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Judicial reform in developing economies: constraints and opportunities

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ABSTRACT

Judicial Reforms need to take place in an integrated manner and important because the public has lost faith in the system. The police, prosecution, lawyers and courts, must be thought of as being cohesive and everyone is concerned about the large delays in disposal of cases, and the agenda for judicial reforms must first tackle the problem of this backlog. Law Commission Reports and formation of tribunals to take away some of the workload of High Courts, but still, High Courts are burdened with a large number of cases. Increasing the manpower in judiciary is the need of the hour. Also, the problem faced by the judiciary can be solved, it is an urgent need for improvements in the physical infrastructure available to the judiciary, the state of legal education as well as Continuing Legal Education (CLE) in India and last but not the least, the continuing debate about judicial accountability.

Introduction

Many commentators now argue that the next generation of reforms should follow up with changes such as full-fledged privatization and changes in labour laws generation reforms are a fundamentally different set of changes (1). Academics and policy analysts have sought to better understand the relationship between legal and judicial institutions and economic performance, while governments, policy advisors, international financial institutions, and various nongovernmental organizations have promoted legal and judicial reform projects (2) that range from modest efforts to improve court administration to ambitious attempts to eliminate judicial corruption, promote judicial independence, and craft better, more equitable, and more market-friendly legal systems (3).

The diversity and complexity of debates about legal and judicial reform, and of the myriad reform projects that have been undertaken to date, make it impossible for a short essay to offer a comprehensive overview of the field. Therefore need to identify basic and recurring problems that afflict efforts to design and implement effective legal and judicial reform projects (4), and to suggest some conceptual tools that might be helpful in addressing, or at least thinking about, these difficulties. It mainly improving the capacity and quality of a judicial system requires material and human resources that are often in short supply in developing economies (5).

The judiciary's capacity to perform the economic and other functions assigned to it by law-and-development theorists depends in large part on the willingness of affected parties to use the courts to resolve disputes and to abide by judicial decisions, and on the willingness of judges and other legal officers to behave in a manner that is consistent with the requirements of a well-functioning judicial system (6).

But aligning incentives in this way is often difficult. Finally improving the law or the courts and attempting to avoid, the pitfalls associated with the necessarily incremental and partial nature of virtually all modern legal and judicial reform efforts(7).

Judiciary role in Economic Development

The problems and constraints associated with attempts to reform judicial and legal institutions in developing countries, it is useful to provide a brief overview of legal judicial reform. There is, of course, an even more basic set of definitional questions that come up whenever one wants to investigate the relationship between legal institutions and development. Some scholars, for example, have pointed out that it may be difficult even to define and identify "courts," "law," and "lawyers" in comparative or historical contexts because of the degree of variation of institutional arrangements and functions (cites) (8). And then there is the vexed question of how one ought to define "development" – in particular, the question whether certain qualities of the legal system ought to be considered constitutive of, not merely causally connected to, "development" properly understood (Sen 2000). As for "development," a broad welfarist concept of development in which the importance of legal and judicial institutions depends primarily on their causal, instrumental role in promoting social welfare rather than any intrinsic value of such institutions (9).

Generally, the primary service provided by courts is thought to be reliable and efficient dispute resolution. The dispute resolution service provided by the judiciary is considered important to economic progress for several reasons. First, courts enforce contract and property rights, and secure property and contract rights are widely believed to be essential for fostering productive investment and arms' length economic transactions (10). There are several reasons why we might think that public provision of dispute resolution services, in the form of effective courts, is superior to total reliance on the private market for dispute resolution services.

A well-functioning judicial system may also improve economic performance by correcting various market failures. For example, judicial imposition of legal liability for certain types of harm may induce private parties to internalize what would otherwise be negative externalities associated with their

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conduct. Another aspect of judicial dispute resolution thought to be particularly important to economic development is the role that the judiciary plays in making commitments – particularly commitments by the government – more credible. An independent, effective judiciary is thought to enhance the credibility of government commitments for at least three related reasons.

Resource Constraints

The first important limitation on the ability of legal and judicial reform to improve overall economic well-being in developing countries is the simple fact that material and human resources are limited (11). This is not to disparage the importance of legal and judicial reform as part of the larger project of economic reform. Clearly, legal and judicial reform has some role in the overall development project (12).

B. Incentive Compatibility

In order for the judiciary to perform the dispute resolution and credibility conferring functions generally assigned to it by law and development theorists, all relevant parties must have appropriate incentives. That is, individuals must have an incentive to rely on the courts to adjudicate their disputes rather than relying on alternative, socially undesirable dispute resolution mechanisms or forgoing certain transactions altogether (13); those with the power to disregard judicial decisions or to subvert judicial independence must have an incentive to refrain from such activities; and the judges themselves must have an incentive to carry out the functions assigned to them.

Many nonjudicial dispute resolution mechanisms may often be more efficient (from both a private and a social perspective) than the court system, and therefore decisions to forgo judicial adjudication may often reflect a market success rather than a market failure (14).

The first, and most obvious, is that the court system may simply fail to provide dispute resolution services of acceptable quality. The judges or court administrators may be incompetent, venal, or corrupt. The law itself may be inefficient or unfair. Or, the private costs to litigants of using the court system may be inefficiently high (15). Going to court would involved disclosing these transactions – even if they were only peripherally related to the transaction which give rise to the legal dispute at issue – which would often result in undesirable consequences for the firm.

Another political mechanism that is sometimes thought to provide the government in power with sufficient incentives to permit and respect independent courts is public support for the judiciary. On this account, because judicial independence improves social welfare – for instance, by ensuring that the government respects welfare-enhancing limits on its own power – attempts by the government to subvert judicial independence or to defy judicial decrees would be detected by public watchdogs and punished by public opinion.

A final incentive compatibility issue concerns the incentives of the judges themselves. If the judges do not have incentives to decide cases along appropriate lines, the judicial system will cease to function effectively as a forum for dispute resolution or as a source of new or improved law.

One source of bad judicial incentives, already discussed, are threats and promises offered by the government in power. But, even if the government has incentives to respect judicial decisions, the judges themselves may lack appropriate incentives. The most obvious problem here are the various forms of improper influence brought to bear by interested parties, either in the form of threats (the problem of judicial coercion) or promises (the problem of judicial corruption). This sort of problem is easy to define but hard to combat. Another concern regarding judicial incentives is that even if judges are not corrupt, their interests may not align with social interests. For instance, judicial decisions, especially in controversial cases, may reflect judge's pre-existing political or ideological commitments.

Many countries, corruption can be efficiency-enhancing because it allows parties to avoid excessively cumbersome regulatory requirements, and therefore efforts to combat corruption may be counterproductive if unaccompanied by regulatory reform (cites).

Conclusion

Judicial reforms may encourage scholars and practitioners to pay greater attention to the inherent tradeoffs induced by resource scarcity, the importance of making sure that individual incentives are properly aligned with institutional objectives, and the dangers that particular institutional reforms that appear to be welfare-improving when considered in isolation may have counterproductive effects if other institutional reforms are unachievable.

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