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### LATIN AMERICA: THE WORK OF FORMAL INSTITUTIONS IN PROVIDING AND ENSURING ACCESS TO HUMAN RIGHTS:

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1. The issue of access to the state is finally meriting the attention it deserves from those working in the field of human rights.<sup>1</sup> A number of reasons explain why they put off looking at the issue. One was a rather wilful understanding that the road to human rights protection was an irreversible process that would begin with the fall of dictatorships.<sup>2</sup> Democracies, however, have not brought about effective human rights protection: while they marked the end of official policies of human rights abuse, they also revealed elected governments' inability or lack of will to ensure the dignity of the human person. It is in this context that the role of formal institutions in providing and ensuring human rights access takes on special relevance.
2. It is important to point out that access to human rights must not be confused with access to justice, especially in the narrow sense of access to the courts. On the contrary, the issue of rights access takes in all the powers of the state and includes different types of claims, from consumer rights claims against official health control bodies, to calls to the local police station to report domestic violence. Even such issues as the channels of representation between rulers and constituents and citizens and political parties can be included within the generic framework of rights access.
3. In order to look at this issue, the following paper is divided into four parts. The first discusses the issue of human rights access and what sets it apart from the other two connected issues: institutionalisation and rights enforcement. The second part attempts to give a brief introduction to the context where this issue becomes relevant: exclusive democracies. This leads into the third

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<sup>1</sup> The concept of human rights in this paper includes the basic rights recognised by international agreements and local Constitutions that are necessary for living with dignity. In this light, the typical distinctions made among human rights — civil and political; economic, social and cultural; first, second and third-generation, and individual and collective — are no longer relevant.

<sup>2</sup> Thomas Carothers, "The end of the Transition Paradigm", *Journal of Democracy*, The Johns Hopkins University Press and the National Endowment for Democracy, 13:1, 2002.

part, which takes a look at the tepid responses the state has come up with to deal with lack of human rights access. Finally, some comments on non-governmental organisations' difficulties in carrying out activities having to do with access to the state.

4. A few clarifications are in order about the paper's scope. First of all, this is not exhaustive research, but rather a paper that sets out to identify some of the core aspects for analysing formal institutions' performance on the issue of human rights access. In this regard, a number of cases will be mentioned, for illustrative purposes only. Secondly, it must be pointed out that, at the express request of this meeting's organisers, non-government human rights organisations will fall under the "formal institutions" heading. Finally, as the subtitle indicates, the paper is written from the perspective of a concrete experience: that of actor-observer in the human rights movement in Latin America and, more specifically, in the Southern Cone. This paper thus makes no academic or conceptual pretences and will limit itself to describing the human rights situation in the region, while assuming that many of its conclusions regarding the issue of human rights access can be applied in other parts of the world.

## THE ISSUE OF HUMAN RIGHTS ACCESS

5. Identifying the lack of human rights access as a problem in itself aims at distinguishing it from two other related topics: the legal recognition of rights and their enforcement. The difference between legal recognition and access to rights is simple: the former has to do with articulating the rights in a formal law, and the latter with the real possibility that those entitled to these rights have of demanding their enforcement by State agencies. This difference, however, has been glossed over to a certain extent by those who confuse human rights institutionalisation with their effective protection.
6. In this sense, one of the most worrisome aspects of many democracies is that, even though fundamental rights are clearly defined in their national constitutions and the international treaties ratified by these states,<sup>3</sup> the assertion of full citizenship hardly exists for large sectors of the population.<sup>4</sup> This is because human rights protection has often been confused with their institutionalisation, i.e., with their legal recognition. For instance, many democratic governments ratified international human rights treaties as if that were all there was to it, without following through on them with the implementation of internal measures, as all such instruments require to be effective.
7. The reinstatement of Latin American democracies in many cases also brought back one of their main vices: the law as fetish, i.e., the belief that reality changes just because a legal provision is set down on paper. The scope of this law-as-fetish mentality varies from one country and one region to another, but there can be no doubt that it is one of the main obstacles to human rights access and their enforcement. Many countries have passed laws and even adopted new constitutional provisions, for example, condemning discrimination, advancing gender equality and recognising ethnic and racial minority rights. The legal recognition of some rights has been a major achievement, such as the 1993 Law No. 70 in Colombia, which provides for the protection of cultural identity and the collective rights of Colombians of African descent. However, in practice

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<sup>3</sup>To see how rights are enshrined in Latin American constitutions, see [www.cajpe.org.pe/RIJ/bases/nuevdh/dh1/princ2.HTM](http://www.cajpe.org.pe/RIJ/bases/nuevdh/dh1/princ2.HTM).

<sup>4</sup> Paulo Sergio Pinheiro, "The rule of Law and the Underprivileged in Latin America: Introduction", in Méndez, J., O'Donnell, G. and Pinheiro, P. (eds.) *The (Un)Rule of Law and the Underprivileged in Latin America*, University of Notre Dame Press, Notre Dame, 1999, p. 2.

the situation of the black communities continues to be precarious, as demonstrated by the fact they are the main victims of forced internal relocation.<sup>5</sup>

8. One of the main reasons for this disparity between the legal standard and actual practice is the lack of adequate monitoring of the implementation of these laws. A typical example is the sanction set forth in laws that double the punishment for those committing police brutality or acts of violence against women; the trouble is that neither the State nor civil society monitors the effective application of these provisions. The same lack of follow-through plagues many of the decisions made by international human rights organisations. These bodies often emit recommendations with no further thought to any internal or international mechanism for overseeing their implementation. Certain sectors of civil society can make no better claim—they seem to think it is enough to pass a new law or an international state sanction, but its enforcement does not cause them overdue concern.
9. An important Argentine jurist had suggested that to put an end to torture there was no need to change the penal code; it was enough to remove all the typewrites (today we would say computers) from the police stations. The idea was that the only way to discourage the use of torture in criminal investigations was to render all declarations made in police stations worthless, since it made no sense to threaten them with a punishment that would never be dealt out.
10. All of this in no way implies a general dismissal of the international recognition of human rights. There is no doubt that the institutionalisation of human rights, by way of a new law or other kinds of official recognition, is an important step in many societies that until a few decades ago went so far as to confront human rights openly. Whatever symbolic value this recognition may have, it cannot ignore the fact that recognition, by itself, is not enough to guarantee human rights protection.
11. The second distinction that must be made before addressing the topic of human rights access has to do with its relation to rights enforcement. Access to rights depends on citizens' being able to assert claims before competent official bodies. Enforcement, for its part, is linked to the performance of state bodies in applying these rights. In this sense, there seems to be a direct relation between both issues: if there were more access, there might be a greater possibility of enforcement and, more importantly, more enforcement could generate more interest in approaching authorities charged with human rights protection.
12. Along these lines, the Argentine case perhaps represents a paradigm, where a growing movement of court claims was interrupted by a lack of response from judges. Once democracy was restored, a historic trial took place that condemned military officers for human rights violations; it even included televised hearings. Society began pinning its hopes on the courts to an unprecedented degree, filing legal claims regarding different kinds of social conflicts. One example of this heightened citizen interest was the filing of class-action suits demanding that the State make all outstanding retirement payments as required by law. The judges, however, did not look kindly on this new style of activism and turned their back on the incipient social demands. As a result, the gap between society and the courts reopened.<sup>6</sup>

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<sup>5</sup> Afro-Colombians represent about fifty per cent of the displaced population, although they make up only twenty-seven per cent of Colombia's total population. See G. Gallon, "Este Guerra no se Gana a Bala" Colombian Jurists' Commission., 2002: mimeographed copy.

<sup>6</sup> By 1992, seventy-nine per cent of Argentines expressed dissatisfaction with the judicial branch of government, and since then the dissatisfaction has increased, reaching a peak during last year's mass demonstrations demanding the impeachment of the entire Supreme Court. For a review of the transfer of the demands from the executive branch to the judicial branch and then back to the political arena, see, Martín Abregú, "El Cazador Cazado. Una Lectura Cartográfico-Histórica de la Realidad Política Nacional", in *No hay Derecho*, Year III, No. 7, September-November 1992, pp. 22-23.

13. These and many other examples show how closely human rights access is related to its enforcement; we should not, however, deduce that they are one and the same. On the contrary, what this paper is arguing is that even if the enforcement problem were fairly well taken care of, that would by no means ensure adequate levels of access. Look again at the case of Argentine retirees: they had access to the courts because their demand included an economic redress that many lawyers were interested in, but other social demands that did not involve personal wealth never went before the courts because lawyers were not interested in representing the plaintiffs as clients.
14. Access to human rights therefore is somewhat independent of the law enforcement that State agents may undertake concerning cases that come to their attention. Especially in the context of 'exclusive' democracies where, as we will see later, only a very limited sector of the population actually benefits from the functioning of formal institutions, the difference between human rights access and its enforcement is of fundamental importance inasmuch as these institutions, even when they function well, only cover a small part of the population.

### THE CONTEXT IN WHICH THE PROBLEM APPEARS: EXCLUSIVE DEMOCRACIES

15. As we already mentioned, the growing interest in the topic of human rights access is justified by the recent transition many countries have made from inclusive dictatorship to exclusive democracy. The idea of inclusive dictatorship is linked to the fact that, in the context of authoritarian governments, massive and systematic human rights violations went across the board: there was no special bias due to race, gender, social status or sexual orientation. The victims of human rights violations were chosen for political reasons. While certain traditionally oppressed groups (Jews, women, blacks, unionists) suffered the consequences of the dictatorship more harshly than others, no social sector completely escaped the State's repressive apparatus.<sup>7</sup>
16. On the other hand, many of the democratically-elected governments that followed these dictatorships gradually consolidated systems that treated different sectors of society differently. Many administrations, in varying degrees, have been unable to govern democratically, and have had serious problems meeting their goals and distributing the social benefits in this system. Particularly worrisome is their partial failure to ensure the Rule of Law and to protect human rights. As Paulo Sergio Pinheiro points out, "since democracy has come back, in a number of Latin American countries the relationship between government and society, especially the poor and underprivileged groups, has been marked by the illegal and arbitrary use of power".<sup>8</sup>
17. This failure to advance democratic government policies has brought with it, at least in most Latin American countries, a deterioration of the economic and social situation and a worsening of wealth distribution. To cite but a few examples: in Colombia the percentage of people living in poverty conditions grew from 51.7 in 1993 to 61.5 in 2000;<sup>9</sup> in Peru, in just three years (from 1997 to 2000), the growth of poverty was from 51.1% to 54.1%, despite sustained growth in social expenditures starting in 1993;<sup>10</sup> Argentina is another case where the unemployment and

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<sup>7</sup> This assertion is especially true in cases such as Argentina, less so in others, such as Peru, where the main cases of human rights violations were directed against marginalised *campesino* groups. In spite of these differences, a different profile can clearly be distinguished between the victims of human rights violations in rightist dictatorships and those that now face the greatest obstacles in asserting their rights.

<sup>8</sup> Paulo Sergio Pinheiro; *op. cit.*, p. 1.

<sup>9</sup> Citizen Control Report 2001/No. 5. According to the United Nations Development Program, the inequality in Colombia is equivalent to a ten-year setback in human development (United Nations Development Program and National Planning Department, *Informe de Desarrollo Humano para Colombia 1999*, p. XVI.)

<sup>10</sup> National Standard of Living Survey (ENNIV) 2000. See also, H. Bejar, "Globalisation Consolidated: Poverty and Increased Inequality" in Social Watch, Peru 2000, at <http://www.socialwatch.org/index.html>.

poverty levels (25% and 53% respectively) have reached unprecedented heights.<sup>11</sup> The radical implementation of the neo-liberal economic model starting in the 1980s has brought about the dismantling of the welfare state, leaving considerable sectors of society without social protection and diminishing the level of human rights access for the very poor. The impoverishment of basic health, education and security services<sup>12</sup> widens the gap between the state and its citizens even more, therefore working against the effective assertion of fundamental rights.

18. In this context, there are more and more people whose only contact with the state is for bad reasons, i.e., they have been victims of police brutality or abuse, they have been victims of a crime or accused of one, they have been arrested (arbitrarily or otherwise). While all societies include a sector of the population that has no access to formal institutions in order to assert its rights, this should not blind us to the fact that in some countries, those unable to claim their basic needs make up large percentages of the population. In this sense, the problem with exclusive democracies is not so much the quality of the democracy, as the number of people who (do not) have access to it.<sup>13</sup>
19. This gap between the legal recognition and the enforcement of human rights generates what some observers have described as low-intensity citizenship: a legal system in which, at least in principle, everyone has the political rights associated with the democratic regime, but many are denied their basic civil and social rights.<sup>14</sup>
20. The human rights situation, in this context, is also paradoxical: while the most brutal crimes perpetrated by the state have disappeared, serious, systematic violations continue to be a daily reality for the most vulnerable sectors. These human rights violations have been characterised as ‘inherent’ or ‘structural’ to these democratic systems, referring to the governments’ inability to avoid them. This is the case, for example, of pervasive police brutality that not even the best-intentioned democratic governments have been able to wipe out.<sup>15</sup>
21. It can thus be seen that many democratic regimes have been capable of strengthening democracy for certain social sectors only (most clearly those enjoying the greatest economic stability and those belonging to the political establishment) while many other sectors are far from seeing any real improvement in their access to rights. This leads to the conclusion that there are two kinds of citizens: first-class, having rights both in theory and in practice, and second-class, having no real possibility of asserting rights, legal recognition notwithstanding. Even when these people’s rights are protected by law, institutional practices of systematic discrimination make the current situation look like what history calls “Roman-style citizenship”: a complete and complex system of rights for the very few.<sup>16</sup>

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<sup>11</sup> In May 2002, half the population lived below the poverty line. Source: National Statistics and Census Institute (IMDEC), in the *Diario Clarín*, May 10, 2002.

<sup>12</sup> According to Social Watch data, significant percentages of the population have no access to even minimal sanitation services (forty per cent in Colombia, for example).

<sup>13</sup> In Argentina, “people feel abandoned by their institutions”, see C. Laub, “La Seguridad Ciudadana en Una Sociedad Democrática.: Participar en Estos Tiempos?,” in *Seguridad Sostenible*, [www.iigov.org/seguridad/7/7\\_01.htm](http://www.iigov.org/seguridad/7/7_01.htm). For his part, Hugo Fruhling, referring to the Latin American situation, points out that “the militarised nature of the police forces makes people approach them only when it is absolutely necessary (serious crimes)”; “La Reforma Policial y el Proceso de Democratización en América Latina”, CED, Citizen Security Area, 2001, p. 9.

<sup>14</sup> Guillermo O’Donnell; “Human Development/Human Rights/Democracy,” paper presented at the workshop “Calidad de la Democracia”, sponsored by the Programme “Estado de la Nación” and its project “Auditoría Ciudadana de la Calidad de la Democracia”, from Costa Rica, and by the Regional Division for Latin America and the Caribbean of the United Nations Development Program, which took place in Heredia, Costa Rica, February 1-2, 2002.

<sup>15</sup> N. Rodley, “Torture and Conditions of Detention in Latin America”, in Mendez *et al.*, *op. cit.*, pp. 25-41.

<sup>16</sup> The idea of Roman-style citizenship belongs to Víctor Abramovich, Executive Director of the Centre for Legal and Social Studies (CELS) of Argentina, who mentioned it in an informal conversation.

## SOME OFFICIAL 'RESPONSES' TO LACK OF HUMAN RIGHTS ACCESS

22. State institutions have actually made very little effort to reverse this situation. On the contrary, the fact that those governing and those benefiting from democracy belong to one and the same group, has made for a vicious circle whereby public administration is at the service of this sector.
23. This is notorious, for example, in the state resource allotment in different administrative areas. An interesting case is the budgeting of resources in law enforcement. Even though the most impoverished sectors are the hardest hit by growing crime rates, pressure from the middle and upper classes, who have greater access to policy-makers, forces democratic governments to distribute state funds unequally. Anyone who visits a police station in a marginal neighbourhood and compares it to a police station in an upper-class residential district will immediately notice the difference. This can be explained in part by the fact that in many cases, neighbourhood associations that co-operate — in many ways — with the police, are the ones that make the greatest investments. Still, this does not change the fact that even public security depends on the economic clout of each sector. In fact it often turns out that the police auxiliaries — one of the formats for neighbourhood aid to the police — acquire infrastructure, and the maintenance ends up being charged to the State, which then must cut back the budget for police stations in poorer neighbourhoods and reassign it to the well-to-do.<sup>17</sup>
24. A similar situation occurs in the administration of justice, where state spending basically benefit those who have the most, because only a limited sector of the population makes use of the courts and official institutions. In this sense, it is enough to look at the diagnoses made in many Latin American penal systems; it turns out that the criminal justice systems are overwhelmed with cases of bounced checks, or credit card and cell phone robberies. In other words, they are serving as collection agencies or investigators for private companies. A recent study by the Diego Portales University in Chile, showed that despite efforts to impart equitable justice, the reality is that the sectors with the most resources continue to take the lion's share of the benefits. This study shows that public investment in justice has a distinct regressive tendency: in 1996, the average *per capita* state expenditure for justice in Chile was \$3,319. However, the spending for the poorest sectors of society was \$2,916, while for the non-poor, the state invested the equivalent of \$3,568.<sup>18</sup>
25. The Chilean case, involving as it does one of the countries that has made important strides during democratic governments, is particularly interesting. In spite of evident improvements in various areas of administration, the perception of the most vulnerable sectors is eloquent: “for the psychopath of La Dehesa (a rapist who committed a series of crimes in an upper-class neighbourhood of Santiago), everyone got up and mobilised, but here no one listens to us, as more and more bodies are found”<sup>19</sup>, says an inhabitant of a forgotten region of the country's north, where the case of a serial killer moved public opinion too little and too late. Similarly, a recent Presidential Advisory Commission Report for the Defence of People's Rights in Chile states that when it comes to access to justice, users “feel treated like second-class citizens, seeing high-quality justice being dispensed for those that can afford lawyers, while the poor get a more diluted form, putting up with semi-professional attention and depending on the Administration's good will”.<sup>20</sup> This perception has actually varied little in recent years: according to a 1993 study, 63.5% of the population said that judges behave differently toward the rich and the poor, and

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<sup>17</sup> This reality was described in an expert discussion on police reform organised by the Center for Development Studies (CED), in Santiago in October, 2002.

<sup>18</sup> J. Peña Vargas, C. and J. Correa, *El Rol del Estado y el Mercado en la Justicia*, Cuaderno de Análisis Jurídico, Diego Portales University, No. 42, 2001, p. 131.

<sup>19</sup> *El Mercurio*, August 17, 2002, Suplemento Enfoques, p. 5.

<sup>20</sup> Executive Summary of the Fourth Report of the Presidential Advisory Commission for the Protection of People's Rights, p. 3.

88.7% thought that justice in Chile was one thing for the rich, and another — bad — thing for the poor.<sup>21</sup>

26. The inequitable distribution of public spending, in any event, is not limited to the administration of justice, but reaches its most alarming levels elsewhere. For example, in Argentina, resource allotment widens the cultural gap between rich and poor as well as between the federal capital and the provinces. Recent information indicates that 77% of the budget for culture was earmarked for the city and state of Buenos Aires, i.e., the country's richest and most populous region, with the remaining 23% distributed among all the other provinces. In its extremes, this budget sets aside \$53.3 for each inhabitant of the City of Buenos Aires (the Federal Capital, with the highest per capita income in the country) and just \$0.31 in the Province of Santiago del Estero, (one of the poorest in Argentina).
27. Thus the state not only did not close the access-to-rights gap between the most stable and the most vulnerable segments of the population, it actually consolidated and widened it. The state has become the private domain of one social sector, while significant parts of the population are for all practical purposes left off the official agenda.
28. Another important cause that explains the lack of human rights access is the narrow conception of efficiency that has dominated the institutional reforms that many countries have carried out in recent decades. The underlying vision sees the modernisation of the state primarily in terms of spending cuts and greater effectiveness in administering private interests, so problems like the lack of access to democratic institutions were not included on the reform agenda. Thus political reform, for example, is often understood as simply cutting back on political spending, but it does not include problems like the crisis of representativeness.
29. Among these reforms, one of the most relevant for our topic of inquiry is no doubt judicial reform. Motivated to a large degree by increased international trade, the International Financial Institutions (IFI) made hefty investments in the modernisation of justice, and many countries all over the world undertook reform processes. However, these reforms systematically ignored the issue of access to justice for the most marginalised sectors.<sup>22</sup> In the words of Jorge Correa, "if one observes the reform projects that are being pushed the hardest in Latin America, especially by its governments and international development agencies, I would go so far as to identify the existence of four fundamental forces that have formed an alliance to bring about these changes. Not one of them...gives priority to equal access or rights protection for the weakest members of society".<sup>23</sup>
30. A clear example of these justice administration reforms that underscores how the courts are being organised behind people's backs, is the insistence on building a 'judicial city'. Even some groups committed to human rights have moved for the construction of a new site for the courts in some central location where all the different tribunals could be gathered. This idea of giving justice 'its own space' goes exactly against greater human rights access. This is a proposal that reinforces the mindset that citizens must travel to a place where they will be foreigners in a land of lawyers. Greater access is really achieved by getting the courts out into the neighbourhoods, in

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<sup>21</sup> L. Barros and J. Correa, eds., *Justicia y Marginalidad. Percepción de los Pobres*, University Promotion Corporation, Santiago, 1993.

<sup>22</sup> C. Rodríguez, "Globalisation, Judicial Reform and the Rule of Law in Latin America: the Return of Law and Development", in *Beyond Law*, Latin American Institute for Alternative Legal Services (ILSA), Vol. 7, No. 23, February 2001, p. 14.

<sup>23</sup> J. Correa, "Acceso a la Justicia y Reformas Judiciales en América Latina: ¿Alguna Esperanza de Mayor Igualdad?", *Revista Jurídica de la Universidad de Palermo*, SELA 1999, 2000, p. 260. For its part, the Andean Jurists' Association points out that the judicial reform that has been pushed in the continent has placed exclusive emphasis on adopting 'legislative' and 'organic' measures, which reveals the indifference toward access to justice for the poor. See Andean Jurists' Commission, *La Reforma Judicial en América Latina*, Comisión Andina de Juristas, Lima, 2000.

houses that look no different from the rest of the local buildings. From this standpoint, the lack of progress in the decentralisation of the courts is an unmistakable sign of the low priority that access to the state enjoys in recent institutional reforms.

31. One of the most questionable state responses from the perspective of human rights access is the way it addresses poverty and other forms of social discrimination by means of social aid programs. In many cases, the only 'positive' interaction that the more vulnerable sectors of the population have with the state is through social aid programs that grant subsidies, food or other kinds of resources. While these programs often help to endure situations of extreme poverty, in general they work against human rights access, because they consider people as beneficiaries of these plans and not as subjects entitled to rights. In this way, the person has no possibility of making a legal claim if, for example, the subsidy is interrupted. In addition, the dependence on the state agent's generosity to receive a benefit inhibits the recipients from confronting these same authorities to assert their rights. The state-beneficiary relationship is contrary to the state-citizen relationship.
32. If we recognise the systematic discrimination that the state reinforces by excluding vast segments of the population from the benefits of democracy, it becomes necessary to review other initiatives that, although aimed at strengthening democracy and the effective exercise of human rights, may turn out to be limited in scope or even useless.
33. In this regard, certain recent constitutional reforms have incorporated the mechanism of the popular initiative, which allows for the collection of a certain number of signatures in order to force Congress to consider a specific legislative project. A tool of this type is useful, in the framework of an exclusive democracy, as a correcting instrument to force the discussion of a law that no representative wants to sponsor but that ordinary citizens are clamouring for. At the same time, however, it reinforces the distance between the state (representatives) and citizens (constituents), because it consolidates the idea that the Congress is a state body far beyond ordinary citizens, and therefore exceptional mechanisms are necessary if representatives are to listen to social demands. From this standpoint, the popular initiative is a patch sewn onto an inaccessible state, but it does not favour greater representation of all social sectors in Parliament.
34. Another interesting case is that of training programs for judges, who in the field of human rights are still quite limited in terms of narrowing the distance between the state and its citizens.<sup>24</sup> Having better judges is always a good thing, but this by no means ensures that more people will have access to the courts. As it was pointed out before, a judicial branch with higher levels of rights enforcement should spark a greater interest among the citizenry in making use of the courts and, in the event greater access levels are achieved, it will be necessary to have better-trained judges. However, the training of judges in itself is no guarantee of more or better access.
35. This does not mean it would be best to give up on training programs for judges. Just the opposite is true: these initiatives are indispensable, but they should include, as one of their main objectives, the narrowing of the gap between citizens and the state by favouring greater access to justice and preparing the judges so that they can give better answers to social demands that citizens will eventually articulate. For instance, it would be necessary to train judges and other judicial personnel in communicating on the same level, as equals, with underprivileged groups. The relatively successful experiences of justices of the peace in Peru, where a townspeople or neighbour is in charge of resolving conflicts arising within the community, is a good example of justice administration at the service of those needing it most.<sup>25</sup>

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<sup>24</sup> In recent years, a number of training courses for judges have been developed on topics dealing with human rights. For a description of these initiatives, see Andean Jurists' Commission, *Formación de Magistrados y Derechos Humanos*, Comisión Andina de Juristas, Lima, 1998.

<sup>25</sup> *Gente que Hace Justicia. La Justicia hace la Paz*, Comisión Andina de Juristas, Lima, 1999.

36. While on the subject of more or less positive experiences, the case of the People's Defenders (*Defensorías del Pueblo*) can be mentioned. This relatively recent institution has had a great impact in several Latin American countries,<sup>26</sup> because they are institutions designed to be a service to the community and because, being new institutions, the users have taken them over. Of course, many of them must deal with the restriction of issuing only recommendations, but that has not kept them from becoming a space open to the citizenry. The greatest limitation to these defenders is that, generally speaking, they end up benefiting the urban middle and lower-middle classes, leaving numerous sectors without a formal institution to defend their interests.
37. In the area of justice, perhaps the best experiences that promise greater access have been linked to injunctions and especially, acts of enforcement (*acción de tutela*) in Colombia. These legal actions provide for the filing of suits by citizens to protect their constitutional rights in cases in which these rights are being unduly restricted, and they oblige the judge to act immediately.<sup>27</sup> It is interesting to see how this new legal instrument has had an enormous impact on improving access to justice and therefore, on citizens' attitudes toward the courts.<sup>28</sup> In fact, it is noteworthy that people tend to have a better image of the enforcement judge than of the ordinary judge, even though it is often the same person<sup>29</sup>. The fact that by means of these actions the country's Constitutional Court has issued historical decisions in favour of social rights protection is another example of the potential that this kind of procedural resource offers.

#### **THE CASE OF HUMAN RIGHTS NON-GOVERNMENTAL ORGANISATIONS**

38. Non-governmental organisations (NGOs) have had serious difficulties addressing the problem of lack of human rights access. At times, they too have confused the legal recognition of human rights with their effective protection. Many historical human rights organisations have not been able to form alliances and create bridges with organisations representing the most marginalised sectors in democracies, which in a certain way inhibits them from systematically confronting issues such as the lack of access to the state.
39. In Latin America these organisations have not yet managed to effect the paradigm change involved in the shift from an inclusive dictatorship to an exclusive democracy, which is why they have not known how to take on the issue of human rights access. This assertion, however, requires two preliminary clarifications. The first is that there can be no doubt that many organisations have managed to make this shift. The second is that this does not mean to say that human rights organisations continue doing the same thing they did during the dictatorships.
40. In recent decades, Latin America and other parts of the world have witnessed important changes in traditional human rights work. It is easy to see that NGOs have become more professional, that they have added new issues to their agendas, that they have made efforts to establish a new kind of relationship with the State and, in some cases, have tried to make concrete proposals to resolve the violations they denounce.
41. Nonetheless, this "democratisation" of non-governmental organisations has not challenged the paradigm of human rights work that was originally designed to confront dictatorships and that still dominates a large part of the sector. This is not the place to describe this paradigm in detail,

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<sup>26</sup> Andean Jurists' Commission, *La Sombra de la Corrupción. Informe Anual Sobre la Región Andina*, Comisión Andina de Juristas, Lima, 2002, pp. 170-189.

<sup>27</sup> The act of enforcement is found in Article 86 of the Constitution of Colombia.

<sup>28</sup> In Colombia, over eighty per cent of the acts of enforcement that were filed in offices in 2000 were handled by lower courts. A. Fuentes and B. Perafán, "Sistemas de Justicia y Sociedad Civil", in press, Centro de Estudios de Justicia de las Américas, p. 41.

<sup>29</sup> This information was mentioned by a participant in the Forum "Civil Society and the Administration of Justice in Colombia", held in Bogotá, on April 4, 2002.

but it is the place to describe some of the assumptions that work against an adequate approach to the issue of human rights access.

42. There are three elements of this paradigm of human rights work that must be revised under the current circumstances:
43. *The state as adversary* — Many human rights organisations still consider the state essentially as a human rights violator and thus believe that the only valid relationship with it is confrontation. The state is thus bypassed as a human rights protector and the value of joint proposals or work is underestimated, or considered automatically as co-optation.
44. As for the issue of rights access, it is important to point out that this conception of the state also implies seeing it as an alien state, belonging to others. Since the State is always a human rights violator, no effort is made to work with it, and in a certain sense, access to it is not even considered to be a goal. From this standpoint, the most important thing is to denounce human rights violations, while designing or exploiting mechanisms that could lead to their effective protection takes a back seat.
45. Once again, this assertion requires a number of clarifications. The first is that here an extreme position has been articulated that only the most radicalised sector could subscribe to. The second is that this criticism in no way means that human rights organisations should forsake their fundamental work of denunciation. What it does mean is that we must recognise that this stance is present in one way or another in the non-governmental sector (at least in Latin America), and that while few organisations would defend the extremist position, it is still very hard for human rights activists to undertake a systematic take-over of the state, for example, by working toward greater human rights access.
46. *The strong state* — Human rights work still assumes (and in some cases without admitting evidence to the contrary) that the state is strong and that its responsibility for all human rights violations means that it has control over all of them. In fact, the opposite is often true: the current situation in Latin America brings us up against often weak democratic governments, with enormous difficulties in confronting other power groups.
47. This is a very controversial assertion that should not be misinterpreted. In the first place, it does not intend to relieve democracies of their responsibility for human rights violations that are committed under their Administration. In the second place, it also does not mean that all governments want to do things right but unfortunately are unable to. Nevertheless, the difficulties that many governments have had, for example, reforming the police or the health system, bring to the fore the power that certain groups have to block democratic reforms. The point of underscoring these governments' weaknesses is merely to suggest that, in many cases, the collaboration of non-governmental organisations is essential to achieving substantive reforms.
48. In this context, any state that hopes to ensure higher levels of human rights access should doubtlessly rely on the help of non-governmental organisations. Even in the case of such fundamental state functions as court access, it is important to bear in mind that, although it is the state's responsibility to ensure justice for all, budget constraints mean that better chances of success will depend on lawyers and other legal professionals from NGOs and other civil organisations. For example, they could play a preventive or consulting role, instead of limiting themselves to legal defence representation<sup>30</sup>.

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<sup>30</sup> Alejandro Garro, "El Acceso a la Justicia y el Derecho de Interés Público", in *Justicia y Sociedad: Hacia un Mejor Servicio Público de Justicia*, 1999, April, No. 2, pp. 37-39.

49. *All segments of society are victims of the same human rights violations* — During the military dictatorships that governed Latin America in the 1970s and 1980s, all segments of society suffered State Terrorism. This led to many victims’ organisations that, for example, offered their particular professional experience to help others who had suffered the same abuses. Since now the main human rights violations stem from exclusive democracies, the NGOs’ experience is insufficient to help others who are in a very different situation altogether.
50. Access to democratic institutions is limited to certain groups, political activists being one of them. This means that human rights defenders often belong to this privileged group that has the wherewithal to assert its rights. Thus human rights organisations, for example, today have no trouble gaining access to the courts (unlike what happened during the dictatorships).
51. If human rights organisations want to develop a strategy for achieving greater access to the state, they must necessarily collaborate with other sectors of society that have not historically been their “clients”. It is true that there have been many attempts to just this, some of them successful. However, what is required in this situation is a much more active policy of alliance-formation with, for example, the feminist movement, ethnic and racial minorities, and grass-roots organisations. Only by recognising that the victims “are somewhere else” can an effective strategy for human rights access be designed.