During recent decades Latin America has once again embarked in ambitious law reform processes. This is by no means a new venture. Domestic and global legal actors, including various multilateral agencies, have long noted the need for legal reforms in Latin America. Scholars associated with the Law and Development programs of the 1960s and 70s, for instance, argued that an effective and accessible legal system:

1) Helps keep social processes within the “rule of law”. This is essential for a process of “balanced” development, for clear and coherent “rules of the game” provide the security and certainty necessary for investment and private initiative.
2) Promotes a sense of “community”, of belonging to an enfranchised and participatory citizenry.
3) Softens the inequality that often goes with “development”, by providing some protection to those hurt by the process.
4) Plays a crucial role in moderating or checking the abuses of power of government. (Karst and Rosenn 1975: 629-710).

Current law reform goals are quite similar, though the means for achieving them has changed. Whereas legal education was the venue for reform in the 60s and 70s, the focus now is on improving the administration of justice through new procedural codes and other related institutions, and enacting market-friendly legal environments. The underlying premises are that these reforms will simultaneously achieve economic efficiency and consolidate democratic institutions.

We could spend many hours questioning these premises. While most of us would probably agree that a stable and non-arbitrary environment is probably a reasonable requirement for foreign investors, are clear and predictable legal norms really that essential for fostering investment and trade? Such an assertion is repeated time and time again with almost religious fervor. But is it based on empirical law and society studies or is it more an ideological, value-loaded belief? Contract law in the United States, for instance, is notoriously indefinite, with many conflicting doctrines in force in diverse jurisdictions. California state courts and the Federal 9th Circuit Court of Appeals are noted for their transactional interpretations and application of various contract law doctrines, with the goal of carrying out the “real deal” as agreed upon in fact by the parties rather than a formalistic application of norms where the goal is certainty and predictability, regardless of the particular outcome. Yet business is alive and well in California, seemingly impervious to the “inadequate” legal environment.

The point here is that law, while certainly important, is certainly not the only or perhaps even the key factor in determining economic or business behavior. As Macaulay and others have repeatedly shown through empirical studies, non-legal sanctions and interests are generally more important than the availability of enforceable legal rights. Moreover, foreign investors have other mechanisms for resolving potential conflicts, such as
compulsory international arbitration, or specifying that US or other foreign laws will be determinative.

If anything, this state of affairs is even more notorious in Latin America, where an energetic "informal economy" seems to be thriving in the "pueblos jovenes" of Lima and other squatter settlements in the large cities of the region, despite the almost total absence of any formal legal system. Informal or extra-legal normative institutions prevail, often mimicking the formal system (Santos; De Soto, 1989.)

So one wonders what is behind some of these "market-oriented" legal reforms, as pushed by the World Bank and other multilateral institutions. Are they merely symbolic gestures, the product of new business elites who desire a modern version of a business environment (Dezalay and Garth, 1998: 58-60), much as their 19th century ancestors looked at the French Code Civil and other foreign models to "forge liberal states" (Schor, 2005) regardless of the different contexts? An even if these market-oriented reforms result in more agile legal processes, will they be of any utility to the majority of the population? Or is this just a case of "trickle down" justice?

This at last brings me to what I want to emphasize here; the question of implementing the law reforms, particularly as regards access to legal institutions and processes by and for the underprivileged or marginal sectors of society (also emphasized by Schor.) In this sense, any analysis of the current legal reforms must answer the often ignored questions of law reform for whom and for what?

Needless to say, if the underprivileged are to participate more evenly from economic and social development, they must be provided with effective access to the allocation of goods and services, including justice. But As Ungar (2002:187) has pointed out, "[Ultimately,] institutions are not truly transformed unless they are accessible to all citizens. ...But...a range of physical, educational, and linguistic obstacles...thwart justice to more than 80% of all Latin Americans." (Id)

However, as several observers have pointed out, the reform processes do not necessarily mean good news for the underprivileged. Correa (199:267), for instance, asserts that the underprivileged are not relevant actors in the judicial or other legal reform processes in Latin America. They do not form "part of an organized movement promoting reform": their interests do not inspire the reforms, nor are they "a target sector to be beneficially affected by them." (Id., 268). Moreover, processes of cultural modernization and social change also produce many problems. Thus, the growing disintegration of extended family networks, rural-urban migrations and the widening diaspora of indigenous communities produce a breakdown of traditional methods of conflict resolution. The State thus faces the challenge of diversifying its responses to these different problems (Correa, 1998:102.)

Some, if not most, of the legal reform efforts, as well as prior efforts often led by NGOs, Law Schools and other non-government institution have at least tried to respond to these access needs. Public interest and legal service programs have been around for some time. The criminal procedure reforms have as a goal making the process fairer, more transparent and accessible and to curtail the common excesses of the past.

Still, what is the reach of the NGO programs, how stable are they, and do they reach the...
The most important problems of the marginalized or underprivileged? As regards the criminal process reforms, no one doubts that change was essential and some of the reforms seem to be successful in making (Chile, Documento, 2003- in my files). Nevertheless, one can still question whether this reform, though important, really addressed the most serious problems or social demands of the under-privileged.

My comments will thus focus on the problem of access to justice for the underprivileged and marginalized groups, including indigenous communities. My interest is in outlining the constraints to effective access to the relevant institutions. These include: (Thome, ILANUD Report, 1984; Ungar, 2002)

• The administrative and structural framework; that is, the administrative and judicial infrastructures, organization and resources available for processing conflicts and social demands, as well as other potential access barriers, such as costs, distance, time, favoritism, venality (Thome…)

These often include “bureaucratic requirements, poor infrastructure, and lack of judges,” byzantine procedures and rigid legal formalism. (Ungar: 187)

• Economic: Costs of entering and working through the system, including corruption. (Id)

• Political/Social: lack of influence, power and connections (voice).

• Cultural/Social: discrimination against indigenous peoples, the less educated and other marginalized groups, is common (Thome, 1984; personally witnessed in various government institutions at different times). Perceptions and attitudes toward the legal process and other institutions may lead to “exiting” from the formal system. Related problems include other problems: class or interest divisions, e.g., indigenous communities vs. urban population. Property conflicts also divide social sectors. Commonly, officials and much of population look down on less educated citizens, the street people and illegal immigrants. Thus little or no political support for extending legal rights to them. (Ungar: 190)

Among indigenous people, the access problem is particularly difficult – here, the task is that of finding mechanisms that guarantee autonomy to the communities while at the same time protecting individual rights of the members of the community. These regulatory schemes must operate in culturally sensitive form, and with the full participation of the communities themselves. Historically, however, national legal systems have been distant from and mistrusted by indigenous peoples. And the traditional judiciary has been hostile to legal pluralism and indigenous customary law (Domingo and Sieder, 2001, 161; Guevara and Thome, 1992).

Many if not most of these constraints or obstacles derive from the prevailing economic/social structure, making the problem even more difficult. (Thome, Legal and Social Structures…,1979: 252-261).

“The difficulties that Latin America faces today and has faced in the past in implementing law reforms tell an important story about the linkages between law and other social structures that we need to unravel before concluding that Latin America’s
unsuccessful" institutional past is prologue to its future. Law cannot work its magic in ameliorating political and social conflict unless there is a constituency for the legal system. That constituency is lacking in the underdeveloped world." (Schor Workshop Statement, 2005).