Judicial Reform: Re-Examining Basic Assumptions

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Over the last decade considerable Western resources have been devoted to judicial reform in Central and Eastern Europe. In many cases these resources have been deployed at the invitation of host countries, and in virtually all cases, the governments have welcomed and supported this judicial reform assistance. The governments of these newly emerging democracies understand that judicial reform will play a central role in their respective futures. Accession to the European Union, for instance, presupposes the existence of an independent and impartial judicial system. Thus, it is not surprising that local scholars, politicians, and civil society leaders have increasingly understood and agreed upon the necessity for an independent and impartial judiciary.

Probably the most poignant example of this agreement can be found in the substantial body of constitutional and legislative provisions that have been adopted to provide the legal framework for the judiciaries of these fledgling democracies. Throughout the region, there has been nothing less than a paradigm shift in the way this topic is addressed in law. However, this impressive shift rests on fragile foundations. In the course of the development and execution of the *ABA/CEELI Judicial Reform Index (JRI)* [1] analyses, a picture has emerged of young judicial systems foundering on common, basic problems, and these problems have clearly interfered with the formation of the underlying judicial culture. Without this underlying culture, these new legal frameworks will not be given their full effect, and their laudable judicial reform goals will remain elusive.

The question then becomes why such impressive regional agreement as to objectives meets with such difficulties in terms of practice. Perhaps, both Western and local reformers have presumed an appreciation for core democratic principles, which is not present. Reformers frequently bring an intuitive understanding of democracy, and it is certainly understandable that they would in turn project these assumptions and values upon the rank and file of the justice system. However, when the core elements are consistently found lacking, it is crucial that reformers pause and consider whether the core principles are truly understood. This moment of reflection is particularly needed when critical analyses of reform efforts strongly suggest that these principles have been endorsed, but not realized in practice. To do otherwise jeopardizes the reform agenda and threatens prospects for lasting systemic reform.

Transparency and public information

Transparency may well be first and foremost among these misunderstood core principles. Across the region, courts and their staff are commonly characterized by their reluctance to share information with the public. Some speculate that this may be attributed to the communist legacy of secrecy. However, regardless of the root cause(s), a widespread lack of transparency undermines the legitimacy of courts and the legal system that they are tasked with implementing. In a democracy, the public has a legitimate right to information about how and why its courts make decisions. Thus, the judicial system should make every reasonable effort to accommodate the media and general public, and decisions to exclude the media and public should be strictly scrutinized.

While there are certain appropriate justifications for restricting access, e.g., protecting the interests of minors, the general approach should favour openness and the right of the public to information. Many courts in the region follow the letter of this approach, but few fully embrace the spirit that underlies this principle. For example, it is not uncommon to find situations where high profile cases are held in small, inadequate spaces and the final written decision is not made publicly available. In circumstances like that, it is clear that the public right to information has been at best marginalized and, at worst, effectively eliminated.

Many rationales are offered to justify these types of results, with varying degrees of legitimacy. One of the more legitimate-and most frequent-is that court facilities are inadequate to meet public demand. Although largely true, this statement should not be taken at face value. Clearly, the governments, ministries of justice, and ministries of finance could and should provide additional resources, and reformers should bring pressure to secure these resources. However, each court must also accept an appropriate share of responsibility. Typically, court schedules can be arranged to make sure high profile cases are heard in the largest available venues, and the limited copying facilities of a court can be dedicated-at least in part-to ensuring that the public can access final decisions. Thus, judicial

reformers need to be prepared to look beyond tertiary justifications and question dubious results from all perspectives. In the process, reformers should examine whether those responsible have actually demonstrated a real understanding and commitment to securing and protecting transparency.

Democratic values beyond the common/civil divide

This process may in turn require Western assistance providers to revisit their own assumptions. Western common law and civil law lawyers need to be able to bridge differences between their respective systems to communicate a coherent vision of their shared democratic values. For example, common law and civil law lawyers should be able to join forces in supporting public access to court decisions regardless of their differences as to the ultimate significance of the decision itself. Of course, it is true that civil law systems do not follow the doctrine of *stare decisis*, [2] but do we need to reach that question? Should we be exploring the differences between that and the concept of *jurisprudence constante*? [3] If the core value of transparency is at stake, are we responsible professionals even to engage with local reformers in that type of discussion? Shouldn't a Western European and an American judicial reform expert be able to agree on certain higher values and tailor their efforts to secure these values first? If Western technical assistance providers succumb to parochial interests, distinctions and debates may emerge that distract reformers from core objectives, blurring priorities in the process and diluting scarce reform resources.

To illustrate the magnitude and urgency of the problem, consider a fundamental principle upon which there exists agreement among legal professionals: Judges must have access to the laws they are obligated to enforce. On its face, this proposition would appear to be a tautology, which one might assume to be the first step taken by any and all judicial reformers. Nevertheless, the *ABA/CEELI JRIs* reveal that, across region, judges routinely lack proper access to the laws themselves, much less any system for tracking changes or amendments to the outstanding body of law. Under these circumstances, it is indeed a luxury to debate the finer points between concepts like *stare decisis* and *jurisprudence constante*. Western and local reformers who take for granted such basics as access to current law and proceed to more sophisticated issues unwittingly gloss over fundamental structural problems, leaving these malignancies within the system to metastasise.

While it may seem demoralizing to be focusing on such basic democratic vocabulary more than ten years after the fall of the Berlin Wall, the real lesson of the last decade is that democratic fundamentals should not be taken for granted. Building democracy is hard, and it takes time, focus, and resources. Few predicted that the process of democratization would take as long as it has, and few are comfortable predicting how much more time will be required to truly realize it within the region. However, what should be understood, and agreed to, is that there is no substitute for securing the fundamentals.

Defining the field: legal reform

As law reform has emerged as a separate specialty within the legal profession there has arisen a concomitant pressure to bring structure to the field. As is customary in the practice of law, the emergence of a specialty brings with it efforts to standardize and define its parameters, and legal reform is no exception. Ultimately, various approaches to legal reform will survive or die out based on the utility they demonstrate in emerging democracies. However, in the interim, we are bearing witness to an expensive, at times chaotic, competition. In its best form, this competition takes comparative law from the dusty shelves of academia and applies it to real problems, giving reformers in new democracies a selection from the best the world has to offer. In its worst form, it becomes a platform for chauvinistic dictates, leaving local partners to wade through nationalistic, uncoordinated offers of assistance. Lawyers who are serious about the development of the specialty should be prepared to test their own legal inheritance in the pursuit of unifying themes. In this way, legal reform specialists can engage in defining the underlying fundamentals of legal reform.

As a general proposition, there is broad support for this endeavour. The explosive post-WWII growth in international human rights treaties and accompanying implementing legislation is a prime example of the widespread support for defining the fundamentals of legal reform. However, when one examines these treaties and the implementing legislation, one is frequently struck by how cautious they are when it comes to providing guidance

as to domestic implementation machinery. For those on the frontlines of legal reform, the details of domestic implementation circumscribe the battlefield where the real fight for legal reform will be won or lost.
To get to the level of detail that is required to define these types of fundamentals, one must turn to international instruments that are less formal and generally considered non-binding. Thus, in the development of the *JRI*, ABA/CEELI first turned to the international norms set out in the *United Nations Basic Principles on the Independence of the Judiciary; Council of Europe Recommendation R(94)12 "On the Independence, Efficiency, and Role of Judges"*; and the Council of Europe's *European Charter on the Statute for Judges*. Through careful comparison, common themes were identified, which were in turn distilled into goals by which to measure progress towards judicial reform. Interestingly, during the process, it was discovered that certain basic issues, such as access to laws, were not covered by these instruments. This fact, in turn, led ABA/CEELI to embark on the process of drafting and designing certain basic goals to capture the lessons learned from a decade of experience in the realm of judicial reform. The final product, the JRI, is a series of thirty statements setting forth factors that facilitate the development of an accountable, effective, independent judiciary. Throughout the process, a touchstone of these efforts was a commitment to avoid giving higher regard to American, as opposed to European, concepts of judicial structure and function. Thus, certain factors are included that an American or European judge may find somewhat unfamiliar, and these were included with the explicit intention of setting aside parochialism and capturing the best that leading judicial cultures have to offer.

Assessing a country's progress towards judicial reform is fraught with challenges. The *JRI* will certainly not be met with uniform acclaim from all sectors involved in judicial reform. Reasonable professionals can differ as to reform criteria and their proper application, and we recognize that those areas of judicial reform that are of particular interest to external reformers, such as judicial training, may not be the most important. Though every judiciary does need to be well-trained, having the most exquisitely educated cadre of judges in the world is no guarantee of an accountable, effective, or independent judiciary. Undoubtedly, the nexus between development assistance and the reform of a country's judiciary has inherent limitations. Building an accountable, effective, and independent judiciary requires real political will and dedication on the part of the reforming country. Nevertheless, the development and application of criteria like those in the JRI must play a role if the field of legal reform is to come into its own.

Comparative law in the pursuit of common goals

Decades ago, the German sociologist Max Weber posited that democracy and legal development were inextricably intertwined. In the years that have followed, social scientists have attempted to discern where causative relationships may be established. Through this research, it has become clear that there is no single criterion that may serve as a talisman, and many commonly considered factors are difficult to quantify. Regardless, legal reform lawyers are being asked for advice in today's world with all its limitations. Like any lawyer, reform lawyers have a duty to provide their clients with the best available advice under the circumstances. While the JRI will not provide mechanical remedies for judicial shortcomings, it can serve as a tool for cataloguing and digesting options across key sectors and providing analysis of the results. For legal reform lawyers, this legal database is important because they do not have the luxury of waiting for final, scientific conclusions.

Bringing this type of systemic approach to judicial reform holds the promise of increased standardization and rigour within the profession, employing comparative law in the pursuit of common goals. No system is perfect, and the marketplace of ideas has space for competing approaches, but we can ill afford to discard the lessons of the past in our programs of the future. After a decade of judicial reform assistance, the troubling fact is not that work remains to be done, but rather, that many of the most elementary tasks have been taken for granted in the emerging democracies. What is crucial is that legal reformers from the East and the West reflect on the assumptions they bring to the task and that they endeavour to establish rational priorities that address basic needs. With this commitment, judicial reformers can explore together their understanding of core principles and devise the most effective method of realizing them.

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Footnotes

[1] During the last quarter of 2001, ABA/CEELI put the finishing touches on its *Judicial Reform Index (JRI)*, an assessment tool designed to examine a cross-section of factors important to judicial reform in emerging democracies. Since its completion, ABA/CEELI has applied the *JRI* in a number of jurisdictions, and currently, there are a number of the finalized *JRIs* available for downloading at the ABA/CEELI website .

[2] *Stare Decisis*: Latin for "to stand by a decision," the doctrine that a trial court is bound by appellate court decisions (precedents) on a legal question which is raised in the lower court. Reliance on such precedents is required of trial courts until such time as an appellate court changes the rule, for the trial court cannot ignore the precedent (even when the trial judge believes it is "bad law"). Definition from *law.com Law Dictionary*. Online here: http://dictionary.law.com .

[3] French for "uniform jurisprudence". A doctrine in the civil law [of Louisiana]: a long series of previous decisions applying a particular rule of law carries great weight and may be determinative in subsequent cases. Definition from *FindLaw*. Online here: http://dictionary.lp.findlaw.com .