

Institutional Reform and the Judiciary

Which Way Forward?

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This paper presents some general lessons in institution building that has relevance for reform of the judiciary. The paper emphasizes the value of simplicity in design commensurate with country capacity, the importance of innovation/experimentation, and of economic openness in effective institution building. It underscores how the incentives of individuals depend on both the details of institutional design within the judiciary itself but also some critical institutions external to the judiciary. Finally the paper argues for the need to ground reform initiatives on a solid empirical and comparative approach. It illustrates some of these issues by drawing on a recent project conducted by the World Bank and others.

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Introduction

All societies need institutions to settle disputes and mechanisms to enforce property rights and contracts. Without these mechanisms commercial transactions are limited to the simplistic and high risk constrains many productive investments. The systems that nations develop to fill these needs take myriad forms ranging from family- and community-based norms and networks to formal state-sponsored judicial systems enforcing complex laws. In each country, the relative importance of state-sponsored formal enforcement mechanisms versus informal methods depends on the nature of the transaction being disputed, the nature of the parties involved in the dispute, the particular conditions of each country (such as income level, literacy, and technology), and how well (swiftly, cheaply and fairly) each of these mechanisms provide or are perceived to provide what the disputing parties demand.

Well functioning, state-sponsored justice provides a complement to other, more informal, systems. Together these systems, when they work well, keep the costs of enforcement low for both small and large participants in markets and for small and large transactions. But in many countries formal, state-sponsored courts and the laws and regulations that they attempt to propagate and enforce bear no relation to private informal systems. That is, the two systems are viewed as complete substitutes for justice and contract enforcement because formal judiciaries are not relevant or are not perceived to be relevant for many citizens. For example , while large agricultural corporations and wealthy landowners may use formal courts to resolve disputes, small family firms and farm labourers not only may not use the courts but may consider the rules that courts are enforcing alien to their way of life.

Governments in many countries around the world are designing reforms in their judicial systems or thinking about how to build consensus or coalitions for reforms. Some interesting policy questions arise –why is the legal and judicial system not relevant for some citizens and in some countries? When and how should one strengthen the roles that judicial systems play in economic development? What does the study of institutional reform in general, and judicial system reform in particular, teach us about the design of systems in various countries?² To answer these questions, it is necessary to think not only about the final goal but, the capacity of countries to implement certain reforms and the possible need for a graduated approach.

This paper presents some general conclusions regarding institutional development (see World Bank, 2001), which are also relevant for the judiciary and some of the evidence which indicates how critical a role the formal legal system can play to support the development of private business.³ It discusses why it is important for governments and citizens to take an active and practical approach to judicial system development, and the value of a comparative and cross-country, empirical approach for reformers, illustrating this point by drawing upon a recent project undertaken by the World Bank and others.⁴

One of the main conclusions that has emerged from the study of institutional design and institutional change is that despite the prevalence of international norms and the popular notion of “best” practice, a great part of effective institution building relies on

² Recent thinking underscores how looking across different types of institutions rather than confining oneself to the study of one particular institution yields useful lessons.

³ Institutions are the informal and formal rules that guide behaviour. Sometimes “institutions” is also used to refer to organisations and organisational structure.

⁴ Parts of this paper are based on the WDR 2002, and on a project conducted jointly by Harvard University, Lex Mundi and the World Bank. This project is described in Djankov et al, 2003.

the capacity of those establishing and using these institutions. New institutions need to complement existing conditions in a country—that is, it needs to be consistent with the country’s income level, skills and education levels, available technology, the distribution of income, geography, and other institutions (e.g. court performance depends on how the laws are written in the country, how lawyers associations work, the presence of alternative dispute resolution systems etc.). While this “lesson” may seem obvious, it is sometimes hard to reconcile with the concept of international “best” practice. This is not to say that nothing can be learned from looking at international or foreign norms and practices. To the contrary, as is argued later.

A key question is how do we adapt institutions which are effective in high income countries for the needs of low income countries? Courts are only relevant to the extent that they approach dispute resolution in a manner that is understood by the people they serve and that meet their needs . One answer might be “ simplicity” in design.

Second, both state and private entities can benefit by being allowed to experiment /innovate in terms of finding the institutional design that “fits”. Study of different systems, however distinct in history and origin, is important because it gives us ideas and enhances the realm of the possible: moreover, some of these ideas may bear fruit.

Third, some degree of competition provides incentives for improving institutional design. The desire to do better than a peer group is often a healthy driver of change in private business—so can it be in the public domain for both individuals and organizations.⁵ Fourth, economic openness, for example trade in goods, and services, information sharing across and within countries, can go a long way in facilitating institutional reform by creating demand for change.

⁵ World Bank, 2001.

Finally, embedded in the above, is the notion that how institutions function depends very much on the incentives provided to the relevant agents. People's incentives depend on the whole institutional system; to understand how various institutional features work together, it is necessary to understand the details of each institution.

This paper starts with a general introduction which reviews some of the existing empirical evidence on the importance of formal courts to economic development. The second part of the introduction discusses some examples of the process of change drawing on the limited literature on this subject.⁶ The second section is devoted to a discussion of the various institutional features that must be considered when designing court reform. A final section of the paper is devoted to one particular type of institution - procedural law. It draws on a recent project conducted jointly by Harvard University, Lex Mundi and the World Bank, that looks at examples of procedural law in countries around the world. The purpose of the discussion is to illustrate, in light of what recent studies have shown, and the lessons mentioned above, how countries may think about judicial reform going forward.

The paper also highlights systematic differences among different regions of the world. This type of regional classification may be a purely spurious one—that is one might argue that contiguity does not necessarily imply similarity of either outlook, culture, or experience. However, it is almost universally true that countries are keen to learn about institutions in neighbouring countries. A regional perspective can highlight in what way neighbouring countries may learn from each other but also the limitations of merely looking regionally.

⁶ This discussion is based on World Bank, 2001, and background work done for the report.

How Much Do Courts Matter?⁷

Increasing evidence from around the world suggests that when court performance improves, it can support economic development by facilitating market transactions.⁸ To take an example, China, in 1979 undertook an economic reform program that provided incentives for new enterprise creation, increased inter-provincial trade, and allowed the entry of foreign investors. With business expanding, the number of cases filed in commercial courts increased dramatically. Between 1979-82, and 1997 there has been more than a 100-fold increase in the average number of commercial disputes filed in the courts. Beginning from around 14,000 a year; by 1997, 1.5 million new cases had been filed. What is telling is that at about the same time, the number of commercial disputes arbitrated by community committees, the traditional mediation mechanism, hardly increased.⁹ Liberalisation, more trade within the country and business with foreigners meant an increased demand for formal dispute resolution mechanisms. In this context, community mechanisms were not appropriate for resolving disputes with non-community members.

Poland and Slovakia in the early 1990s also demonstrate how regime change can render existing dispute resolution mechanisms ineffective and how the state can step in to promote business in a new economic environment. During these early years, farmers faced long delays in payments for produce delivered upstream. They had difficulty in enforcing contracts with outside business partners. Responding to this challenge, small farmers, and later, firms processing produce, changed their strategy and integrated their

⁷ See also World Bank, 2001.

⁸ In this paper, I focus on the effectiveness of the judicial system in the commercial function of courts-enforcing contracts between private parties.

⁹ WDR 2002, "Building Institutions for Markets", World Bank, 2001; and Pie (2001).

businesses vertically. Through vertical integration contracts outside the firm were minimized- a preferred solution given the cost of enforcement. The government recognized the importance of court development- in the late 1990s a strengthened court enforcement system meant that industry no longer had to devise alternative methods of reducing risk and could diversify business dealings.¹⁰

Another study (Kumar, Rajan and Zingales, 1999) shows that when judicial systems are strong, countries tend to have larger firms. Firms can rely on courts to protect their property rights and enforce increasingly sophisticated contracts, for example property rights associated with intellectual property. Pinheiro and Cabral (1998) discuss how states in Brazil with better performing courts have more developed credit markets. As is intuitively obvious, creditors are loath to advance credit when they lack the means to enforce repayment. For the post communist countries, Johnson, McMillan and Woodruff (2000) discuss how well functioning courts support the development of new relationships so that entrepreneurs are encouraged to contract with new suppliers. Without well functioning courts, firms are forced to rely only on “relationship business”—that is, contracting with those with whom they already have well established relations. In a rapidly changing economic environment such constraints prevent firms from venturing into potentially very profitable opportunities. They also limit the extent to which they are able to protect themselves from relationships that are no longer profitable.

Foley (2000) shows how the development of formal bankruptcy proceedings, in which costs play a key role, make both debtors and creditors better off. Bigsten et al (2000) and Collier and Gunning (1999) analyse countries in Africa. They find that ineffective courts and weak legal systems prevented the growth of small firms or limited

¹⁰ World Bank, 2001, Gow and Swinnen 2001.

investment. In Zimbabwe, a country with a better legal and judicial system than many of its neighbours, firms are more likely to take disputes to court and at the same time more likely to engage in more risky (and potentially more productive) activities than in these neighbouring countries.¹¹

Each of these experiences shows the importance of a sound court system for commercial transactions and explain the words of Douglas North (1990) who claimed that the absence of low cost means of enforcing contracts was “the most important source of both historical stagnation and contemporary underdevelopment in the Third World”.¹² Indeed, the evidence suggests that providing better courts – more accessible, faster, fairer¹³ and predictable courts can support the development of economic activity. Reform in many countries today could bring definite benefits in terms of stronger market activity.

Developing countries have been undergoing vast economic and social changes. The advent of more open and larger markets have presented opportunities, but also, in many cases rendered less efficient, community mechanisms for contract enforcement (World Bank, 2001). This is to be expected. As economic transactions become more distant in time and space, as the transactions conducted with those outside of one’s normal social or kin group extends, monitoring becomes difficult. Reputational and social bonds weaken and cannot be used to enforce contracts. In these situations, a third party system such as an unbiased and effective state-sponsored court, acceptable to

¹¹ Bigsten et al (2000).

¹² North 1990, 1999.

¹³ As is well known, these dimensions of quality are not independent of each other. Improvements that increase access could increase delay and improvements which reduce delay temporarily could increase demand and therefore increase delay again.

agents from different groups is needed to enforce contracts.^{14 15} Another issue with community mechanisms is that they can also be exclusionary. For example, they may not be available to women, or the truly indigent.

How Do Sound Courts Develop?

It is relatively easy to find examples which show the critical role that formal courts have played in market activities. Similarly, there are many examples of how private mechanisms of property rights enforcement have been critical to the development of business. Bernstein (2001) discusses how private dispute resolution mechanisms facilitated grain trade in the United States. What is more difficult is understanding how the two systems fit together, how they support each other and what provided the incentives and impetus for development.

Study of economic history does not easily help identify the sequence of events that led to the development of formal courts. Typically, strong states with a desire to encourage commerce or alternatively, to limit feuds over land and inheritance, established courts funded and/or managed by the state. These systems often competed with existing private institutions and over time as the state became stronger and performed better, replaced some of these mechanisms.

The establishment of the royal courts after the Norman invasion of England provides lessons for countries today. At that time, disputes in England were generally settled by feudal or local courts. However, the Norman invaders did not consider these courts to be effective in terms of sustaining social stability and in ensuring productive use of the land. Disputes took a long time to be settled and this was both socially and

¹⁴ See Messick (2001), and Milgrom, North and Weingast, 1990, and Greif, 1994.

¹⁵ The Genoese in the tenth century recognized this, as did the old English and French empires.

economically costly. Thus, they established royal courts to handle disputes as an alternative to the traditional courts: the two systems co-existed and in a sense competed with each other. Over time, disputes that were once heard by feudal courts or local courts were increasingly brought to the royal courts because of the latter's streamlined procedures and more effective remedies. In cases arising from the seizure of land, a common problem in 13th century England, the royal courts offered a speedy and uncomplicated method for restoring the land to the rightful owners. By contrast, it could take other tribunals decades to restore possession to the rightful owner as the trespasser took advantage of various procedural devices to delay a decision being reached.¹⁶ The English experience shows that by providing better rules and fostering competition the new state established a system that people chose to use.

In more recent history, the development of a specialized commercial court in Tanzania was spurred by a coalition of the domestic and international community. Strong leadership, which responded favourably to business needs played a key role (Finnegan, 2001). The main incentive of business was to compete effectively in an open economic environment.

Development history teaches that changes in politics and economics can create demand for new institutions among private citizens, but also that supplying or introducing new institutions (as the English did) can change behaviour- as long as it is done the right way. Competition and openness are among two strong forces that have worked in favour of judicial system strengthening. But the incentives to behave differently must be embodied in the design of the new institutions not just the environment in which they operate. Rewards for using and abiding by new rules (in this

¹⁶ Stenton (1964), Pollack and Maitland (1968); Van Caenegem (1988).

case faster dispute settlement at low cost) and penalties for not doing so (in this case protracted disputes with high cost) were sufficient incentives.

Of course the question immediately arises, how much do we want people to use state sponsored justice - the formal courts? Do we want all types of disputes to end up in court? While most disputes are settled away from courts through negotiations, mediation or arbitration (or sometimes by fiat, depending on the system), how much access is warranted? And, how inefficient does a court system have to be before reform is warranted?

A court system (and associated legal system) that serves the population is not one such that every citizen will have incentives to come to court for every dispute large and small. Neither is it one that barely has relevance for most of the country's citizens. It means identifying some ideal level of relevance such that people have faith in the system and believe that it upholds justice and does it efficiently – this faith will help resolution of disputes outside and inside the courts. It means structuring the legal and judicial system such that the incentives for appropriate behaviour are there while the costs to society are kept as low as possible. There are no ideal ratios of formal versus informal mechanisms that one should aspire to; neither is there an absolute standard of efficiency. So answering these questions is a difficult matter- with the judgment to be made by each country's government and citizens, with the help of evidence and data. Data gathered on the system will help stakeholders form judgments about where they are and where they should strive to be.

In a country where the majority of the population operate outside the system,

access to the courts is probably too low and courts too slow, biased, or unpredictable.¹⁷

Access may be hampered by financial reasons or because there may be little understanding of the formal system. Courts may be “too slow” because of the incentives provided to various participants or lack of resources/capacity. Governments, and citizens broadly agree that in these countries, constituting much of the developing world, reforms which increase efficiency in terms of speed, make courts fairer and more accessible, are necessary to make the formal legal and judicial system relevant for most of the people, and are therefore highly desirable. Such reforms can change what is often called the “culture” of the business community. Businesses respond to incentives: clear definition and enforcement of property rights provides incentives to act that are different from a situation in which these two factors do not exist.

The need for reform of judicial systems becomes even clearer when we look at what citizens think of their systems. While it is a difficult matter to evaluate how efficient¹⁸ judicial systems really are, indices have been constructed which reflect people’s perceptions of their judiciary’s performance. As the charts below show for a sample of countries, high income countries have judicial systems that are perceived to be much more efficient, to enforce contracts better, to give more access to people, and to be less corrupt than those of the lower and middle income countries.¹⁹ The differences between the latter two groups are small except for access to justice.^{20 21}

¹⁷ By unpredictable I mean that there is little faith in the ability of the justice system to render consistent solutions to disputes. An unbiased or fair system is meant to be one where the law is applied as written and people perceive the adjudication processes to be generally fair.

¹⁸ I am using the term “efficient” in a broad sense to cover the concepts of cost, speed and fairness.

¹⁹ Note that the corruption indices refer to overall perceptions of corruption in the country and not just in the judiciary.

²⁰ Sometimes perceptions of overall corruption may be different from perceptions of how corrupt the judiciary is.

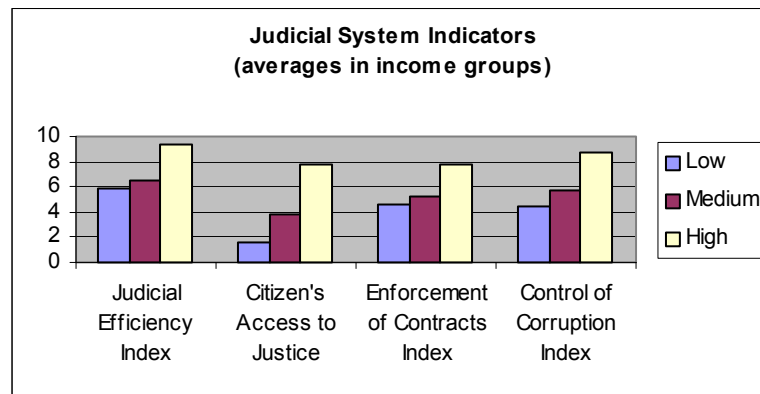
Perceptions of access to justice - that is whether you are actually able to use the courts are much worse in low income countries relative to middle and high income countries. Access may be affected by a number of things but cost (both financial and non-financial) is probably a key factor. It is important to remember that these scores do not give us absolute standards- there is always room for improvement. A closer look reveals that *within* the low income group, none of the measures of judicial performance vary much with income. In other words, either income has to reach some threshold level before the performance of the formal sector is affected or factors other than income play a key role in establishing effective judiciaries for these countries. Probably both reasons are valid. Formal government structures that are efficient are also expensive to establish and maintain and they strain government's non-financial capacity- which is limited in many developing countries.

Perceptions regarding judicial performance matter since one can expect that at least to a certain extent, they reflect actual performance. Moreover, the behaviour of individuals will more likely be affected and they will more likely follow the law and use their judicial system if they perceive it to be efficient. It follows that if people *believe* that the formal judicial system is not efficient, that it does not deliver benefits commensurate with the costs of using it, then they will use it less and it will tend to be less relevant for the majority of the people.

The situation depicted in Figure 1 suggests that there could be substantial benefits in redesigning judicial systems so that people's perceptions improve and so they induce people to behave as intended by substantive law.

²¹ Note that the sample (see annex 1) is divided in the following manner: the top 25% are considered rich, the next 50% are considered middle income and the bottom 25% poor.

Figure 1



Source:Judicial Efficiency from ICRG; Citizen's Access to Justice from World Business Environment Survey; Control of Corruption from ICRG; Enforcement from Business Environmental Risk Intelligence; GNP from World Bank.

The Value of a Comparative Approach

How can governments build legal and judicial systems that serve the population while minimizing the costs of such an undertaking for society? In which direction should court reform go- which institutional structure / design should be adopted? The manner in which the judiciary is organized and the rules and regulations that different individuals / entities in an economy follow vary tremendously from country to country. The diversity jumps out by just considering simple numbers on how many lawyers and judges there are in a given country (see Table 1). It is clear when one considers the different ways that judges' benefits and tenure (La Porta et al 2001) may be determined, and how lawyers may be rewarded. For example lawyers may be paid by the hour regardless of the outcome of the case or they may be paid only if the outcome settles in the client's favour. Or they may have fixed fees depending on the nature of the transactions. The market for lawyers' fees may or may not be competitive.

Just noting the diversity in institutional design, and attributing it all to social conditions and culture while interesting in itself, does not take the work of policymakers very far. For example, Germany has a very high ratio of professional judges relative to the number of incoming cases in first instance courts. The question is why do the numbers for Germany vary so much from England which has a much lower number? Is one system more efficient (in terms of speed) than the other, or cheaper, and might the countries learn from each others' experience? Is it because cases are screened before coming to court in England and only some come to these courts and is this a better solution in some circumstances? Are there fees which make the difference—and what economic /social benefit does the structural difference confer?

To bring about change we need to understand what might be the reasons for the diversity (e.g. which social and economic factors prompted the adoption of particular institutional features) and what might be the relative advantages and disadvantages of each system for different people and for society as a whole. Until the existing data on judicial systems and new data collected across countries are analysed in this manner, unless the impact on welfare and the costs to society are analysed, such data will be of little use to those seeking for a better way of doing things.

Table 1: Inputs Into the Judicial System for Selected Countries, 1995
(per 100,000 population)

Country	Professional judges	Other judicial staff	Incoming cases in first-instance courts
Austria	21	117	29,294 ^a
England and Wales	5	4	4,718
France	10	41	2,242
Germany	27	69	2,655
Italy	12	60	1,227
Netherlands	10	n.a.	2,031
Portugal	12	70	3,719
Spain	9	83	1,898

a. Including summary cases.

Source: Contini 2000

Designing reform however, is complicated by the fact that there is little available data and research on many countries, particularly poor countries. Second, there are few systematic comparisons on how judicial systems actually operate around the world and what might account for differences in performance between countries, and even different localities within the same country. Even when the data exist, are kept together and analysed, they may not be used in the design of reform; reformers having shown a preference to basing their strategies on theories. Such an attitude can lead to reforms being chosen which, with the help of more systematic analysis would not have been implemented (Murrell, 2001).

As legal and economic scholars have noted, each country's particular political and economic development process has affected the evolution of the legal and judicial system. Many scholars believe that the law reflects the spirit and social codes of the people. Others point out that people with very different social codes have developed greatly similar legal systems - at least regarding specific rules of contract law (Watson 1993)²² and Shapiro (1999)). As Epstein (1995) suggests "*Every system of law must address the acquisition of property, the limitations on the use of force, the enforceability of promises, the creation of state franchises and privileges, and the collection of taxes and the expenditures of public revenues*". Certainly, if one considers the increasing formal demand for court-led dispute resolution in countries as diverse as China and Slovakia, or Brazil, one would tend to agree.

Given that the nature of the legal and judicial system is to some extent particular to a country and to some extent not, the important empirical question is: what do we gain by researching and studying the judicial systems of other countries? Should policymakers

²² See also Cohen and Cohen (1951) *Readings in Jurisprudence and Legal Philosophy*.

and scholars focus only on studying their own systems? One cannot argue with the proposition that knowing oneself is essential. But knowing oneself only leads to a very limited view of what might be the whole set of possibilities. Moreover the world is changing and all countries want to keep up.

In an increasingly international world, the businessman who needs to contract with partners in foreign countries obviously would prefer to do so in a country with a sound legal and judicial system and one he understands. Both host and foreign country entities will benefit from this knowledge. Third, governments and those involved in building legal and judicial systems have, throughout history, used their knowledge about other systems to improve their country's institutions. This might be one of the reasons for the similarity in laws observed across many countries, as noted by Watson and Shapiro. It is easily argued that systematic study will probably lead to better solutions. Fourth, many developing countries today have been forced to adopt legal and judicial systems from colonizing powers. To understand how these systems may work better in their own countries- some research would help. Fifth, multilateral companies and organizations are busy constructing international agreements which depend on strong domestic legal and judicial systems for their enforcement: a knowledge of how one's country fits in with the rest of the world is becomingly increasingly important in this complex world. The implementation of rules set by the World Trade Organisation in the biotechnology area is one example.

What research and study can offer is a better way to integrate with the outside world and a better way to embark on a reform process within one's own country: the knowledge base to make the best choices for a country. To quote esteemed scholars of

comparative law “Legislators all over the world have found that on many matters good laws cannot be produced without the assistance of comparative law, whether in the form of general studies or of reports specially prepared on the topic in question” (Zweigert and Kotz, 1987). Similarly, the great German jurist Rudolph Jhering states that: “The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need...”²³

While accepting that study of law in other countries can help lawmakers and the judiciary develop their own systems, a relevant question is to what extent should domestic institutional design²⁴ be affected by those abroad? To quote Zweigert and Kotz (1987) : *Should one, in using the comparative law method of interpretation, consult only related systems like those of Switzerland and France, or also systems that are quite different in style, such as the Common Law or the law of socialist states? Can the judge choose whichever of the foreign solutions seems to him the best, or can he choose only a solution which is common to a number of other systems? May we, with the help of comparative law, reach an interpretation of our legal rules which is independent of, perhaps even at odds with, the conceptual structure of our own system? These questions, with the possible exception of the last one, should receive a bold rather than a timid answer.*”

Details Matter

Looking at the judicial system in its entirety and comparing the whole set of institutions affecting judicial performance across countries is a major task and not within the scope of any single project. In making any comparison, the first step is to think about

²³ (in Zweigert and Kotz, 1987).

²⁴ By institutional design I mean both the design of laws, and the organization and rules that make up the whole legal and judicial system.

which functions (and which transactions) of the judiciary should be the area of focus.

First, there are the general broad categories to choose between such as commercial transactions, family and inheritance related legal issues, or criminal issues. In this paper I will discuss commercial transactions though much of what is written may be relevant for other areas of dispute as well.

Second, it is necessary to choose particular transactions on which to focus. The most basic transaction in any economic sphere is the extension of credit and the repayment of debt. There are several additional considerations. For example, should one consider debt of all sizes or limit the number of cases and enhance comparability by limiting the magnitude? Should one look at debt due to banks or to any agent? Should one focus on rural or urban areas? Should one consider disputes that entered the appeals process or not?

Even after having narrowed the focus of attention, for each transaction there are several potential institutional elements²⁵ which may affect the performance of the judiciary in adjudicating disputes and in enforcing decisions/judgements. How each institutional arrangement performs depends on the incentives it provides to various actors, the resources available to these people and the skills/education of the agents who operate within the system. It depends on the ability of others to monitor actions and consequences as well as on the magnitude and scope of the associated rewards and penalties for actions taken. For example, if there is no way of knowing that judges in a given jurisdiction take longer than all the others to adjudicate similar cases, and if there is no way of knowing why this is so, then regardless of any injunctions in the law or moral

²⁵ By institutions I mean rules and regulations including their enforcement mechanisms. This definition is broad enough to cover formal laws and social codes.

exhortations aimed at reducing delay, there will be little incentive to change behaviour. Yet monitoring alone is not sufficient. If there is no one to penalize poor performance once it becomes known, then information only serves to the extent that reputational penalties matter. Monitoring mechanisms, reward, and penalty systems vary between countries; yet effective institution building means explicitly considering how these elements fit together. There are broadly six groups of agents who are directly responsible for the performance of the judicial system in each transaction: judges, those who assist them (e.g. clerks), lawyers and legal aides, litigants, the state and external agencies.

External agencies are those which are not related to any other parties mentioned. These are entities such as domestic and international NGOs, media companies/ journalists, and research or policy institutes studying the judiciary. Examples include Transparency International, the Center for the Study of Democracy in Bulgaria, or the Policy Research Institute in Hong Kong. External agencies affect the performance of the judiciary in two ways: First they monitor information on processes and outcomes and disseminate it. Second, they analyse the information they obtain and present this to interested stakeholders. These actions have two effects: first, they allow stakeholders to evaluate performance, including comparative performance and take action / impose sanctions; second, they have an impact on the reputation of those involved, such as judges, litigants or particular government officials. Each of these individuals cares about both their reputations in both professional and social spheres (see Bernstein, 2001 and Dyck, 2002), and may adjust their behaviour to “safeguard” their reputations and avoid the possibility of public humiliation.

Both public and private institutions play a critical role in affecting the incentives and the abilities of each of these agents to perform efficiently. For example, the government sets rules for judges' promotion and penalties for underperformance. Private business such as the media may affect reputation of judges and lawyers and therefore performance. Government regulations can affect the market for legal services but so can private lawyers' associations. These associations may determine the degree of competition in the economy or standards for legal education, or moral /ethical standards for lawyers. These arrangements can affect how litigants behave and how court cases are conducted. They can affect perceptions of access to, and fairness in, the courts. Institutional arrangements which determine how courts are funded (such as court fees) or how lawyers are paid can affect which agents choose to use the courts, how long they remain in court and how often they use them. Therefore they also affect measures of judicial performance such as access or delay.²⁶ Table 2 shows the myriad institutional factors which may affect the incentives of some of the various players and thus judicial performance.

Table 2 also leaves out some important elements which affect judicial performance. First, it does not completely address the incentives of the state to let the judiciary operate independently. Judges may "do the right thing" but their actions may be overturned by government . The institutional arrangements guaranteeing the accountability of the state to its citizens are a critical complement to rules governing the judiciary.

²⁶ Some of these issues are discussed in Botero et al (2001) and Messick (1997).

Table 2: Elements of Institutional Design Which Affect Court Performance

Incentives for Judges	Incentives for Judicial Staff:	Incentives for Lawyers	Litigants *
<p>Mechanisms which affect reputation: ex post evaluation mechanisms within the judiciary for specific aspects such as delay (individual calendars and keeping of statistics on performance); external monitoring and evaluation mechanisms (NGOs, media, academia);</p> <p>Wages, other benefits;</p> <p>Promotion criteria,</p> <p>Direct constraints or rules, such as mandatory time limits, case managements</p> <p>Independence from state (budgets, allowing judges to declare acts of the executive and legislative branches to be in violation of the constitution or laws, selection and dismissal of judges)²⁷</p> <p>Legal clarity: Substantive and Procedural Law</p> <p>Rules regarding who may provide what service: competition with other providers</p> <p>How budgets are allocated (e.g. whether they depend on performance?)</p>	<p>Wages</p> <p>Promotion criteria</p> <p>Monitoring mechanisms and reputation</p> <p>Direct constraints on activities.</p>	<p>How legal fees determined</p> <p>Regulations and restrictions on the markets for legal services</p> <p>Requirements in the law for legal representation</p> <p>Clarity in the law and procedures.</p> <p>Reputation</p> <p>Legal/lawyers' associational rules</p>	<p>Legal fees;</p> <p>Court fees;</p> <p>Difficulty of process;</p> <p>Size of claim.</p>

* Most aspects affect incentives to go to court in the first place.

Second, there are myriad systems of alternative dispute resolution (ADRs), formal or informal, which may substitute for or complement the courts. These too will typically affect both the incentives of agents to go to court and their behaviour while there. When courts are predictable and accessible, the formal legal system provides a baseline for what the parties may achieve in any substitute system and litigants may use other ways to settle disputes before coming to court. If these methods are effective there may be fewer court-led disputes and therefore faster time to adjudication. ADRs are important because they also provide competition for the formal courts when they work well. Finally, the table

²⁷ Others are rules that determine the tenure of supreme court judges and whether citizens can freely ask the judiciary to review administrative acts of government (see World Bank 2001 and La Porta et al, 2001)

does not address the incentives of third party monitoring mechanisms (such as NGOs and the Media).

Even when incentives (determined to a great extent by institutional design) are aligned to produce effective justice, other factors affect the ability of the judicial system to deliver. For example, the magnitude of the budget determines how many administrative staff and aides each judge has and how many computers he has at his disposal. The training and education level of judges and lawyers affect how well a law is understood and applied. Training of legal aides influences how effectively judges do their work. Income and education levels affect people's understanding of the formal legal system. The general flow of information that is available to citizens in an economy (e.g. through the media) also determines their understanding of their legal and judicial systems.

Table 2 illustrates some key institutional features which affect the incentives of various parties to take their cases to court and their behaviour while there. However, enforcement of judicial decisions may be the critical factor negatively affecting perceptions of judicial performance and the responsibility for ensuring enforcement usually resides with the police and/or other state institutions. Scandinavian countries have a special Enforcement Commissioner, Germany relies on a bailiff. In common law countries the court order may be delivered privately to the debtor whereas in civil and socialist law countries the order is delivered by a bailiff or another officer of the court. Usually, the actual execution of the court order – seizing property, auction, garnishment, is performed by law enforcement authorities (police, sheriff's office, etc.) although some

countries have dedicated judgment enforcement agencies (sometimes part of the fiscal authorities).

Table 2 does not set priorities for reform – it lists the different areas in which judicial reform may lead to improved judicial performance. The priorities for reform will differ from country to country, with the priority areas being the one(s) in which action will yield the greatest result or where lack of action is having the greatest negative impact on performance.

How Much Does Legal Tradition Matter?

Scholars and practitioners in the legal and economics profession distinguish between different types of legal systems. Typically attention has focused on the differences between the civil and common law traditions France and Germany being the main originators of the former and England of the latter.

The main European legal traditions were exported to countries around the world with conquests. The colonised lands were missing one of the two ingredients which would have led to a better assimilation of the colonisers' legal traditions. The first was that the political and social context which made the laws relevant for the colonisers did not exist in the colonised land. And second, existing economic conditions did not provide sufficient incentives for assimilation. In most of the colonised countries, native populations were not required to use the colonial law. Some of these countries however, adopted the ex-colonial legal system as their own at independence though sometimes only partially.

Tunisia follows Islamic family law and inheritance law but commercial law is based on the French civil law tradition. Yet even when the colonial law was adopted for

the country, it has still failed to have relevance for a vast majority of the people who did not understand it, who were not trained to use it, for whom the formal administrative structure were too costly to access, and who did not have the resources to make it function. I would like to draw attention to the words of Mattei (1998) “*the common law vs. civil law dichotomy probably does not mean much in Africa. The level of the civil law vs. common law opposition is limited to a remarkably superficial layer of the legal system, certainly a layer that would be wasteful to approach by itself if one hopes to reform the law.*” Though he overstates the case, to the extent that Mattei considers that less formal/costly methods of dispute resolution need to be considered, it would be hard to argue with him.

Some scholars contend that France and Germany in fact look quite different from other countries following the French or German tradition (Merryman, 1985). France and Germany in fact present striking evidence of how dynamic is the process of legal change when countries are faced with changing economic and political forces. One might argue that one of the reasons that the originators of civil law look so different from their followers today is that economic interests in these countries had to contend with competitive pressures from surrounding countries, notable among them, England. Competition will induce governments to undertake institutional change to protect their own economic interests.

All this to say that where many developing countries find themselves today partly reflects the vagaries of history and that history will be a partial guide to the future. The relevant question is how much to innovate and how much to work with what is already there. Looking forward, there are important choices that each country can make which

can improve the performance of their legal and judicial systems. The remainder of the paper focuses on one area of potential reform.

Procedural Complexity

Clearly, it would be an impossible feat to discuss all the elements which affect judicial performance in a single paper.²⁸ As stated earlier in the paper, this paper aims to illustrate some general principles and discuss certain aspects of procedural law in this context. The focus on legal procedure does not imply that it has been found to be universally the most important or pressing area for judicial reform. Just as countries differ in the design of their laws and other institutions, so they differ in terms of where reform needs are the greatest. In this section, I base the discussion on a recent project initiated jointly by the World Bank, Harvard University and Lex Mundi, (the Project) analysed empirically (looking at a sample of over 100 countries) how excessive formalism affects judicial performance.²⁹ Since this Project is unique in that it covers a large number of countries it allows for comparisons between countries.

The Project focuses on a commercial transaction relevant for the everyday lives of ordinary people: small debt collection and it also studies another non-related transaction, tenant eviction, as a “control” event. The project is summarized in Annexes 2 and 3 which are from the World Bank, 2001 and Djankov et al 2003. It assesses how many procedural steps are required from the time notice is served to a debtor in default until enforcement of the court’s decision. The construction of the index which I will refer to as procedural complexity is described in Djankov et al (2003).

²⁸ Botero et al (2002) provide a good summary of the existing literature which addresses country experience with judicial reform.

²⁹ This project was originally undertaken for the World Development Report, 2002, World Bank, 2001. See Djankov et al (2003) for a detailed description. See also Annex 3.

Legal procedure may be viewed as “*providing the means by which substantive legal rules are ultimately enforced*” (Kaplow and Shavell, 2002). While substantive law determines the rights of parties under different scenarios, procedural law determines how these rights are enforced in practice. Both substantive law and legal procedures affect the incentives of individuals to act in a certain way (e.g. to fulfill contracts or not). For example, if a debtor does not pay his debt then the probability that the creditors will take him to court and the expected outcome when there matters (assuming social norms/networks and ADRs cannot solve the problem). If it is costly to intervene through the courts relative to the benefits expected or if courts are unpredictable, it is less likely that people will use the courts and less likely the substantive content of the law will influence behaviour; that is it is more likely that the debtor will not honour his contract.

What is meant by complexity? To quote Epstein: *the cheaper the cost of compliance the simpler we can say the rule is....the minimum condition for calling any rule complex is that it creates public regulatory obstacles to the achievement of some private objective. ..how much simplicity is required? To answer this question it is essential to consider the great trade-off, namely, that between social incentives and administrative costs. ... does the creation of some administrative structure - hiring a police force, formulating rules, electing people to public office, ...- also create some desirable incentives for individual behaviour such that the gain from this particular administrative expenditure is justified in terms of the overall improvement in incentive structures?*³⁰

³⁰ In the words of another legal scholar, Steven Shavell: In many cases simpler is better: especially when resources are scarce and the marginal social benefits to increased complexity are slight.

It is obvious that any system which is more costly to use in terms of financial or other resources will be less likely to be used for disputes where the claim is relatively small. To the extent that smaller businesses and poorer individuals are more likely to have disputes which are of lower value financially, they will be less likely to use the courts, particularly when doing so is costly. Which claims should be settled in the courts depends on broad considerations of how the ability to access courts affects overall welfare and economic development. Overall welfare depends on both the behaviour of the parties (*ex ante* to bringing the suit to the court) as well as the costs of litigation. These costs have to be weighed against any benefits that would actually be attainable from a given design, particularly in developing countries where implementation capacity is weak.

Procedural complexity or formalism raises the costs of dispute resolution; complex systems tend to be more opaque and tend to have other negative consequences. For example, as discussed in Djankov et al, 2003, they are perceived to be less efficient, have greater delay on average, may facilitate corruption and are perceived to be less accessible.

The Project found that poor countries *on average* have a higher degree of procedural complexity for the debt collection and tenant eviction cases mentioned above. A close look at the data reveals that a number of rich countries also have a high degree of procedural complexity, Austria, and Greece being examples. In fact Austria's complexity index derived from the Project is higher than that of Pakistan (see Table 3). However, perceived efficiency and access are much higher than that of Pakistan .

Table 3.

Country	Eviction Formalism	Check Collection Formalism	Judicial Efficiency Index	Citizens' Access to Justice	Enforcement Index	Control of Corruption Index
Austria	6.30	6.07	9.50	7.50	8.25	8.57
Pakistan	4.21	4.21	5.00	0.00	3.85	2.98

Sources: Formalism Index: Djankov et al. (2003); Judicial Efficiency Index: ICRG; Citizens' Access to Justice: World Business Environment Survey; Enforcement Index: Business Environmental Risk Intelligence; Control of Corruption: ICRG.

There are several possible explanations for this, all of which are probably true. First, there are other factors besides procedural complexity which affect perceptions of efficiency or access and these may be more important in some countries. Second, in rich countries administrative capacity, and other institutional designs (see Table 2) including ADR systems may be more developed; therefore citizens may be better able to deal with procedural complexity, or to counteract some of the negative effects associated with procedural complexity. Third, while comparative values for indices tell us how countries fare relative to each other, they do not tell us what is the appropriate level of the index for a particular country. For example, while a score of 2.42 may be “small” enough for Denmark, it may not be so for Malawi.³¹ In fact, no score will be “small enough” for Malawi if Malawi does not have court structures in suitably accessible places: something which is not picked up by the data.³²

While the data discussed above and some of which is shown in Table 3 deals only with relatively simple and small transactions, the general principles, stemming from common sense and supported by some empirical evidence, should hold for all types of commercial transaction which are disputed in the courts.

³¹ The theoretical benefits of formalism and the practical experience is discussed later in the book.

³² For example if parties must travel long distances to courts, the likelihood of using courts falls even further and the relevance of courts declines.

A closer look at the data reveals some interesting variations when the countries in the sample are grouped regionally.

East Asia

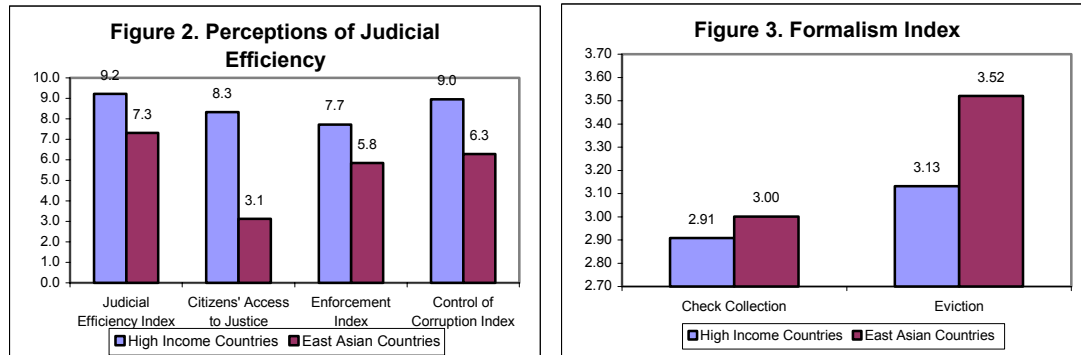


Fig.1 Sources: *Judicial Efficiency Index: ICRG; Citizens' Access to Justice: World Business Environment Survey; Enforcement Index: Business Environmental Risk Intelligence; Control of Corruption: ICRG.*
 Fig.2 Source: *Djankov et al. (2003)*

The East Asian countries in the sample score lower on various performance indicators and on average have more procedural complexity than high income countries (statistically significant at the 5% level). Figure 3 shows an index measuring overall procedural complexity for both the check collection and eviction cases.

A number of procedures seem to matter particularly: for example whether or not professionals are required to represent the litigants in court, whether the procedure relies on judges who have undergone complete training or not³³, whether or not there is a specialized court (such as a small claims court). Other aspects which are important are the nature of the legal justification required (how formal a justification is required), the number of independent procedural actions required (that is how many actual steps are needed in the filing and service of a complaint, trial and judgement and enforcement), and how the presentation of evidence is regulated (e.g. only certified documents are

³³ Dispute resolution may also be conducted by an arbitrator, or an administrative officer, practicing merchant etc.

accepted). The use of written procedures only may also limit access to the judicial system.

Table 4 shows how long enforcement related to disputes takes. The first column shows the time lag between filing of a complaint and a summons to court. The second column shows the time taken for adjudication and the third column shows the time taken for enforcement after adjudication. Korea and the Phillipines seem to do particularly well in enforcement of judicial decisions for check collection. In the UK and in the US for example, it takes 14 days after adjudication for enforcement. Of note is the fact that the Project also highlighted that establishing mandatory time limits for the various steps in adjudication, seemed to have little effect on delay or perceptions of efficiency once procedural complexity is accounted for.

Table 4. Duration: East Asian Countries

	Eviction					Check Collection				
	Duration until completion of service of process	Duration of trial	Duration of enforcement (from notification to actual enforcement)	Total Duration	Duration of trial and Duration of enforcement	Duration until completion of service of process	Duration of trial	Duration of enforcement (from notification to actual enforcement)	Total Duration	Duration of trial and Duration of enforcement
China	15	105	60	180	165	15	120	45	180	165
Korea	30	180	93	303	273	20	40	15	75	55
Malaysia	60	90	120	270	210	15	15	60	90	75
Thailand	30	510	90	630	600	30	90	90	210	180
Vietnam	35	55	60	150	115	35	35	50	120	85
Indonesia	30	165	30	225	195	30	165	30	225	195
Philippines	42	97	25	164	122	42	97	25	164	122

Source: World Bank 2001 and Djankov et al. (2003)

Enforcement of a decision in the check collection case takes significantly longer in French but not in other civil law countries relative to common law countries on average. The reasons for this are not clear at this stage. This does not mean however that countries whose legal systems are based on the French civil law system will be constrained in the future by the nature of their legal systems from achieving better results.

Indonesia and the Phillipines are examples of French civil law countries where enforcement is actually faster than in many other countries.

Africa

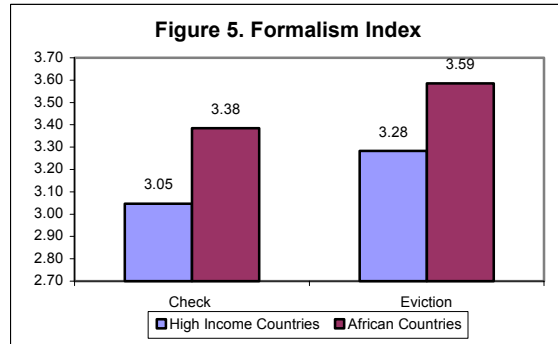
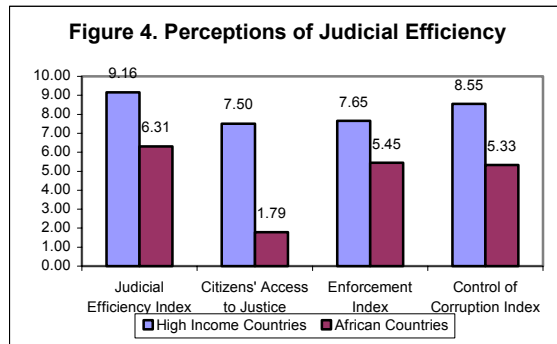


Fig.3 Sources: *Judicial Efficiency Index: ICRG; Citizens' Access to Justice: World Business Environment Survey; Enforcement Index: Business Environmental Risk Intelligence; Control of Corruption: ICRG.*
 Fig.4 Source: *World Bank 2001 and Djankov et al. 2001*

A close look at the data on procedural complexity shows that there is a significant difference in the level of procedural complexity in Africa relative to the high income countries in the sample (at the 5% confidence level) and particularly in the statutory regulation of evidence in Africa³⁴. The sample of African countries shows a higher degree of formalism relative to the E. Asian sample. A comparison of common law African and rich countries shows that despite the similar legal background, there is a substantial difference in the level of statutory regulation of evidence, the degree of intervention by the appellate courts (control of superior review), and the degree of other statutory interventions – all significant at the 5% confidence level. The common law African countries have less procedural complexity than the civil law ones and faster dispute resolution and better control of corruption.

³⁴ In this sample, Botswana, Ghana, Kenya, Malawi, Namibia, Nigeria, South Africa, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe follow the English common law tradition, while Cote d'Ivoire, Egypt, Mozambique, Senegal, and Tunisia follow the French civil law system.

The evidence (looking at the individual components of the complexity index) suggests that reforms to decrease formalism, by decreasing the written component in procedures, simplifying rules for the presentation of evidence; and simplifying and limiting the appeals process in the group of African countries may show results in terms of faster adjudication and less corruption, *ceteris paribus*.

Latin America (LAC)

As Figure 6 shows, judicial efficiency is rated higher in wealthy countries than in the LAC countries in the sample. Similar conclusions are reached with respect to the perception of citizens' access to justice, corruption, and the level of contract enforcement.

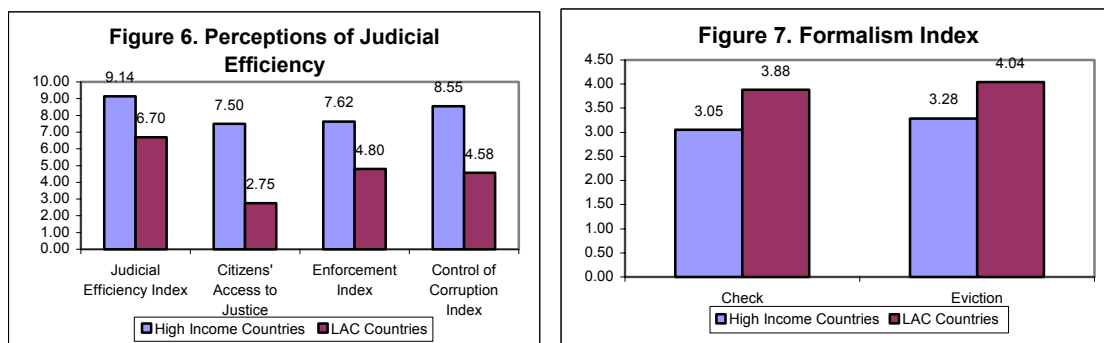


Fig.5 Sources: *Judicial Efficiency Index: ICRG; Citizens' Access to Justice: World Business Environment Survey; Enforcement Index: Business Environmental Risk Intelligence; Control of Corruption: ICRG.*
 Fig.6 Source: Djankov et al. (2003)

The data show that the degree of procedural complexity in the LAC region is significantly higher than in the sample of high income countries (at the 5% confidence level) and in some of its major subcategories – notably in the amount of statutory regulation of evidence required for these simple cases, as well as other statutory interventions; the use of appeals; and in the overall number of independent procedural actions required for resolution (Figure 2). In the Central and South American countries, in particular, there is an almost universal right to superior review (appeals) for even the

most minor case (an exception is Belize). As a result, the appeals process is often used by the losing party to delay enforcement even further after the already protracted court of first instance proceedings.³⁵ The LAC index for formalism is higher than that of both the African and E. Asian index.

Some examples help illustrate the severity of the problem in the LAC region: In Colombia, it takes on average 527 days to resolve a case of small debt collection in the courts, while in Peru it takes 441, and even in Argentina it takes nearly a year. The eviction of a delinquent tenant through court order can be even more cumbersome – 440. Looking at data in the other regions shows similar results.

The project discussed here does not set absolute standards of formalism for any country. For example, the degree of procedural complexity in the UK, while low by the standards of developed countries may not be low enough for Mozambique. And reform towards greater simplicity in the courts of Mozambique for example, will continue to have little relevance if there are few courts in the country and distances traveled are large. Another thing that is missing is information on who actually uses the courts for the disputes considered. Two other caveats need to be mentioned in considered these results: while the project focuses on small disputes relative to GDP, in many countries the amounts chosen may still be large relative to the income of the vast majority of the population, especially where inequality is high.

Any reform of the judicial system needs to assess how it will affect behaviour.

³⁵ Common Law LAC countries exhibit substantially less regulation of dispute resolution, all of its major components and substantially faster resolution than their Civil Law counterparts. Because of their small size, Caribbean countries are often omitted in international surveys and unfortunately, data on corruption containment from the Common Law LAC countries is virtually missing (exceptions are Jamaica and Trinidad and Tobago).

Legal procedures are often more complex in an effort to ensure accuracy (Kaplow and Shavell, 2002). But instead, such complexity can lead to non-transparency and abuse. It is critical to ask whether the theoretical advantages attainable under a given structure actually attainable in practice?

Scholars today agree that the costs of adjudicating and enforcing a decision should be commensurate with the importance of the case at hand. But this is not enough. It should be consistent with the nature and capacity of the state, with the ability of people it serves and would like to serve, and with the available technology and resources. If it is too far from the capabilities of the country and the resources available to its people, then the legal and judicial system cannot serve them. The work described above provides an indication of what types of actions may improve the performance of the legal and judicial system in one area and also demonstrates the value of data and research, and the value of a comparative approach to judicial reform.³⁶

As the discussion also indicated, the nature of the overall institutional structure matters: whether or not ADRs exist for example, or how many courts there are. Finally, there are situations when procedural reform cannot improve the performance of the judiciary. For example when the main problem of the judiciary is high level corruption; that is, the judiciary is pressured or bought (financially or otherwise) by one of the litigants (one party may be the state) and the government is loath to take action.³⁷

Usually, the parties involved in these cases are large (large companies or banks or the government). In these cases, external agencies such as the media and civil society can

³⁶ I use a broad concept of the term “efficient”- to mean swift, fair and accessible justice.

³⁷ In smaller cases simplification may be enough to reduce the opportunities for corruption. It may also reduce the incentives for corruption if the likelihood of being caught is increased (as it would be in a more transparent system).

play a large role by providing the necessary checks and balances. In cases where the government is willing to reform but the judiciary is closely linked to the private sector, other methods which affect the incentives of judges are also warranted. The good news is that there are many things that can be tried.

Conclusion.

Integral components of an effective institutional reform strategy are country-specific data which illustrate how a given system is working, comparative data which help suggest ways in which a system may improve, and an analysis which identifies the importance of the data collected and hypotheses formed relative to competing hypotheses.

Any reform of the judiciary should ideally take into account the net benefits to society, to assess which an empirical and comparative approach is critical. These depend on how the change may affect behaviour (for example, will more people be less likely to default, and if they default will more creditors be more likely to use the courts) as well as the total cost of administering the change. To do this job more effectively is needed a deeper and more concrete understanding of how institutions work in other countries, how the various pieces fit together.

As governments move forward they will need to think which changes would complement their existing endowments. Reforms in the judiciary, just like reforms in any other field can be greatly enhanced if key players are open to innovation and to new ways of doing things. One of the ways in which ideas can be stimulated and consensus for reform brought about is through greater openness- both with the rest of the world and

within each society. Finally, reform in small steps is also reform and it is important to advance in small ways even if a “comprehensive” reform is not possible.

ANNEX 1:

**Annex 1
List of Countries with National per Capita Income (\$US)**

Legal Origin	Country	GNI per capita	Legal Origin	Country	GNI per capita	Legal Origin	Country	GNI per capita
High Income Countries			S	Slovenia	11178	S	Lithuania	1924
G	Switzerland	48160	F	Portugal	11030	F	Dominican Rep.	1920
F	Luxembourg	42930	E	Bahrain	10760	F	El Salvador	1920
G	Japan	42783	F	Malta	9210	F	Guatemala	1680
Sc	Denmark	36923	E	Barbados	8600	F	Jordan	1630
Sc	Norway	36750	E	Anguilla	7900	F	Paraguay	1560
E	USA	31910	E	Turks and Caicos	7700	S	Bulgaria	1409
E	Bermuda	31500	F	Argentina	7550	Low Income Countries		
G	Germany	31413	F	Uruguay	6220	F	Egypt	1380
G	Austria	30943	S	Czech Republic	5049	F	Ecuador	1360
Sc	Iceland	30014	S	Hungary	4976	E	Swaziland	1350
Sc	Finland	29723	E	Trinidad & Tobago	4750	S	Kazakhstan	1323
Sc	Sweden	29242	F	Chile	4630	S	Romania	1253
F	Monaco	27000	F	Mexico	4440	F	Morocco	1180
F	Netherlands	25140	F	Brazil	4350	F	Philippines	1050
F	France	24790	S	Croatia	4015	F	Bolivia	990
F	Belgium	24650	S	Estonia	3875	E	Sri Lanka	890
E	Hong Kong	24570	S	Poland	3729	S	China	840
E	Singapore	24510	F	Lebanon	3700	S	Ukraine	812
E	Cayman	24500	F	Venezuela	3680	F	Honduras	760
E	United Kingdom	23590	F	Costa Rica	3570	F	Cote D'Ivoire	670
E	Ireland	21470	E	Grenada	3440	F	Indonesia	600
E	Australia	20950	E	Malaysia	3390	E	Zimbabwe	530
F	Italy	20170	E	Botswana	3240	F	Senegal	500
E	Canada	20140	E	South Africa	3170	S	Georgia	473
F	Kuwait	19020	F	Panama	3080	E	Pakistan	470
E	UAE	17870	F	Turkey	2900	E	India	440
F	Spain	16800	E	Belize	2730	E	Ghana	400
Middle Income Countries			E	St. Vincent	2640	E	Bangladesh	370
E	Israel	16710	E	Jamaica	2430	E	Kenya	360
E	Br. Virgin Islands	15000	S	Latvia	2336	E	Zambia	330

E	New Zealand	13990	F	Colombia	2170	E	Uganda	320
G	Taiwan	13235	F	Peru	2130	S	Vietnam	314
F	Greece	12110	E	Namibia	2120	E	Nigeria	260
G	Korea	11958	F	Tunisia	2090	E	Tanzania	260
E	Cyprus	11950	S	Russia	2051	F	Mozambique	220
F	Neth. Antilles	11800	E	Thailand	2010	E	Malawi	180

Legal origin legend: E– English Common Law; F– French Civil Law, G – German Civil Law; Sc – Scandinavian Civil Law; S – Socialist Law. Source for GNI – World Bank data.

ANNEX 2: The World Bank-Lex Mundi-Harvard University Project

The Project involved implementing a survey to discover how courts work. The data systematically compare the pace of litigation by means of a standardized survey delivered to private law firms. The survey presents two hypothetical cases that represent typical situations of default of an everyday contract: (a) the eviction of a tenant; and (b) the collection of debt (a returned check or an invoice in countries where checks are not popular).

These two cases proxy for all types of commercial disputes that enter the courts. Two quite different cases are chosen in order to check whether the findings can be generalized to all civil litigation. The questions cover the step-by-step evolution of these cases before local courts in the country's largest city. Importantly, the survey studies both the structure of the judicial system – that is, where the plaintiff would seek redress in specific cases – and the efficiency with which judicial decisions are made.

The survey chooses cases in which the facts are undisputed by the parties but where the defendant still does not want to pay. The judge consistently rules in favor of the plaintiff. In this way the survey controls for fairness across countries, as judges follow the letter of the law. We assume that no postjudgment motions can be filed. Should any opposition to the complaint arise, the judge always decides in favor of the plaintiff. The data consist of the number of steps required in the judicial process, the time it takes to accomplish each step, and the cost to the plaintiff. The last provides a comparable measure of access to the judicial system, while all three address the issue of judicial efficiency. The questionnaire makes a distinction between what is required by law and what happens in practice.

The following are examples of questions asked: What is the most commonly used mechanism for collecting overdue debt in your country? Does this mechanism differ if the debt amount is small, equal to 5 percent of GNP per capita, or large, equal to 50 percent of GNP per capita? What type of court will this mechanism be applied through? Would the judgment in the debt collection case be an oral representation of the general conclusions, an oral argument on specific facts and applicable laws, or a written argument on specific facts and applicable laws?

Source: Lex Mundi, Harvard University, and World Bank. *World Development Report 2002* background project.

ANNEX 3: Procedural Complexity

Procedural complexity is approximated by an index of dispute resolution, which describes substantive and procedural statutory intervention in judicial cases at lower-level civil trial courts. The index covers seven broad categories of such regulation, as defined below: (1) the use of professional judges and lawyers as opposed to lay judges and self-representation, (2) the need to make written as opposed to oral arguments at various stages of the process, (3) the necessity of legal justification of various actions by either disputants or judges, (4) the regulation of evidence, (5) the nature of superior review of the first-instance judgment, (6) the presence of various statutory interventions during dispute resolution (such as service of process by a judicial officer), and (7) the count of the number of independent procedural actions required by law.³⁸

³⁸ Djankov, Simeon, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer. 2003 and *World Development Report 2002 Background Paper*, World Bank, 2001

Table 2: Elements of Procedural Complexity

Professionals vs. laymen

Describes whether the resolution of the case provided would rely mostly in the intervention of professional judges and attorneys, as opposed to the intervention of other types of adjudicators and lay people. This index ranks from 0 to 1, where 1 is the normalized sum of the following variables: (i) General jurisdiction court, (ii) Professional vs. non-professional (iii) Legal representation is mandatory.

Written vs. oral index

An index evaluating the written or oral nature of the actions involved in the procedure, from the filing of the complaint, until the actual enforcement, assigning a percentage of stages carried out mostly in a written form, as defined above, over the total number of applicable stages.

Index of legal justification

Describes the level of legal justification required in the process. This index ranks from 0 to 1, where 1 means a higher use of legal language or justification, while 0 means a lower use. The index is formed by the normalized sum of the following variables (i) Complaint must be legally justified, (ii) Judgment must be legally justified, and (iii) Judgment must be on law, not on equity.

Index: Statutory regulation of evidence

Describes the level of statutory control or intervention of the administration, admissibility, evaluation and recording of evidence. This index ranks from 0 to 1, where 1 means a higher statutory control or intervention, and 0 means a lower level of statutory intervention. The index is formed by the normalized sum of the following variables: (i) Judge cannot introduce evidence, (ii) Judge cannot reject irrelevant evidence, (iii) Out-of-court statements are inadmissible, (iv) Mandatory pre-qualification of questions, (v) Oral interrogation only by judge, (vi) Only original documents and certified copies are admissible, (vii) Authenticity and weight of evidence defined by law, and (viii) Mandatory recording of evidence.

Index: Control of superior review

Describes the level of control or intervention of the appellate court's review of the first-instance judgment. This index ranks from 0 to 1, where 1 means a higher control or intervention, and 0 means a lower level of intervention. The index is formed by the normalized sum of the following variables: (i) Enforcement of judgment is automatically suspended until resolution of appeal, (ii) Comprehensive review in appeal, and (iii) Interlocutory appeals are allowed.

Index of other statutory interventions

An index aggregating statutory interventions in judicial procedural actions. This index ranks from 0 to 1, where 1 means a higher statutory control or intervention in the judicial process, and 0 means a lower level of statutory intervention. The index is formed by the normalized sum of the following variables: (i) Mandatory pre-trial conciliation, (ii) Service of process by judicial officer required, and (iii) Notification of judgment by judicial officer required.

Independent procedural action index

Independent procedural action index: Is coded as 1 if the total minimum number of independent procedural actions (defined as every action by the judge, the parties or a third person, required to complete the following stages of the process under the case facts provided: filing, admission, attachment, and service) would be higher or equal to the median, and 0 otherwise.

Overall Procedural Complexity

This index describes substantive and procedural statutory intervention in judicial cases at lower-level civil trial courts, and is formed by adding up the following indices: (i) Professionals vs. laymen index, (ii) Written vs. oral index, (iii) Legal justification index, (iv) Statutory regulation of evidence index, (v) Superior review/control index, (vi) Other statutory interventions index, and (vii) Independent procedural actions \geq median. The index ranks from 0 to 7, where 7 means a higher level of control or intervention, and 0 means a lower level of statutory intervention.

REFERENCES

- Bernstein, Lisa, 1996 (Vol. 144, No. 5), “Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms”, University of Pennsylvania Law Review
- Bigsten, Arne, Paul Collier, Stefab Dercon, Bernard Gauthier, A. Isaksson, Abena Oduro, Remco Oostendorp, Cathy Pattillo, Mans Soderbom, M. Sylvain, Francis Teal, and Albert Zeufack, 2000, “Contract Flexibility and Dispute Resolution in African Manufacturing” *The Journal of Development Studies* 36(4): 1-37
- Botero, Juan Carlos, Florencio Lopez-de-Silanes, Rafael La Porta, Andrei Shleifer and Aleksandr Volokh, 2002, “Judicial Reform”, mimeo, background paper for the World Development Report 2002
- Cohen, Morris R. and Felix S. Cohen, 2002, “Readings in Jurisprudence and Legal Philosophy”, Beard Books
- Collier, Paul and J. W. Gunning, 1999, “The Microeconomics of African Growth, 1950 - 2000” Thematic Paper for the AERC Collaborative Research Project on “Explaining African Economic Growth, 1950 - 2000”
- Contini, Francesco, 2000, “European Database on Judicial Systems”, European Research Network on Judicial Systems
- Djankov, Simeon, Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer. 2001, “Regulation of Entry”, World Bank Policy Research Working Paper #2661, Available at <http://econ.worldbank.org/resource.php?type=5>
- Djankov, Simeon, Rafael La Porta, Florencio Lopez-De-Silanes and Andrei Shleifer, 2003, “Courts”, *The Quarterly Journal of Economics*
- Dyck, Alexander and Luigi Zingales, 2002, “The Corporate Governance Role of the Media”, *The Right to Tell— the Role of Mass Media in Economic Development*, World Bank Institute, Washington DC
- Epstein, Richard A., 1995, “Simple Rules for a Complex World”, Harvard University Press
- Finnegan, David, 2001 “The Creation and Operation of the Tanzania’s Commercial Court”, background paper for World Development Report 2002
- Foley, Fritz, 2000 “Going Bust in Bangkok: Lessons from Bankruptcy Law Reform in Thailand”, Harvard Business School, mimeo.
- Gow, Hamish and Johan Swinnen, 2001, “Private Enforcement Capital and Contract Enforcement in Transition Economies” Policy Research Group, Katholieke Universiteit Leuven, Belgium.
- Greif, Avner, 1994 “Trading Institutions and the Commercial Revolution in Medieval Europe”, *Economics in a Changing World—proceedings of the 10th World Congress of the International Economic Association*, Vol 1, edited by Abel Aganbegyan, Oleg Bogomolov and Michael Kaser, London: Macmillan. 1994

- Johnson, Simon, John McMillan, and Christopher Woodruff. 2000, "Courts and Relational Contracts", Sloan School of Management, Massachusetts Institute of technology, Cambridge, MA. Available on line at : <http://web.mit.edu/sjohnson/www/research.htm>.
- Kaplow, Louis and Steven Shavell, "Fairness Versus Welfare", 2002, Harvard University Press
- Kumar, Krishna B., Raghuram G. Rajan and Luigi Zingales, 1999 "What Determines Firm Size?", NBER working paper #7208. Available on line <http://www.nber.org/papers/w7208>
- La Porta, Rafael, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny, 1999, "The Quality of Government". *The Journal of Law, Economics & Organization*, Vol. 15, #1, pp. 222-79.
- Mattei, Ugo, 1998, "Legal Pluralism, Legal Change and Economic Development", in L.Favali, E.Grande, M.Guadagni (eds) *New Law For New States*. *Politica Del Diritto In Eritrea*, Harmattan.
- Merryman, John H., 1985, "The Civil Law Tradition: an introduction to the legal systems of western Europe and Latin America", second edition, Stanford University Press
- Messick, Richard E., 1999, "Judicial Reform and Economic Development: A survey of the Issues", *The World Bank Research Observer*, vol. 14, # 1, (Feb., 1999), pp. 117-36
- Messick, Richard E. 2001, "The Origins and Development of Courts: a Background Paper for the World Development Report", memio
- Milgrom, Paul R., Douglass C. North and Barry R. Weingast, 1990. "The Role of Institutions in the Revival of Trade: The Law Merchants, Private Judges, and the Champagne Fairs", *Economics and Politics*, 2(19):1-23
- Murrell, Peter, 2001, "Institutional Reform Shunning Empirical Analysis: Demand and Supply in Romanian Commercial Courts", mimeo, background paper for the World Development Report 2002
- North, Douglass C. 1990. *Institutions, Institutional Change, and Economic Performance*, Cambridge, U.K.: Cambridge University Press.
- Pei, Minxin, 2001, "Does Legal Reform Protect Economics Transactions? Commercial Disputes in China" in Peter Murrell (ed.) *Assessing The Value of Law in Transitions Economies*, Anne Arbor: University of Michigan Press
- Pinheiro, Armando Castelar and Celia Cabral, 1998, "Credit Markets in Brazil: The Role of Judicial Enforcement and Other Institutions", paper for research project "Institutional Arrangements to Ensure Willingness to Pay in Financial Markets : A Comparative Analysis of Latin America and Europe", conducted in Brazil by the Centro de Estudos de Reforma do Estado (CERES/EPGE/FGV), in the contest of the Inter American Development Bank's Network of Research Centers.

- Pollack, Frederick and Frederic W. Maitland, 1968. "The History of the Common Law Before Edward I", 2nd Edition, reissued, 2 Vols., Cambridge: Cambridge University Press
- Shapiro, Martin, 1999, "The Success of Judicial Review", Constitutional Dialogues in *Comparative Perspective*, Edited by Sally Kenny, William Reisinger and John Reitz, St. Martin's Press, New York
- Stenton, Doris M. 1964. "English Justice Between the Norman Conquest and the Great Charter: 1066-1215 " Philadelphia: The American Philosophical Society
- Van Caenegem, R.C. 1988. "The Birth of the English Common Law" 2nd edition, Cambridge: Cambridge University Press
- Watson, Alan, 1993, "Legal Transplants: An Approach to Comparative Law", The University of Georgia Press
- World Bank, 2001, "Build Institutions for Markets", World Development Report 2002
- Zweigert, Konrad and Hein Kotz, 1987, "Introduction to Comparative Law", Volume 1, "The Framework", translated from German by Tony Weir, Clarendon Press, Oxford

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