Judicial Reform

A review of the evidence on judicial reform across countries shows that those seeking to improve economic performance should not focus on judicial efficiency alone but on independence as well. It also shows that the level of resources poured into the judicial system and the accessibility of the system have little impact on judicial performance. Most of the problem of judicial stagnation stems from inadequate incentives and overly complicated procedures. Incentive-oriented reforms that seek to increase accountability, competition, and choice seem to be the most effective in tackling the problem. But incentives alone do not correct systematic judicial failure. Chronic judicial stagnation calls for simplifying procedures and increasing their flexibility.

Judicial systems around the world are perceived to be in crisis. Civil and criminal cases take too long and cost too much, and judicial systems are plagued by dishonest judges. Though there is little consensus on exactly what judicial efficiency means or how to measure it, people seem to agree that it is low. Judicial inefficiency is not only bad for litigants, it is also bad for economic prosperity, undercutting a nation’s wealth and economic growth. Markets, as Posner (1998:1) reminds us, “depend on the establishment of an environment in which legal rights, especially property and contractual rights, are enforced and protected—an environment that is taken for granted in wealthy nations.” The impact of judicial inefficiency may be particularly severe in poor societies. As Widner (2001) has recently documented in Tanzania, judicial inefficiency hurts the poor the most.

These and other considerations have invited calls for major judicial reforms. In particular, it is widely believed that such reforms may improve economic performance. Messick (1999:120) presents two hypotheses describing the link between good judiciaries and economic development. The first holds that well-functioning courts support economic development broadly by checking government abuses and
upholding the rule of law. This view puts a large premium on judicial independence. The second hypothesis links the two elements more directly, maintaining that judicial efficiency enhances economic development by facilitating fruitful exchanges between private individuals.

Indeed, a large part of economic theory—from the theory of the firm to labor economics to finance—rests on the assumption that courts enforce contracts both perfectly and freely. Yet this assumption does not hold up to empirical scrutiny (Djankov and others forthcoming). This article presents building blocks for the analysis of judicial reforms.

There are several schools of thought about judicial reform. One views the primary problem of the legal system as one of funding and thus sees the solution to judicial inefficiency as lying in more resources—more training, better computer systems, and more courts, judges, and clerks. Another school of thought believes that judicial systems are inefficient because of excessive and indiscriminate access. Far from increasing fairness by allowing more people to assert their rights, the democratization of the legal system has opened the floodgates, bogging courts down with mostly frivolous cases and slowing the meritorious ones. This view suggests such solutions as greater procedural hurdles for lawsuits and restrictions on lawyers’ advertising and fees (see Olson 1991). A third school views the problem as one of incentives. Judges who do not bear the costs of their slowness tend to be slow. Court systems unafraid of losing litigants to alternative venues of dispute resolution, such as arbitration or small claims courts, will treat their litigants as the captive market they are. Yet another group believes that the main problem is overly rigid and ineffective procedures, particularly in developing economies that inherited their legal systems from their colonizers without the systems’ being sufficiently adapted to their needs. Reforms can enhance efficiency even within the existing system by streamlining procedures and creating specialized courts.

A review of the evidence on judicial reform across countries suggests that inadequate incentives and overly complicated procedures account for most of the problem. It also shows that not all incentive-oriented reforms are equally effective. A system that relies on incentives and competition to improve legal services could probably put a greater premium on efficiency without sacrificing quality. But incentives alone will not correct chronic judicial inefficiency. Most cases of judicial stagnation require simplifying procedures and increasing their flexibility.

Review of the Evidence

The following review of the empirical evidence on judicial reform is organized by the schools of thought already outlined.
More Resources Will Probably Not Solve the Problem

Judicial officials commonly complain that they have too few resources and too little staff. But the evidence on the effectiveness of increasing resources is mixed. Data from the United States and countries in Latin America and the Caribbean show no correlation between the overall level of resources and the time to disposition of cases (Buscaglia and Ulen 1997; Church and others 1978; Dakolias 1996, 1999). In one study, however, “resources allocated for court personnel” emerged as an important factor in Argentina and Ecuador (Buscaglia and Dakolias 1996).

Many reform efforts lump other initiatives together with funding increases (see Dakolias and Said 1999 on Peru; Hendrix 2000 on Guatemala; Hong 1995 on Singapore; and Tarigo 1995 on Uruguay). These packages may be effective more because of the other initiatives than because of the funding. For example, in Tanzania the Commercial Court is well funded because it gets its operating budget from filing fees as well as the fact that because it does not have exclusive jurisdiction, its ability to collect fees depends on its ability to offer a better product for the filing party (Finnegan 2001). In Paraguay the number of judges was increased at the same time that oral proceedings were introduced (Dakolias 1996), so the time savings achieved may have resulted from the greater efficiency of oral procedures rather than from the increase in judicial personnel.

Funding increases alone may help alleviate temporary case backlogs in systems that have made a serious effort to work better. But they may be useless in those with large inefficiencies—or even worse than useless if they draw resources away from fixing systemic problems. “Crash programs” to reduce backlogs—presumably through a large infusion of resources—have shown good results in the short term. But just as with crash diets, without deeper change, courts revert to their old, bad habits (see Neubauer and others 1981).

Similarly, introducing computer systems or other mechanization apparently helps reduce delay according to studies in Latin America and Singapore (Buscaglia and Dakolias 1996; Buscaglia and Ulen 1997; Hong 1995). It also appears to reduce corruption (Buscaglia and Dakolias 1999). But this is probably not a success story about increasing resources. Introducing computer systems seems to help because the systems increase accountability. Computerized case inventories are more accurate and easier to handle than the paper-based procedures they replace, which makes them harder to manipulate. So it is more difficult for judges to “lose” case files and extract bribes from litigants (see Hendrix 2000).

Of course, there are still cases of extreme underfunding where an infusion of resources can be effective. In Uganda backlogs caused by shortages of stationery were solved when another court donated paper (Odoki 1994). Although overall resource levels are often uncorrelated with judicial efficiency, increasing resources may im-
prove efficiency in certain circumstances if the additional resources are well targeted (see Buscaglia and Dakolias 1996). Unfortunately, because courts are often loath to admit that they are inefficient, identifying cases where money is truly the bottleneck is an exercise that many countries get wrong.

A major inefficiency in many judicial systems is judges’ responsibility for administrative work, such as signing paychecks and ordering office supplies. Centralizing administrative work in a single office, staffed by employees with administrative training, increased efficiency in Colombian and Peruvian pilot courts and in the Guatemalan public ministry (Dakolias and Said 1999; Hendrix 2000). But because it may subject judges’ paychecks to the government’s mercy, it may also reduce judicial independence.

Reducing Access Is Probably Not the Solution Either

Intuitively, it seems that delay could be defeated by reducing the number of filings—for example, by raising the procedural hurdles to lawsuits or increasing the costs of litigation.

A straightforward quantity theory of the judiciary would suggest that decreasing filings directly decreases backlogs. But the number of filings was found to be an insignificant factor in a study in Latin America and several studies in the United States (Buscaglia and Ulen 1997; Church and others 1978; Feeley 1983; Goerdt and others 1989, 1991; Mahoney and others 1985), though a study in Argentina and Ecuador did find it to be important (Buscaglia and Dakolias 1996). Overall, however, the evidence suggests that merely reducing filings does not solve a chronic problem of court delay. Judges are often subject to weak incentives, and reducing filings may reduce their productivity if they discover that they will not be penalized for keeping delay at the same level as before.

In countries where many people speak a language other than the dominant legal language—for example, local Indian languages in Guatemala (see Hendrix 2000)—reforms that improve access by providing interpreters or aboriginal-language materials will probably increase costs, both by making cases more expensive and by increasing caseloads as the disenfranchised assert their rights more often. The same is probably true for judicial institutions that watch over public officials, help people mobilize against injustice, and assist people in making representations to and obtaining benefits from authorities—such as acciones de tutela in Colombia and lok adalats in India (Cranston 1986; Gaviria-Díaz 1996). For that matter, any procedural reform that lowers the cost of litigation may increase filings and possibly drive up backlogs and costs, at least in the short term. If access is a major problem, a short-term increase in filings and backlogs is probably inevitable and not necessarily inefficient (see Dakolias and Said 1999).

Moreover, the interaction between access and efficiency is normally positive when associated with long-term structural or fundamental changes to the system. For ex-
ample, measures aimed at broadening access to lower-level courts, such as simplifying procedures and restricting lawyers’ involvement at certain levels of litigation, have been generally associated with increased efficiency (reduction in the time to disposition of cases). Similarly, lowering the legal requirements of complaints has been associated with increased efficiency in Japan (Hasebe 1999).

Finally, limiting access for the sake of efficiency raises social concerns, because justice may become a luxury that only the wealthy can afford. Generally speaking, efficiency is not an end in itself, and some “democratic” procedures may be desirable even though they are inefficient. For example, juries in the Russian Federation have been expensive and do not seem to be particularly good fact-finders, but in countries with a history of untrustworthy governments and inadequate protection of the innocent, juries may increase overall efficiency by restoring a sense of legitimacy, reducing convictions of the innocent (see Thaman 1999), and guarding against judicial corruption (see DeVille 1999).

**Incentive-Oriented Reforms May Help in Solving the Problem**

Many judicial reforms seek to create the “right” incentives for judges, lawyers, and litigants to increase judicial efficiency. Clearly, not all achieve that goal. The evidence suggests that the incentive-oriented reforms that foster accountability, competition, and choice are those that produce the greatest impact.

*Making judges accountable.* Judges may be regulated in many ways, but not all such regulation increases efficiency. Legislated time limits for cases appear to be ineffective, whereas individual calendars and case management seem to work, apparently by increasing accountability and competition.

Legislated time limits have been a popular response to slow trials, but they have a poor track record. In Argentina and Bolivia judges face mandatory time limits, but these are rarely enforced (Dakolias 1996). In the United States time limits were first set by the Supreme Court as a constitutional matter, then by the Federal Rules of Civil Procedure, then by federal and state legislation. In each case the rules were unenforceable. There is no objective way to tell whether a case drags on because it has legitimate difficulties or because someone falls down on the job. Moreover, every legislated time limit in the United States has had exceptions and loopholes broad enough to fit any case (see Feeley 1983). In addition, step-by-step regulation of litigation seems to merely add rigidity, limiting the space for case management techniques, reducing judges’ accountability for the overall efficiency of the procedure and leaving ample room for corruption.

Individual calendars appear to have more impact on judicial performance, by increasing accountability. A study of U.S. metropolitan courts found that civil cases move significantly faster in courts with individual calendars—where judges have
assigned cases and follow them from beginning to end—than in courts with master calendars—where many judges may work on different parts of a case at different times (Church and others 1978). The experience with delay-reduction programs in the United States suggests that because individual calendars allow problems on a case, such as excessive delay, to be traced to a single judge, they make judges work harder and manage cases more effectively (Neubauer and others 1981). Similarly, some studies have found that the individual calendar reduces times to disposition not only because the judge in charge is more familiar with his or her own cases but also because judges feel more accountable (Church and others 1978; Neubauer and others 1981; Dakolias 1996). Individual calendars have been found to be important in some Latin American countries (Buscaglia and Dakolias 1996). But the evidence is not uniform. Nimmer (1978:142) argues that neither individual nor master calendars have “a clear and consistent impact on elapsed time to disposition.”

Case management—a bundle of reforms that includes pretrial conferences, strict scheduling, and shortened discovery time cutoffs—may also improve the judiciary’s managerial capacity. Some studies in Singapore, the United States, and Latin America suggest that case management reduces time to disposition (Buscaglia and Dakolias 1996; Buscaglia and Ulen 1997; Church and others 1978; Hong 1995; Neubauer and others 1981). A U.S. study reports that pretrial conferences have no effect on time to disposition or settlement activity but may improve the quality of trials (Leubsdorf 1999). A RAND study reports that case management reduces time but increases costs, whereas shortened discovery reduces both time and costs (Kakalik 1997). (However, the RAND methodology has been criticized recently; see Flanders 1998.) The introduction of case management techniques in the Supreme Court of India is believed to be the driving force in reducing the backlog to almost a third, despite a considerable increase in filings (Verma 2000:104).

Case management is at the heart of Lord Woolf’s blueprint for reforming civil litigation in England and Wales. It may still be too early to assess the impact of these reforms, which faced some initial opposition in the academic world (see Zander 1995). Because case management was bundled with other initiatives (such as simplifying procedures) targeted at broadening access to justice and improving service for the average citizen, isolating its net effect on civil litigation in England and Wales will be difficult.

If poorly designed, case management can seriously backfire, as it did with pretrial hearings in Japan (Hasebe 1999). Moreover, there appears to be little room for case management in civil law jurisdictions, where procedure is often minutely regulated. If judges have no procedural room to maneuver (as is often the case in countries following the French civil law tradition), they can always blame their inefficiency on rigid procedure. A safe conclusion seems to be that in the hands of judges who already take judicial efficiency seriously, case management can bring effective pressure on litigants to get their acts together. But because there is no easy way to test whether
cases are being managed well or badly, case management may not make recalcitrant judges reform (see Feeley 1983).

One advantage of reforms that transfer control of cases to a particular judge, as individual calendars and case management do, is that they allow measurement of judicial performance. The mere ability to generate accurate statistics reduces delay, even without enforcement, because judges care about their numbers. This effect has been reported in Colombia, Guatemala, and the United States (Dakolias and Said 1999; Hendrix 2000; Neubauer and others 1981). More broadly, “legal culture” is a crucial determinant of whether delay is light or severe. A “soft” variable, legal culture is difficult to measure, but its existence can be verified because cases in state and federal courts in the same area take similar amounts of time even though the procedures differ substantially (see Church and others 1978). Reforms such as reporting judicial statistics appear to work because they support a legal culture unsympathetic to delay.

Sharpening incentives for lawyers. Judges are not the only cause of inefficiency. In both civil and criminal cases at least one of the parties often pursues delay or other inefficient outcomes (see Church and others 1978; Feeley 1983). In Uruguay lawyers objected to reforms that would speed up civil and criminal trials, fearing that speedier trials would mean less work. Similarly, in Peru attorneys vigorously opposed measures to cut the costs of registering land belonging to the urban poor because the measures would make them compete against other professionals, such as engineers and architects (Messick 1999). Regulating lawyers through controls on attorneys’ fees will probably not improve efficiency, but deregulating the legal services market seems promising.

Attorneys’ monopolies are good targets of judicial reform. Making lawyers compete with other professionals and facilitating self-representation by litigants can be fruitful strategies for making lawyers more accountable and increasing overall efficiency. Part of the success of the Japanese judicial system is attributed to the absence of lawyers in 90 percent of summary court cases, which account for more than 60 percent of civil litigation in Japan (Japan Ministry of Public Management 1999:762; Ogishi 1999). Similarly, high levels of efficiency and litigant satisfaction in lower-level courts in England are associated with low rates of involvement by lawyers. More than 80 percent of unrepresented small claims litigants surveyed in a recent study in that country said they would not have preferred representation (Baldwin 1997b:117).

Deregulating the legal services market improves not only efficiency but also equity by increasing access to the judicial system. The experiences in Japan and the Netherlands suggest that deregulating legal services increases the supply of legal aid and decreases costs (Blankenburg 1999; Kojima 1990). Studies of legal advocacy by lawyers and nonlawyers in the United States suggest that the decrease in costs is not necessarily associated with a decline in quality (Kritzer 1997). In the Netherlands
deregulation seems to have contributed to the high rate of mediation, allowing the less litigiously minded (such as mediators and insurance companies) to easily enter the legal services business and compete directly with lawyers. In England locally funded citizens’ advice bureaus are among the biggest providers of legal advice, though many of the advice givers are not professional lawyers. In the United States nonlawyers regularly appear as advocates before government agencies, many of which wield disciplinary power over nonlawyers or require them to pass an examination.

Establishing stringent requirements for practicing law or making membership in self-governing bar associations mandatory for lawyers may help increase accountability. Similarly, better information and accreditation systems make law schools more accountable and tend to improve the quality of the legal profession (see Fuentes-Hernández forthcoming). But caution is needed, because these are also tools of the legal monopoly. To increase competition, countries considering these measures may bundle them with policies aimed at diversifying services. Countries raising standards for legal practice might also liberalize requirements for advocacy by nonlawyers, such as mediators or paralegals.

Because attorneys’ fees account for a large part of the costs of the justice system, one natural place to apply incentives is on the attorneys themselves. Direct regulation to limit fees may reduce efficiency by restricting the supply of lawyers, whom people often believe they need. Of course, high lawyers’ fees are not desirable, but without wholesale reform of the legal profession, cheap lawyers are not a pure good. Low fees may lead claimants to hire an attorney even for minor controversies that an arbitrator could have resolved. Reduced costs may also increase litigation—both good claims and bad.

Pressure can also be placed on subordinate judicial officials. Administrative concentration—the concentration of many administrative tasks in the hands of one official—has been associated with corruption, because bribery becomes easier when a single identifiable individual has the power to speed the processing of a case. Reforms that disperse administrative tasks across several officials appear to increase accountability and reduce corruption (see Buscaglia and Dakolias 1999).

**Sharpening incentives for litigants.** One way to discourage long litigation is to increase the direct costs to one or both parties. In Singapore, where the first day of trial is free and court fees progressively increase for subsequent days, 80 percent of trials take a single day (Buscaglia and Dakolias 1996). Similarly, in Latin America higher direct costs have been found to shorten the duration of cases (Buscaglia and Ulen 1997). But what a court system gains in speed it may sacrifice in access for poor people with more complex cases. The system allows wealthier litigants to win cases by outspending their opponents.

Fee shifting mechanisms can increase the direct costs to at least one party. In countries where the losing litigant pays, the loser ends up bearing greater costs than in
the American system, where litigants generally bear their own costs. A loser-pays system probably cuts down on frivolous litigation—by deterring parties who have no chance of succeeding on the merits but bring a case to extort a settlement from the defendant. But in cases where both litigants stand a fair chance of winning, each may be encouraged to outspend the other in the hopes of producing a marginally more persuasive case—thereby winning and paying nothing. This may contribute to high legal costs in Germany and Great Britain (Baldwin 1997a; Rohl 1990). So the effect of litigants’ cost on judicial efficiency is unclear.

Creating competition among courts. Creating specialized courts generally improves efficiency, in part because such courts tend to have streamlined procedures and in part because they offer an alternative forum for litigants that may compete with regular courts.

Competition between different courts and between different bodies of law has been a guiding force behind legal innovation in Anglo-American law since medieval times. The English legal system was largely shaped by the “rather unedifying but often beneficial competition” among the royal common law courts “vying with each other to attract litigants by offering better procedures” (Kiralfy 1990:129). The Chancery Court led the way in this competition, and the common law courts had to imitate the Chancery Court—by adding flexible procedures and remedies—or lose business (Kiralfy 1990:128–39). Similarly, competition between courts of different states and between state and federal courts has led to improvements in the United States (Berman 1983).

Creating or extending small claims courts is among the most praised judicial reforms. In many countries small claims courts have substantially reduced times to disposition and expanded access to justice. The introduction of small claims courts in Brazil in 1995 “succeeded in bringing justice closer to the Brazilian people [by allowing them to] litigate at a very low cost, in an informal manner, and see immediate results for their judicial initiative” (Bermudes 1999:347). The increase in the small claims limit in Great Britain is vastly popular among old and new litigants (though some of the enthusiasm may be driven by the lower risk for small claims litigants, who, unlike litigants in regular British courts, need not pay their opponents’ legal fees nor go up against defendants bankrolled by the government’s generous legal aid system; see Baldwin 1997a). Parties in informal or small claims courts in the Netherlands may initiate ordinary proceedings after the initial case, but this rarely happens, suggesting that both parties are generally pleased with the result (Blankenburg 1999). Small claims courts are popular in many other countries, such as the United States and Japan (see Kojima 1990). But they also receive criticism for not providing enough legal advice to pro se litigants (Baldwin 1997a) and sometimes for remaining too formal in their procedures and thus failing to fulfill their promise of reducing cost and delay, as in Germany and Italy (Rohl 1990; Varano 1997).
In Uganda administrative tribunals have provided an efficient solution to judicial stagnation. When the National Resistance Movement took power in 1986 after a protracted guerrilla war, it set up resistance councils and committees to “promote national unity and foster popular participation in the governance and development of Uganda” (Odoki 1994:63). In 1988, with magistrates’ courts seen as slow and corrupt, the resistance committee courts were given judicial power to provide popular justice at the grassroots level. Their jurisdiction—mainly civil—includes debts, contracts, trespass, conversion of property, assault and battery, and customary disputes related to eloping with or impregnating a girl under age 18. These courts may order civil remedies, including costs, apology, reconciliation, declaration, compensation, restitution, or attachment and sale. They use simple, informal procedures and keep only the essential particulars of a case in the record of proceedings to assist in case of appeal. Decisions are made by consensus or majority vote, and lawyers are not allowed to appear before the courts except in cases dealing with breach of council by-laws.

Uganda’s resistance committee courts are said to be a popular forum providing simple, efficient, and accessible alternative dispute resolution. But plans to expand their jurisdiction have been criticized as offending the independence of the judiciary and separation of powers, because the resistance committee courts also act as police, prosecutor, judge, and enforcer and exercise political power (Odoki 1994). Experience in other countries suggests that simplifying procedures and creating specialized courts within the judiciary could also have provided efficient and inexpensive justice for citizens.

Specialized courts with jurisdiction over particular subject matter can also increase efficiency. Such courts have been set up for streamlined debt collection in several countries, including Germany, Japan, and the Netherlands (Blankenburg 1999; Kojima 1990; Rohl 1990). Labor tribunals in Ecuador, tenancy tribunals in New Zealand, and commercial courts in Tanzania have all reduced times to disposition (Cole 2001; Dakolias 1996; Finnegan 2001). The Netherlands also has a specialized court for divorce cases, which is considered cheap and easy to use (Blankenburg 1999). In the United States judges who specialize in contested divorce trials tend to resolve cases faster (Buscaglia and Dakolias 1996). Many of these specialized courts emphasize arbitration and conciliation, so some of these positive results may be due to the effect of alternative dispute resolution and not the specialized courts themselves.

In Tanzania a commercial court created to handle large commercial disputes reduced the average time to disposition of commercial cases from more than a year to less than three months in its first year of operation. Because the commercial court must compete with the general division of the High Court that otherwise has jurisdiction, and because it is more expensive than the general division (it collects filing
fees proportional to the amounts in dispute), it must offer quicker or higher-quality dispute resolution (Finnegan 2001).

Specialization is good not only for courts. Experience in Guatemala shows that setting up specialized teams in the prosecutor’s office can lead to better-quality prosecutions (Hendrix 2000). But a note of caution is in order. Courts that specialize in native or “peasant” justice have often been criticized for failing to respect human rights, as in Peru (Zarzar 1991). Other courts specializing in popular justice, like the *nyaya panchayats* in India, have been considered corrupt and driven by factionalism, though the experience with *lok adalats* in that country has been more positive (Cranston 1986). Even specialized, informal courts are still agents of the state, and procedures are in place in part to guarantee fairness and equal treatment for all litigants.

*Providing alternative dispute resolution.* Alternative dispute resolution is also generally positive, particularly because it creates competition and choice. As noted, arbitration and conciliation are a strong element of many successful small claims courts, specialized courts, and native justice courts—including the *kort geding* in the Netherlands (Blankenburg 1999), labor mediation in Ecuador (Dakolias 1996), mediation centers in Latin America (Hendrix 2000), *lok adalats* in India (Cranston 1986), and justices of the peace in Peru (Brandt 1995), the United States (Dakolias 1996), and elsewhere. Moreover, the presence of alternative dispute resolution can reduce opportunities for corruption, as it has in Chile and Ecuador, because a judicial system competing with other institutions is less able to extract bribes from litigants (Buscaglia and Dakolias 1999).

In criminal courts, introducing plea bargaining to avoid or abbreviate a trial tends to reduce times to disposition, as expected (Hendrix 2000). Some countries with a totalitarian past frown on plea bargaining, however, for fear that it may mask a coerced confession (DeVille 1999).

Although no one questions the value of voluntary alternative dispute resolution, the mandatory kind is another story. One study suggests that whether mediation is voluntary or mandatory has no effect (Buscaglia and Dakolias 1996). But others suggest the opposite. In the United States the courts with the most intensive civil settlement efforts tend to have the slowest disposition times; extensive settlement programs improve neither processing time nor judicial productivity (Church and others 1978). Referring cases to mandatory arbitration has no major effect on time to disposition, lawyers’ work hours, or their satisfaction and has an inconclusive effect on their views of fairness (Kakalik 1997). In some mediation programs—for example, in Japan and some parts of Latin America (Dakolias 1996; Hasebe 1999)—the mediator is also the judge. This may be procedurally unfair, as the judge may railroad the parties into a settlement, and the parties will fear being frank before the same official who will later pass judgment on them.
Simplifying procedures and increasing their flexibility appear to improve both efficiency and access to the judiciary, and ultimately to increase justice, in countries experiencing a chronic problem of judicial stagnation.

Complex procedures reduce transparency and accountability, increasing corrupt officials’ ability to elicit bribes for progress on a case (see Buscaglia and Dakolias 1999). By contrast, simplifying procedures tends to decrease time and costs—as with the shortened time cutoff for discovery in the United States (Kakalik 1997)—and increase litigants’ satisfaction—as with the streamlined procedures of British small claims courts (Baldwin 1997a) or justices of the peace in Peru, the United States, and elsewhere (Brandt 1995; Dakolias 1996). The efficiency of small claims courts seems to be driven less by any structural difference with regular courts than by the simplicity of procedures. Indeed, English small claims courts are not a separate institution—county court procedures have merely been modified over the years to accommodate small claims (Baldwin 1997b:5). The same is true in Scotland (Kelbie 1994; Mays 1995) and several U.S. states.

In the Netherlands the kort geding, technically the procedure for a preliminary injunction, has developed informally into a type of summary proceeding on matters of substantive law. To decide a kort geding rarely requires more than one oral hearing. The parties present their case and reply immediately; the president of the court indicates the parties’ chances of success in a full action. The oral hearing often ends in settlement. Kort geding cases take six weeks on average. The Netherlands has also cut costs and time to disposition by instituting streamlined debt collection and divorce courts. The debt courts are extremely quick and cheap for plaintiffs in the mass of cases where defendants do not contest the claim. In the divorce courts judges can make a decision based on written documents submitted by one side unless the other party objects or the Council for Child Protection says that children will be adversely affected. In 25 percent of cases parties handle their own divorce on the basis of a precourt agreement negotiated with the help of one attorney. In the future nonlawyer divorce mediators may play an increasing role (Blankenburg 1999).

The introduction of Tenancy and Disputes Tribunals in New Zealand in 1986 was another successful judicial reform. Before the reform complex and archaic legal language made resolution of landlord-tenant disputes slow, expensive, and inaccessible. Today, Tenancy Tribunals handle 41,000 landlord-tenant disputes a year, hearing 64 percent of the cases within 10 working days and 88 percent within 15. Cases are normally settled or adjudicated in a single hearing among the parties and the adjudicator, with 55 percent resolved by mediation (Cole 2001).

New Zealand’s Tenancy and Disputes Tribunals are both specialized courts, but procedural simplicity, not court specialization, is at the heart of the reform. Jurisdic-
tion is not bound to give effect to strict legal forms or technicalities, and many of the adjudicators do not hold a law degree. Participation of lawyers is prohibited in Disputes Tribunals and strongly discouraged in Tenancy Tribunals. Complaints are expected to be very simple, and defendants are notified by mail. Proceedings are mostly oral. Tenants are not required to notify the tribunal or the landlord of their defense before the hearing. The tribunal may call for and receive as evidence any statement, document, information, matter, or thing that in its opinion may help deal effectively with the matters before it, whether or not that evidence would be admissible in a court of law. Judgment is normally handed down in court at the end of the hearing. Only 5 percent of decisions are appealed (Cole 2001).

India’s lok adalats (“people’s courts”) are an inexpensive alternative to formal justice. The lok adalats, normally composed of a retired judge, a lawyer, and a social worker, mediate disputes through informal procedures accessible to the ordinary citizen. If there is no settlement, cases can revert to the formal system. In the decade ending in 1992 the 5,634 lok adalats disposed of 3.25 million cases. They are most successful with motor accident claims, revenue issues, and minor criminal matters; less so with family disputes (Cranston 1986).

Lok adalats have also successfully handled complicated multiparty conflicts that in other countries would typically require lengthy and expensive class action litigation. A lok adalat in Visakhapatnam settled claims for additional compensation of about 25,000 villagers whose lands were acquired for a steel plant, and one in Andhra Pradesh settled 40,000 land acquisition cases arising out of three irrigation projects. Another settled claims of 9,046 small cane growers and 1,186 workers in sugar factories taken over by the state government (Cranston 1986).

Simplifying procedures has improved efficiency and access in countries with such diverse legal traditions as those of Japan, Peru, and Scotland (see Brandt 1995; Kelbie 1994; Kojima 1990; Mays 1995; Ogishi 1999). Moreover, using a sample of 109 countries, a recent study of comparative litigation, the Lex Mundi project, found that formalism in procedures is strongly correlated with judicial inefficiency. Formalism is associated with more corruption, less consistency, less honesty, inferior access to justice, and longer expected durations of judicial proceedings. Because formalism is significantly greater in countries with civil law traditions than in those with common law traditions, the authors of the study suggest that transplanting civil law traditions from France or Spain may have led to inefficiently high procedural formalism in developing economies especially (Djankov and others forthcoming).

Clearly, the impact of simplifying procedures depends on how burdensome they were before. Streamlining procedures in clogged systems will probably improve service, shorten time to disposition, increase litigants’ satisfaction, and improve access in the long run. But reforming already simple procedures may have little effect or result in frivolous litigation. Common law countries, rich and poor, seem to have more easily adaptable procedures than civil law countries, where judges facing overly rigid
procedures have little room to maneuver (see Djankov and others forthcoming). The need for more flexibility in procedures appears to be particularly acute in developing economies with civil law traditions.

The predominance of written over oral elements is a factor commonly associated with inefficiency in civil law countries, especially in Latin America but also elsewhere (see Rohl 1990; Varano 1997; Véscovi 1996). Oral hearings are unimportant, and judges do not have direct contact with witnesses and other sources of evidence. These characteristics tend to go along with a piecemeal trial rather than one continuous in time. A move toward orality produced positive results in Paraguay, Uruguay, eighteenth-century Prussia, and possibly Italy (Dakolias 1996; Tarigo 1995; Varano 1997; Véscovi 1996; Weill 1961). Orality is, of course, a dominant characteristic of small claims courts and specialized tribunals, which are widely popular for this and other reasons (see Baldwin 1997a; Blankenburg 1999).

Reforms aimed at increasing procedural flexibility can do so by creating different procedures for different types of cases or by allowing the judiciary some leeway to adapt procedures. Lord Woolf’s recent reform of civil procedures in England and Wales is based on the concept that different procedures should govern different types of cases. Litigation is divided into small claims (up to £3,000), fast-track cases (£3,000–10,000) with limited procedures and fixed costs, and multitrack cases (more than £10,000) with effective judicial control over both procedures and the protection of the interests of litigants. Similarly, New York launched a pilot program in 1993 in which four judges with expertise in commercial litigation and management of complex cases were designated to hear complex commercial disputes. The program substantially reduced the number and length of pending cases and increased the number and speed of dispositions. In 1995 the court was established permanently (Kerr and others 1999).

Such experimentation and innovation can become difficult if every procedural change has to go through the legislature. To ease the bottleneck, the legislature could partially delegate its powers relating to courts’ organization and procedural rules to the judiciary as a whole—which has been done to some extent in the United States and has proved beneficial in Uruguay (Tarigo 1995). Or the legislature could partially delegate these powers to individual courts to encourage more flexibility—as has been done in Great Britain, where small claims judges are free to adopt any procedure they believe will be just and efficient (Baldwin 1997a). Procedural flexibility allows experimentation and innovation and permits local courts to adapt to local needs (Weller and others 1990). As long as legislatures retain control over judicial procedure, they should be able to continue to check abuses of the procedure-making power.

Not all streamlining efforts work. In the Dominican Republic, for example, forms intended to simplify case filing procedures apparently complicated the process (Varela and Mayani 2001:12). But in this case the streamlining effort was quite limited, when much more fundamental reforms were needed.
Moreover, time to disposition and cost do not tell the whole story. Most legal procedures were adopted because they were believed to serve accuracy, protect the accused, improve access, or otherwise further justice. In the United States, for example, the Federal Rules of Civil Procedure appear to have increased costs and to have had no effect on delay but may have increased accuracy, which may or may not be a net gain (Leubsdorf 1999). To the extent that a legal system focuses on speed and cheapness, it risks losing some of the less measurable goals of procedure. The introduction of preliminary criminal hearings in Uganda is a prime example of a reform that seems to reduce backlogs of criminal cases but at the cost of accuracy and protections for the accused (Odoki 1994).

Other Considerations

This section discusses some caveats on judicial reform efforts in general, the politics of judicial reform, and the relationship between judicial reform efforts and economic development.

*We Have No “Justice-O-Meter”*

Lest this discussion sound too optimistic, two notes of caution are warranted. First, one should not read too much into these empirical results. The complexity of judicial systems points to some important caveats. Of the three elements of justice—accuracy, speed, and cost—the first is not easily measurable and hard to even define without reference to country-specific norms. The best we can do is subjective surveys of the satisfaction of litigants or attorneys (see Baldwin 1997a; Kakalik 1997), surveys that are admittedly unrefined and problematic. Sometimes we know the effect of reforms on accuracy: In one study that reported effects of reforms on the duration of cases, patterns of case disposition remained unchanged, so accuracy probably also stayed the same (Neubauer and others 1981). Usually patterns of case disposition do change, and without an independent way of judging accuracy, we generally cannot be sure whether accuracy has increased.

Second, studies of the judicial system tell us little about the invisible mass of cases that settle before even seeing a courtroom.1 They tell us even less about the possibly larger mass of cases that never develop because potential litigants are discouraged by procedural problems, a hostile substantive law, distrust of the accuracy or honesty of the judicial system, or simple ignorance of their legal rights. One way to measure discouragement of litigants is to observe the number of filings—if people file fewer cases, the reason may be that they have less confidence in the ability of the justice system to rule in their favor. But this measure reflects plaintiff-friendliness, not accuracy. Because of the way the judicial system works, defendants are at the mercy of
plaintiffs, even in a loser-pays system. They do not choose to be sued. Thus if proce-
dural changes increase the number of filings, we still cannot know whether they
increase judicial accuracy or simply increase frivolous litigation.

Despite such caveats, common in most empirical work, capturing the underlying
forces identified across studies is useful. Knowing empirical results but recognizing
their deficiencies—for example, knowing results on time and cost and demanding a
convincing intuitive story about accuracy—is a step up from much discourse about
judicial reform, which describes reforms in the belief that their correctness is intu-
itively obvious to the reader and dispenses entirely with the need for evaluation. If
anything, the field of judicial reform needs more empirical analysis, not less.

**The Perils of Transplantation**

Allison (1996) argues that the importation into England of administrative tribunals
modeled on the French *Conseil d’État*, where individuals could sue the government,
was unsuccessful because the English legal tradition, unlike the French one, did not
have a well-developed distinction between private and public law. Damaška (1997)
explains the similar perils of transplanting Anglo-American rules of evidence into the
Continental system.² “Anyone contemplating the use of foreign legislation for law
making in his country,” Kahn-Freund (1974:12) tells us, “must ask himself: how far
does this rule or institution owe its existence or its continued existence to a distribu-
tion of power in the foreign country which we do not share?”

In a critique of the transplantation of the American constitutional model into Ethio-
pia, Mattei (1995) wonders whether the Western rule of law is a desirable target for an
African country. Mattei (1995:127) concludes, “If Africa desires to borrow from west-
ern institutions, which I do not believe to be a sound policy, it should do so after a serious
comparative analysis of the pros and the cons of each institutional alternative.”

Similarly, after a thorough review of transplanted legal systems and customary
law in several African countries, a South African legal scholar categorically concludes
that it would be a pity to miss the opportunity to enrich our social and legal
culture by some imaginative fusion of distinctly African models of, for
example, dispute settlement. The blind and hegemonic push for uniformity
around a non-African standard simply increases resentments that have been
simmering since colonial times. We are dealing with a people who have
grounds for being suspicious of the purveyors of “modernization,” which in
their minds translates into “westernization,” a process not characterized in
the past by too much respect for the African viewpoint. (Nhlapo 1998:88)

In the Philippines, enhancing tribunal and community-based traditions and sys-
tems for resolving conflict has proved to be an effective strategy for addressing struc-
tural inefficiencies of the judiciary (Mayo-Anda 2001). Mayo-Anda (2001:851–52) argues that transplantation may give rise to “serious strains in the recipient justice system,” for foreign law is not “a boutique in which one is always free to purchase some items and reject others. An arrangement stemming from a partial purchase—a legal pastiche—can produce a far less satisfactory . . . result in practice” than either the recipient or the source system in its unadulterated form.

Part of the reason is that to succeed, a judicial system must achieve a balance among at least three elements—accuracy (or fairness), speed, and access (Zuckerman 1999)—and the tradeoffs among these elements differ for different countries. Some countries—for example, France, Germany, Japan, and the United States—have achieved a balance among accuracy, speed, and access that if not optimal at least does not seem glaringly wrong. Other parts of the world—even the developed world—have succeeded less well.

The accuracy-speed-access tradeoffs in the developing world may be quite different than those in developed economies. It is unlikely that complicated legal systems that work in rich countries, which have the resources and expertise to handle complexity, can be transplanted without significant modification into poor countries. Developing economies tend to lack a highly trained and competent judiciary, have fewer resources with which to fund such a system, and would have more trouble achieving good results even if they had the same resources as developed economies.

Moreover, the evidence suggests that poor countries have more formal procedures than rich countries, apparently as a result of legal transplantation rather than benevolent design (Djankov and others forthcoming). In many developing economies proceedings often last more than 10 years, even for simple cases (see Buscaglia and Dakolias 1996). In Sri Lanka, lawyers have a high level of professional competence, and “a good number of [them] have been trained in western, and particularly North American countries,” yet the judicial system functions poorly (Malik 2001:93). Even appeals against death penalty sentences “take at least three years,” and “land disputes are often passed on to sons and grandsons” (Malik 2001:97). There appears to be a mismatch between the types of conflicts that the legal system was designed to address and those that most people actually face.

This is not to say that lawyers in poor countries should not seek foreign education. Instead, it suggests that in a largely agricultural society with a judiciary that has very limited human and financial resources, greater emphasis should be placed on reducing the gap between highly sophisticated justice in a few cases and no justice at all in most.

Poor countries, or countries without a developed judicial tradition, should probably concentrate on instituting simple rules and procedures that are easy to enforce. A legal system that will do perfect justice in infinite time and at infinite cost is probably a luxury that the poor can ill afford. Efficient though blunt justice is better than no justice at all.
Short- and Long-Term Effects of Judicial Reforms

Judicial reforms that enhance efficiency often have negative effects in the short term. If filings are exogenously decreased, judges who remain equally productive will resolve cases more quickly. But when the quality of the service improves, the demand for justice increases. Therefore, if delay decreases, filings may increase, as they did in Ecuador after a large one-time budget increase and in Colombia after the introduction of pilot courts in Itaguí (Buscaglia and Dakolias 1996; Dakolias and Said 1999). The reverse is also true: if delay increases, filings may decrease—as they have in Argentina, Ecuador (Buscaglia and Dakolias 1996), and the United States5—as litigants are forced to resolve their disputes informally or leave their grievances unresolved. Thus it may be impossible to fully understand the effect of judicial reforms in the short run.

Moreover, pain relievers cannot solve chronic congestion problems. Large one-time efforts are effective only if accompanied by broad structural or procedural changes in the judicial system (see Hong 1995; Neubauer and others 1981). Reforms that do work may increase congestion temporarily (see Bermudes 1999).

The Politics of Judicial Reform

To be successful, judicial reform, like any legal reform, needs to incorporate local political and judicial realities (see López-de-Silanes forthcoming). It also needs to be translated into enforceable changes. But the politics of reform are difficult, because forces that benefit from the status quo (such as through rent seeking) will attempt to block reform. These forces include most types of actors in the judicial process, from judges and clerks to lawyers and politicians.

One of the most important questions in judicial reform is that of judicial independence. Clearly, the degree to which courts can adjudicate without fear of meddling by the other branches of government bears directly on questions of accuracy and the political feasibility of many reforms, such as introducing juries (see Schauer 1998; Widner 1999). This issue might be particularly important for developing economies as they struggle to establish the independence of different branches of power. Judicial independence—desirable for free, democratic, and prosperous societies—is difficult to establish and maintain (see Widner 2001 for a discussion of efforts to achieve judicial independence in Tanzania). As Oxner (1998) reminds us, measures to strengthen judicial independence, such as by improving security of tenure, may also hamper judicial accountability.

Many judicial reforms aim at strengthening judicial independence, because in many cases the sovereign’s influence on judges and lawyers affects judicial performance. In China, for example, the fact that judges “remain under the de facto control of the same power that controls local enterprises” has seriously undermined the en-
forcement of judgments against locally important state-owned enterprises and led to judicial inaction in class action suits involving publicly traded firms (Clarke 1996:80).

Clarke (1996) has shown that the Chinese judiciary’s lack of independence may stem from factors that go beyond the protection of local enterprises. Chinese judges have to deal with the fact that ruling officials may determine the outcome of cases. As a result both judicial and nonjudicial officers appear to perceive judges as no different than any other government functionaries; in effect, judges act as if they were another piece of the state apparatus. This observation, which can also be made about many other developing economies, has deep economic implications. The successful transformation of a centrally planned economy or one dominated by state enterprises into one driven by market forces depends not only on the adoption of new laws but also on profound changes in the ways in which laws are applied and enforced. Independent courts are a fundamental part of the institutional framework that enables markets worldwide to operate smoothly.

The political feasibility of reforms also depends on the strength of the institutions of civil society—a free media, opposition political parties, a reform-friendly business community—which can bring pressure to bear on a judiciary that is not keen on reforming itself (see Dakolias and Thachuk 2000; Finnegan 2001; Fuentes-Hernández 2001). Such pressure can also come from the outside, from foreign governments or foreign businesses. Such institutions are not sufficient to bring about reform, but they are probably necessary in the long run for reforms to succeed.

In the Philippines judicial reform engaged civil society through continued community empowerment activities, informal monitoring and evaluation mechanisms, effective use of tribal and community-based systems of decision making and law enforcement, and sustained partnerships between local communities, nongovernmental organizations, and government. The Philippines experience suggests that all these may play a crucial part in effective justice at the local level in developing economies (Mayo-Anda 2001).

**Judicial Reform and Economic Development**

Effective judicial reform may improve economic performance by checking government abuses or by facilitating fruitful exchanges between private individuals. As World Bank President James Wolfensohn declares in the foreword to World Development Report 2002,

> Effective institutions can make the difference in the success of market reforms. Without land-titling institutions that ensure property rights, poor people are unable to use valuable assets for investment and income growth. Without strong judicial institutions that enforce contracts, entrepreneurs find many business activities too risky. Without effective corporate governance
institutions that check managers’ behavior, firms waste the resources of stakeholders. And weak institutions hurt the poor especially. For example, estimates show that corruption can cost the poor three times as much as it does the wealthy. (World Bank 2002:iii)

The view that well-functioning courts boost economic performance by controlling government abuses and upholding the rule of law puts a large premium on judicial independence. Recent work by La Porta and others (2002) sheds some light on the mechanics of the relationship. After examining the constitutions of a large number of countries, the authors measure the independence of the judiciary from other branches of power and find that institutions of judicial independence are strong predictors of economic freedom.

A second view, that judicial efficiency directly enhances economic development by supporting transactions between private contracting parties (Messick 1999:120), is supported by cross-country evidence. A study of more than 100 countries shows that greater regulation of dispute resolution does not translate into positive outcomes, as measured by litigants’ satisfaction with and trust in the judicial system and the enforcement of the law (Djankov and others forthcoming).

The two theories of the effect of judicial efficiency on the economy may not be mutually exclusive. More independent judges are often more efficient judges. For example, the systematic corruption of judges associated with poor judicial independence has led to a deterioration in the service delivered by the judiciary in many countries (see Buscaglia and Dakolias 1999; Widner 1999, 2001). Moreover, the combination of judicial independence and efficiency seems to be essential for judicial reforms to have a positive effect on economic development.

Conclusion

The four basic schools of thought about judicial reform point to different factors as the main cause of judicial inefficiency—inadequate resources, excessive access, poor incentives, and complex procedures. A review of the evidence shows that the first two are insufficient to explain judicial inefficiency in most countries. Instead, the evidence suggests that inadequate incentives and overly complicated procedures account for most of the problem. Although incentive-oriented reforms can be effective, incentives alone will not end chronic judicial inefficiency. Most cases of judicial stagnation require simplifying procedures and increasing their flexibility.

If the goal is to ensure cheap, swift, and accurate justice, infusions of money are probably not the answer. Reforms that tinker around the edges—such as indiscriminately increasing judicial budgets or salaries or instituting a one-time crash program to reduce case backlogs—are unlikely to succeed. But purely managerial reforms can
work in extreme cases, where resource shortages are particularly acute or allocations of the workload particularly perverse (with judges unable to delegate routine administrative tasks to a clerk). Managerial reforms can help judges who already want to change, though these are the judicial actors least in need of prodding.

Nor does limiting access to court services appear to be the solution. A reduction in filings will not solve a chronic problem of court delay. As with any public service, limiting access for the sake of efficiency may have a net negative social impact. A judicial system that denies people the right to sue will leave many wrongs unrighted and create a perverse incentive for people to take justice into their own hands. Moreover, access and efficiency can often go hand in hand when associated with long-term structural or fundamental changes to the system.

Incentive-oriented reforms that seek to increase accountability, competition, and choice appear to be the most effective. Strengthening accountability increases judicial efficiency. Judicial databases that make cases easy to track and hard to manipulate or lose (whether by accident or on purpose) also help guard against sloppy procedures and corrupt behavior. Individual calendars explicitly link the management of a case to a particular judge, making judges accountable to the public and the political decisionmakers about whose opinions they care. Statistics on judicial performance have been reported to reduce delay in several countries, even without enforcement mechanisms. Statistics are most effective when information on clearance rates and time to disposition is generated for each judge. In traditionally corrupt or repressive countries, juries can provide a check on the behavior of judges, because overruling a jury is a visible and seemingly heavy-handed act.

Improving competition and choice, by creating alternatives to the standard court system, also tends to increase judicial efficiency. Alternative dispute resolution and nonexclusive small claims and specialized courts enable litigants to escape slow and expensive court processes and save time for the courts (as does criminal plea bargain- ing). Mandatory alternative dispute resolution is less clearly beneficial than the voluntary kind, however. Competition and choice seem to work at all levels—sophisticated international commercial arbitration provides an expensive yet cost-effective alternative to court litigation for complex international transactions, and small claims courts provide a cost-effective alternative for day-to-day disputes.

Administrative justice has proved effective in poor countries facing extreme court delays. Yet the success of administrative tribunals may come at the cost of losses in judicial independence, in the separation of powers, and ultimately in democracy. The same results may be achieved without compromising judicial independence by simplifying procedures and creating specialized courts.

By allowing people to prepare a case without relying on the expensive services of the legal monopoly, deregulation of legal services can create efficiency-enhancing competition (for interesting case studies, see Blankenburg 1999; Kojima 1990; Kritzer 1997). Of course the best alternative to the standard legal system is the opportunity
to avoid a dispute in the first place. Simplifying substantive rules can enable people to structure their behavior so as to reduce their chances of ever having to use the legal system (Epstein 1995).

Allowing courts to offer superior service in exchange for higher fees would increase accountability: Litigants would signal their desire for better procedure through their willingness to pay, and courts would have to respond to these desires or risk losing business. But this reasoning runs afoul of the ideal of equal justice unless competition and choice are truly present—that is, if the jurisdiction of the “better” court is nonexclusive, and if the old court system does not increase its fees or allow the quality of its service to deteriorate (see Finnegan 2001).

Not everything that looks like an incentive-based reform will succeed or will be beneficial if it does succeed. For example, legislated time limits are largely unenforceable. Fee shifting, as with loser-pays rules, makes frivolous litigants responsible for the burdens they place on hapless defendants, but it can lead to excessive legal costs in cases where either party might win, by encouraging the parties to think that if they spend enough they will win and thereby avoid having to pay. Although high legal fees reduce the legal system’s subsidy of litigation, they do so at the cost of restricting access.

Streamlining procedures is another way to increase judicial efficiency. Establishing simple procedures for simple cases apparently improves the overall efficiency of a system by allowing most litigation to be resolved swiftly and inexpensively in one or two hearings, avoiding adding to the caseloads of upper judges. Such reforms have improved efficiency and access in countries with such diverse legal traditions as those in Brazil, England, Japan, Peru, Scotland, and the United States. Lay language and pared-down procedures have made small claims courts and justices of the peace widely popular. By contrast, overly formal procedures have been blamed for the limited success of small claims courts in Italy.8

Cutting the number of steps in a trial decreases time and costs and reduces opportunities for corruption. Even so, many procedures exist for a reason, and to the extent that streamlining procedures may undermine important procedural rights, caution is warranted. But judicial systems in developing economies seem to suffer more from an excess of formality than from its lack (Djankov and others forthcoming).

In judicial systems that rely excessively on written procedures, shifting toward oral hearings tends to make trials simpler, faster, and cheaper. This shift probably will not lead to an appreciable loss of accuracy and may even lead to a gain, because the judges will have direct contact with the evidence and the trials will not be piecemeal.

Procedural rigidity seems to be strongly correlated with legal origin (Djankov and others forthcoming). In developing economies that inherited civil law traditions from France or Spain, judges must contend with overly rigid statutory procedures allowing little room to maneuver. Common law countries—rich and poor—seem to have more easily adaptable procedures.
Analyzing the problem of judicial inefficiency a few years ago, Posner (1998:3) suggested that “there may be a chicken and egg problem: a poor country may not be able to afford a good legal system, but without a good legal system it may never become rich enough to afford such a system.” The available evidence suggests that judicial inefficiency is not just a matter of national income. According to Djankov and others (forthcoming), the problem of overly rigid procedures seems to be particularly critical in developing economies, apparently as a result of legal systems being transplanted without adaptation to local needs. The evidence also shows that judicial independence is essential for judicial reforms to have a favorable economic impact. Independent judges are the watch guards of economic freedom (La Porta and others 2002).

It is unlikely that complicated legal systems that work in rich countries, which have the resources and expertise to handle complexity, can be transplanted without significant modification into poor countries. Poor countries and those without a developed judicial tradition should probably concentrate on instituting simple rules and procedures that are easy to enforce. A good first step is often to enhance community-based mechanisms for resolving conflicts.

Notes

Juan Carlos Botero is with the School of Management at Yale University; his e-mail address is juan.botero@yale.edu. Rafael La Porta, Andrei Shleifer, and Alexander Volokh are with the Economics Department at Harvard University; their e-mail addresses are rafael_laporta@harvard.edu, ashleifer@harvard.edu, and volokh@fas.harvard.edu, respectively. Florencio López-de-Silanes is with the School of Management and the Economics Department at Yale University; his e-mail address is florencio.lopezdesilanes@yale.edu.

1. One study, based on a telephone survey to randomly selected U.S. households, revealed that among grievances involving $1,000 or more that were reported during the previous year, only 5 percent finally resulted in a court filing (Carp and Stidham 1990:191).

2. Damaška (1997) describes three perils of transplanting rules of evidence from the Anglo-American system into the Continental system. First, American rules of evidence are heavily influenced by the American jury system; in a world of bench trials, concerns about prejudicial evidence may be less pressing. Second, Anglo-American trials are characterized by “continuous” fact-finding in the context of a concentrated trial, whereas Continental trials have “episodic” proof-taking, and rules of evidence designed for the first system may not work well in the second. Finally, adversarial evidence gathering methods, in which attorneys prepare their own witnesses and develop evidence by direct and cross-examination, do not sit well with the inquisitorial system, in which attorneys provide witnesses (with whom they have little contact) to the court.

3. In 1993 French cases lasted an average 4.8 months in the Tribunal d’Instance, 9.3 months in the Tribunal de Grande Instance, and 13.3 months in the Court of Appeals (Nouel 1999). In Germany in 1993, civil disputes in a court of first instance lasted an average 4.2 months in county courts and 6.1 months in district courts; disputes lasted an average 4.9 months in a district court of second instance and 8.7 months before the Higher Regional Court. More than 53 percent of county court cases were disposed of in less than three months, and more than 80 percent in less than six months; for district courts, the shares were 42 percent and 68 percent (Heckel 1999). In Japan nearly 60 percent of cases are dis-
posed of at a low cost, in a single hearing, and without a lawyer. More than 95 percent of civil cases in summary courts and more than 60 percent in district courts are disposed of in less than six months (Ogishi 1999). The overall clearance rate is 99.5 percent (5,104,000 civil, administrative, criminal, domestic, and juvenile cases were disposed of in Japan in 1997, out of 5,128,000 cases filed). Only 5 percent of all civil litigation is appealed (see Japan Ministry of Public Management 1999). In the United States typically more than half of all cases are disposed of quickly and cheaply in single hearings before small claims and other lower courts, and the vast majority are never appealed (Ostrom and Kauder 1998; Carp and Stidham 1990; Kerr and others 1999: Weller and others 1990).

4. In Italy civil disputes last an average of almost two years before a pretore, three years before a tribunale, and three years before the Corte di Apello (Gianni 1999). Varano (1997) associates this inefficiency with procedural rigidity.


6. Under the forum non conveniens doctrine, U.S. courts will often decline jurisdiction over disputes that can more conveniently be tried in a foreign court (even if the U.S. court otherwise has jurisdiction). But a U.S. court can choose to assert jurisdiction rather than sending the matter to the foreign court if it believes that the system of justice in that court’s country is inadequate.

7. See Matus (1999:64) for a discussion of how millions of dollars in foreign investment were withdrawn from Chile because of frustration over the uncertainty of the legal system.

8. For interesting case studies of small claims courts, see Baldwin (1997a), Kojima (1990), and Rohl (1990). For an interesting case study of a commercial court, see Finnegan (2001).

References


