

Enhancing Judicial Institutions: Enhancing Economic Development

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Abstract

Since the 1980s, scholars and development banks have recognized the link between judicial institutions and economic growth. This thesis proposes to explore the role of judicial institutions in the performance of economies and questions whether enhancing judicial institutions can result in enhancing economic development in developing countries. Since the 1990s development banks have explored the role of judicial institutions in the quest for economic development. Both the World Bank and the International Monetary Fund (IMF) have done this through the pursuit of judicial reform efforts in countries with ailing economies. The focus has been on improving the efficiency of the judicial system through reforms in the civil justice system. Through documentary analysis, information was garnered relating to judicial institutions, the criminal justice system and corruption, and their role with respect to economic development. The author reviewed the traditional approach towards judicial reform which focused on the civil justice system, and then suggests a novel, non-traditional approach which also emphasizes the role of the judicial institution in respect to the criminal justice system and anti-corruption initiatives. This study found that enhancing judicial institutions, through judicial reform efforts within both the civil justice sector and the criminal justice sector minus corruption, may potentially enhance economic development. The conclusion is that in order to enhance economic development, resources should be channeled into enhancing judicial institutions to deal effectively with both the civil justice system and the criminal justice system with an emphasis on the eradication of corruption.

Keywords: judicial reform; judicial institutions; developing countries; economic development; corruption; rule of law; criminal justice system, criminal law, corruption.

An Abstract of a Master's thesis.

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CHAPTER 1

Introduction

In any society, but more so in developing countries, the significance of economic development cannot be underscored. Economic development generally includes such trends as technological innovation, improvements in the standard of living and life expectancy, and increases in the amount of invested assets per capita. Some features of economic development tend to include positive changes in socioeconomic structure, and progress in citizens' quality of life.¹

Since the 1980s, the link between judicial institutions and economic development has been the subject of much discourse. Judicial institutions have gained recognition as important institutions in the quest for economic development.² The judicial system plays a fundamental role in providing the necessary conditions for an operative market. A deficient judicial system generates high transaction costs, especially in the case of increased contractual relationships, and limits the extension of the market and possibilities of growth.³ This conversation about judicial institutions, the judicial system and economic development is even more important today given the state of the world economy. The 2008 global recession and collapse of the financial sector saw many countries suffer from emergent challenges to their economic viability which inevitably hindered development. In the 21st century, many arguments have been made as to the determinants of economic development. Some have been tested while others remain mere conjectures. Consequently, this study posits, all avenues to enhance economic development should be explored to discover how best development can be achieved.

¹"Glossary on Investor Words," accessed January 23, 2016.
http://www.investorwords.com/16382/economic_development.html.

²Knack and Keefer, "Institutions and Economic Performance," 223; North. *Institutions, Change, and Economic Performance*, 54.

³Eyzaguirre. *Institutions and Economic Development*, 17.

BACKGROUND

Various scholars have discussed the role of institutions in the quest for economic development.⁴ Nobel Prize winner Douglass C. North, for example, wrote about the importance of institutions in the analysis of economic performance and identified the judicial system as one such institution.⁵North asserted that the role of the judicial system was to provide coercive enforcement. He further contended that the inability of societies to develop effective, low-cost means of enforcing contracts is the most important source of both historical stagnation and contemporary underdevelopment in the Third World.⁶Other authors concurred, pinpointing the judicial institution as an entity with an integral role to play in this quest for economic development.⁷Consequently, there has been global emphasis on optimizing the function of the judicial institution through judicial reform measures.

One of the key arguments for judicial reform is the need for a well-functioning legal system as a precondition for economic development. The World Bank, and more recently the International Monetary Fund (IMF), have both played a major role in implementing judicial reform measures aimed at enhancing the growth of economies in developing countries.

Some efforts at judicial reform are geared towards enhancing the judicial institution in the execution of its role. However judicial reform encapsulates other activities outside of that function. Richard Messick defined judicial reform in this way:

Judicial reform is part of a larger effort to make the legal systems in developing countries and transition economies more market friendly. This broader legal reform movement encompasses everything from writing or revising commercial codes, bankruptcy statutes, and company laws through overhauling regulatory agencies and teaching justice ministry officials how to draft legislation that fosters private investment. Although the line

⁴Pinheiro, "Judicial System Performance and Economic Development";Knack and Keefer, "Institutions and Economic Performance";Richard E. Messick, "Judicial Reform and Economic Development: A Survey of the Issues," 117-36.

⁵North, *Institutions, Change, and Economic Performance*, 54.

⁶Ibid., 54.

⁷Dam, "The Judiciary and Economic Development"; Pinheiro, "Judicial System Performance and Economic Development," 3.

between judicial and legal reform blurs at the margin, the core of a judicial reform program typically consists of measures to strengthen the judicial branch of government and such related entities as the public prosecutor and public defender offices, bar associations, and law schools.⁸

According to Messick, these measures aim to make the judicial branch independent, speed the processing of cases, increase access to dispute resolution mechanisms and professionalize the bench and bar.⁹

As the premier financial institution dealing with judicial reform, this thesis will examine the role of the World Bank as well as the more recent efforts by the IMF. The World Bank and IMF's focus on commercial law and civil determinations may be based on the need to improve market function across sectors and on the Washington Consensus.¹⁰ The Washington Consensus emphasizes a neo-liberal view of globalization. It determines reform policies towards macroeconomic development in countries undergoing fiscal crisis mode, such as Latin America, the Caribbean, and most postcolonial territories. Traditionally, neither the IMF nor the World Bank focused on judicial reform that incorporated reform in the criminal justice system. It will be argued that any approach which fails to take into account the relationship between the different sectors of the judicial system, and the fact that they are all intertwined, will be imprudent since unilateral reform may be a waste of time and resources.

RESEARCH QUESTIONS

In order to address the proposed hypotheses, I propose the following questions:

1. Can enhancing or reforming judicial institutions lead to enhancing economic development in developing countries?

⁸Messick, "Judicial Reform and Economic Development," 118.

⁹Ibid., 118-119.

¹⁰See World Health Organization on the Washington Consensus at <http://www.who.int/trade/glossary/story094/en/>.

2. In reforming judicial institutions in developing countries what are the elements required for a successful judicial reform project?
3. Does it make sense to focus on some aspects of the justice system and not others?
4. In developing countries should judicial reform initiatives be focused not only on the civil justice system but also the criminal justice system and anti-corruption initiatives?

THESIS OUTLINE

The thesis will consist of five chapters. In the first chapter, an introductory paragraph will serve as a preamble to the background information. The hypothesis, as well as the research questions will be presented, along with the methodological approach.

In the second chapter, the literature review will explore the empirical discourse on economic development and judicial reform. Other related themes will be examined such as corruption and the traditional approach towards judicial reform which focuses on the civil justice system. The enforcement of contracts, debts and the protection of property as significant elements that can influence economic growth will be assessed. Note the proposal does not suggest reform focusing on the civil justice system is unimportant. On the contrary, it is acknowledged as being of paramount importance; albeit the suggestion here is that they are simply one avenue in the journey towards economic development. The non-traditional approach is also examined. The argument is that countries experiencing significant problems with crime and violence, accompanied by a large number of criminal cases should include reform to the criminal justice system in any judicial reform project. Such reforms should include enhancing the capacity of the judiciary to uphold human rights, standards and norms in criminal cases, as well as improving the capacity of the judicial institution to deal effectively with breaches of the criminal law. I will argue that reform to the criminal justice system is necessary to restore confidence in the judiciary, ensure balance and guarantee access by all persons to a robust criminal justice system that

promotes fairness and equality. I also suggest that any such reform should heed the role of the judicial institution in eradicating corruption. This position is important since high crime rates tend to deter investors, and investments are essential for economic growth.¹¹ If judicial reform measures can be channeled towards the enhancement of judicial institutions, the result could be high quality courts focused on strategies geared towards the reduction of crime and corruption.

This study will also explore measures the judicial institution can utilize to reduce the incidence of crime. The hypothesis is that a reduction in crime will enable the country to be viewed as a safer place for people to live, work and do business. The ambit of criminal justice reforms is wide and expansive. The objective of this thesis, therefore, is to discuss its wider remit, and explore the aspects of criminal justice reform and criminal offences that correlate to the economy, with specific attention to local and foreign investments. Aspects which will be examined include serious crimes against the person, crimes against property, and corruption. Although corruption is included in this listing, it will also be singly examined to ascertain whether it has any impact on investments.

It will also be argued that corruption and anti-corruption initiatives must be included in any program geared towards enhancing the judicial institution. Corruption presents a fruitful area for research into ways it can thwart growth in the economy; as well as the role of judicial institutions in advancing development and growth through available mechanisms. Emphasis will also be placed on exploring the role that anti-corruption efforts, driven by the judicial institution can play in influencing economic development.

The Methodology will be presented in the third chapter. Here the choice of document analysis as a research method will be discussed and expanded. The Analysis and Implications will form the fourth chapter. The thesis ends at Chapter five with the Conclusion. In this section

¹¹World Bank, *Crime, Violence, and Development*, i.

further discussions and recommendations for future works and or avenues for judicial reform will be presented.

CHAPTER 2

Literature Review

The aim of this chapter is to review the literature dealing with judicial institutions, judicial reform, the civil justice system, the criminal justice system, corruption and how they all relate to economic development. This literature review is divided into three main sections, namely Judicial Institutions and Economic Development, Criminal Justice and Economic Development, and Corruption and Economic Development.

Judicial Institutions and Economic Development

As early as 1981, Douglass North expressed the view that the judicial institutions not only determined the wealth of nations,¹ it also responded to, helped create, change and sustain the rules of the game- the institutional environment in which development took place.² He found that competition played a critical role in inducing enforcement and that the judicial system provided coercive enforcement.³

These suggestions situate the judicial institution out of the realm of the usual activities of judges and courts. If it can be confirmed that judicial institutions can determine the wealth of nations, then it is little wonder subsequent researchers have explored this notion. If the judicial institution is indeed part of the rules of the game that determine wealth, then how this game is

¹North, *Institutions, Change, and Economic Performance*, 53.

²Ibid., 53.

³North, "Economic Performance through Time," 359-368.

played in developing countries is an issue of great interest. Can they play this game under prevailing conditions or is there need for a new breed of judicial institutions?

Researchers and development banks such as the World Bank maintain that in order for judicial institutions to stimulate economic growth, reform is necessary.⁴ This is evident in the large number of judicial reform initiatives implemented in the last few decades. It has been suggested that judicial systems in developing countries and transition countries are choked with inefficient procedures that cause unreasonable delays, and undermine the courts' ability to enforce judgments.⁵ If it is true that these are the prevailing conditions in developing countries, then judicial reform is a necessity from all angles.

Empowering judicial institutions to carry out tasks such as the impartial enforcement of the law is a large part of what judicial reform efforts aim to achieve. The function of enforcement, in a modern society, is primarily the responsibility of the judicial system.⁶ Ingram in a study of Brazil and Mexico from 1985 to 2010, noted that despite the evidence of political and economic benefits from strong judicial institutions, courts are not always empowered.⁷ This study further supported the assertion that judicial institutions in developing economies necessitated judicial reform if these countries were to grow economically.

Researchers attempted to provide an overview of what a successful judicial reform project entailed. Traditionally researchers found validity in focusing on enhancing the competency of the judicial institutions in commercial and economic matters, which included the enforcement of property and contract rights as important elements. Other researchers focused on the independence

⁴Rowat, Malik, and Dakolias, eds, "Judicial Reform in Latin America and the Caribbean".

⁵Laver, "The World Bank and Judicial Reform," 183-238.

⁶Eyzaguirre, *Institutions and Economic Development*.

⁷Ingram, *Crafting Courts in New Democracies*, 1.

of the judicial institution. Yet other researchers suggested a large variety of elements were necessary in such initiatives.⁸

Messick (1999) sought to address what constituted a successful judicial reform project. . He acknowledged that little was known about the impact of the judicial system on economic performance, and that there was a lack of agreement as to what made a successful judicial reform project. Despite that assessment, many projects aimed at judicial reform in developing countries were implemented. Messick concluded that crafting an efficient judicial reform project posed several challenges and that before reform could take place there should be an in-depth analysis of the country's need. This analysis should be continually reviewed during the process of implementation.⁹ Despite those observations it was not always obvious that the country's needs were taken into account in all implemented projects.¹⁰

Although Messick provided no direct answer to the question of the components of a successful project, he indicated that projects funded by development banks such as the World Bank were premised on a legal system in which contracts between private parties were enforced and the property rights of investors were respected.

Laver found that a sound judicial system was crucial to economic development. He emphasized stimulating investment through a judicial system that protected property and contractual rights, and adjudicated disputes without capriciousness and undue outside influence based on its importance to private investors.

⁸ See Pinheiro, "Judicial System Performance and Economic Development," who suggests that well-functioning judiciaries may foster growth essentially through three different channels: technological progress, investment and high efficiency. He also discussed the literature which concentrated on securing property rights against administrative expropriation, reducing political instability and increasing the flexibility and credibility of economic policy.

⁹ Messick, "Judicial Reform and Economic Development," 132.

¹⁰ See Clustered Project Performance Assessment Report, Judicial Reform Project, Ecuador, Guatemala, Colombia June 30, 2010, at www-wds.worldbank.org/Ext. NB. Although the Columbia suffered from high levels of crime there is no indication of any reforms to the criminal justice sector.

Another work concerned about setting up institutions to spur economic growth, with particular reference to developing or transition economies, was done by David F. Levi and Mitu Gulati.¹¹In their paper, the legal institution was one of the institutions examined. While the authors acknowledged the focus was on the levels of protection given to property rights, they also acknowledged the difficulty of correlating substantive laws to growth rates because of the difficulty in determining causality. Legal institutions, they argued, served to enable easy exchange in a variety of ways, for example, by providing clarity of property rights and flexibility in protecting against opportunism problems. Focus had primarily been on the levels of protection given to different types of property rights; protection to property rights being a key element of the theoretical foundations of their research.

If the findings of North, Messick, Laver, Gulati and Levi were accepted, one would determine that in any judicial reform project, the enhancement of the role of the judicial institution in securing property and contract rights would an important element to include. Other researchers concurred with this position. For example, Haggard, McIntyre, and Tiede suggested the existence of a reasonably strong consensus, supported by both cross-national and survey work, confirmed that property rights matter.¹²

This talk about the importance of property rights and contract rights is seemingly not confined to any one region. Osman, Alexiou, and Tsalikin¹³ in researching the role of institutions in economic development in 27 sub-Saharan African countries found that several methods of improving institutional infrastructure played key roles in delivering long-term economic development. Some examples included enhancing the rule of law and quality of regulation, improving contract enforcement, securing property rights, and reducing uncertainty.

¹¹Levi and Gulati. "Judging Measures," 381-413.

¹²Haggard, MacIntyre, and Tiede, "The Rule of Law and Economic Development," 205 -234.

¹³Hashim Osman, Alexiou, and Tsaliki, "The Role of Institutions in Economic Development,"142-160.

Some authors however are more cautious about how to approach this.

Chukwumerije,¹⁴ for example, discussed the validity of the doctrine which professed a link between the rule of law and economic development. On one hand he argued the promotion of a stable and predictable legal environment in which individuals are free and able to contract, and the provision of state support for the enforcement of contractual obligations, played a positive role in fostering economic development through the rule of law. On the other hand he suggested the relevance of the rule of law in this respect, may well be overstated because there were countervailing considerations that would seem to indicate important limits to the primacy of the doctrine as an engine of economic growth. Chukwumerije identified China as a country that had achieved significant economic growth without any rule of law reforms. That example suggests there is more to economic development than the rule of law.

The work of the World Bank on judicial reform has been quite extensive. Up until the late 2000s the initiatives undertaken have followed the path of strengthening the independence of the judiciary and focusing on property rights, contract, commercial and other aspects of the civil justice system. Faundez¹⁵ explored the evolution of the World Bank's approach towards legal and judicial reform. At the time of authorship the Bank had spent over a decade implementing judicial reform activities yet no success stories were related. He highlighted one of the flaws to the approach of the World Bank as being its tendency to assess the quality of judiciaries in developing countries in the same way they assessed the quality in developed countries.

Faundez argued further that the viewpoint and the approach taken by the World Bank about the role of law were far too narrow. He noted the institution neglected to take into account the fact that law does not merely have an economic dimension. Instead it is deeply embedded in all aspects of social life, including the all-important political process of democratization.¹⁶

¹⁴Chukwumerije, "Rhetoric Versus Reality," 383-436.

¹⁵Faundez, *Rule of Law or Washington Consensus*, 5.

¹⁶*Ibid.*, 16.

Matthew Ingram's work raised concerns about the judicial reform agenda in Brazil and Mexico. He documented and explained variations in sub national judicial capacities across the 27 Brazilian and 32 Mexican states from 1985 to 2010.¹⁷ His research design reflected a mixed method approach, sequencing regression analyses and case studies as well as personal interviews, archival analysis, direct observation and fieldwork.¹⁸ Ingram pointed out that the judicial reform agenda in both Mexico and Brazil included but was not limited to policies geared towards economic development. The key concern was to make courts efficient and competent for business transaction and investors. He suggested this was the main focus of multilateral banks especially the World Bank.¹⁹ In focusing on reform laws governing bankruptcy, taxation and investment banks sought to make courts more competent in commercial and economic matters. The objective was to attract foreign investors through reasonable treatment by the courts, and domestic investors by building their confidence in enforcing laws relating to business transactions. Ingram observed some tension between the economic cluster of activities and the social justice cluster of activities, which was more concerned with promoting security through the criminal law. He highlighted security as a concern for promoters of both democracy and markets. High crime rates and insecurity eroded public trust and confidence in democratic institutions and tore at the social fabric in ways that undermined support for democracy. High crime rates and insecurity also intimidated investors and consumers, increased costs for the movement of goods, and dampened business relations.²⁰

The economic cluster of activities seems to have been dealt with separately and distinctly from activities concerned with addressing security and crime. Themes like corruption and

¹⁷Ingram, *Crafting Courts in New Democracies*, 3.

¹⁸*Ibid.*, 13.

¹⁹*Ibid.*, 26.

²⁰*Ibid.*, 34.

criminal justice were only marginally mentioned in relation to economic development and judicial reform.

Indeed judicial reform projects tended to focus on enforcement of contracts and property rights and the business side of the courts. If these were the components of a successful judicial reform project why then was progress towards economic development so slow? This begs the question whether there was something missing in this approach to judicial reform. Whereas some focus has been placed on corruption as a factor inhibiting economic growth, there is a paucity of literature on the criminal justice system and its relationship to economic development and whether or not there is any value in examining the role of the criminal justice system as an aid to economic development.

Criminal Justice and Economic Development

One of the few researchers to have paid attention to criminal law and its effect on economic development is Richard Posner. In *Creating a Legal Framework for Economic Development*,²¹ he noted that a modernizing nation's economic prosperity required, minimally, modest legal infrastructure centered on the protection of property and contract rights. However he went on to analyze the effects of criminal law on economic development. In discussing the grant of extensive rights to criminals, Posner posits that this is bound to undermine the efficacy of criminal laws and by doing so, unsettle property rights. Rights, he argued, made it harder to convict the guilty as well as the innocent. Drawing a link between criminal law and property rights, Posner highlighted the necessity to implement laws that improved the rights of accused persons and noted the prevalence of acquisitive crimes in countries such as Russia, as a factor that retarded economic growth. He asserted that in such countries a strict criminal law and a corresponding de-emphasis

²¹Posner, "Creating a Legal Framework for Economic Development," 1–11.

on the protection on civil liberties may be an important part of legal reform and an important tool for the protection of property and contract rights.²² Posner's observations were light years ahead of the times, made when little if no regard was paid to criminal law and the criminal justice sector in the discussion on economic development. It was not until around 2009 that a shift in the approach of the World Bank was detected followed by their generation of interest in the criminal justice system.

In 2011 a report on Central America identified crime and violence as being development issues that also negatively impacted economic growth. Poor growth was attributed not only to the victim's lost wages and labor, but also pollution of the investment climate and diversion of scarce government resources to strengthen law enforcement rather than promote economic activity.²³ This was an interesting observation and subsequent to that time a few authors have explored the criminal justice system and the criminal law with respect to economic development.

Lydia Tiede²⁴ researched criminal justice reforms in Chile using original data sets to test the impact of Chile's criminal law reforms on the rights of criminals and economic development. Chile's criminal law reforms were aimed directly at enhancing the rule of law by making the justice system more transparent, open, efficient and treating criminal defendants in a timely and fair manner. Tiede recognized that only a few studies tested the effect of specific reforms on a country's legal development, and whether such reforms more broadly affected government's capacity and economic development.

The primary focus of her analysis was the impact of criminal law reforms on civil rights and foreign direct investment (FDI). Specifically, Tiede found that the reforms had a positive effect on regional economic development but only increased FDI in some regions. She found that these results supported some scholars' assertion about little direct link between civil rights and

²²Ibid., 9.

²³World Bank, *Crime and Violence in Central America: A Development Challenge*.

²⁴Tiede, "Legal Reform and Good Governance," 237–262.

economic development. This is not to say that other legal reform measures would not bolster the economy. Rather, for reforms to have an effect on the economy, they needed to be related more closely to issues of economic concern such as enforcement of contracts and property rights.²⁵

On the other hand, a recent work by Margaret Lewis²⁶ examined China's significant economic growth and suggested that the role of criminal law ought to be seriously considered and it would be a mistake not to do so.²⁷ She noted that China's economic development occurred directly alongside the development of its criminal law. After tracing the history of the law and development movement and its impact on China, Lewis suggested the government first used criminal law to create a fundamental sense of security upon which economic activity could grow. In the early years of China's criminal law development the government waged campaigns against "the three evils" (corruption, waste and bureaucracy) and "five poisons" (bribery, tax evasion, stealing state property or obtaining it by fraud, cheating in workmanship, material or stealing state economic intelligence).²⁸

Lewis's main contention was that criminal law mattered in China's story of economic development.²⁹ Lewis also suggested a direct relationship between the criminal law and economic growth. Several factors were worth noting: the increase in prosecution for financial crimes or the creation of new offences, and also the swift and harsh nature of the punishment dispensed for economic crimes that contributed to this fast growth.

This was important for this period because of the re-thinking of the role of law and development movement and because the reviews, in relation to the impact of economic determinations, have been at best, mixed. There is insufficient empirical evidence establishing a direct link between judicial reform and economic development and this begs the question whether

²⁵Ibid., 21.

²⁶Lewis, "Criminal Law Pays," 371-450.

²⁷Ibid., 375.

²⁸Cohen, *The Criminal Process in The People's Republic of China, 1949-196*, 9.

²⁹ Lewis, "Criminal Law Pays," 448.

or not policy makers, development banks and researchers are missing something. Could a reference from China aid developing countries in other regions or is the situation peculiar to China? Could the criminal law be the missing link?

Corruption and Economic Development

Whether developing countries involved in judicial reform initiatives should also focus on the role of the judicial institution relative to corruption and anti-corruption will be discussed next.

Although the relationship between corruption and economic development has been the subject of much research, the findings are somewhat mixed. Additionally, there is some debate about the effect of corruption on economic development.

In an IMF Working Paper, Vito Tanzi examined the impact of corruption on economic growth. While Tanzi recognized divergent views, he suggested that corruption is likely to reduce economic growth. Among the factors contributing to this was reduced investment.³⁰

Mendonca and Fonseca conducted analysis based on cross-country data questioning the effect of corruption on income and ways to mitigate corruption. The main results from this empirical analysis were highlighted in two points. First, the idea that corruption is intrinsically connected with income is confirmed. In particular, it is observed that an improvement in *CPI* is capable of promoting a positive effect on income per capita for both developing and developed countries. Second, the traditional argument that an increase in rule of law represents a good strategy in the fight against corruption is valid for developing countries.³¹ The authors examined the Corruption Perception Index (CPI) and observed that a higher level of rule of law is associated with a lower level of corruption. They also found that an increase in rule of law for the case of emerging countries represents a powerful instrument for inhibiting corruption. The

³⁰Tanzi, "Corruption Around the World," 559-594.

³¹De Mendonça and da Fonesca, "Corruption, Income, and Rule of Law," 305-314.

absence of statistical significance for developed countries is justified due to the fact that the rule of law in these countries is already high.

In Daniel Kaufmann's *Judicial Corruption Index*³² skeptics of the anti-corruption agenda are quick to highlight countries such as Bangladesh that score poorly on most cross-country assessment of corruption but managed to report impressive growth performance over the past decade. Kaufman however referred to this as an exception which should not be confused with the more general empirical finding that corruption adversely affects growth in the medium to long run.³³

Marc Freckleton, Allan Wright, and Roland Craigwell examined the relationship between economic growth, FDI and corruption. They collected data from World Bank and IMF statistics on 42 developing countries and 28 developed countries during the period 1998 to 2008. Their analysis of the data revealed that corruption had a significant impact on foreign direct investment in the short run than it did in the long run. The fact that corruption had an impact, albeit limited on foreign direct investment is instructive.

The question of the impact of FDI is directly addressed by Castro Conceicao and Pedro Nunes in *Does Corruption Inhibit Foreign Direct Investment?*³⁴

They conducted a study of the impact of corruption on FDI in 73 countries. Although their study was not limited to developing countries, findings were applicable on a broad scale. The conclusion they arrived at included the fact that to attract FDI, a host country had to promote a favorable environment to investors. This also meant transparent political institutions, that is, low corruption in order not to increase business cost. Both authors highlighted corruption as a crucial determinant of FDI inflows. Countries which took effective measures to combat corruption may attract more FDI than those who did not.³⁵ He also found that corruption

³²Kaufmann, Kraay, and Mastruzzi, "Measuring Corruption, 322.

³³Ibid., 322.

³⁴Castro and Nunes, "Does Corruption Inhibit Foreign Direct Investment," 61-83.

³⁵Ibid., 76.

potentially reduced foreign investment based on uncertainty which increased in environments with higher corruption, as well as the cost of doing business.

If it is true that corruption has the potential to inhibit economic growth, then the role of the judicial institution in combating corruption is an important one for consideration. Judicial institutions that are strengthened to effectively enforce corruption prevention law may be able to combat corruption. Susan Rose-Ackerman³⁶ explored the topic and suggested six possible solutions to help curb corruption. Among them and coming in at fourth place was the solution that the state should enforce bribery laws against major offenders both inside and outside of government³⁷. However she cautioned that law enforcement ought never to be the primary means of fighting entrenched corruption.

A more recent contribution by Ackerman and Soreide³⁸ observed the close relationship between estimated corruption control and the level of sanctions imposed on those found guilty of corruption. They highlighted the need to address serious acts of corruption within the criminal justice system by available means such as fines, imprisonment or dismissal from a government position.

The literature raised concerns about the role of the judicial institutions vis a vis corruption as well as the anti-corruption agenda. This will be the subject of further analysis throughout this paper.

³⁶Rose-Ackerman, "Corruption: Greed, Culture, and the State".

³⁷Ibid.,138.

³⁸Soreide and Rose-Ackerman, "Corruption in State Administration,"15.

CHAPTER THREE

Methodology

The purpose of this thesis is to ascertain whether or not the enhancement of judicial institutions in developing nations can result in enhancing economic development. In an attempt to address those questions, documentary analysis, a qualitative method was utilized. Documentary analysis is a systematic procedure for reviewing or evaluating documents.¹ Documents can serve a variety of purpose as part of a research undertaking. They provide background and context, answers to additional questions, supplementary data, track changes and developments, and verify findings from other data sources. Moreover, documents may be the most effective means of gathering data when events can no longer be observed or when informants have forgotten the details.²

This research method was selected because of the abundance of available literature linking judicial institutions with economic development and the need to present existing information. It was necessary to present a comprehensive background into the traditional and non-traditional view of the relationship between the judicial institution and economic development. The literature examined also provided insight into how academic researchers, scholars, jurists, development banks personnel and policy makers thought and how the thought process evolved over almost four decades to become what it is currently. The aim was to provide the reader with authentic information of the subject area and to place this study within the context of other research, looking at the challenges and presenting new thoughts on the subject. The Literature Review comprised the main documentary analysis.

¹Bowen, "Document Analysis as a Qualitative Research Method," 27.

²Ibid., 31.

Documents, as a record of human activity, provide a valuable source of data. Along with interviews and observations, they comprise one of the main forms of data sources for interpretation and analysis. Document analysis can provide a window into a variety of historical, political, social, economic, and personal dimensions of the case beyond the immediacy of interviews and observations.³ Researchers using documents as a data source need to both broaden and narrow their scope, ensuring that they use documents that provide a rich variety of information focused on their particular research purpose.⁴ Documentary analysis can prove to be quite useful as it provides support for a particular hypothesis. The method is advantageous because it is efficient, as it is less time consuming; available, meaning many documents are available in the public domain; and cost effectiveness as it is less costly than other research methods.⁵

Document analysis however is not always advantageous, as it usually does not provide sufficient detail to answer a research question.⁶ One of the main drawbacks encountered in this study was that findings depended on the quality of the information contained in the reviewed documents. In an attempt to overcome this deficiency, a wide range of documents was scanned before settling on select documents to reference. Another drawback to the use of this methodology was the fact that the results may be inconclusive. It might have been possible to arrive at a direct causal relationship through a process of data collection or cross country analysis but for the time constraints. The collection of data over a period of years after the implementation of projects would have to be collected. This is because economic development does not occur within a short time

³Olson, "Document Analysis," 319.

⁴Ibid., 321.

⁵Bowen, "Document Analysis as a Qualitative Research Method," 31.

⁶Ibid., 32.

span but can take years. The use of questionnaires and interviews might have been helpful to the extent that they have enabled triangulation and enhanced validity.

This analysis entailed the review of literature obtained through electronic databases such as JStor, Proquest, Google and Google Scholar. Websites visited included the World Bank, IMF, as well as Transparency International with specific reference to the Corruption Prevention Index. Keywords utilized in the search engines were: judicial institutions, rule of law, judicial reform, economic development, criminal justice system, criminal law, corruption, anti-corruption and foreign direct investments.

Over 60 different documents were examined. In some cases general information was noted but not specifically referred to. Some of the studies examined used documentary analysis as their primary research method; others utilized cross country analyses, quantitative and other research techniques. While some of the documents examined focused on the justice system and its relationship to the economy, others were confined to corruption and economic development and a few dealt with the criminal law and the criminal justice system.

A lot of the research was linked to property, contracts, debt enforcement, commercial law and economic development. Few studies referred to any causal link between economic development, judicial institutions and the criminal justice system. Each article was examined within the context of the earlier research questions. Secondary questions were: “What does the article suggest about the link between judicial institutions and economic development? Is there any suggestion that judicial institutions can aid in promoting economic development? If so how does the author contend that this is done? What interventions or reforms are suggested that would facilitate economic growth? Does the author pay any regard to the criminal justice sector and to anti-corruption initiatives? Are these initiatives influenced by the ability to attract foreign direct

investment and other types of investments in developing nations? What suggestions are made for optimizing the role of the judicial institution?”

Although the results arrived at were not conclusive they provided some food for thought and material for further research. Whereas there exists an abundance of literature on the general role of the judicial institution in reforming the justice system, and reasonable literature on the impact of corruption, there appears to be a dearth of scholarly literature on the impact changes in the criminal justice system, effected by the judicial institution, can have on economic growth. It is expected that this thesis will contribute to the literature on the role of the judicial institution in influencing growth through the means discussed herein.

CHAPTER 4

Analysis and Implications

The Traditional Approach

Much of the efforts at judicial reform have been spearheaded by the World Bank. From the 1990s onward, the World Bank implemented judicial reform projects as part of its initiatives in several nations. The Latin American and Caribbean initiative projects were implemented in countries such as Ecuador, Guatemala, Colombia, Peru, and Venezuela.¹ The rationale for such assistance was built on the assumptions that the rule of law promotes economic growth and reduces poverty, and that it does so by enhancing opportunity, empowerment, and security through laws and legal institutions.² Much of these reforms, although they acknowledged the importance of generally upholding the rule of law, were oriented toward making courts efficient and competent for business transactions and investors.³ The goal was to enable the business community and foreign investors to have access to the efficient adjudication of any conflict that arose in the course of their transactions.⁴

Some of the elements of judicial reform projects included strengthening of judicial decisions, advancing insolvency proceedings while modernizing selected commercial courts, strengthening of the judicial system to handle business-related cases and also providing anti-corruption support.⁵ It was felt that the inability of the judicial systems to effectively deal with

¹“Clustered Project Performance Assessment Report,” Judicial Reform Project, Ecuador, Guatemala, Colombia (June 30, 2010), www-wds.worldbank.org/ext.

²*Ibid.*, xi.

³Ingram, *Crafting Courts in New Democracies*, 27.

⁴*Ibid.*, 27.

⁵ See “Clustered Project Performance Assessment Report.”

these issues resulted in higher transaction cost for businesses and this resulted in the retardation of economic growth. Hence judicial reform was part of the larger effort to make legal systems in developing countries more market friendly.⁶

The IMF's approach to judicial reform has been similar to that of the World Bank. An example of this is the more recent judicial reform initiative of the IMF in Portugal, implemented as part of their program to improve the Portuguese economy.⁷The economic relevance of this program was substantiated through the economics literature. These works recognized the importance of a predictable and efficient system of property rights and effective enforcement of civil and commercial claims for economic growth.⁸

At the time of the implementation of this program, one of the main problems affecting the growth of Portugal's economy was the inability to attract foreign investment. The focus of the IMF was on commercial cases and the civil justice system. Nowhere was there any mention of reducing the backlog of criminal cases or of improving the efficiency in criminal case processing.

A brief look at the IMF in Indonesia⁹ showed support for a judicial reform program focused on economic stabilization, and reform by changing the bankruptcy regime and establishing new commercial courts. This was despite the fact that the conditions on the ground were characteristic of corruption, incompetence, mis-orientation, and organizational breakdown with the courts, prosecution, and the police being underfunded and self-funded.¹⁰Undoubtedly, these conditions demonstrated the need for reform to other aspects of the justice system yet the focus was on the creation of commercial courts. It stands to reason then, that a program aimed at curbing corruption and at addressing deficiencies in the criminal justice sector might have been

⁶Messick, "Judicial Reform and Economic Development," 118.

⁷Pompe and Bergthaler, "Reforming the Legal and Institutional Framework."

⁸ *Ibid.*, 5.

⁹Lev, "Comments on the Judicial Reform Program in Indonesia," ch. 23.

¹⁰*Ibid.*, 2.

better suited for Indonesia at that time. Regrettably, the program only addressed the business side of the justice system.

In the normal course of events, reforms to the civil justice system which focus on commercial cases and other types of cases that dealt with business transactions may be more obviously linked to economic development. The fact that judicial reform programs were designed with a focus on market efficiency and friendliness of the economy seems sensible and may reap benefits in a society where the main factors inhibiting efficiency in the justice system are related to business transactions. However where this was done without regard to the specific needs of a locale this may result in wasted resources. In the case of economic development the answers may depend on the country's needs.¹¹ In many developing countries there are usually problems with crime, violence and corruption. Where high rates of crime and violence prevail, this can have both direct effects on human welfare in the short-run and longer run effects on economic growth and social development.¹² Where crime and violence are prevalent, this may require interventions to the criminal justice sector rather than to the civil justice sector.

Throughout this thesis I argue that it is especially important that developing countries experiencing problems with crime and violence, accompanied by a high volume of criminal cases in the courts, include criminal justice reforms and anti-corruption initiatives in any judicial reform project. It is important that judicial reform programs consider the relationship between the different sectors of the judicial system and the fact that they are all intertwined. To reform one sector without regard to the other may result in a waste of time and resources.

¹¹ See Greene, "Perspectives from the Rule of Law and International Economic Development," 75.

¹²World Bank, "Crime, Violence, and Development."

The Non-Traditional Approach

The traditional approach does not appear to have reaped the desired success. In the case of Colombia the outcome was unsatisfactory whereas for Guatemala and Ecuador outcomes were satisfactory.¹³ No resounding successes were reported. In recent years there has been a slight shift from the exclusive focus on business transactions. Increasingly, development banks now recognize that crime and violence are also development issues.

In a 2011 World Bank Report, crime and violence were described as variables that significantly dampened the business investment climate. This is because it skewed the calculations that shaped opportunities and incentives for firms to invest productively, create jobs and expand. Three main cost factors were included in the investment decision:

- (i) the potential losses to criminal activity discussed;
- (ii) the cost of diverting resources from productive (and hence growth-enhancing) activities to crime prevention; and
- (iii) lost productivity resulting from crime-caused fear, increased absenteeism or limitation of working hours to times of the day when workers are not concerned with personal security.¹⁴

A Staff Guidance Note¹⁵ addressed the question of the importance of criminal justice sector assistance by pointing out that high levels of crime and violence are recognized as fundamental challenges to economic growth, and that a number of countries have voiced interest in support for criminal justice reform programs.¹⁶ It was noted that the institutions of the criminal justice sector contributed to citizen security and safety, held criminals accountable in a fair and

¹³World Bank, *Ecuador - Judicial Reform Project, Guatemala - Judicial Reform Project, and Colombia - Judicial Conflict Resolution Improvement Project*(Washington, DC: World Bank, 2010), <http://documents.worldbank.org/curated/en/2010/06/12619511/ecuador-judicial-reform-project-guatemala-judicial-reform-project-colombia-judicial-conflict-resolution-improvement-project>.

¹⁴World Bank, *Main Report*(Washington, DC: World Bank, 2011), 6.

¹⁵World Bank, "Staff Guidance Note."

¹⁶*Ibid.*,5.

equitable manner, protected and restored the rights of victims, and provided alternative solutions to reduce crime. Among the institutions identified as being involved in the criminal justice sector are courts, the judiciary, judicial schools, training academies and anti-corruption entities.¹⁷ It was further noted that criminal justice institutions are particularly key in addressing corruption because corruption covers a range of criminal activities that undermine and derail economic development and that an effective, credible and reliable criminal justice system is indispensable to a country's ability to combat corruption.¹⁸

The role of justice institutions in assisting to counter corruption was also highlighted in *New Directions in Justice Reform: A Companion Piece to the Updated Strategy*.¹⁹ Justice systems were identified as having three developmental functions, namely; preventing and mitigating conflict, crime and violence; ensuring executive accountability; and fostering private sector growth in compliance with legal and regulatory framework.²⁰

A major theme running throughout the criminal justice sector is that of anti-corruption activities. Corruption also stands on its own as a factor that inhibits investments and therefore represents a significant challenge to development. One of the lessons learnt from the traditional approach is that the approach to judicial reform and economic development cannot be a one size fits all approach. The design of projects aimed at spurring economic development should take into account the social and economic conditions prevailing in the country. Where crime and violence are present this may impact the likelihood of attracting investments. In that scenario it would be futile to focus only on the civil justice system and improve on the ability of the judiciary to enforce contracts, property rights and cases that address business transactions. On one hand investors would be encouraged to invest and on the other, they would be discouraged because of crime, violence and security concerns.

¹⁷Ibid., 3-4.

¹⁸Ibid., 6.

¹⁹ The World Bank, "New Directions in Justice Reform," 2.

²⁰Ibid., 2.

The civil justice system has been the subject of many studies and so it is not the aim of this thesis to enter into any further analysis of the civil justice system and its reform with respect to the judicial institution. Instead the objective is to delve into seldom explored areas—the criminal justice system and corruption with a reference to their relationship to investments. In the sections that follow I analyze ways in which the judicial institution can operate in the criminal justice system and also in the fight against corruption geared towards effecting positive changes in the economy.

The Criminal Justice System

The definition accorded to the criminal justice system by the World Bank ²¹ is that sector which comprises all of the institutions, processes and services responsible for the prevention, investigation, adjudication, treatment, and response to illegal behaviors. The sector includes the institutions traditionally associated with it, such as police, prosecutors, public defenders, courts and corrections, as well as a wide range of other institutions such as private police, victim services, private lawyers and bar associations, human rights and ombudsman’s offices, addiction and other treatment programs as well as community engagement and service programs.

The criminal justice system remains an essential tool in crime and violence control and, to some extent, in their prevention.²² Although academics and researchers are divided as to the real impact of the criminal justice system on reducing crime, it has been posited that this uncertainty cannot be an excuse for inaction. This is especially so for governments facing increasing levels of crime and violence and citizen demands that they do something about them.²³ The critical nature of addressing crime is even more evident in countries whose criminal justice

²¹World Bank, *Legal Note on Bank Involvement in the Criminal Justice Sector*, 2.

²²World Bank, “Crime, Violence, and Development,” 105.

²³*Ibid.*, 106.

systems have languished unattended for decades, lack the technical and human resources to respond to less traditional types of crime, have not adopted new standards of transparency and accountability, or have themselves been penetrated by political and occasionally, criminal elements.²⁴

Where high crimes rates result in a large volume of criminal cases in the courts, an onus is placed on the judges and courts to reduce this volume by expeditious adjudication. Where this is not the case, citizens may lose faith in the judicial institution and resort to alternate means for justice. One consequence of a weak court system or judicial system is that vigilante justice is often utilized as citizens, when faced with difficulties of accessing justice, inordinate delay or a lack of convictions sometimes take justice into their own hands. Additionally where the criminal justice system is not effective this will result in ordinary, law abiding citizens being put at risk of crimes being committed against them. Additionally, and far less straightforward, crime has potentially deleterious consequences on growth, through reduced productivity and shortened planning horizons for investments in physical and human capital.²⁵

The fact that crime can negatively impact the confidence of local and foreign investors makes it necessary for interventions in the criminal justice sector to mitigate this. An effective criminal justice system is capable of not only investigating criminal cases successfully but also adjudicating them with equal success. Although there are many institutions involved in the criminal justice sector, the successful adjudication of such cases is largely dependent on the quality of the judicial institution. In enhancing the role of the judicial institution the focus should be on mechanisms geared toward making the judiciary and the court more efficient in carrying out their duties. A more efficient justice system is one in which perpetrators of crimes and acts of violence are brought to justice swiftly and fairly, ensuring at all times that the defendant's human rights are upheld.

²⁴Ibid., 106.

²⁵Skapardas et al., "The Costs of Violence," 28.

Expediting the rate at which criminal cases are disposed may aid in building the confidence of ordinary citizens in the ability of the judicial institution to resolve crimes. This is not always dependent on the judge, as other variables exist, such as the availability of witnesses, the presence of legal representatives and of course the availability of venue and time. The role of the judge is paramount. Judges can ensure the expeditious disposition of these cases when they come up for trial and also implement targeted backlog reduction strategies for older cases through the use of case management strategies. The sentencing power of the judiciary is a major tool available which can send appropriate messages relating to crime and violence. Imposing sentences that are just and commensurate to the crime is one way in which the judiciary can effectively adjudicate and aid in deterring would be offenders.

Where offenders are convicted of financial crimes and where the law permits, judges can deal effectively with the forfeiture of assets. This can be a valuable tool for seizing the assets of drug offenders and other criminals but requires the necessary legal framework as not all developing countries have laws and rules dealing with the proceeds of crime and the confiscation of ill-gotten gains.

Corruption

The role that judicial institutions can play in influencing economic development through mechanisms that address corruption is a question of importance. This is because some studies have demonstrated that the presence of corruption increases the cost of business and as a consequence discourages potential investors from investing.²⁶

If institutions, including the judicial institution have a role to play in the eradication of corruption, then where such institutions do not exist governments should endeavor to create

²⁶See Carrington, "Law and Transnational Corruption."; Conceicao and Nunes, "Does Corruption Inhibit Foreign Direct Investment."

institutions which foster this. Where they exist, but are not adequate they should be empowered and strengthened to effectively address corruption. In examining the causes of corruption the contention is that corruption tends to flourish when institutions are weak and government policies generate economic rents.²⁷ If corruption flourishes when institutions are weak then the converse may also be true; if institutions, including the judicial institution are strengthened to combat corruption, this may assist in its eradication.

I have sought to ascertain how the judicial institution can impact the level of corruption within the society. In order for the judicial institution to be effective, it is therefore essential to ensure that the judicial institution is not involved in or perceived as being involved in corruption. If the judicial institution is expected to be a driver of change then they should be impeccable and above reproach. However sparse the incidence of judicial corruption, when it occurs, the impact is great and may be unforgettable. One of the means by which judicial conduct can be curtailed is by the creation of a code of ethics. The Bangalore Principles²⁸ served to guide many developing nations in their search for a structured code of ethics. Codes of conduct strengthen the integrity of judges and improve public perception of the courts by clarifying the behavior expected of judges.²⁹ Having a code of ethics constitutes an effective control mechanism against unethical behavior and corruption.

The role of the judicial institution in combating corruption should extend to the way in which the judiciary treats with corruption offences as an aspect of criminal law. Corruption offences can range from petty bribery to serious fraud and sometimes include the misappropriation of public funds. The criminal law allows for the identification and seizure of assets of convicted persons. Strengthening of the judicial institution includes ensuring that there are sufficient judges who are equipped with the necessary tools, are sensitized, and educated to

²⁷World Bank, "Helping Countries Combat Corruption," 12.

²⁸ See Mayne, "Judicial Integrity: The Accountability Gap and the Bangalore Principles," 42.

²⁹See Mary Noel Pepys, "Corruption within the Judiciary," 9.

deal with cases involving corruption. The creation of specialist courts and specialist judges to deal with cases involving corruption is worth implementing. Courts must expeditiously, but fairly, adjudicate the resulting cases, and the penalties imposed on those convicted must be sufficient to dissuade others from similar acts.³⁰

The creation of efficient laws to govern cases involving corruption is another step towards addressing corruption. According to Susan Rose Ackerman law enforcement ought never to be the primary method of fighting entrenched corruption.³¹ Despite the fact that enforcement does not start with the judicial institution, the judiciary has a role to play.

Coercive enforcement is a tool available to the judiciary. This can take the form of stiff penalties for such offences. Enforcement does not begin with the judiciary but rather with the legislature followed by the prosecution. The sentencing powers of the judge may in some instances require legislative intervention to ensure that the nature of the corrupt activity is suitable to the scope of available punishment mechanisms. Ackerman emphasizes that judges have the ability to send signals through their sentencing power, of the pronouncements of prohibition. Where persons fall short of being convicted due to technical gaps in the evidence, there is an avenue for recommendation for disciplinary proceedings or other sanctions.

Necessary to the process of the strengthening of the judiciary is the training and capacity building of other court personnel. Training should also include the prosecutorial arm, as well as sensitization of the administrative staff. Gonzales de Asis is supportive of this approach which is evident in her focus on Rule of Law programs which included training not only judges but also prosecutors and administrative staff in the new domain of international anti-corruption laws.

Organizations such as Transparency International have a key role to play in assisting countries to deal effectively with corruption. Transparency International brings together scholars, legal professionals and civil society activists from around the world to examine how, why and

³⁰Mennen, Frye and Messick, "Enforcement of Anti-corruption Laws," 310.

³¹*Ibid.*, 138.

where corruption mars judicial processes and to reflect on remedies for corruption-tainted systems.³²The organization focuses on judges and courts, situating them within the broader justice system and exploring the impact of judicial corruption on human rights, economic development and governance. Their mandate is to combat corruption and in doing so focus on prevention and reform systems.³³An examination of the Corruption Perception Index ³⁴revealed that developing countries usually find themselves at the lower end of the ranking. This means that they are perceived as being more corrupt. One interpretation is that countries with more corruption face more challenges transition to become developed countries. Another interpretation is that once countries are developed they become less corrupt. Either way there appears to be some relationship with the level of perceived corruption and the economic status of a country.

Implications

Scholars continue to debate the link between judicial institutions, property and contract rights, judicial independence, criminal law, corruption and economic development. Nothing in the literature reviewed suggests that empowering judicial institutions is a negative move. In fact while some question whether empowering judicial institutions is the cause and not the consequence of economic development, and others question whether it is possible to establish a causal link between the two; it is acknowledged that there is a strong association between judicial institutions and economic development.

Similarly, there is no debate on the need for judicial reform in developing nations particularly because resources are usually scarce and allocation of sufficient resources to the justice sector is usually a challenge. In some developing nations the judiciary is not provided with

³²Transparency International Global Corruption Report 2007, <https://www.transparency.org/>.

³³Ibid.

³⁴Corruption Perception Index available at <http://www.transparency.org/cpi2015>.

the tools required to effectively execute its role. The literature suggests that overall there is a strong case to be made for enhancing judicial institutions

An examination of the literature suggests that the idyllic approach to judicial reform is one which is designed after an in-depth analysis of the country, and one designed to meet the needs of the particular society. Not only is it necessary to conduct an analysis of the prevailing conditions in the country before implementing any reform, but it is equally necessary to continue assessment during implementation. The argument that the traditional approach of limiting reform to civil determinations, enforcement of contracts and property may result in wasting resources is largely based on common sense. On one hand there are investors who are keen on markets that can provide some guarantee to their business transactions; and may be likely to invest. On the other hand where investors lack confidence to invest, either because of crime and violence or because of the increased transactional costs, this will inhibit investments. Additionally, where corruption is prevalent, this further serves to erode their confidence or serve to further increase the cost of business. No discourse on this topic would be complete without significant regard to the independence of the judiciary. The literature suggests that this has to be the starting point for any enhancement or empowerment of the judicial institution. This is because an independent and efficient judiciary supported by a modern legal framework and trained with appropriate techniques to investigate cases of corruption would by itself reduce corruption.³⁵

Where judicial institutions are enhanced they must be fully equipped to effectively carry out their functions. If judicial reform measures are aimed at improving the capacity of the judicial institution to execute their functions in the civil justice system and the criminal justice sector in developing countries, I argue that this has potential implication for the growth of their economies. The suggestions from the literature are that there is value to focusing on the protection of property

³⁵Gonzales de Asis, *Anti-Corruption Reform in Rule of Law*, 14.

rights and also that there may be some value to focusing on enforcing property laws and laws relating to economic crimes.³⁶

With respect to the main hypothesis that the criminal law has a role to play in spurring economic development, the literature contains conflicting arguments. Posner argued that granting extensive rights to defendant may result in unsettling of property rights and also suggests that where acquisitive crime is rampant it may retard economic development. Conversely, Tiede found that such improvements could lead to an increase in labor force and result in some growth. Her findings though are more indicative of some relationship where a country has no security measures to protect private property or when the prosecution of economic crimes is being discussed. Although I would not agree wholeheartedly with the suggestion by Lewis that criminal law pays, the suggestions she makes about the case of China's fast economic growth is linked to the robust prosecution and enforcement of property and economic crimes and is worth further exploration. Although the link between economic development and crimes affecting security seems more elusive than the link between economic development and property crimes, there is a significant shift in the World Bank scholarship to a position of confidence in the use of the criminal justice system as a tool in the control of crime and violence.

As it relates to corruption, there are a few who question the level of causation associated with economic development and corruption. A preponderance of literature suggests more than just a casual association or connection with economic development and corruption. If these findings are substantiated, then empowering judicial institutions to fight against corruption by greater enforcement and swifter sanctions could have the potential to reduce the incidence of corruption in the society. If corruption reduces the likelihood of investments then the converse would also be true that less corruption may result in more investments. Despite some cynicism, the findings are supportive of this position. What is clear though is that a lot of work remains to

³⁶See Lewis, "Criminal Law Pays."

be done to provide more evidence of the link that judicial institutions can play in the fight against corruption. Although the evidence is mixed, and there is room for further research, the findings are deductive. This study posits that empowering judicial institutions through judicial reform within both the civil justice and the criminal justice systems minus corruption can potentially enhance economic development.

CHAPTER 5

CONCLUSION

The enhancement of judicial institutions, if the result is the enhancement of economic development is dependent on a number of factors. Among those factors is the nature of the enhancement activities. These have largely taken the form of judicial reform initiatives. The findings have shown that the exact nature of reform activities should be determined by the needs of the country. Although the exact nature of activities required for economic development to occur has not been directly established, the literature suggests a number of responsible variables. Among those noted are the enforcement of property and contract rights, the establishment of anti-corruption initiatives and interventions in the criminal law and criminal justice system. The link between judicial institutions, economic development and anti-corruption initiatives and corruption has been explored and the findings have suggested the existence of this link. However the link between judicial institutions, economic development and the criminal justice system has not been as clear cut. Although the findings are suggestive the challenge remains to provide empirical data to give validity to the hypothesis that enhancements of judicial institutions in the nature of criminal justice reforms have the potential to enhance economic development.

There is no shortage of literature exploring the general relationship between economic development, judicial institutions and judicial reform. The more I learn about the relationship between them is the more I contend that there must be something missing. Many years have passed and billions of dollars have been spent on enhancing judicial institutions through judicial reform efforts aimed at stimulating economic development in some developing countries. Yet these countries have failed to acquire the level of growth required to shift them from being

“developing” to being “developed” countries. Are they missing something? Could the missing link be criminal law and the criminal justice system?

Although development banks and developing countries have expressed an interest in the criminal justice system there is still a paucity of literature exploring the link between criminal justice systems and economic development. It is unusual that despite suggestions of criminal law being linked to development there are still few reforms to the criminal justice sector embarked on by development banks. The criminal justice sector still takes a back seat when economic development is being discussed. Lewis, Posner, and Tiede are few of the authors who have explored the role of the criminal law in economic development. Both Posner and Tiede examined the criminal law reform with respect to the rights of defendants. Tiede went further and related it to property and economic crimes. Lewis delved deeper and questioned whether criminal law can be used to target a broader array of activities detrimental to economic growth. She also discussed the need to harness the power of criminal law against people engaged in corruption and other economically detrimental activities. Lewis focused mainly on property crimes but World Bank scholarship has identified both crime and violence as being factors that restrict economic growth. A World Bank study identified weak criminal justice institutions as compounding problems with crime and violence in Central America.¹

Common sense would also dictate that a safe country would produce more growth than one which is unsafe as it is difficult to envisage property rights if there are concerns about life and limb. Criminal justice reforms have been contemplated specifically with economic development in mind in the case of Central America.² If crime and violence are identified as development issues then the role of the judicial institution, as one of the key institutions involved in the criminal justice institution, must be paramount in addressing these issues. The ambit of the criminal law is vast and encompasses a wide range of crimes to include crimes against the person,

¹World Bank. *Crime and Violence in Central America*, iv.

²See Cox, “Central America Receives a Major Boost to Fight the Consequences of Crime and Violence.”

crimes against property, drug related crimes, financial crimes, and of course, corruption. Any robust approach to criminal justice reforms and criminal law must be keen to consider all types of crimes while simultaneously bearing in mind the rights of defendants and the observation of due process.

This study has limitations as the conclusions arrived at are based solely on the scholarship in the field. Based on these limitations it is impossible to make any bold statements. What is clear is the need for more empirical research to establish that the conclusions are more than just conjectures or speculations. Elements of justice are difficult to measure but not impossible. Measuring or establishing the direct link between judicial institutions will require resources, investment in the process and sufficient time for the penetration of reforms to take place. There is need for further research using quantitative approaches, collecting data from countries that have implemented programs of criminal justice reform and cross-tabulate those with countries that have not implemented programs. Any such research would benefit from specific case studies on developing countries plagued with problems of crime, violence, corruption and who are experiencing challenges with their criminal justice system. Further research may help to answer questions raised by this thesis. This may be important to public policy decision makers, economists, social workers, scholars and jurists in developing countries.

If enhancing the capacity of the judicial institution to deal effectively with breaches of the criminal law, corruption prevention laws, and implementing anti-corruption strategies in a country can result in economic development, then it may be worthwhile to invest significantly in the justice sector. This may be an interesting proposition to public policy decision makers in the ministries of justice in some developing countries. Investments in justice ministries are sometimes lacking. It is hoped that this study will cause a reconsideration of this position and that more investments will be channeled into judicial institutions. Hopefully this thesis will stimulate further interest in the potential impact of interventions in the criminal justice sector. The premise

is that the researches a continuation of the interests raised by other authors in the ability of the judicial institution to effect developmental changes through interventions in the criminal justice sector.

The main contribution of this thesis was to generate interest in this aspect of the law and the role that judicial institutions can play if adequately enhanced and empowered to address any deficiencies in the criminal justice system. The role of judicial institutions in the development of economies is a broad and rich field. I have merely sought to identify some aspects that may benefit from further research and scholarship. All areas that can contribute to enhancing economic development must be explored.

BIBLIOGRAPHY

- "Judicial System and Rule of Law Reform in Latin America." *Arizona Journal of International and Comparative Law* 25.2 (2008): 299-328.
- "Rule of Law and Economic Development: An Overview on the Region." *Arizona Journal of International and Comparative Law* 25.2 (2008): 267-298.
- Botero, J.C., R. La Porta, F. López-de-Silanes, A. Shleifer, and A. Volokh. 2003. "Judicial Reform". *The World Bank Research Observer* 18, no. 1(2003): 61–88, <http://www.jstor.org/stable/3986424>.
- Bowen, Glenn A. "Document Analysis as a Qualitative Research Method." *Qualitative Research Journal* 9, no. 2 (2009): 27-40. Accessed February 23, 2016. <http://go.galegroup.com.proxy.lib.duke.edu/>.
- Bowen, T. "Justice Delayed is Justice Denied: The Rule of Law, Economic Development and the Future of the European Community Courts." *European Competition Journal*, 4, no. 1(June 2008): 1+. <http://go.galegroup.com.proxy.lib.duke.edu/ps/>.
- Bushway, Shawn, and Peter Reuter. "Economists' Contribution to the Study of Crime and the Criminal Justice System." *Crime and Justice* 37, no. 1 (2008): 389-451. Accessed June 30, 2015. <http://www.jstor.org/stable/10.1086/524283>.
- Carrington, Paul D. "Law and Transnational Corruption: The Need for Lincoln's Law Abroad?" *Law and Contemporary Problems* 70, no. 38 (Fall 2007): 109-138. <http://Scholarship.Law.Duke.Edu/Lcp/Vol70/Iss4/2>.
- Castro, Conceicao and Pedro Nunes, "Does Corruption Inhibit Foreign Direct Investment." *Politica/ Revista de Ciencia Politica* 51, no. 1 (2013): 61-83.

- Chukwumerije, Okezie. "Rhetoric Versus Reality: The Link between the Rule of Law and Economic Development." *Emory International Law Review* 23, no. 2 (October 2009): 383-436. Accessed February 17, 2016. EBSCOhost.
- Cohen, Jerome Allen. *The Criminal Process in the People's Republic of China, 1949-1963: An Introduction*. Cambridge, MA: Harvard University Press, 1968.
- Dam, Kenneth W. "The Judiciary and Economic Development." Olin Working Paper No. 287. U Chicago Law & Economics. (October 2006). <http://dx.doi.org/10.2139/ssrn.892030>.
- Davis, K. E. "The Prospects for Anti-corruption Law: Optimists versus Skeptics." *Hague Journal on the Rule of Law* 4, no. 2(2012): 319-336.
<http://dx.doi.org/10.1017/S1876404512000188>.
- Davis, Kevin E., and Michael Trebilcock. "The Relationship between Law and Development: Optimists versus Skeptics." *New York University Public Law and Legal Theory Working Paper*, Paper 72.(2008).http://lsr.nellco.org/nyu_plltwp/72.
- deAsis, Maria Gonzales. *Anti-Corruption Reform in Rule of Law Programs*. Washington, DC: World Bank Institute, 2006.
- De Mendonça, Helder Ferreira, and André Oliveira da Fonesca. "Corruption, Income, and Rule of Law: Empirical Evidence from Developing and Developed Economies." *Revista De Economia Politica/Brazilian Journal of Political Economy* 32, no. 2(2012):305-314. Accessed March 2, 2016. EBSCOhost.
- Dearden, Stephen. "Corruption and Economic Development." European Development Policy Study Group, Discussion Paper No. 18, Manchester Metropolitan University, Department of Economics, October 2000.

Eyzaguirre, Hugo. *Institutions and Economic Development: Judicial Reform In Latin America*

Washington, DC: Inter-American Development Bank, 1996.

Faundez, Julio. *Rule of Law or Washington Consensus: The Evolution of the World Bank.*

Washington, DC: World Bank, 2009.

Franck, Susan D. "Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of

Law." *PacificMcGeorge Global Business & Development Law Journal* 19.2 (2006): 337-374.

Glaeser, Edward L., Rafael LaPorta, Florencio López-de-Silanes, and Andrei Shleifer. "Do

Institutions Cause Growth?" *Journal of Economic Growth* 9, no. 3 (2004): 271-303.

Greene, Norman L. "Perspectives from the Rule of Law and International Economic

Development: Are There Lessons for the Reform of Judicial Selection in the United States?" *Denver University Law Review* 86, no. 1 (July 2008): 53-114. Accessed February 17, 2016. EBSCOhost.

Hashim Osman, Rasha, Constantinos Alexiou, and Persefoni Tsaliki. "The Role of Institutions in

Economic Development." *International Journal of Social Economics* 39, no. 1/2 (2012): 142-160.

Ingram, Matthew C. *Crafting Courts in New Democracies: The Politics of Sub national Judicial*

Reform in Brazil and Mexico. Cambridge, UK: Cambridge University Press, 2015.

Johnson, Noel D., Courtney L. LaFountain, and Steven Yamarik. "Corruption is Bad for Growth

(even in the United States)." *Public Choice* 147, no. 3/4 (June 2011): 377-393. Accessed June 30, 2015. <http://www.jstor.org/stable/41483665>.

- Klerman, Daniel M.. "Legal Infrastructure, Judicial Independence, and Economic Development." USC Center in Law, Economics and Organization Research Paper No.C06-1 USC, Legal Studies Research Paper No.C06-1. <http://dx.doi.org/10.2139/ssrn.877490>.
- Knack, Stephen, and Phillip Keefer. "Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures." *Economics and Politics* 7, no. 3 (November 1995): 207-227.
- Kutan, Ali M., Thomas J. Douglas, William Q. Judge. "Does Corruption Hurt Economic Development? Evidence From Middle Eastern, North African and Latin American Countries." *Economic Performance in the Middle East and North Africa: Institutions, Corruption and Reform* (2009). doi: 10.4324/9780203879771.
- Laver, Roberto. "The World Bank and Judicial Reform: Overcoming 'Blind Spots' in the Approach to Judicial Independence," *Duke Journal of Comparative & International Law* 22, no. 2 (2012): 183-238. <http://Scholarship.Law.Duke.Edu/Djcil/Vol22/Iss2/2>.
- Lev, Daniel S. "Comments on the Judicial Reform Program in Indonesia," in *Current Developments in Monetary and Financial Law*, vol.4, edited by IMF, Washington, DC: IMF, 2005.
- Lewis, Margaret K. "Criminal Law Pays: Penal Law's Contribution to China's Economic Development." *Vanderbilt Journal of Transnational Law* 47, no. 2 (Mar. 2014): 371-450. Accessed February 17, 2016. *LegalTrac*.
- Macaulay, Fiona. "Knowledge Production, Framing and Criminal Justice Reform in Latin America." *Journal of Latin American Studies* 39, no. 3 (August 2007): 627-651. Accessed June 29, 2016. <http://www.jstor.org/stable/40056546>.

- Mennen, Tiernan, Eric Frye, and Richard Messick, "Enforcement of Anti-corruption Laws: The Need for Performance Monitoring." In *Transparency International Global Corruption Report 2007*, edited by Diana Rodriguez, 310-313. Cambridge, UK: Cambridge University Press, 2007.
- Messick, Richard E. "Judicial Reform and Economic Development: A Survey of the Issues," *The World Bank Research Observer* 14, no. 1 (1999): 117-36.
- Nagle, Luz Estella. "The Cinderella of Government: Judicial Reform in Latin America." *California Western International Law Journal* 30, no. 2 (April 15, 2000): 345-379. Accessed March 2, 2016. Retrieved EBSCOhost.
- North, Douglass. *Institutions, Change, and Economic Performance* (Cambridge, UK: Cambridge University Press, 1990).
- North, Douglass. "Economic Performance through Time." *American Economic Review* 84, no. 3, (June 1994): 359-368.
- North, Douglass. *The Contribution of the New Institutional Economics to an Understanding of the Transition Problem*. Helsinki: UNU/WIDER, 1997.
- Nwabuzor, Augustine. "Corruption and Development: New Initiatives in Economic Openness and Strengthened Rule of Law." *Journal of Business Ethics* 59, no.1-2 (2005): 121-138.
<http://dx.doi.org/10.1007/s10551-005-3402-3>.
- Olson, Margaret. "Document Analysis." In *Encyclopedia of Case Study Research*, edited by Albert J. Mills, Gabrielle Durepos and Eiden Wiebe, 319-21. Thousand Oaks, CA: Sage, 2010.
<http://dx.doi.org.proxy.lib.duke.edu/10.4135/9781412957397.n120>.

- Pepys, Mary Noel. "Corruption within the Judiciary: Causes and Remedies." In *Transparency International Global Corruption Report 2007*, edited by Diana Rodriguez, 3-10. Cambridge, UK: Cambridge University Press, 2007.
- Peters, E. "Impact of FDI on Economic Development, International Law and Development." vol. one, Edited By Paul J. I. M. De Waart Paul
- Pinheiro, Armando Castelar. "Judicial System Performance and Economic Development." (1996). http://www.bndes.gov.br/SiteBNDES/export/sites/default/bndes_pt/Galerias/Arquivos/conhecimento/ensaio/ensaio2.pdf.
- Placid, Debbie M. *The Caribbean Single Market and Economy (CSME): Testing the Rule of Law in the Caribbean Economic Development Plan*, 2006.
- Pompe, Sebastiaan and Wolfgang Bergthaler. "Reforming the Legal and Institutional Framework for the Enforcement of Civil and Commercial Claims in Portugal." IMF Working Paper No. 15/279, 2015. Washington, DC: IMF.
- Posadas, Alejandro. "Combating Corruption under International Law." *Duke Journal of Comparative & International Law* 10 (2000): 345-414. <http://scholarship.law.duke.edu/djcil/vol10/iss2/4,p409>.
- Posner, Richard A. "Creating a Legal Framework for Economic Development." *The World Bank Research Observer* 13, no. 1 (1998): 1-11. <http://www.jstor.org/stable/3986386>.
- Rapley, Tim. "Exploring Documents." In *Doing Conversation, Discourse and Document Analysis*, edited by Tim Rapley, 112-25. London: Sage, 2007. <http://dx.doi.org.proxy.lib.duke.edu/10.4135/9781849208901.n9>.

- Rose-Ackerman, Susan. "Corruption: Greed, Culture, and The State," *The Yale Law Journal*, 120 (2010). <http://www.Yalelawjournal.Org/Forum/Corruption-Greed-Culture-And-The-State>.
- Roussey, L., and B.Deffains."Trust in Judicial Institutions: An Empirical Approach." *Journal of Institutional Economics* 8, no. 3(2012): 351-369.<http://dx.doi.org/10.1017/S174413741200001X>.
- Rowat, Malcom, Waleed H.Malik, and MariaDakolias, eds. "*Judicial Reform in Latin America and the Caribbean: Proceedings of a World Bank Conference*." World Bank Technical Paper,No. WTP 280. Washington, DC : The World Bank (1995).
<http://documents.worldbank.org/curated/en/1995/08/697108/judicial-reform-latin-america-caribbean-proceedings-world-bank-conference>.
- Salminen, Airi, KatriKauppinen, and MerjaLehtovaara."Towards a Methodology for Document Analysis." *Journal of the American Society for Information Science*48, no. 7 (July 1997): 644-655.
- Skaar, Elin, IngridSamset, and Siri Gloppen. (2004)"Aid to Judicial Reform: Norwegian and International Experiences."CMI Report R, Bergen: Chr. Michelsen Institute, 2004.
- Skapardas,Stergio, Rodrigo Soares, Alys Willman, and Stephen C. Miller. "The Costs of Violence." Social Development Department, Washington, DC: The World Bank, 2009.
http://siteresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/244362-1239390842422/6012763-1239905793229/costs_of_violence.pdf.
- Soreide, Tina, Rose-Ackerman, Susan, Corruption in State Administration (August 3, 2015). Yale Law & Economics Research Paper No. 529. Available at SSRN:
<http://ssrn.com/abstract=2639141>.

- Stephan Haggard, Andrew MacIntyre, and Lydia Tiede. "The Rule of Law and Economic Development." *Annual Review of Political Science* 11 (June 2008): 205-234.
- Tanzi, Vito. "Corruption Around the World: Causes, Consequences, Scope, and Cures." *IMF Staff Papers* 45, no. 4 (Dec., 1998): 559-594. Accessed June 20, 2015. <http://www.jstor.org/stable/3867585>.
- Tiede, L. B. "Legal Reform and Good Governance: Assessing Rights and Economic Development in Chile." *Law & Policy* 34(2012): 237-262.
- World Bank, "Staff Guidance Note, World Bank Support for Criminal Justice Activities." Justice Reform Unit, Legal Vice-Presidency, Washington, DC: World Bank, 2012.
- World Bank. *Crime, Violence, and Development: Trends, Costs, and Policy Options in the Caribbean*. A Joint Report by The United Nations Office on Drugs and Crime and The Latin America and the Caribbean region of The World Bank. New York: UN, 2007.
- World Bank. "Crime and Its Impact on Business in Jamaica: Chapter 6." <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JamaicaPaper.pdf>.
- World Bank. "New Directions in Justice Reform: A Companion Piece to the Updated Strategy and Implementation Plan on Strengthening Governance, Tackling Corruption." World Bank Working Paper 70740, Washington, DC: World Bank, May 2012.
- World Bank. *Conflict, Security and Development: World Development Report 2011*. Washington, DC: IBRD/World Bank, 2011.
- World Bank. *Crime and Violence in Central America: A Development Challenge: Main Report*. Washington, DC: World Bank, 2011.
- <http://documents.worldbank.org/curated/en/2011/01/14081460/crime-violence-central-america-development-challenge-vol-1-2-main-report>.
- Zak, P. J., and S. Knack, S. "Trust and Growth." *The Economic Journal* 111(2001): 295-321. doi: 10.1111/1468-0297.00609.