans and 4%, non-reimbursable funds (Table 2). In other words, over the last 20 years, Latin American countries added 1.45 billion dollars to their public debt from financing justice reform.

TABLE 2. LOANS AND NON-REIMBURSABLE FUNDS FOR JUSTICE REFORM PROVIDED BY THE WORLD BANK (1992-2011) AND THE INTER-AMERICAN DEVELOPMENT BANK (1993-2011) IN US DOLLARS\*

<i>IFI</i>	<i>Loans</i>	<i>Grants/Non-Reimbursable</i>	<i>Total</i>
WB	298,544,400 (97.7%)	7,009,000 (2.3%)	305,553,400
IDB	1,151,953,270 (95.6%)	52,946,726 (4.4%)	1,204,899,996
Total	1,450,497,670 (96%)	59,955,726 (4%)	1,510,453,396

\* Data compiled by the author from World Bank and Inter-American Development Bank sources.

The contribution of USAID is more difficult to assess. At a public conference, a USAID officer estimated that, by the end of 1999, US\$ 300 million had been disbursed by USAID and the State Department for programs promoting justice and police reform in Latin America.<sup>6</sup> An analysis of the statistics available in 2012 does not provide sufficient information to even estimate the magnitude of the funds the U.S. Government has allotted to justice reform in Latin America. The difficulty arises from the fact that US-

<sup>6</sup> Margaret Sarles, *USAID's Support of Justice Reform in Latina America*, in *RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM* 44, 44 (Pilar Domingo & Rachel Sieder eds., Institute of Latin American Studies, University of London, 2001).

AID justice reform projects have been implemented under different areas (human rights, governance, democracy, etc.) at different times and in different countries. Moreover, USAID is not the only U.S. agency working in this field. For instance, the Department of Justice has been training public attorneys in Latin America over the last 15 years. Hence, determining the exact amount of U.S. support given to justice reform in the region would require devoting an entire research project to this aim.

Taking into account the fact that a number of developed countries — mainly Germany, Spain and the Nordic countries— have also contributed funds to justice reform programs, a fair estimate of the amount of financing for justice reform in Latin America would be that external funders have channeled more than US\$ 2 billion over the last 25 years.

A key factor in justice reform for most countries in the region has not only been the amount of funding provided by international actors. In the absence of in-depth case studies on the role international actors have played, there is not enough knowledge to assess the way their presence has affected the justice reform process.<sup>7</sup>

This article explores the role of international support given to justice reform in Latin America while addressing several questions. How does international aid work in the field of justice and what is its rationale? Who are the actors involved? What is the relationship between and dynamics of those who participate in international aid? What are the results of the projects it funds and what limits have been encountered? Are these characteristics specific to the field of justice or do they simply reflect what international aid in fact is? And finally, what is the value of the international support for justice reform, or would Latin American justice systems be better or worse without it?

The central argument of this article is that international actors underperform their roles for two main reasons. One, the approach used in the recipient country seriously restricts an understanding of the root causes of the problems. Two, international actors lack a serious interest in learning. In the predominant approach, bureaucratic criteria prevail: projects are designed and promoted according to the aid agency's blueprint, evaluation is usually poor, and money is readily available, especially if it can be channeled towards building infrastructure and acquiring equipment. If there are no strong national actors in a given country, international agencies establish asymmetrical relationships with their counterparts, importing recipes that hardly suit national conditions and imposing paths to reform that are difficult for local actors to appropriate. Cooperation agencies have disseminated an ideological construct based on an unproven causal relationship between justice systems and economic growth as the driving force for reform. International actors could do it better were they to develop a capacity for learning, but this goal seems difficult for them to reach.

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<sup>7</sup> BINDER & OBANDO, *supra* note 5, at 712.

## II. HOW DOES IT WORK?

A large number of initiatives for cooperation in justice reform come from international actors and organizations who offer to help local authorities —ministries of Justice, Supreme Courts, and the like. Such “offers” tend to include money —donated or loaned— and technical support to design and implement a program aimed at improving justice system efficiency. Both elements are very attractive to most governments. In some cases, simply the effect of the funding on the fiscal balance may be a decisive element —not necessarily for justice sector authorities, but for those in the government who are responsible for the economy. In the late 1960s, World Bank President Robert McNamara created “a bureaucratic environment in which development initiatives came not from the borrowing countries, but from Bank staff drive by organizational imperatives.”<sup>8</sup>

Thus is established an asymmetrical relationship that entails all the consequences on which this article will further elaborate: “[d]eveloping countries may find themselves unable to resist the demands placed on them by foreign funding agencies and may adopt legal reforms implanted by developed countries with little public discussion or analysis.”<sup>9</sup> In Central America, the region where international aid for justice reform started in the 1980s, even the government’s political will to initiate justice reform was considered secondary, and not quite indispensable, component according to official U.S. documents:

State Department officials believed that the availability of funds for judicial reform in Latin America in the 1980s pushed AID into initiating large projects prematurely in El Salvador, Honduras, Costa Rica and Guatemala. They noted that Congress, in an attempt to deal with the political instability in the region, earmarked funds for the region before host governments had demonstrated a willingness to implement significant reforms... the impact of these early efforts are [*sic*] largely uncertain.<sup>10</sup>

Since it did not take the initiative, the national counterpart agrees to the proposal for assistance “in the hope that participating will bring at least some benefits.”<sup>11</sup> However, this sort of acceptance does not really assure very much.

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<sup>8</sup> CATHERINE WEAVER, *HYPOCRISY TRAP. THE WORLD BANK AND THE POVERTY OF REFORM* 85 (Princeton University Press, 2008).

<sup>9</sup> Luis Salas, *From Law and Development to Rule of Law: New and Old Issues in Justice Reform in Latin America*, in *RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM*, *supra* note 6, at 44.

<sup>10</sup> U.S. GENERAL ACCOUNTING OFFICE, *ASSISTANCE FOR JUSTICE ADMINISTRATION* 14 (GAO/B-252458, 1993).

<sup>11</sup> THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 260 (Carnegie Endowment for International Peace, 1999).

Some of the national authorities and officials may be aware of the importance of the reform project, but the result will not likely contribute to the appropriateness of the project, which is indispensable to achieve its objectives.

In some cases, a similar relationship is established with NGOs dedicated to analogous purposes, as Carothers noted regarding the relationship between donors and civil society entities:

With donor dependence so high among NGOs in most transitional societies, donors invariably find an enthusiastic response to almost any line of activity they propose... NGOs in transitional societies everywhere are following the leads of donors in both area and project style and that local ownership of much civil society assistance is still very partial.<sup>12</sup>

The initial phase of any project is —or should be— an accurate diagnosis of the problem to be solved. However, a very common view among the critics of international assistance maintains that the diagnostic phase is frequently too short and its conclusions tend to be superficial —usually confined to the legal realm. To some extent, the diagnoses —also revealingly called “legal assessments”— only focus on the normative elements of the country being diagnosed, without giving further consideration to the way in which the system really works: “the emphasis appears to have been placed excessively on collecting information on legal institutions, but without an in-depth understanding of the way these institutions work... legal assessments tend to be somewhat formalistic exercises that compare legal institutions of a particular country with an ideal model of what a good legal system should look like.” In consequence, the diagnosis is hardly “a device designed to provide pointers regarding which components of a particular legal system can realistically be expected to change or improve.”<sup>13</sup>

As a result of this prevailing approach, reform projects often tend to focus on the symptoms rather than the causes of the realities to be transformed. As noted regarding U.S. cooperation programs’ assessment of a judicial system, foreign experts may

...conclude that it falls short because cases move too slowly, judges are poorly trained and lack up-to-date legal materials, the infrastructure is woefully inadequate, and so on. The aid providers then prescribe remedies on this basis: reform of court administration, training and legal material for judges, equipment for courtrooms, and the like. What they tend not to ask is *why* the judiciary is in a lamentable state, whose interests its weakness serves, and whose interests would be threatened or bolstered by reforms.<sup>14</sup>

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<sup>12</sup> *Id.* at 261.

<sup>13</sup> Julio Faundez, *The World Bank Justice Reform Portfolio. A Preliminary Stocktaking* 23 (31 July 2005, on file with author).

<sup>14</sup> CAROTHERS, *supra* note 11, at 102

What is seldom found in most diagnoses is the relationship between the specific problem and the context within which said problem originated and developed. Therefore, the historical and cultural roots of the problem are often ignored or underestimated. A short-sighted diagnosis gives way to a poorly defined project that hardly anticipates the magnitude of the difficulties that will be faced.

According to Blair and Hansen, “[t]he decision process starts with the question... *Does the state meet the minimal criteria for even contemplating an ROL [Rule of Law] effort?* ...attempting to improve such systems before basic minimal integrity is established would be senseless.”<sup>15</sup> This basic question is rarely asked during the initial phase of project formulation and when it is explicit, it may be easily circumvented with the excuse that the project is actually designed to set conditions that allow the reform to be made. As an IFI official wrote, “[i]t might very well be counter-productive for the IDB to refuse to do any justice reform work in those countries that do not meet IDB-established standards for judicial independence or for consensus for reform.”<sup>16</sup> According to this approach, the conditions for justice reform work in a given country are not applied as requisites in real terms. Accordingly, an independent judiciary is not a requisite for proposing a project because “[w]hen independence does not exist, the IDB has developed projects that address some of the obstacles to independence.” In sum, implementing a project in a country can always be justified under any circumstances, including a lack of consensus regarding the need for reforms: “the IDB is working both in countries where there is a broad-based support for reform and admirable judicial independence, and in countries or contexts in which only partial independence and consensus for reform exists.”<sup>17</sup>

If the country’s actual situation does not really matter and/or the diagnosis of that situation is rather feeble, how is the content of the project defined? During the initial years of international cooperation in this area, simplistic responses to complex problems were the norm. In Central America, “AID projects focused on easier-to-manage technical assistance, such as judicial training seminars and computerized caseload management, rather than working on the institutional, political, and attitudinal changes necessary for fundamental, sustainable, reform.”<sup>18</sup>

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<sup>15</sup> Harry Blair & Gary Hansen, *Weighing in on the Scales of Justice. Strategic Approaches for Donor-Supported Rule of Law Programs* 10 (U.S. Agency for International Development, Assessment Report No. 7, 1994).

<sup>16</sup> Christina Biebesheimer, *Justice Reform in Latin America and the Caribbean: the IDB Perspective*, in *RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM* 99, 106 (Pilar Domingo & Rachel Sieder eds., Institute of Latin American Studies, University of London, 2001).

<sup>17</sup> *Id.*

<sup>18</sup> U.S. GENERAL ACCOUNTING OFFICE, *supra* note 10, at 17.

As time showed that no effective change was taking place, the work on international support for justice reform produced a blueprint which though not particularly related to conditions prevailing in any country is in fact used throughout the region. In a candid presentation, a World Bank official explained this outline:

The basic elements of judicial reform should include measures with respect to guaranteeing judicial independence through changes to judicial budgeting, judicial appointment, and disciplinary systems; improving court administration through the adoption of case management and court management reforms; providing alternative dispute resolution mechanisms; enhancing the public's access to justice, incorporating gender issues in the reform process; and redefining and/or expanding legal education and training programs for students, lawyers and judges.<sup>19</sup>

Using the [general, one-size-fits-all] strategy, assistance providers can arrive in a country anywhere in the world and, no matter how thin their knowledge of the society or how opaque or unique the local circumstances, quickly settle on a set of recommended program areas.<sup>20</sup>

The resulting intermingling of available money from international agencies with the recommended prescriptions “facilitates” the adoption of certain standards for the reform projects:

The IFIs pushed a “recipe” of policy prescriptions for the judicial sector, and loans were made available for specific types of judicial reforms. These included, for example, the adoption of national judicial councils, the creation of judicial academies, and the establishment of alternative dispute resolution mechanisms. Indeed, the IFIs’ general formula for judicial reform has served as a template for most of the reforms initiated in the region.<sup>21</sup>

This blueprint was usually supplemented with operational tools like new buildings and computer systems. These costly components have in turn used up a significant portion of the money for justice reform projects. When the approach includes a bottom-up perspective, additional beneficiaries are “[n]on-governmental organizations that work for public interest law reform...; ...that seek to help groups of citizens...; NGOs whose explicit goal is to stimulate and advance judicial reform, police reform, or other institutional reforms directly related to the rule of law; media training... legal aid clinics.”<sup>22</sup>

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<sup>19</sup> Maria Dakolias, *The Judicial Sector in Latin America and the Caribbean. Elements of Reform* 7 (World Bank Technical Paper Number 319, 1996).

<sup>20</sup> CAROTHERS, *supra* note 11, at 96.

<sup>21</sup> JODI S. FINKEL, *JUDICIAL REFORM AS POLITICAL INSURANCE. ARGENTINA, PERU, AND MEXICO IN THE 1990s* 26 (University of Notre Dame Press, 2008).

<sup>22</sup> CAROTHERS, *supra* note 11, at 169.

In the blueprint, the specific content of a project is not usually based on the diagnosis made of the country, weak as it may be. Instead, it is based on practices routinely established by the donor or lending entity. For the WB, it has been noted that a “predilection to deductively design aid proposals around the prevailing organizational discourse and routines of the Bank rather than the specific context” is usually apparent on developing a project.<sup>23</sup> In the same vein, “[c]onsiderable weight is given to economic and technical factors that are easy to identify and measure, whereas complex political and social risk assessments that involve ‘soft’ qualitative indicators are usually distrusted as unscientific.” A review of WB justice reform projects concludes that: “project components often appear as disconnected activities that are not clearly linked to objectives.”<sup>24</sup>

Among the preferred activities included, project training is probably one of the most frequent. When projects for justice reform are reviewed, it is apparent the presumption that judges and public attorneys in Latin American countries need to be trained—and sometimes the sessions are even provided in English with simultaneous translation. Public defenders also need to be trained. Lawyers need to be trained, too. Even law professors require training. Every actor in the justice system needs to be trained or retrained, not once, but repeatedly. In the absence of a real diagnosis of these actors’ actual weaknesses, training becomes a routine activity that fills—with diverse and sometimes humoristic content—any project. In some cases, “the training has covered such broad areas that it is difficult to draw any cause-and-effect relationship between the training and USAID/Mexico Rule of Law goals” and is not even known whether “the training programs are having the desired impact.”<sup>25</sup>

Perhaps, the not-so-cognizant rationale for repeatedly introducing training in these projects rests on the idea that “if a society can reproduce the institutional components of established Western democracies, it will achieve democracy.” If that is the goal, training is the means through which “individuals in key institutions can and should be taught to shape their actions and their institutions in line with the appropriate models.”<sup>26</sup> It should be noted, however, that “[i]nvariably, ...the performance of these components has been disappointing.”<sup>27</sup>

It is possible to conclude that most internationally funded projects are not fully produced by personnel working in the institution “beneficiary” of the project. The designing phase of the project is mostly entrusted to officials from the international entity or consultants provided or proposed by said

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<sup>23</sup> WEAVER, *supra* note 8, at 87.

<sup>24</sup> Faundez, *supra* note 13, at 7.

<sup>25</sup> U. S. AGENCY FOR INTERNATIONAL DEVELOPMENT, AUDIT OF USAID/MEXICO’S RULE OF LAW AND HUMAN RIGHTS PROGRAM 8, 12 (Audit Report N° 1-523-11-001-P, January 12, 2011).

<sup>26</sup> CAROTHERS, *supra* note 11, at 90.

<sup>27</sup> Faundez, *supra* note 13, at 9.

entity: “the bulk of projects continue to be designed by foreign experts during brief visits, primarily consulting with government agencies and with little publicity.”<sup>28</sup>

Projects are designed to operate within a given period of time —usually no less than six months, no more than three years— and are deemed as the right tools to tackle aspects of the justice *problematique* that are deeply rooted in traditional practices. In this way, the shorter the term employed in producing results, the better the project is considered at the time of its approval. The need to produce fast results has been officially recognized with respect to assistance provided by the United States: “[t]he State Department’s policy stipulated that all assistance should be practical, start up quickly, have an immediate impact, serve as demonstration projects, and be directed toward existing institutions.”<sup>29</sup> Hence, problems that would require attention for an extended period of time are not suitable for reform projects. Notwithstanding, projects tend to promise more than what can be realistically delivered. According to Faundez, WB “project expectations” become “wholly unrealistic” and he pondered the question: “[a]re there structural reasons related to the project approval process that create an incentive to exaggerate the outcomes and impact of project components?”<sup>30</sup>

The WB clearly explains how conditionality is handled through the lending instruments for legal and judicial reform: “[s]tructural and sector adjustments loans were the Bank’s most common instrument to induce changes in legislation and reform in the administration of justice in borrowing countries. The ‘conditionality’ of these loans often includes the preparation and adoption of certain laws and regulations that reflect policies agreed upon with the Bank.”<sup>31</sup>

In their observations, a number of authors<sup>32</sup> concur that the contents of reform projects are usually imported prescriptions that are transplanted without serious consideration of local conditions, in spite of the well-known lack of success in importing legal institutions because “law is a set of institutions deeply embedded in particular political, economic and social settings.”<sup>33</sup> Notwithstanding, based on their knowledge of various countries, international aid entity officials —and especially experts serving as their consultants—, who base their work on the knowledge of various countries, regularly use the transplant as a preferred tool in justice reform projects.

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<sup>28</sup> Salas, *supra* note 9, at 45.

<sup>29</sup> U.S. GENERAL ACCOUNTING OFFICE, *supra* note 10, at 21.

<sup>30</sup> Faundez, *supra* note 13, at 8.

<sup>31</sup> THE WORLD BANK, INITIATIVES IN LEGAL AND JUDICIAL REFORM 6-8 (2004).

<sup>32</sup> Julio Faundez & Alan Angell, *El rol del Banco Interamericano de Desarrollo*, 4-8 SISTEMAS JUDICIALES 90, 102 (2005).

<sup>33</sup> S. Haggard, A. MacIntyre, & L. Tiede, *The Rule of Law and Economic Development*, 11 ANNUAL REVIEW OF POLITICAL SCIENCE 205, 221 (2008).

It has been noted that some of the criminal procedure reforms recently introduced in the region were promoted by a “Southern activist expert network.”<sup>34</sup> However, most of the transplanted elements that usually came with the internationally-funded reforms originated from the developed countries. By blending legal formalism and instrumentalism, transplants facilitate “a convenient methodological shortcut as it enables [consultants and experts] to offer legal advice without having to go through the tedious, difficult and often unrewarding task of understanding the societies they purport to help.”<sup>35</sup> Among the various cases, one clear example of transplants can be found in the implementation of alternative dispute resolution mechanisms (ADRM), originally introduced in the United States and then copied in Latin America under the auspices of the IDB, regardless of the specific nature and conditions of the conflicts to be solved,<sup>36</sup> without asking whether these mechanisms have safeguards to protect individuals’ rights or perceiving the effects of their “marginalizing ordinary courts from involvement in important social and economic issues.”<sup>37</sup>

The manner in which projects are designed —routinely based on the recipes that have supposedly worked well elsewhere— goes a long way in explaining why the diagnostic phase receives so little attention. As a procedural requirement for formulating a project, assessments in real terms become a formality rather than the foundation on which to understand the whole environment in which the project is to be implemented and hopefully succeed. One of the effects of this practice is that it underestimates the risks of the project. When it comes to the WB, in trying to get projects approved as quickly as possible, staff members pay little attention to the difficulties —political and institutional— that are found in the context and

...are frequently overoptimistic (at least in writing) about how the project relates to broader development objectives, its expected output and the impact, and its sustainability... As a result, ...staff members underestimate the risks during implementation that may undermine long-term outcomes. This often results in poor rating of a project’s performance.<sup>38</sup>

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<sup>34</sup> Langer, *supra* note 1, at 663.

<sup>35</sup> Pilar Domingo & Rachel Sieder, *Conclusions: Promoting the Rule of Law in Latin America*, in *RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM*, *supra* note 6, at 142, 145-146; Bryant G. Garth & Yves Dezalay, *INTRODUCTION TO GLOBAL PRESCRIPTIONS. THE PRODUCTION, EXPORTATION, AND IMPORTATIONS OF A NEW LEGAL ORTHODOXY* 1, 5 (Yves Dezalay & Bryant G. Garth eds., The University of Michigan Press 2002); Julio Faundez, *The Rule of Law Enterprise: Promoting a Dialogue between Practitioners and Academics*, 12-4 *DEMOCRATIZATION* 568, 575 (2005).

<sup>36</sup> Faundez & Angell, *supra* note 32.

<sup>37</sup> Julio Faundez, *Introduction*, in 1 *LEGAL TECHNICAL ASSISTANCE TO GOOD GOVERNMENT AND LAW. LEGAL AND INSTITUTIONAL REFORM IN DEVELOPING COUNTRIES* 1, 18-19 (Julio Faundez ed., MacMillan Press/St. Martin’s Press 1997).

<sup>38</sup> WEAVER, *supra* note 8, at 87.

Another consequence of this approach is that it affects the relationship between the project and domestic actors. Riggirozzi has observed in the Argentinean case that WB “pre-conceived policy ideas and project intentions” may diminish “the capacity of domestic actors to influence the policy course... either because the Bank conditions the flow of capital to certain normative principles or ideological tenets or because it’s a a-political stance is less conflictive to follow by the government than politically sensitive proposals presented by local experts that challenge the status quo.”<sup>39</sup> The resulting alliance between the government’s political interests and WB “principles” alienates a sector of local leaders, thereby frustrating their possible cooperation with the reform project.

In real life, the role reserved for national actors is not central. To begin with, various donors and lenders prefer a foreign entity to be in charge of the implementation phase of the project instead of the beneficiary institution or a local entity. “The projects are then awarded based on fairly closed bidding procedures with primary implementation responsibilities being awarded largely to foreign multinational consulting companies.”<sup>40</sup> In the case of aid provided by the U.S. government, these general criteria corresponds to the “hope that giving aid dollars to American intermediary organizations rather than directly to groups or people in the recipient countries will allow them to keep close track of the funds.” As a result, a new industry has prospered: “[a] whole community of American development consultants depends on U.S. aid funds.”<sup>41</sup>

### III. THE RATIONALE TO WORK ON JUSTICE REFORM

When international concern about justice systems in Latin America brought up the first external funded projects twenty-five years ago, two main strategic lines of work on justice reform were considered. One promoted changing laws, given that it was usual for international and local lawyers to blame “old statutes and codes” for backwardness and poor performance in the justice system. And as an official assessment of USAID’s work in El Salvador suggests, legal changes in themselves seem to be a success: “progress in passing justice system reforms because most enabling legislations for the legal and structural reforms to the justice system has been enacted.”<sup>42</sup> Many

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<sup>39</sup> María Pía Riggirozzi, *Knowledge Producers, Knowledge Users and the World Bank: Research-Policy Dynamics in Argentina’s Judicial Reform* 16 (The Global Development Network’s ‘Bridging Research and Policy’ Project, 2005, on file with the author).

<sup>40</sup> Salas, *supra* note 9, at 45.

<sup>41</sup> CAROTHERS, *supra* note 11, at 258.

<sup>42</sup> U.S. GENERAL ACCOUNTING OFFICE, FOREIGN ASSISTANCE. U.S. RULE OF LAW ASSISTANCE TO FIVE LATIN AMERICAN COUNTRIES 10 (GAO/NSIAD-99-195, 1999).

years later, a similar effort was launched to “modernize” Eastern Europe. In a couple of Latin American countries, even a full overhaul of legal norms was intended and funds were provided for that purpose. The other strategic line aimed at investing in infrastructure and training. In particular, a significant proportion of IDB projects on justice reform have included large sums for new buildings.

In spite of their very limited success, changing laws, new facilities and training for everyone are seldom omitted as project activities. Changing laws are in tune with a “purely technical” understanding of justice reform and they reflect views —especially in Latin America— by which a change in the law produces a change in reality. Since the 1990s, a reform of criminal judicial procedures has attempted to alter behavioral patterns in judicial processes by introducing new codes in most Latin American countries. First comes the new code; then, an intensive training program for the actors; and finally a new justice system should emerge. However, the facts tell a different story.

Buildings went up and the number of computers multiplied in judicial systems all over Latin America while these neutral —and uncontroversial— changes were able to generate consensus and experience only minor resistance. But considerable investment in infrastructure and training did not produce any notable results. While adding or improving infrastructure by itself is not a reform, results of training are very limited at best: “[t]raining for judges, technical consultancies, and other transfers of expert knowledge make sense on paper but often have only minor impact.”<sup>43</sup>

In the evolution of the reform process, the fields of work for external funded projects later expanded and a variety of subjects have been included in what we called the valid blueprint for actions performed by international cooperation agencies. Issues such as access to justice —including the complex matter of indigenous justice—, judicial independence and the expeditious operation of the system are recognized as the three main areas of improvement to work in justice reform.

Judicial reform aid seeks to make a court system work more efficiently, armed with better knowledge of the law, applying the law more consistently and appropriately, and with greater independence from political authorities or other powerful actors in society who would interfere. It may include programs for: rationalizing and strengthening overall management of the judiciary; increasing the judiciary’s budget; renovating the physical infrastructure; reforming judicial selection and judicial career laws; training judges and other court personnel; increasing the availability of legal materials for judges; strengthening case management and other internal administrative tasks.<sup>44</sup>

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<sup>43</sup> Thomas Carothers, *The Rule of Law Revival*, 77-2 FOREIGN AFFAIRS 95, 104 (1998).

<sup>44</sup> CAROTHERS, *supra* note 11, at 166.

This new approach may elicit a sort of “shopping-list” syndrome when in fact it is not part of any strategy, but rather just an extensive list of goals, objectives and activities that are neither interrelated nor logically sequenced. In 1993, an official U.S. report on the results admitted: “neither the Department of State, USIA, nor AID had assessed the region’s needs or formulated long-term goals or objectives before targeting short-term technical requirements.”<sup>45</sup> As IDB officials have conceded, “most projects are not defined as partial efforts to achieve a broader, longer-range goal,” and that happens because “most [projects] developed so far have not been preceded by a country sector study which could help establish a long-range strategy... Formulation of project strategies will be helped by better diagnostics.”<sup>46</sup> The strategy —based on a well-founded diagnosis— is mostly lacking as a framework to elaborate projects. The same authors recommend that the IDB “should develop justice sector studies that set medium-to long-term goals and provide organizing principles and priorities for project work,” working with a strategy to “identify those projects that are priority in terms of their impact and catalytic potential for bringing about additional changes in the system.”<sup>47</sup>

The WB sustains it has a strategy to work in this area, grounded on the so-called “three pillars on which the World Bank’s legal and judicial reform (LJR) strategy is based.” Those pillars are: “[f]irst and foremost, the judiciary must be independent, impartial, and effective... Second, an appropriate legal framework must provide enforceable rights to all. Third, there must be access to justice, without which all laws and legal institutions are meaningless”<sup>48</sup>. While nobody could possibly object to these three objectives, these principles are probably not substantial enough to form the basis of a strategy. However, there is another guiding idea permeating IFI documents that may exert direct influence on the project preparation phase: The judiciary must change to promote economic reform. This is a very important, frequently repeated, WB goal: “[e]conomic reform requires a well-functioning judiciary which can interpret and apply the laws and regulations in a predictable and efficient manner. With the emergence of an open market, there is an increased need for a judicial system.”<sup>49</sup>

The conditions of justice administration have been increasingly linked to the reliability that any country supposedly needs to attract foreign investment and, consequently, improve growth and employment. According to this argument: “[i]f a country does not have the rule of law... it will not be able to at-

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<sup>45</sup> U.S. General Accounting Office, *supra* note 10, at 3.

<sup>46</sup> CHRISTINA BIEBESHEIMER & J. MARK PAYNE, IDB EXPERIENCE IN JUSTICE REFORM. LESSONS LEARNED AND ELEMENTS FOR POLICY FORMULATION 31, 30 (Banco Interamericano de Desarrollo, 2001).

<sup>47</sup> *Id.* at 30, 31, 41.

<sup>48</sup> THE WORLD BANK, INITIATIVES IN LEGAL AND JUDICIAL REFORM 2 (2004).

<sup>49</sup> Dakolias, *supra* note 19, at 3.

tract substantial amounts of foreign investment and therefore will not be able to finance development.”<sup>50</sup> The WB is mainly responsible for disseminating this argument, and it probably has won the battle in providing a foundation to justice reform since it offers a widely accepted rationale: economic success requires good governance; therefore, the rule of law and justice reform are crucial for achieving growth and development. Other international actors have also adopted this orientation. For instance, the Spanish international co-operation agency has formally stated that “an independent and professional judiciary... is a key for the development of economic activities,” emphasizing that “carrying out of contracts depends on judges being independent and having a good technical preparation.”<sup>51</sup>

Interestingly, a USAID report of what the agency achieved in the region in almost two decades —describing the agency’s record in the field of justice reform as “impressive”— emphasized the time and meaning of that role:

USAIDS’s shift in the mid-1980s toward trade, investment, and indigenous private sector development brought attention to the enabling environment for private sector growth, and the Agency quickly recognized that the legal, regulatory, and institutional framework operating in target countries represented major barriers to foreign and domestic investment.<sup>52</sup>

The main goal for various international entities working with justice reform seems to be improving investment. Riggiozzi perceives that the WB’s actual approach to reform concerns solely to the creation of “conditions that enable a sound investment climate and reduce the costs of commercial transactions.”<sup>53</sup> Some years before this assessment, Méndez arrived at a similar conclusion about international community actors working in the field of justice: “[i]ts priority has been the efficient delivery of services, particularly in fighting crimes of international interest and in expeditious resolution of investment disputes... there has been relatively little interest in emphasizing the overall fairness of processes and any decisions resulting from them.”<sup>54</sup>

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<sup>50</sup> Thomas Carothers, *Promoting the Rule of Law Abroad. The Problem of Knowledge* 6 (Carnegie Endowment for International Peace, Rule of Law Series, Working paper N° 34, 2003).

<sup>51</sup> ESTRATEGIA DE LA COOPERACIÓN ESPAÑOLA PARA LA PROMOCIÓN DE LA DEMOCRACIA Y EL ESTADO DE DERECHO 35 (AECI, 2003).

<sup>52</sup> Gail Lecce, *Preface* to US AGENCY FOR INTERNATIONAL DEVELOPMENT, *ACHIEVEMENTS IN BUILDING AND MAINTAINING THE RULE OF LAW. MSI’S STUDIES IN LAC, E&E, AFR AND ANE* (2002).

<sup>53</sup> María Pía Riggiozzi, *The World Bank as Conveyor and Broker of Knowledge and Funds in Argentina’s Governance Reforms*, in *THE WORLD BANK AND GOVERNANCE. A DECADE OF REFORM AND REACTION* 207, 219 (Diane Stone & Christopher Wright eds., Routledge, 2007).

<sup>54</sup> Juan E. Méndez, *Institutional Reform, Including Access to Justice: Introduction*, in *THE (UN)RULE OF LAW & THE UNDERPRIVILEGED IN LATIN AMERICA* 221, 224 (Juan E. Méndez, Guillermo O’Donnell & Paulo Sérgio Pinheiro eds., University of Notre Dame Press, 1999).

The link between growth and justice was first established in the work of Douglass North as he emphasized the importance of functioning institutions for economic development. This line of thinking was later broadened by the Law & Economics school. While the concrete connection between economic growth and the administration of justice has not been subject to further elaboration, a number of studies have noted the lack of empirical evidence of a causal relationship between the two factors.<sup>55</sup> Moreover, during the last decade, the impressive economic growth of China has shown that the rule of law and an effective justice system are not needed for either attracting foreign investment or reaching a high rate of economic growth.

But whether a rigorous theory or just a crude ideological proposal, the WB's role in the widely accepted the criteria regarding development can hardly be overemphasized. "The financial leverage of the Bank... is perhaps surpassed by the normative power of its development theories... what it *says* about development, shapes other multilateral, bilateral, and national development strategies and defines the conventional wisdom on global development."<sup>56</sup> This preeminence is particularly clear in the field of justice reform.

The key aspect of WB's success in this field is its use of knowledge as a resource, closely and smartly combined with money, together with close collaboration with key decision-makers. As explained by Riggiozzi for the case of Argentina:

It is simply analytically misguided to assume that local actors simply agree or consent, or are coerced or co-opted by external development or financial agencies... the power of an international financial institution, such as the World Bank, to implement reforms is not linked to the leverage of conditional loans, but rather to its capacity to engage with key local actors to gain their consent to advance politically sensitive reforms. It emphasizes the implications of the configuration of social relations, funds and knowledge.<sup>57</sup>

The WB adopted and disseminated specific criteria that were widely accepted. Revolving around the link between growth and justice, these criteria did not have a scientific basis but were articulated in such a way that they came to shape the ideology of justice reform. This was followed up with a package of standard modules to be applied in any country. Finally, offers were made to some countries, providing them with funds and technical assistance.

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<sup>55</sup> Beatrice Weder, *Legal Systems and Economic Performance; the Empirical Evidence*, in JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN. PROCEEDINGS OF A WORLD BANK CONFERENCE 21-26 (Malcolm Rowat, Waleed H. Malik & Maria Dakolias eds., World Bank Technical Paper Number 280, 1995); Richard E. Messick, *Judicial Reform and Economic Development. A Survey of the Issues*, 14-1 RESEARCH OBSERVER 117-136 (1999); Thomas Carothers, *Promoting the Rule of Law Abroad. The Problem of Knowledge* 6 (Carnegie Endowment for International Peace, Rule of Law Series, Working paper N° 34, 2003).

<sup>56</sup> WEAVER, *supra* note 8, at 9-10.

<sup>57</sup> Riggiozzi, *supra* note 53, at 207, 212.

The process was not entirely up-down and several aspects of the “package” were probably learned through trial and error, but by its final presentation, the proposal appeared to be impeccable. Most countries accepted it for various reasons, one of them being the authority (and funds) of the WB. These countries most surely thought the WB knows the “right policies” and the “best practices” to build “sound institutions.” As Riggiozzi pointed out, the WB created both the ideology of the reform and the demand for it.<sup>58</sup> This conclusion is shared by a participant of the process in Argentina: “[t]he Bank capacity for orienting funds towards reforms —via loans or technical assistance or training— has been a crucial element to boost the WB’s policy ideas in the reform process. By the same token, this capacity has somehow sterilized efforts made by domestic actors.”<sup>59</sup>

Regardless of the lack of evidence about a causal relationship between an effective justice system and economic success, presenting this guidance principle entails a clear advantage from the IFI’s viewpoint: justice reform should not be conceived as a political process, but a technical one.<sup>60</sup> If the rationale for the reform is to be found in economics, its implementation should not be placed in the political realm. As the reform is depoliticized, some politically controversial components, such as the selection process of the judges, accountability and independence of courts, fall outside the scope of such projects, and —maybe more importantly— the judiciary’s legal control over government actions is diminished.<sup>61</sup>

USAID has also chosen to define the limited scope of the reforms as “technical” instead of “political” by entering into the complex world of the contextual factors that deeply affect justice performance:

AID officials in El Salvador and Guatemala favored technical projects because they (1) believed that such projects were easier to design, implement and manage; (2) assumed that technical changes could bring about substantive improvements; or (3) underestimated the extent that political considerations drove the host government’s decision-making concerning the future of the judicial system.<sup>62</sup>

Perhaps this is why most international actors prefer to propose neutral justice reforms and not politically loaded ones when infrastructure projects become so important —and so expensive. While governance appears as the guiding concept of, for instance, IDB action in the field of justice reform, the depoliticized operational orientation is to bring in funds for buildings and computers.<sup>63</sup> The official way to ground this stress on the importance of

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<sup>58</sup> Riggiozzi, *supra* note 39, at 28.

<sup>59</sup> Personal communication with Horacio Lynch (Jan 2, 2006) (on file with author).

<sup>60</sup> Carothers, *supra* note 43, at 99.

<sup>61</sup> Riggiozzi, *supra* note 39, at 9.

<sup>62</sup> U.S. GENERAL ACCOUNTING OFFICE, *supra* note 10, at 4.

<sup>63</sup> Faundez & Angell, *supra* note 32, at 99.

computers is as follows: “[t]hrough upgrading technology does not, in itself, constitute reform or modernization, it can be an important tool to achieving transparency and more efficient functioning of institutions.”<sup>64</sup>

As one WB official has admitted, “efficiency is a promising starting point... because of its relatively apolitical nature... Efficiency is a more neutral area in which changes can begin without major changes in the structure of government.”<sup>65</sup> The argument is probably right. The problem is that, when adopted as a principle, it leads to a kind of reform that preserves the root causes of the traditional vices in justice systems intact.

The political aspects of judicial reform are important issues in the process of transforming this public service, the most important of which is to “enhance the principle of separation of powers: judicial independence of the courts; and the extent to judicial review powers vis-à-vis the other branches of the state.” But international aid agencies find it difficult to confront these issues, and as a consequence “have generally been shy of pursuing reform initiatives that engage”<sup>66</sup>. There is no doubt that “[p]olitical benchmarks are the most difficult for the donor to establish or impose,” but at the same time they are “the most important conditions for project success.”<sup>67</sup>

A fundamental element of the game is money. But, when it comes to IFIs, or big donors like USAID, money is always readily available —and not always upon request. In the late 1990s, a WB task manager arrived in Guatemala City and with no further introduction he announced that the Bank had decided to lend the country US\$ 30 million to overhaul its justice system. Years later, a representative of the European Union decided and proclaimed —more or less the same way— that the EU would donate 10 million euros to overhaul the Guatemalan prison system. According to a UNPD assessment, international sources made more than 185 million dollars available to Guatemala’s justice institutions between 1996 and 2003.<sup>68</sup>

The case of IFIs is simple to understand. Banks *need* to lend money, as Weaver pointed out in the case of the WB: Robert McNamara (who took office in 1968)

...initiated annual lending targets that over his thirteen-year tenure would increase lending from \$1 billion to \$12 billion. Internal promotions were granted on the basis of the ability of operational staff to meet targets. As a result, staff members have a strong incentive to find “bankable” projects (particularly those that would require large loans), convince borrowing governments of their ne-

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<sup>64</sup> BIEBESHEIMER & PAYNE, *supra* note 46, at 31.

<sup>65</sup> Maria Dakolias, *Court Performance around the World: A Comparative Perspective* 6 (World Bank Technical Paper Number 430, 1999).

<sup>66</sup> Domingo & Sieder, *supra* note 35, at 142, 154.

<sup>67</sup> Salas, *supra* note 9, at 41.

<sup>68</sup> LUIS PÁSARA, PAZ, ILUSIÓN Y CAMBIO EN GUATEMALA. EL PROCESO DE PAZ, SUS ACTORES, LOGROS Y LÍMITES 211 (Universidad Rafael Landívar, 2003).

cessity, and get the projects designed and approved as quickly as possible... The internal pressure to lend means that, in practice, projects are pushed through the organization very quickly.<sup>69</sup>

The IFIs' operational mode has been criticized by contesting "the loan structure itself" in which staff members aim at "making big loans, even when those loans are going to incompetent or corrupt debtor countries whose priorities —financial liquidity over institutional reform— vary considerably from those of the project." According to this argument, officials "seek out investments that can absorb huge amounts of capital with modest, if any, concern for the extent to which those investments support the larger judicial reform effort. And that is why project activities usually include the construction of courthouses and the purchase and installation of computers. Put simply: they cost more money." As a matter of fact, the view of traditional judges who demand large capital investments in infrastructure and facilities fits well into this approach.<sup>70</sup>

A bureaucratic mandate is probably shared by IFIs and donor agencies: money must go out there and, to some extent, regardless of the actual conditions to be found in the countries. Looking at the El Salvador experience, Popkin observed: "the availability of funding often does not coincide with a country's readiness to undertake major reform efforts... the dollars are available and must be allocated, but the counterparts may have a very limited ability to absorb the assistance and may actually be resistant to change."<sup>71</sup>

Disregarding obvious mistakes, if a bureaucratic procedure imposes its rules, the rationale of a justice reform may be lost along the way. IFI officials and donor agents are evaluated according to their capacity to assign funds. They will try to hand out funds in projects that at the beginning —and at the end— intend to be better than they really are. In the case of U.S. aid, Carothers noted: "[t]he imperative of getting millions of dollars out the door on a regular basis with a high degree of fiscal accountability produces inexorable pressure to create molds and formulas that stifle innovation."<sup>72</sup>

In fact, there is probably not much room for innovation in this routine. Nor is there much room to be thorough at the time of evaluating results and, especially, requiring national counterparts to fulfill their obligations in the project: "international agencies... have failed to require fundamentals change from

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<sup>69</sup> WEAVER, *supra* note 8, at 84-85.

<sup>70</sup> Erik G. Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 336, 350, 353 (Thomas C. Heller & Erik G. Jensen eds., Stanford University Press, 2003).

<sup>71</sup> MARGARET POPKIN, PEACE WITHOUT JUSTICE. OBSTACLES TO BUILDING THE RULE OF LAW IN EL SALVADOR 254-255 (The Pennsylvania State University Press, 2000).

<sup>72</sup> THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE 343 (Carnegie Endowment for International Peace, 1999).

recipient governments in their Rule of Law projects.<sup>73</sup> At its worst, some international officials look for ways to justify national actors' non-compliance in order to keep the best possible relationship with them while looking forward to the next project.

Ultimately, what is the focus of a rationale that falls short of producing a strategy, has a working ideology to justify what it does, and always seems to have available, ready to go, money? Behind the operational blueprint, there are probably some implicit models—those of justice systems in the developed world<sup>74</sup> and a very simple idea: “if the institutions can be changed to fit the models, the rule of law will emerge.”<sup>75</sup> Rhetorically, worldwide accepted concepts—such as due process, judicial review and constitutionalism—are used while making no reference to the specific historical and social contexts in which said systems were produced, and converted into “moral and political imperatives that are used to measure and evaluate the quality of governance and the efficiency of legal systems.”<sup>76</sup>

When this rationale is compared to internationally funded reform projects, a significant degree of coherence becomes apparent. The most enlightening example is that of criminal procedure reform, implemented by following a basic model—heavily influenced by the U.S. criminal system—slightly adapted to the cases of fourteen Latin American countries. A change in the actors' performance was expected as a result of the legal changes introduced by the imported model. A better administration of justice should emerge as the final result. The rule of law would be reached in the end. And, of course, huge amounts of money are needed—in both grants and loans—to implement these changes in the system.

#### IV. ACTORS IN THE REFORM AND THE DYNAMICS OF THEIR RELATIONSHIPS

In times characterized by globalization, international actors are well accepted and old questions of “interventionism” tend to fade away. Nowadays, national actors tend to enhance their legitimacy by positioning their performance and proposals within frameworks provided by the discourse and actual behavior of international agencies working on a given project. For instance, human right groups frequently concentrate a significant amount of their efforts on achieving international impact instead of trying to work on growing better roots in local settings—always a more difficult and tedious task. In fact, they look for “rebound effects” in the country to which they belong, which are

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<sup>73</sup> Salas, *supra* note 9, at 43.

<sup>74</sup> Rachel Sieder, *Renegociando 'la ley y el orden', Reforma judicial y respuesta ciudadana en la Guatemala de posguerra*, 35 AMÉRICA LATINA HOY 61, 62 (2003).

<sup>75</sup> Carothers, *supra* note 50, at 9.

<sup>76</sup> Faundez, *supra* note 35, at 575 .

in turn amplified by the media, hopefully in that way that will leave a more influential mark on public policies faster than by pursuing increased awareness in the citizenry.

When it comes to justice reform, international officials frequently have led the national authorities to consider the issue in order to create a starting point for the reform process. In that process, national actors have participated, but the extent to which each side —international vis-à-vis national actors— has an influence on the outcome varies a great deal from one country to another. In countries where a core of willing actors was in place —as seen in the cases of Costa Rica and Chile—, the contribution of international actors reinforced a basically endogenous process. Conversely, where just a few local and weak actors took part, international intervention would make use of several pressure mechanisms to impose that the issue be included on the public agenda. In these latter cases, which include most Central American countries, it is possible to argue that international cooperation has been “decisive, at least at the beginning.”<sup>77</sup> Once the justice system reform is on the public agenda, countries are served irresistible proposals, made and funded by international agencies, with little domestic debate, not to mention consensus.<sup>78</sup> On the path these countries follow the “appropriateness” of the project becomes a recurrent problem that is difficult to solve.

The international experts brought to a given country as consultants for a justice reform project deserves attention. They may be specialists in justice reform or have some expertise in human resources, management or institutional reengineering, and proposed by the funding agency to do a diagnosis, draft a project or advice on its implementation. Previous experiences in other countries are highlighted in experts’ resumes, no matter how deep the knowledge gained through these experiences. Working on an individual basis or as an associate to a consulting firm, the main attraction international experts offer relates to their international knowledge that, in turn, allows national officials, who frequently feel insecure when facing the reform challenge, to use the experiences of other nations to enlighten them.

A number of criticisms have been written on the work done in this field by international experts. On the diagnoses produced, it has been observed that most of them “focus almost only in the judicial sector pretending it is a separated entity from all the other national institutions” and offering, as a result, “assessments that put emphasis on formal aspects.”<sup>79</sup> Accordingly, project designs are based in models built on legal norms without proper consideration of its actual functioning. Frequently, projects prepared by foreign experts, on the basis of short visits to the country, frequently fail to take into account national experts’ opinions and rest basically on consultations and talks with gov-

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<sup>77</sup> BINDER & OBANDO, *supra* note 5, at 61, 89-90.

<sup>78</sup> Salas, *supra* note 9, at 44 .

<sup>79</sup> Faundez & Angell, *supra* note 32, at 103.

ernment officials.<sup>80</sup> A common outcome is that “reform projects are imported prescriptions rather than policy proposals which reflect specific local needs and power relations.”<sup>81</sup> This trend entails “the risk than reform promoters assume that a one-size-fits-all model” is the right thing to work with.<sup>82</sup>

Since the importation of laws and legal institutions —via transplant or imposition— are prominent in the history of law,<sup>83</sup> the fact is that international actors exacerbate legal importation by taking advantage of the asymmetric relationship established between international and national actors. It is hard to establish any limits between the technical advice provided by an expert and the imposition of a policy based on the concurrent funding needed to implement the recommended policy.<sup>84</sup> The frontier is muddy also because the national actors feel legitimized their performance when using imported models. As it was observed for the Chilean criminal procedure reform, “importing ideas was a tool that legitimized the agents promoting the reforms, allowing them to gain a better position in the legal and political fields.”<sup>85</sup>

For the case of the WB it has been remarked that consultants in some cases have a limited experience —or not experience at all— in the country where the projects are located, and therefore their goal is to replicate a WB standard format made for solving most usual problems in the judicial sector. In Argentina, in particular, the content of the program funded by the Bank was based on the work done by consultants who frequently worked on judicial reform projects being implemented in other Latin American countries. These consultants paid insufficient attention to the analysis, explanations and proposals made by national researchers, thus bringing about the risk that “[g]lobal knowledge carried by external consultants versus local knowledge supported by local ones can obstruct the prospects of joint efforts to cooperate in analytical work.”<sup>86</sup>

However, it should be noted that the ultimate influence of foreign consultants’ intervention depends not only on their expertise and bearing, but also on the knowledge accumulated by local actors. The better the local knowledge and thinking on justice issues, the greater the quality of the demands made on external consultants.

After all, the other side of this asymmetric relationship is the national counterpart. On this side, “many of the recipients... have often failed to question the motives of donors and have primarily focused on the amount to be

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<sup>80</sup> Salas, *supra* note 9, at 45.

<sup>81</sup> Domingo & Sieder, *supra* note 35, at 142, 145-146.

<sup>82</sup> Faundez & Angell, *supra* note 32, at 96.

<sup>83</sup> Faundez, *supra* note 37, at 1.

<sup>84</sup> Riggiozzi, *supra* note 39.

<sup>85</sup> Daniel Palacios Muñoz, *Criminal Procedure Reform in Chile. New Agents and the Restructuring of a Field*, in *LAWYERS AND THE RULE OF LAW IN AN ERA OF GLOBALIZATION* 112, 123 (Ives Dezalay & Bryant G. Garth eds., Routledge, 2011).

<sup>86</sup> Riggiozzi, *supra* note 39, at 22.

received and less on the strings that were attached.”<sup>87</sup> But it is a key part of the counterpart’s attitude —when facing international actors— to not only be influenced by the funds to be received institutionally. Most often, individuals expect to receive some personal benefit, “whether computers, cash, a trip to the United States [or other donor country], or simply the association with a powerful foreign friend.”<sup>88</sup>

Being a counterpart —both at an institutional or an individual level— confers a certain degree of legitimacy vis-à-vis other government agencies, the media and other international cooperation entities because: “[c]ountries outside the West rely on approaches developed in the key Western countries to provide credibility and legitimacy to their governments both locally and in global arenas.”<sup>89</sup> Therefore, sharing the approach, concepts and proposals acquired from international actors is an extremely attractive option for would-be national counterparts. Besides, the national partner may personally receive small benefits handed out by the international entity.

The relationship with national partners needs to be cultivated by the officials of the international entity who need these partners to go forward in their plans. National partners are a sort of political or bureaucratic anchor for their work, especially when it comes to projects “that have no popular base of support [and] may find themselves tied to the coat tails of temporary political leaders.”<sup>90</sup> The role of anchor is important when various international sources for cooperation operate in a given country, and competition among these entities, in generating projects and giving assistance, can be expected. In a situation like this, each agency usually counts on its *champion* —so labeled by an important international agency— who functions as the tactical ally to secure the relationship between the agency and its national counterpart. The alliance between the agency and its *champion* may be based on a real confluence on some goals and/or stimulated by incentives personally granted to the anchor. In Guatemala, whose Supreme Court launched a modernization plan with external support in 1998, the most important cooperation agencies had “his” or “her” justice in the Court, who was both the formal link with the agency and its informal representative before the Court.

In some cases, internal guidelines used by international entities strongly recommend that their officials fulfill the requests made by some key national actors even when they do not fit into the strategy formulated by the agency to reform justice in that particular country. It is advised to respond positively to requests guided by a traditional, non-useful way to reform justice —training, for example— in order to tactically reinforce the relationship with the counterpart and so facilitate the work done by the international agency in the country.

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<sup>87</sup> Salas, *supra* note 9, at 44.

<sup>88</sup> CAROTHERS, *supra* note 72, at 260.

<sup>89</sup> Garth & Dezalay, *supra* note 35, at 1, 5.

<sup>90</sup> Salas, *supra* note 9, at 42.

The interests of foreign cooperation agencies and those of the authorities “need each other to survive” and that is why “they establish tacit pacts of procreation and custody of reforms lacking links with social needs and demands—as in fact it happened many times in the region.”<sup>91</sup> It should be noted that the nature of the relationship established between international actors and their national counterparts to pave the way for the cooperation projects may either facilitate or harm reforms in the long term. For instance, that relationship may be favorable to clientele practices that should be eradicated if an in-depth justice reform project is to succeed. In given cases, it could make the position of an official who occasionally supports a reform project stronger because he or she is receiving some particular benefit, but in broader terms it goes against the transformation of the justice system. In the case of the WB, it has been noted that “[i]n an attempt to enhance support for policy change, World Bank staff endorses power relations that in some cases reinforce and in others limit the implementation of policy reform.”<sup>92</sup>

Through these various practices, international officials’ and experts’ approach to their work seems to be solely guided by the need to accomplish the specific goals of the projects under their responsibility or in which they take part. The needs of a strategy aimed at transforming the justice system are deferred or plainly ignored. In some cases, the rationale by which a given project defines its accomplishments may be satisfied by making the implementation process easier, even if that may ultimately run counter to a more ambitious transformation of justice.

In the case of either loans or donations, the international actors’ rationale tends to:

- Submit projects as outstanding initiatives and their actual outcomes as positive,
- Accept and endorse explanations provided by their national counterparts for any shortcomings and failures in the implementation process, and
- Evaluate the implementation process as relatively successful.

In other words, international actors’ performance, mostly guided by the need to be successful in the project, may simply look for shortcuts to guarantee success for a particular project. In some individual cases, a dose of cynicism may be included but this does not seem to be a general characteristic of international officials’ behavior. Many of them are people who firmly believe in what they are doing. However, beyond good faith, good intentions and clean consciences, the rationale introduced into international aid makes it that in many cases, the transformation of justice can hardly be reached.

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<sup>91</sup> BINDER & OBANDO, *supra* note 5, at 61.

<sup>92</sup> Riggirozzi, *supra* note 53, at 207, 214.

At the core of the difficulties posed by such dynamics is the shortage of appropriateness of the national actors. True, the performance of international actors vis-à-vis their local allies does not usually lend itself to the constitution of a broad alliance so as to allow the project to attract all those in favor of a change in the justice system. Differences in the methods and tactics used by international actors resound in the forms and levels of national appropriation of the reform effort, and at the end of the day the appropriateness of the reform heavily depends on the existence and strength of national actors in favor of an in-depth transformation of the justice system.

International actors seem to be equipped to rightly answer questions regarding the strategy and process to be followed, what the starting points should be, which specific goals and what priorities are to be established. Undoubtedly, international experience is a source of learning and the accumulated knowledge is tremendously useful, but international actors, under no circumstances, are better authorized than national actors to respond those questions. Because national actors know the context and actual restrictions of the existing system better, they are better fitted to identifying the more viable options and courses of action during the project implementation process.

Attempts to replace national actors in that role are probably the most serious mistakes international actors make. After the El Salvador experience, it has been asked “whether excessive or inappropriate international involvement can actually inhibit progress in some areas. International donors can provide crucial assistance, but they cannot and should not replace societal processes.”<sup>93</sup>

A distinction among national cases should be introduced. As Argentina is one of those countries in which national capacities are significant and actors in favor of justice reform are organized, international actors should fit better in their proper role: not trying to be a protagonist and play a complementary role in the process. As Riggiozzi recalled, the WB decided to play a different game and, using money as a lever, chose the easiest way politically speaking: to produce reform projects without consistency with the highest goals of justice reform. Mexico offers a different example: also a country with strong internal capacities, it has not accepted the imposition of externally funded projects. But in other countries, justice reform was forcibly introduced in the national authorities’ agenda by international actors due to domestic actors’ weakness. Later these actors found their initiative and proposal capacity further debilitated. Even actors who are in favor of justice reform but suffer from certain weakness tend to yield to the process driven by the international actor—and in his/her absence the change process gets paralyzed. When strong national actors are involved, many of the risks and problems examined thus far can be minimized, and the imposition of models unrelated to the specific social milieu can generally be avoided.

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<sup>93</sup> POPKIN, *supra* note 71, at 244.

## V. EVALUATION OF RESULTS AND KNOWLEDGE MANAGEMENT

Reports by the cooperation agencies usually maintain that an important, if not deep, change in Latin American justice systems has taken place due to their active contribution to the reform process. A USAID publication (*Achievements in Building and Maintaining the Rule of Law*) invites the reader to recognize “USAID’s role and the changes it helped to bring about in 15 countries: Argentina, Bolivia, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, and Uruguay.” The agency’s work is presented as crucial in “*Placing the Rule of Law on the Political Agenda*” because “USAID has been the catalyst for the justice reform movement in the LAC region” by “*Reforming Laws and Legal Procedures*” for a start—in particular, when “criminal code reform became an integral part of USAID justice programs.”<sup>94</sup> However,

USAID’s support of code reform did not end with the enactment of new laws, but went on to include extensive institutional strengthening and training to develop skills needed by judges, prosecutors, defense counsel, and court administrators to carry out their new roles (p. 5) as the reform movement progressed, USAID continued to reinforce and supplement their efforts with considerable technical assistance and training to help shape new laws and foster public education and debate. USAID also furnished information about best practices, provided opportunities for local experts to observe other systems in operation, and otherwise supported and promoted the progress of legal reform throughout the region.<sup>95</sup>

Moreover, the agency work has focused on “*Strengthening and Reforming the Judiciary and Judicial Institutions*,” “*Increasing Public Awareness, Access, and Advocacy*”, and “*Supporting the Next Generation of Judicial Reformers*,” including “the development of national and regional NGOs.”<sup>96</sup> Overall,

USAID has promoted changes that increase transparency and accountability, reduce political influence, and broaden participation in judicial selection processes... USAID programs introduced the concept of the professional court administrator, together with modern systems of case management, record keeping, and statistics, as well as the separation of judicial from administrative functions.<sup>97</sup>

Despite the modest caution that “[t]his ongoing process is far from complete, but is beginning to raise standards and expectations,” it calls attention

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<sup>94</sup> US AGENCY FOR INTERNATIONAL DEVELOPMENT, *ACHIEVEMENTS IN BUILDING AND MAINTAINING THE RULE OF LAW. MSI’S STUDIES IN LAC, E&E, AFR AND ANE* 1, 3 (2002).

<sup>95</sup> *Id.* at 4-5.

<sup>96</sup> *Id.* at 6-7.

<sup>97</sup> *Id.* at 6.

to something new in the region: “various LAC countries have now witnessed cases being brought against politicians, military officials, and others whose actions until recently had been considered above the law.”<sup>98</sup>

A demanding reader would request hard evidence supporting such optimistic conclusions. However, the very first difficulty in endorsing any conclusion on the work performed by international cooperation in justice system reform in Latin America—and probably all over the world—is the lack of serious evaluation of the work that has been done. For this purpose, according to Carothers,<sup>99</sup> it would be necessary not only to establish certain criteria to define what exactly should be considered a *success*, but also to demonstrate the existence of “*causal links* between assistance programs and changes in the recipient societies.” None of these developments have been produced and in fact most agencies “have tended to do few evaluations of their work.”<sup>100</sup>

It has been noted above that weaknesses and insufficiencies affect the diagnosis. Something similar takes place in project evaluations. In some cases, there simply is no evaluation. In others, the evaluation is restricted to administrative aspects of the project, or merely list the activities completed, using figures “and indicators for components and activities (specifying that, for example, ten laws should be passed or 500 people trained),”<sup>101</sup> that is, focusing “on outputs rather than effects.”<sup>102</sup> This approach entails a distortion: “when faced with strict, narrow criteria for success, aid officials begin to design projects that will produce quantifiable results rather than ones that are actually needed.”<sup>103</sup>

It is rather exceptional to find a closer look taken of the outcomes that were effectively produced, not to mention the effects of the project on the justice system. International actors, seemingly concerned with introducing changes through the projects, do not show any interest in finding out “what effects those changes will have on the overall development of the rule of law in the country” when evaluation time comes.<sup>104</sup> A cynical interpretation of this disregard points out that agencies are not interested in getting real evaluations of the projects they manage: “weak independent evaluation is tied to the politics of donor assistance. After all, the goal of monitoring and evaluating these projects lies in obtaining a clean bill of health so that disbursements can go forward and new loans can be made.”<sup>105</sup>

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<sup>98</sup> *Id.* at 6-7.

<sup>99</sup> CAROTHERS, *supra* note 72, at 281.

<sup>100</sup> LINN HAMMERGREN, ENVISIONING REFORM: IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA 23 (The Pennsylvania State University Press, 2007).

<sup>101</sup> Biebesheimer, *supra* note 16, at 108.

<sup>102</sup> CAROTHERS, *supra* note 72, at 286.

<sup>103</sup> *Id.* at 294.

<sup>104</sup> Carothers, *supra* note 50, at 10.

<sup>105</sup> Jensen, *supra* note 70, at 336, 351.

In any case, evaluation is in fact a circumvented—or considerably minimized—phase of internationally-funded projects. In 1993, the USGAO had already warned about: “AID funded continuation of projects without critically evaluating their impact. One major stumbling block has been AID’s inability to agree upon indicators to evaluate the impact of its work.”<sup>106</sup> The following year, an internal audit found that “USAID/Guatemala did not establish performance indicator baselines and intermediate targets to measure the progress of justice program activities.”<sup>107</sup> Some years later, the same problem was found by an internal review of a program developed in Mexico: “the performance indicators and the respective targets are not appropriate for measuring progress toward accomplishing the subobjectives.”<sup>108</sup>

The point missing in the exercises intended as project evaluations is whether the results really contributed to producing the desired reforms. In El Salvador and Guatemala, “[p]roject evaluations... did not indicate whether the projects resulted in reforms to the judicial system.”<sup>109</sup> “In Honduras, AID cited the number of seminar and workshops given, observational trips taken, and public defenders employed as evidence of progress. However, none of these indicate whether the delivery of justice is actually improving.”<sup>110</sup>

This underperformance has affected not only USAID projects. Most international agencies have tended to call evaluation to short-term situation analysis, which emphasizes certain actions and “not always the most important ones.”<sup>111</sup> Two IDB officials identified the problem: “[c]onclusions of field studies and evaluations to date tend to be too general to be very useful.”<sup>112</sup> Quoting the warning made in an IAB Task Force on Country Offices report, Faundez and Angell<sup>113</sup> underline the evaluators’ emphasis on disbursements instead of paying attention to the project’s impact on the justice system. These authors note that neither the WB nor USAID perform better in this area.

One of the difficulties with evaluation stems from who the evaluators are. Usually an agency has a “roster” to pick the consultant/s to be in charge of the evaluation. They are not officials, but experts in close, and frequently continuous, contact with agency officials. In plain language, “independent” evaluators depend on the agencies to make a living. As a consequence, when problems are found in a project evaluation, these evaluators are not prepared to produce an exacting document in which serious mistakes or severe short-

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<sup>106</sup> U.S. GENERAL ACCOUNTING OFFICE, *supra* note 10, at 17.

<sup>107</sup> U.S. Agency for International Development, Audit of USAID/Guatemala’s Justice Program 5 (Audit Report N° 1-504-011-P, September 9, 2004).

<sup>108</sup> U. S. AGENCY FOR INTERNATIONAL DEVELOPMENT, *supra* note 25, at 2.

<sup>109</sup> U.S. GENERAL ACCOUNTING OFFICE, *supra* note 10, at 4.

<sup>110</sup> *Id.* at 18.

<sup>111</sup> BINDER & OBANDO, *supra* note 5, at 74, note 54.

<sup>112</sup> BIEBESHEIMER & PAYNE, *supra*, note 46, at 43.

<sup>113</sup> Faundez & Angell, *supra* note 32, at 112.

comings are highlighted because there is no “real detachment between those evaluating and those evaluated.”<sup>114</sup> In the case of the WB, “[t]he fact that in some cases task managers are involved in writing the ICRs [Implementation Completion and Results Report] ...further undermines their credibility.”<sup>115</sup>

Usually, problems become prominent when the agency and its national counterpart expect a project extension, or are willing to prepare a new project to deal precisely with the very problems the evaluator will find. This practice has been reported in the case of USAID: when problem areas are “highlighted in project evaluations were often used to justify project extensions and additional project funding in the absence of any clear indication that the project would ever meet its intended goals.”<sup>116</sup>

If *who* evaluates is a key factor, another important one is *what* is to be evaluated. Faundez’s review of the WB project portfolio led him to observe that: “[t]he Bank... has placed excessive emphasis on quantitative indicators associated with the efficiency of courts, but has neglected the development of qualitative indicators to measure project activities that do not lend themselves to quantitative measurement.”<sup>117</sup> This author wonders whether “the Bank has a mechanism to control the quality and relevance of the output of consultancy firms” and concludes that: “[s]ome ICRs [Implementation Completion and Results Report] ...tend to be rather uncritical... Moreover, in the absence of a thorough evaluation in the field, it is not possible to state with any degree of certainty the main achievements of the projects.”<sup>118</sup> Weaver concurred with the “neglect of monitoring and evaluation (M&E) throughout the project life cycle” at the WB, where she detects an “externalization of blame.” This author also observes that: “[t]he result, broadly speaking, is an operational environment in which assessing the impact of a loan may be actively discouraged. Any focus on ensuring results is diminished and organizational learning is impaired.”<sup>119</sup>

Indeed, one of the consequences of a derelict evaluation process is impaired learning. However, most agencies maintain that they pay special attention to what is widely called “lessons learned.” The U.S.G.A.O. report *U.S. Assistance for Justice Administration*, issued in 1993, brought up “the lessons learned from 10 years of judicial reform experience in Latin America.” In very clear words, the report indicated that:

The most valuable lessons based on our work in Latin America were that: imposing judicial reform on a country that is not ready for or receptive to change is generally ineffective and wasteful, addressing technical problems without

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<sup>114</sup> CAROTHERS, *supra* note 72, at 302.

<sup>115</sup> Faundez, *supra* note 13, at 6.

<sup>116</sup> U.S. GENERAL ACCOUNTING OFFICE, *supra* note 10, at 47.

<sup>117</sup> Faundez, *supra* note 13, at 8.

<sup>118</sup> *Id.* at 6-7.

<sup>119</sup> WEAVER, *supra* note 8, at 87-90.

confronting the political and institutional obstacles to reform is usually not productive... Projects Launched Without Commitment From Host Governments Face An Uncertain Future... Projects That Do Not Address Political and Systemic Obstacles Will Have Limited Impact.<sup>120</sup>

However, the report noted at the same time that those lessons seemingly learned had no effective application: “[t]he State Department has stated that it is U.S. policy to provide assistance only when a serious commitment to change exists... If this has been U.S. policy, AID has not always followed it.”<sup>121</sup> In even broader terms, it was remarked that: “AID appeared to ignore the lessons learned from previous efforts” and specifically “failed to appreciate that the institutions AID was trying to change were at the cultural core of the societies they were seeking to alter. Yet, these same conditions remained at the root of many of AID’s most problematic judicial reform programs in the region.”<sup>122</sup>

“Lessons Learned” by the WB appears in a 2004 report entitled *Initiatives in Legal and Judicial Reform* and seems to show judicious comprehension of the subject:

Legal and judicial reform is a long-term process... Legal and judicial reform should come from within the country and respond to its specific needs... Legal and judicial reform requires government commitment... Legal and judicial reform projects should be conducted through a participatory approach... Wholesale importation of legal systems may not be appropriate... Coherence of legal reform requires a comprehensive approach that ensures that the modernized legal system will not suffer from internal inconsistencies. Coordination among all concerned development institutions, multilateral and bilateral, is critical... Partnerships to share knowledge and experience can enhance legal and judicial programs.<sup>123</sup>

The question to be answered is whether comprehension of the complexities surrounding the areas where reform projects are to be developed is in fact guiding the action. It does not seem so if “[d]onors have continued to repeat similar mistakes in different countries, suggesting that important lessons learned are not always incorporated into planning and implementation of judicial reform projects.”<sup>124</sup> Maybe there is a question that should be answered beforehand: beyond the trumpeted lessons learned, is there a policy for learning and managing knowledge in place for the international agencies working on Latin American justice reform?

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<sup>120</sup> U.S. GENERAL ACCOUNTING OFFICE, *supra* note 10, at 2, 3, 6.

<sup>121</sup> *Id.* at 46.

<sup>122</sup> *Id.* at 41, 42.

<sup>123</sup> THE WORLD BANK, *INITIATIVES IN LEGAL AND JUDICIAL REFORM* 12-14 (2004).

<sup>124</sup> POPKIN, *supra* note 71, at 259-260.

A look at the activities undertaken and products developed by these agencies clearly shows that knowledge does not play a pivotal role. Neither before the project is designed nor during its implementation, or later on, is there any sizable investment in producing knowledge about the issue being confronted. Only occasionally —mainly because somebody in the agency develops a personal interest in a specific subject— a solid reflection on a given topic arises. In fact, when the most important agencies' publications are reviewed, they show rather scant cumulative knowledge and, generally, the amount of knowledge is disproportionately low when compared with the amount of material resources invested in the area. In the area of justice reform it is also true that “[d]emocracy aid providers have accumulated almost no systematic knowledge about the long-term effects of their efforts.”<sup>125</sup>

In examining the actual behavior of the international officials involved, one comes to the conclusion that deep knowledge of the operation of the justice system and its relationship with the social and cultural characteristics of a given country is not indispensable to them. Instead, short consultancies, focused on a specific subject and aimed at practical results, are deemed to provide the needed doses of specific knowledge to successfully carry out a project. In that way, there is not enough room for any in-depth study of the subject, an exercise that might shed light on the major complexities —that unavoidably will be encountered during the project implementation— which understanding makes it easier for the implementers to decide what is feasible and what the priorities should be. On the contrary, international actors' working practices correspond to the principle of learning-by-doing; in other words, action is first and by way of doing you will acquire knowledge. Although true to some extent, this is a longer and costlier way to learn, assuming that knowledge will be gained sometime along the road. When it comes to a project, its failure might possibly be also a way to learn something, but it is a very expensive way to do so —wasted resources and time— and unnecessary in the first place.

An international agency even fails to learn from its own experience by discarding “tough-minded reviews of their own performance.”<sup>126</sup> The agencies' bureaucracies usually ignore previous efforts because “frequently do a poor job of collecting and disseminating the information they produce, even among their own employees, sponsor research that is not incorporated in their projects.”<sup>127</sup> New incomers tend to think they are moving in a new direction and sometimes incur expenses in trying to discover what the agency should have already known.<sup>128</sup>

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<sup>125</sup> CAROTHERS, *supra* note 72, at 286.

<sup>126</sup> *Id.* at 9.

<sup>127</sup> HAMMERGREN, *supra* note 100.

<sup>128</sup> BINDER & OBANDO, *supra* note 5, at 706.

It has been noted that “an agency like USAID... is challenged by a lack of institutional learning and memory.”<sup>129</sup> In the case of the WB, it has been recommended that “the Bank should consider adopting a more structured approach to knowledge management.”<sup>130</sup> The IDB has been asked to provide “[a] methodology that permits rapid learning from successes and failures [that] will aid in preventing problems and correcting them as they arise.”<sup>131</sup> All the major actors in internationally funded projects on justice reform lack a policy for learning and handling knowledge.

But international agencies appear to share a consensus that disregards knowledge. To explain it, Hammergreen<sup>132</sup> and Carothers<sup>133</sup> point out that external assistance is a competitive business and suggest that the resulting relationship between foreign agencies discourage them from sharing knowledge and building on each other’s work. Moreover, these entities do not seem very interested in their own past: “[t]hey are by nature forward-looking organizations, aimed at the next project or problem.”<sup>134</sup>

There is a price to be paid for this approach. One of the first consequences is to neglect “the input of those with more in-depth knowledge of local institutions.”<sup>135</sup> If the available knowledge on a subject in a given country is routinely ignored by foreign actors, the projects they sponsor will systematically underestimate any resistance and rest on misperceptions that will drive them to failure. A second consequence, partially related to the first one, is that “international actors tend to underestimate resistance to the profound changes needed to build the rule of law.”<sup>136</sup> A third, broader and more decisive one, is that this approach entails a degree of disconnection —caused by ignorance— between the project and its context, which acutely harms the implementation of the former:

Many U.S. programs treat judicial systems, for example, as though they were somehow separate from the messy political world around them. Such programs have been slow to incorporate any serious consideration of the profound interests at stake in judicial reform, the powerful ties between certain economic or political elites and the judicial hierarchy, and the relevant authorities’ will to reform.<sup>137</sup>

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<sup>129</sup> Jensen, *supra* note 70, at 336, 351.

<sup>130</sup> Faundez, *supra* note 13, at 10.

<sup>131</sup> BIEBESHEIMER & PAYNE, *supra* note 46, at 43.

<sup>132</sup> LINN A. HAMMERGREEN, *THE POLITICS OF JUSTICE AND JUSTICE REFORM IN LATIN AMERICA. THE PERUVIAN CASE IN COMPARATIVE PERSPECTIVE* 276 (Westview Press, 1998).

<sup>133</sup> CAROTHERS, *supra* note 72, at 9.

<sup>134</sup> Carothers, *supra* note 50, at 12-13.

<sup>135</sup> Riggiozzi, *supra* note 39, at 28.

<sup>136</sup> POPKIN, *supra* note 71, at 253.

<sup>137</sup> CAROTHERS, *supra* note 72, at 101-102.

As a result of limits drawn by international agencies themselves, a substantial portion of their projects end in at least partial failure. At the beginning of the new century, it was observed that: “after more than a decade of aid and millions of dollars later, the justice systems of Latin America are facing their gravest crisis.”<sup>138</sup> One of the factors intervening in this outcome is that of agencies having “encouraged over financing and redundancy in areas where everyone wants to work, and the funding of some activities that objectively represent fairly low priorities.”<sup>139</sup>

Limitations also arise in promoting and supporting civil society groups concerned with justice, one of the most recent new developments in this field: “In general, civil society programs reach only a thin slice of the civil society of most transitional countries... Programs to aid civil society help many individuals and small organizations strengthen their civic participation but rarely have society-wide reverberations.”<sup>140</sup>

One concurrent problem has been interagency competition: “the Justice Department’s foreign rule-of-law work is too separate from that sponsored by USAID, due to institutional rivalries among all the U.S. actors involved in rule-of-law aid that dates from the 1980s.” As a result, U.S. funded programs to support justice reform and other state institutions had “weak effects relative to their size.”<sup>141</sup>

International agencies actually find it difficult to recognize shortcomings and failures. In the case of USAID, it has been said that it shows a “reluctance to terminate unsuccessful projects” (U.S.G.A.O. 1993: 6). Even on the rare occasions that the outcomes of a project are evaluated with a negative balance, nothing happens because “one lesson the agencies have had difficulty learning is how to terminate projects that, by their own assessments, consistently fail to achieve results commensurate with the money invested.”<sup>142</sup> This point is illustrated by the approach adopted when the project failures in a country were undeniable: “[i]n Guatemala, AID officials said that discomfort with the judicial reform project led AID to concentrate on commodity purchases and high-priced seminars and technical assistance that did not effect any real changes in the justice system.”<sup>143</sup> In other words, the project was not stopped because it failed and disbursements continued for irrelevant acquisitions and activities.

However, a tacit recognition of failure may be the decision made by the World Bank to quietly retreat from justice reform in Latin America. As shown in Table 3, between 2004 and 2010, the amount of money devoted to Rule

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<sup>138</sup> Salas, *supra* note 9, at 41.

<sup>139</sup> HAMMERGREN, *supra* note 132, at 276.

<sup>140</sup> CAROTHERS, *supra* note 72, at 338, 341.

<sup>141</sup> *Id.* at 275, 336.

<sup>142</sup> U.S. GENERAL ACCOUNTING OFFICE, *supra* note 10, at 9.

<sup>143</sup> *Id.* at 17.

of Law programs has been constantly decreasing and in 2010 was just about 1% of the amount lent to countries in the region.

TABLE 3. WORLD BANK LENDING IN LATIN AMERICA AND THE CARIBBEAN ON RULE OF LAW PROGRAMS IN MILLIONS OF US DOLLARS (2004-2010)\*

2004	2005	2006	2007	2008	2009	2010
270.9	147.9	108.8	97.5	50.1	1.0	22.9

\* Data compiled by the author from World Bank sources

## VI. HOW WORTHWHILE IS INTERNATIONAL AID?

Unfortunately there are no in-depth case studies from which general conclusions can be obtained, but available evidence shows a number of significant failed efforts among internationally funded justice reform programs. The cases of Guatemala and Argentina illustrate the kind of problems that usually affect these programs.

In a case study on the Guatemalan justice reform process<sup>144</sup> —where, as noted, between 1996 and 2003 international sources made more than 185 million dollars available to justice institutions—, it was possible to find many serious shortcomings, and explain why internationally-funded projects incur in them or fail. Most of the factors examined in this article were at hand in Guatemala. Attention was not paid to the particular characteristics of the country. Imported models were introduced in an attempt to strengthen justice institutions. The projects focused more on immediately measurable results, instead of long-term, more deeply-rooted achievements. International actors were not able to proceed in a coordinated manner; that is, sharing a chart of goals and tasks, clearly defined objectives and responsibilities, and time limits.

Each agency contributed to this common failure by focusing in their own policies and mandates —instead of prioritizing what the country required— and competing in their own performances prevailed while official discourses endlessly praised cooperation. A variety of agendas elaborated by international entities in Guatemala blocked the option to work on an integrated plan to help the country's justice system —when the 1996 peace accords opened up a rare window of opportunity to reform it. Each agency grasped at the leadership or the influence of a national personality to carry out its project, paying lip service to considerations of institutional and social conditions, which constrained not only the transformation of the justice system but even the success of specific reform projects.

<sup>144</sup> LUIS PÁSARA PAZ, *ILUSIÓN Y CAMBIO EN GUATEMALA. EL PROCESO DE PAZ, SUS ACTORES, LOGROS Y LÍMITES* (Universidad Rafael Landívar, 2003).

While justice reform in the country “constituted part of the conditionality for donor funds to support the peace process, yet the demand from local political elites and citizens for concerted reform... remained weak.”<sup>145</sup> When it was apparent that there was not enough will or commitment on behalf of their national counterparts, external actors took shelter in the rationale that the projects would generate such will and commitment (although both are prerequisites), under the premise (or excuse) that “[t]he object of many projects is preparing the way for future reforms.”<sup>146</sup> This stance was indeed conducive to ill-conceived, technically poor projects.

In regard to the justice system, one of the big failures was the newly created police force (PNC) —with U.S. and Spanish support— that sooner than later revealed itself as a pernicious actor.<sup>147</sup> At the end of the day, when the national authorities did not fulfill the commitments acquired through the peace accords, funding sources went on providing funds, despite the fact that fulfilling its commitments was a condition for disbursing aid.

In Argentina, international aid found strong resistance to the transformation of the justice system during Carlos Menem’s government (1989-1999). The responses expounded by some international actors included promoting domestic efforts and contributing to build actors with enough capacity to demand and propose that changes be produced in justice administration. On the one hand, the International Monetary Fund (IMF) conditioned a loan —desperately needed by government authorities— to implement the Consejo de la Magistratura, aimed at providing the system with transparency and objectivity in the process for appointing judges. On the other hand, USAID conceded grants to NGOs —such as Poder Ciudadano, Conciencia, and FORES— to strengthen their roles as qualified voices of civil society on justice affairs.<sup>148</sup>

However, the WB persisted in working with the government —which is the only possible borrower that can be considered for a Bank loan— but renounced the power of conditionality, and tried to find national counterparts for reform their own way. After being more or less rejected by the Supreme Court, WB officials made entry through the Ministerio de Justicia that by the middle 1990s had prepared a comprehensive diagnostic study on the Argentinean justice system, funded by the Bank. Its conclusions traced a complex panorama in which political factors —such as decisions on judicial ap-

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<sup>145</sup> Rachel Sieder, *Legal Globalization and Human Rights*, in HUMAN RIGHTS IN THE MAYA REGION: GLOBAL POLITICS, CULTURAL CONTENTION AND MORAL ENGAGEMENTS 67, 81 (Pedro Pitarch, Shannon Speed & Xochitl Leyva Solano eds., Duke, 2008).

<sup>146</sup> BIEBESHEIMER & PAYNE, *supra* note 46, at 31.

<sup>147</sup> Rachel Sieder & Patrick Costello, *Judicial Reform in Central America: prospects for the rule of law*, in CENTRAL AMERICA. FRAGILE TRANSITION 169, 196 (Rachel Sieder ed., Institute of Latin American Studies-MacMillan Press, 1996).

<sup>148</sup> REBECA BILL CHAVEZ, THE RULE OF LAW IN NASCENT DEMOCRACIES. JUDICIAL POLITICS IN ARGENTINA 143 (Stanford University Press, 2004).

pointments and the Supreme Court operations— were identified as critical. However, “despite the highly political issues raised by the assessment reports and the public discussions with local experts, the Bank’s Legal Department designed a programme of reform that narrowly focused on technical managerial aspects of the system related to court administration,” known by its acronym PROJUM and funded with 5 million dollars.<sup>149</sup> By taking this option, the WB domesticated the reform and made it acceptable to the government’s parameters.

According to Riggiozzi, the disregard of the study at the time of designing the project is explained by the WB inclination to choose a depoliticized approach to justice reform that makes it possible to reach an agreement with the government —any government— insofar as its content does not generate resistance among the authorities. The key factor rests on “the power of the Bank to frame policy paradigms that leave aside political questions that challenge the structure of authority... mainly because the Bank’s interest in legal and judicial reform was not related to political aspects of the system but rather technical ones linked to” an investment friendly climate.<sup>150</sup> In the Argentinean case, the result was a justice reform project that brought out some ideas promoted by the WB and deemed acceptable to the depoliticized agenda shared by the Executive and the Supreme Court.<sup>151</sup>

Unfortunately, Guatemala and Argentina are no exceptions. “Between 1984 and 1990 AID provided some \$13.7 million to the judicial reform programme in El Salvador. However, given that it focused on technical problems rather than addressing the lack of political will for reform, the project inevitably achieved little.”<sup>152</sup> Accordingly, an official report admitted: “in 1990 that after 6 years of U.S. assistance, El Salvador’s judicial system still lacked the ability to deliver fairs and impartial justice.” Moreover, “AID documents show that most judicial reform efforts in Latin America experienced serious problems, resulting in a portfolio of marginally successful projects.”<sup>153</sup>

WB projects in Venezuela “neither affected in any relevant way the changes nor reached their objectives.”<sup>154</sup> In the case of U.S. work in the field of Latin American justice, the resulting balance was put forward after 15 years of cooperation:

...what stands out about U.S. rule-of-law assistance since the mid-1980s is how difficult and often disappointing such work is. In Latin America, ...where the United States has made by far its largest effort to promote rule-of-law reform, the results to date have been sobering. Most of the projects launched with en-

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<sup>149</sup> Riggiozzi, *supra* note 53, at 219.

<sup>150</sup> *Id.*

<sup>151</sup> Riggiozzi, *supra* note 39, at 28.

<sup>152</sup> Sieder & Costello, *supra* note 147, at 169, 185.

<sup>153</sup> U.S. GENERAL ACCOUNTING OFFICE, *supra* note 10, at 3.

<sup>154</sup> BINDER & OBANDO, *supra* note 5, at 776, note 38.

thiasm—and large budgets—in the late 1980s and early 1990s have fallen far short of their goals.<sup>155</sup>

Another analysis covering most of the international institutions working in the area of justice arrived at a similar conclusion some years later: “the design and approach were neither complete nor comprehensive. They did not correspond to an integral vision for defining an agenda and a methodology with the capacity to unblock and overcome the basic problems of justice sector in Latin America and the Caribbean.”<sup>156</sup> In most cases of Rule of Law programs, as Salas noted,<sup>157</sup> international actors did not call for substantial changes from beneficiary governments.

In this article, emphasis has been put on the errors, vicious circles and negative causalities. But it is fair to recognize the real contribution some of the internationally-funded programs have made. An official U.S. report is probably right when it asserts that:

U.S. rule of law assistance has helped these countries undertake legal and institutional judicial reforms, improve the capabilities of the police and other law enforcement institutions, and increase citizen access to the justice system... In each of these countries we visited [Colombia, El Salvador, Honduras, Guatemala y Panamá], host country government and civil society representatives noted that the presence of the international community—particularly the United States—was needed, not only for the resources it provides, but also to help encourage government officials to devote the necessary resources to enact, implement, and sustain needed reforms.<sup>158</sup>

It is only fair to recognize the real contributions made by some of the internationally-funded programs. The presence of international agents in the field of justice has initiated or stimulated—depending on the case of each country—work on justice. Probably, as Carothers put it for U.S. democracy aid, that presence “is rarely of decisive importance but usually more than a decorative add-on.”<sup>159</sup>

But if the question is whether they could do better than they have, it is relatively easy to answer in the affirmative. There are many mistakes and structural limits in the way that most of the internationally-funded projects have operated. As has been reviewed in this article, there have been several negative facts: a superficial diagnosis, a separation between general—sometimes unrealistic—objectives and specific activities, the use of imported models regardless of local conditions, a lack of evaluation of the impact on the change in the system. Poor knowledge management contributes to fostering

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<sup>155</sup> CAROTHERS, *supra* note 72, at 170.

<sup>156</sup> BINDER & OBANDO, *supra* note 5, at 774.

<sup>157</sup> Salas, *supra* note 9, at 43.

<sup>158</sup> U.S. GENERAL ACCOUNTING OFFICE, *supra* note 10, at 2, 8.

<sup>159</sup> CAROTHERS, *supra* note 72, at 347.

conditions in which constructive criticism and innovation do not flourish and errors are repeated.

International agencies have not kept a stable interest in the area;<sup>160</sup> their role has been “neither linear nor always coherent.”<sup>161</sup> At the same time, they have excessively available funds and have proposed too many objectives within an agenda that is too broad, impossible to implement,<sup>162</sup> and mainly guided by institutional policies “which frequently will not coincide with objective needs.”<sup>163</sup>

USAID, the most important governmental agency working in the region, has been accused of “lacking an integral vision and a comprehensive strategy of the reform process.”<sup>164</sup> A concurrent conclusion is found, as recently as 2011, in an Audit Report on a Rule of Law program implemented by the agency: “USAID/Mexico has not delivered technical advisory services in a strategic manner to reach maximum efficiency, effectiveness, and sustainability, mainly because it lacks a strategic focus... As a result, USAID/Mexico Rule of Law activities has had limited success in achieving their main goals.”<sup>165</sup>

When looking to the variety of international actors working in a given process of justice reform, contradictory agendas, models and recipes come to light: “[t]ransitional countries are bombarded with fervent but contradictory advice on judicial and legal reform.”<sup>166</sup> A not so silent competition is in progress as a result of “the tendency of different aid providers to try to import their own models and for those models to conflict with one another.”<sup>167</sup> U.S. support for passing and implementing a new criminal procedure and Spanish agency’s (AECI) insistence on introducing *Consejos* to govern judicial systems are clear examples of this trend.

From the point of view of governments, the use of aid as a tool available from the foreign policy toolbox seems unavoidable as long as it is used in domestic policy in the receiving country, as well. Being Scandinavian countries a notable exception, aid is a slot on a foreign policy matrix that is drawn thousands of miles away from the recipient country, a task for which not even the embassy’s opinion is always taken into account. In numerous cases known in

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<sup>160</sup> BINDER & OBANDO, *supra* note 5, at 90.

<sup>161</sup> Domingo & Sieder, *supra* note 35, at 142, 142.

<sup>162</sup> Linn Hammergren, *Quince años de reforma judicial en América Latina: dónde estamos y por qué no hemos progresado más*, in REFORMA JUDICIAL EN AMÉRICA LATINA. UNA TAREA INCONCLUSA 3, 4 (Alfredo Fuentes Hernández ed., Corporación Excelencia en la Justicia, 1999).

<sup>163</sup> HAMMERGREN, *supra* note 132, at 316.

<sup>164</sup> BINDER & OBANDO, *supra* note 5, at 756.

<sup>165</sup> U. S. Agency for International Development, *supra* note 25, at 2.

<sup>166</sup> Carothers, *supra* note 43, 104.

<sup>167</sup> Thomas Carothers, *The Many Agendas of Rule-of-Law Reform in Latin America*, in RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM 4, 15 (Pilar Domingo & Rachel Sieder eds., Institute of Latin American Studies, University of London, 2001).

Latin America, aid projects have been granted or denied on purely political basis, regardless of the project's merits.

That is why in the receiving countries the question has arisen "as whether aid providing countries are not in fact mainly serving the interests of the aid-providing countries."<sup>168</sup> Beyond the donor countries' using the projects politically, the rules governing the procurement processes —including that of considering the nationality of the companies providing equipment or services, and the citizenship of the consultants to be hired— imply that a significant portion of the funds granted sometimes go back into the donor country's economy.

Both governmental cooperation agencies and those that are part of the United Nations system operate under formally established mandates and guidelines —which are not always public— that their officials must follow. Those internal rules prevail over any other consideration. Among them, keeping the institutional profile high becomes a problem when it conflicts with what is needed to accomplish the most important goals of a reform project. This is one of the reasons it is so difficult for cooperation agencies to join efforts for funding and developing a big and significant project; they prefer to fund a short-term, visible project that will reinforce their own institutional image.

Moreover, when it comes to multinational aid organizations, a key factor is the strategy each one develops to occupy spaces and positions, to expand functions, and to increase their own budgets. Explicit discrepancies between these organizations can be explained by the competition for expansion. "The current system of international organizations does not lend itself easily to coherent and integrated action. Each of the different agencies has its own charter, budget and governing body."<sup>169</sup> Besides, a pathology of international bureaucracies has been diagnosed as an important element to explain their actual behavior: "[w]hile I do not seek to generalize my explanation of hypocrisy beyond the critical case of the [World] Bank, I do see its hypocrisy as an exemplar of the bureaucratic 'pathologies', dysfunctions, and legitimacy crises that we observe in international organizations today."<sup>170</sup>

It is worth mentioning the case of the UNDP, as the United Nations' agency in charge of development programs. The UNDP frequently signs contracts to be the agency responsible for the administrative duties in cooperation projects funded by a donor country and executed by a recipient government. The UNDP in turn charges a fee that contributes to financing the agency. This mechanism is increasingly important in a world context with a growing difficulty in finding funds for development. But when the UNDP establishes

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<sup>168</sup> *Id.*

<sup>169</sup> Alvaro de Soto & Graciana del Castillo, *Obstacles to Peacebuilding*, 94 FOREIGN POLICY 69, 74-75 (1994).

<sup>170</sup> WEAVER, *supra* note 8, at 3.

such a partner relationship with the local government around some projects, a critical look of the national authorities' performance carried out by UNDP officials becomes rare.

Harsh criticism of the international cooperation is not lacking, as we have seen. Among the most vocal are Binder and Obando:

...cooperation... works through bureaucratic entities, inter-agencies power games and rules of the game shaping a distant reality... their tendency to achieve short-term results, multiple bureaucratic rationales, internal fights in which political criteria prevail over technical aspects... the structural difficulty for coordination between different cooperation actors... may block advancement or deepness of judicial reform.<sup>171</sup>

Certainly, not all the burden should be placed on international cooperation. Domestic conditions are crucial, not only in the implementation of the projects themselves, but also in framing of the role of the foreign actors. To some important extent, projects aimed at reforming State institutions depend on the wider process unfolding within the State apparatus. National counterparts share responsibilities with international officials and experts because both groups are connected by the implementation of a project.

The national responsibility is apparent when a reform project is put into effect and it is found that “[t]he primary obstacles to such reform are not technical or financial, but political and human,” and also when even the generation of politicians arising out of the political transitions to democracy “are reluctant to support reforms that create competing centers of authority beyond their control.”<sup>172</sup> If anything, international actors are responsible for denying or minimizing the importance of these factors that, as a matter of fact, explain a significant number of the failures.

International actors are also responsible for not paying enough attention to their own learning processes. As early as 1993, a USAID report on agency work in Honduras<sup>173</sup> explained the failures of the projects by attributing them to the conditions lacking in the country. Later, a new report was written<sup>174</sup> presenting a broader analysis of the specific conditions needed for Rule of Law projects to make sense. The authors noted that in the absence of those conditions —mostly related to the will and capacities of the national actors, projects in this area were condemned to failure and were therefore wasteful. The proposed criteria were mostly ignored by both USAID and other agen-

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<sup>171</sup> BINDER & OBANDO, *supra* note 5, at 90-92.

<sup>172</sup> Carothers, *supra* note 43, at 96.

<sup>173</sup> Gary Hansen, William Millsap, Ralph Smith & Mary Staples Said, *A Strategic Assessment of Legal Systems Development in Honduras* (Center for Development Information and Evaluation, A.I.D. Technical Report No. 10, 1993).

<sup>174</sup> Blair & Hansen, *supra* note 15, at 10.

cies. Since the publication of that seminal paper, several other critical works have circulated, but they have had a very limited effect on the activities undertaken by international cooperation.

## VII. CONCLUSIONS

International support for justice reform has played an important —and positive— role in some countries at certain times. In several countries, justice reform would not even be an item of the public agenda if international actors had not induced it. What has been gained through international support in the area of justice makes international actors key protagonists of the process. However, their role needs to be substantially improved and the area in which improvements are mostly likely needed is in the learning capacity of the international actors and their interest in critically reviewing their own work.

On a balance, a couple of introductory caveats should be offered. On the one hand, it is important to keep in mind that establishing the Rule of Law is a broader and more difficult task than reforming the justice system. Therefore, building a better justice system is not enough to establish the Rule of Law; the former is just a component of the latter. The quality of the laws, the legal culture, the actual social and economic inequalities, and the role played by the government —among other elements— are important and complex components of the process of building the Rule of Law.

On the other hand, internationally-funded programs of justice system reform are not able to produce deep changes, which are badly needed for both a better justice system and the establishment of the Rule of Law, in the receiving countries. Clearly, such programs are not able to “fundamentally reshape the balances of power, interests, historical legacies, and political traditions of the major political forces in recipient countries. They do not neutralize dug-in antidemocratic forces. They do not alter the political habits, mind-sets, and desires of entire populations” and “[o]ften aid cannot substantially modify an unfavorable configuration of interests or counteract a powerful contrary actor.”<sup>175</sup> That is why international aid in the area of justice has not delivered a new justice system in receiving countries. It simply could not do it.

But there is some room for improvement. Taking into account the analysis made in this article, some concrete suggestions can be proposed for the many people, acting in good faith in the international agencies and who are willing to find ways to do a better job of improving justice systems in the region:

- *Knowledge is a must.* No decision about the area, content, size, timing or amount of a project should be made without detailed knowledge of the subject in the country where the work is to be done.

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<sup>175</sup> CAROTHERS, *supra* note 11, at 305, 107.

- *Learn what others produced.* To gain knowledge of the prevailing conditions mainly requires: collecting the information that already exists, paying attention to national actors' perceptions and analysis, taking advantage of the knowledge of international experts who have gained experience in that particular country, and evaluating other agencies' experience in the field.
- *National actors and a clear strategy are needed.* The conditions required to develop a project include: a core of national actors who are truly committed to the reform goals, and a strategy—to be designed jointly with national actors—with well-defined short, medium, and long-term goals within the project.
- *National actors have a crucial say.* The implementation phase of any project needs to have a partnership of national and international actors, but the last word should be said by national actors who know better and ultimately are responsible for the reform process in their country.
- *Monitoring and evaluation are indispensable.* Project implementation needs continuous monitoring and project evaluation presents opportunities to learn about both achievements and failures. External reviews of the projects—including work done by academic researchers—are powerful tools for a critical analysis on what works and what does not. Reluctance to share information with capable peers is, in the long term, a way of wasting resources.

If these remedies—and other possible changes—are introduced to alter the performance of international actors and agencies, they may dramatically increase the level of quality of the outcomes of justice reform projects.

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