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Artículos

Assembling the Puzzle of Judicial Reform: A Review of the Analytical Frameworks [*]

Armando el rompecabezas de la reforma judicial: una revisión de los marcos analíticos

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Abstract:

The judicial reforms undertaken during the last thirty years have generated abundant literature by authors with training in legal, political, or economic sciences. Most of these researchers acknowledge the extreme complexity of these reforms and use analytical frameworks specific to their discipline to understand the underlying issues and find possible solutions. Such studies typically aim to identify the strategies and tactics followed by the reformers, as well as the role of the main stakeholders (both within the justice institutions and outside) in the outcome of the reforms. The combination of these three disciplines in the study of the reforms through methodologies such as "process tracing/analytical narratives," including elements of historical analysis, provides an integrated framework that should enable new progress in the study of a key area of democratic governance. To that end, based on the author's experience, this article presents a selection of the relevant literature about judicial reforms, and highlights the role of quantitative and perception data in a field where citizen expectations are increasing, but reliable and comparable information is scarce.
Keywords: Judicial Reform, Analytical Frameworks, Stakeholders, Process-Tracing, Analytic Narratives.

Resumen:

Las reformas judiciales adelantadas durante los últimos treinta años han generado una abundante literatura por autores con formación en ciencias jurídicas, políticas o económicas. La mayoría de estos investigadores reconoce la extrema complejidad de estas reformas y utiliza los marcos analíticos propios de su disciplina para comprender la problemática subyacente y encontrar posibles soluciones. Estos estudios generalmente buscan identificar las estrategias y las tácticas seguidas por los reformadores, al igual que el papel de los principales interesados (en el interior de las instituciones de justicia y fuera de ellas) sobre el resultado de las reformas. La combinación de esas tres disciplinas en el estudio de estas reformas a través de metodologías como el "rastreo de procesos/narrativas analíticas", que añaden elementos de análisis histórico y proporcionan un marco de referencia integrado, debe facilitar nuevos avances en el estudio de un área clave de la gobernanza democrática. Con ese objeto, basado en la experiencia del autor, este artículo presenta una selección de la literatura referida a la reforma judicial destaca el papel de los datos cuantitativos y de percepción en un campo en el que las expectativas ciudadanas están aumentando, pero la información es escasa.
Palabras clave: reforma judicial, marcos analíticos, interesados, rastreo de procesos, narrativas analíticas.

Justice removed, what are kingdoms but great bands of robbers?

Saint Augustine, *City of God,* IV.4

Introduction

After 1990, the non-political branch of government became the object of frequent reform proposals, something that was extremely unusual before because of concerns about institutional independence and the prevailing conservative culture of the Judiciary and the legal profession. [1] A quick review of the most recent report of the European Commission for the Efficiency of Justice (CEPEJ) reveals that at least 14 countries of the Council of Europe were advancing major reforms during 2022. [2] The demand for reform is even more intense in developing countries. The World Bank listed no less than 116 projects designed to support reforms in developing countries after 1990. [3]

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Why is now the independent third branch of government under continuous reform pressures? Which are the undercurrents that so often mobilize a large number of justice stakeholders (not only judges and lawyers, but broader political and social forces like parties and civil society organizations [CSOs]) around the discussion of reform proposals? Why are some reforms more successful that others and how can one measure the level of success? This literature review is designed to compile the diverse answers provided by experts from various disciplines during the last thirty years within a single analytical framework.

The review benefitted from the distinction that the law and economics literature makes between *de jure* and *de facto* judicial reforms. Analyzing the interplay of these reforms helps determining to what extent formal legislation was actually implemented within a country's given institutional background. For instance, it was generally believed that increases in *de jure* judicial independence would be followed by improved *de facto* independence, but the findings of some recent empirical studies suggest otherwise.[4] Moreover, the recurrent cycle of judicial reforms in a number of countries suggests that a number of reforms are only partially implemented or have unwanted effects, and new reforms are needed to correct such limited achievements or effects.

To organize the abundant materials of this literature review this review distinguishes between the "drivers" (i.e. the interests/incentives of internal and external stakeholders) and the "determinants" (i.e. the conditions for the drivers to effect sustained change). Which are the main drivers for justice reforms[5] to happen? Which are the determinants to overcome resistance to change? The answer to these questions is critical to understand the inner workings of the judicial reform process. One can anticipate here that a main message found in the literature is that most judicial reforms start from the outside (i.e., the external stakeholders are critical drivers to "push" the reform, the internal ones remaining more inclined to keep the status quo). The determinants for consolidation/implementation are also internal/external but the relative weight changes: the internal stakeholders are decisive (judicial leadership, union's acquiescence), while the external ones retain only marginal influence (close monitoring and evaluation by CSOs, Government's ideological agendas.)

The distinction between drivers and determinants also helped to select the works used for the review. Instead of looking into the sources that try to make a general case for the desirability of judicial reform within a broader effort to consolidate good governance, the review looked into the ones that explore specific questions about the processes that make reform possible, or may block it: Which are the drivers that initiate the reform process? What are the determinants for reforms to be implemented/consolidated in practice? Why are some reforms initiated but not implemented/consolidated? The answers to these questions were sought at two levels: the reform "strategies" linked to high-level, long-term normative objectives (i.e. embodied into legal instruments), and the "tactics" that move around mid-to-low level goals achievable in the short-to-medium t erm, most of them measurable in economic terms (i.e. through quantitative or perception data). [6] These t wo dimensions seemed to me critical for justice reforms to happen and essential to comprehend the reform process.

The Main Policy Issues of Judicial Reforms

To organize the massive number of scholarly studies about justice reforms of the last thirty years, the review was structured around the basic set of policy issues that most authors in the fields of law, political science and economics have detected around the reforms' purposes and processes. As the objectives embodied in the legal instruments (constitutions or high-level legislation) that contain the reform are supposed to be consistent with the common values of democratic polities (e.g. judges' independence and universal access for citizens), the review preferred to look into the issues that deal mostly with the economic rationale of the reform (its expected costs and benefits) and the political processes for the reform to happen (the decision-makers and the formal/informal rules-of-the game they follow).

The Economic Rationale of Justice Reforms: Why and for what?

As noted above, the high-level legal objectives that the court systems should pursue are commonly reiterated in any modern justice reform proposal. The courts are supposed to provide independent dispute resolution services accessible to all citizens, to ensure effective protection of individual rights and freedoms against government encroachment. However, to that end they need to receive appropriate resources, manage them efficiently and provide prompt response to societal demands. Any mismatch between the high-level societal goals and the performance of the court system triggers calls for reforms designed to close the gap by strengthening the institutions or improving the services they deliver (Figure 1). Once the political decision about the desired high-level legal objectives is taken, reformers move into the practicalities of how to change the way particular court systems operate. This is the most difficult task: Appointing the judges, providing them with resources and incentives, determining the procedures to be followed by the courts, etc.

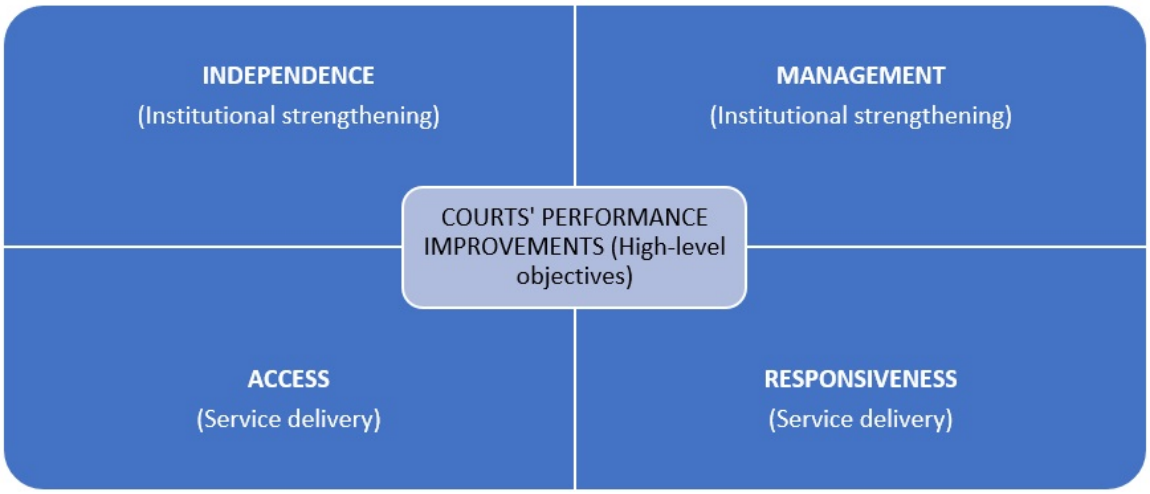


FIGURE 1.
Judicial reform - Areas and tools for performance improvement
Source: Author's own elaboration.

The complexity of a modern justice apparatus and the rapid change in social demands from the courts requires that any reform proposal focuses only on a few institutional strengthening and service delivery reforms where the underpinnings of the performance improvements sought by the reformers are traceable so as to track performance improvement patterns. This approach is consistent with the recent reform experience of most countries where the key political decisions typically: (i) Select a few high-level objectives to improve court performance; and (ii) identify institutional/procedural changes that are conducive to achieve the expected improvements. Holistic approaches are becoming rare so that most reformers prefer to look into particular reforms dealing with groups of courts (e.g. civil or criminal) or geographical subdivisions (states or provinces). [7]

Lastly, measuring the "success" of judicial reforms is acknowledged in the literature as one of the most difficult tasks. Change may happen, but the levels of "success" can be quite varied depending on the measurements selected. For instance, the metrics of particular Judiciaries and international organizations are different, while civil society/private sector organizations tend to set a very high bar inspired by OECD countries standards. [8] The works used for this review continuously struggle with this matter of data comparability.

The Political Process of Justice Reform: What and how?

The main political trigger of justice reform proposals is related to the peculiar challenge that judicial institutions confront: The courts have improved services quality and quantity (as measured in the four areas identified above), but the citizens' demands have increased even more. In other words: Court performance improvements have not met the increased citizens' expectations. New generations of users are more demanding than the old: They do not accept excuses based on limited resources but feel entitled to receive the best services at the lowest cost and within the shortest timeframes. [9] Many countries have thus started a recurrent cycle of justice reforms to address this challenges: In spite of the progress achieved by the initial reforms in particular areas (e.g., fundamental rights protection) the serious deterioration of the perceptions in others (e.g., congestion or delays) triggers calls for new waves of reforms. [10]

Two types of political processes develop around this reform cycle: (A) The large country Politics (uppercase *P*), which involves national-level players like the parties active in the Executive and Congress, business groups and civil society/academic institutions; and (B) the internal judicial politics (lowercase *p*) that only involves judicial actors (the leadership, the middle-management, the unions) loosely connected with the national-level players. While the record of the *P* politics is traceable through publicly available sources, the . politics is less exposed to scrutiny and researchers have to use alternative sources such as anonymous interviews and inferences from the actual reform implementation record. Generally, *P* politics is a major determinant in some reform areas (for instance, access to justice), while *p* politics works more effectively on others (such as management). [11]

Three Approaches to Justice Reform Analysis

The Lawyers' Literature: The Primacy of a Normative Framework

Traditionally, the courts' objectives have been described in terms of high-level normative principles ("achieve justice or fairness"). In Roman Law the purpose of the courts was "to render everyone his due." [12] Locke maintained that the courts should "provide security for each person's rights based on the law of nature." [13] Montesquieu believed that the best form of government was one in which the legislative, executive, and judicial powers were separate and kept each other in check to prevent any branch from becoming too powerful. [14]

The seminal decision about these normative principles may be the result of a political process but is embodied in a legal document such as the constitution or basic/organic law of the country. For example, the U.S. Declaration of Independence mentions the "Laws of Nature" of Locke and the Constitution vests the judicial power "in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." [15] The 1789 French Declaration of the Rights of Man and Citizen follows Montesquieu by recognizing equality before the law and the justice system, and affirming the principle of separation of powers. [16]

For modern scholars, the rule of law is a concept distinct but closely associated with democracy, both key pillars of modern states. More than a legal doctrine, it is the basis of a fair and just society, a guarantee of responsible government, a contributor to economic growth and a system for securing peace and cooperation. [17] Since the origin of democracies inspired by these beliefs in the late XVIII century, a consensus emerged that the role of justice institutions is to make effective the rule of law that binds together various elements of governance and enshrines the citizen's political and civil liberties at the core of a free society. Judicial institutions are expected to be responsible of the enforcement of rights and freedoms not only by

upholding laws and redressing abuses of power but also by inspiring public confidence that they will provide equal protection to law-abiding citizens, firms and communities, and fair resolution to complaints against Government authorities. After World War II a common international framework provides general normative standards as to the performance of justice systems. Human rights conventions and other United Nations instruments also contain rules phrased as high-level objectives: judges independent from political pressures, justice without unreasonable delays. [18]

However, in spite of the common principles, justice institutions are established with unique structures and practices, after long historical processes within a national context. Basic adjudication functions are similar, but significant differences remain across countries. Legal systems in Continental Europe and Civil Law countries in Africa, Asia, and Latin America share similar court frameworks. The same happens with systems belonging to the English Common Law family. However, even within the same legal traditions different national organizations and practices have developed. [19]

The Political Scientists' Literature: The Primacy of a Decision-Making Framework

Judicial Reform Drivers: Interests/Incentives of Internal and External Stakeholders

From a political science point of view, judicial institutions are a small part of the complex web of networks that overlay official governance structures with political bargains. The study of how these networks behave is critical to determine whether reformers can make progress. Judicial reform is part of a political process in which the internal leaders and operators of the judicial bureaucracy interact with external leaders in the government, and influencers in the private sector, civil society, or academia (Figure 2). The analysis of the interactions among these players in the reform process within the context of a broader a political process helps tracking how reforms happen as a result of the agreements they reach around the design of a change package and how they move into an implementation phase which will feature new negotiations and agreements. Change can happen even in the resistant judicial bureaucracies when sufficiently powerful stakeholders coalesce around reform objectives and instruments, and are able to maintain over time their own "star alignment." [20]

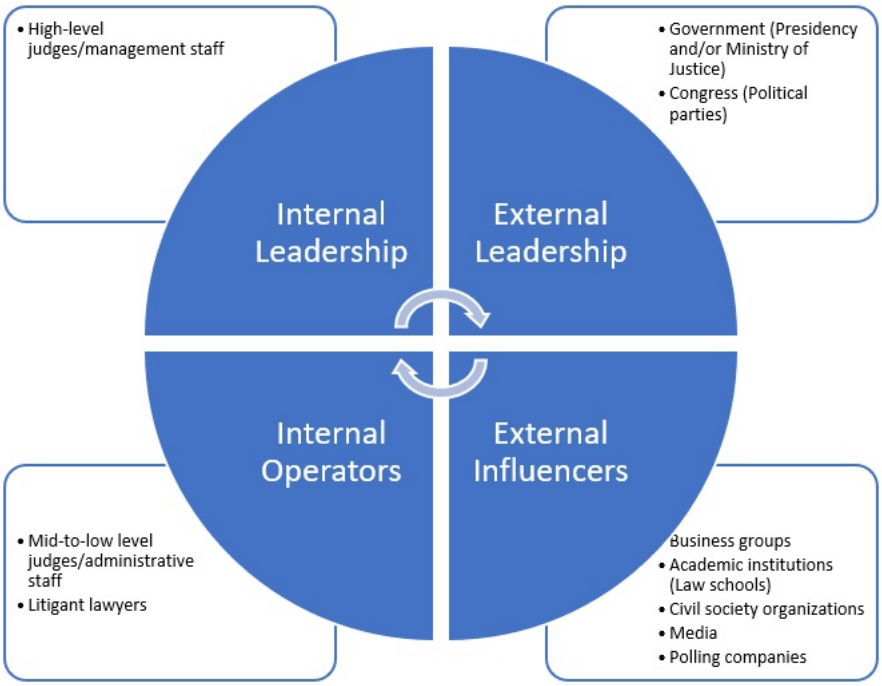


FIGURE 2.
Judicial reform - The decision-making framework (Stakeholders)
Source: Author's own elaboration.

The general literature on bureaucratic behavior [21] [22] and more specific studies about developing countries, [23-24] have identified the main interests and incentives of these stakeholders. Whenever the internal reform leaders (usually in the upper echelons of the Judiciary) agree that the institutional performance has to be improved, they have to pay to costs and take the risks of a mid-to-long term reform process that generally does not show quick gains to reinforce the support of diffuse potentially "winning" constituencies such as the poor and vulnerable, small and medium enterprises, non-unionized laborers, etc., that have to go to the courts and are dissatisfied with the services received. These reform leaders expect to receive the credit for the accomplishments but generally have very short terms in office so their chances to see the changes they propose fully implemented are slim. For that reason, they tend to favor quick technical fixes such as massive investments in information technology. [25]

A strong internal operators' group is usually located in the middle-to-low levels of justice institutions and comprises unionized career officials or organizations of frequent users (for instance, litigants' associations). For this group the institutions are generally working well, and the only change required is for additional resources to be allocated to continue delivering more of the same services, in essence more budget and personnel that would help them to continue "business-as-usual." This group has a very long-term horizon that ensures opposition will be resilient and may block reform attempts. This group's knowledge of the inner workings of the system is quite superior to that of the leaders and its ability to stop any unsupported reform is very high, so they have to be engaged at all stages of the process.[26]

Some scholars have analyzed the risk that judges may only pursue reforms to increase their powers (additional budgets and staff, more prestige and influence). In these cases, the internal reformers may be advancing an agenda that is inconsistent with that of other stakeholders or society at large. A major potential political economy problem may thus arise: How can be judges constrained in their ability to extract rents from the reforms agreed with the other stakeholders? In the literature, the solution comes from a "general political equilibrium" model in which an independent judiciary has to manage carefully the relationship with

the executive and legislative branches, while politicians have to monitor the courts performance. A study has found that players in this "equilibrium" system have incentives to enforce mutual restraint, including some moderation about the aspirations of judges. [27]

The group of external reform leaders is decisive for the reform process to begin. It encompasses the Government and the political parties, stakeholders that have no permanent involvement into justice business but may be seriously affected by the results of the reforms. They may become winners or losers in a reform process that has unexpected turns and twists, after reformers and opposers make the case for the merits of various proposals/counterproposals. Politicians like the credit they can take from the reform results but rarely find justice among the priority issues in the agenda of electoral processes so only a few engage in a reform that in the end they will not control. The parties are typically indifferent about the technical fixes and may look only into advancing ideological platforms. [28] Different dimensions of judicial reform generate distinct incentives for these players. Management and effectiveness reforms are generally attractive to politicians in the Executive and Congress because they could save public resources and enhance economic growth. By contrast, for the same groups independence or access have no obvious benefits and potential risks—why should they delegate power to the judges? The standard explanation in the literature is that, in a competitive party system, political leaders are never sure who will win the next election and concerned about that uncertain future they prefer an independent judiciary. [29]

The external influencers group is led by CSOs working on the justice sector or advocating for the interests of vulnerable citizens that often have to make effective their rights through the court system (i.e., minorities, women, pensioners, or taxpayers associations). CSOs take the initiative in advancing reform proposals to address dysfunctions that affect the groups they represent. Sometimes, they may provide support to the proposals advanced by the reform leaders in the Judiciary or in Government but more commonly are critical of them. CSOs expect to continue operational in the long term so they have time to develop capabilities to monitor the reforms along the road. [30]

Business groups would generally expect better services at lower costs, but some subgroups have more specific interests in particular courts (bankruptcy, commercial) and would like these services to be addressed by the reforms. Academic institutions expect to participate as advisors of the reforms, and through graduates in various positions of the judicial hierarchy have access to information about the internal operation of the courts. Some have built the expertise to monitor and evaluate the reforms, and to propose alternatives. All members of this group also have a very long-term perspective and are careful not to engage in supporting questionable or non-durable reforms. [31]

A peculiar influencer group comprises the main mass media outlets and polling companies that are intermediaries in the generation and measurement of public opinion about justice issues. Judicial matters used to be relegated to the last pages of the traditional papers devoted to the coverage of sensational criminal cases, but in the last decades have turned into major sources of information for all the stakeholders about broader reform issues, sometimes because of the improved quality of the analysis (as in the case of media committed to investigative journalism) or as a result of the rapid and persuasive dissemination of citizen grievances against unresponsive courts. Finally, the polling companies try to measure the evolution of public opinion around a large number of policy issues, with a few specific questions about the justice sector in nationwide surveys that may provide support to the reformers or their opposers. [32]

Judicial Reform Determinants: Conditions for Consolidation/Implementation

Materializing courts' reforms and the performance improvements sought requires reformers to develop a framework that connects the original objectives and the results to be achieved. While useful to determine high-level/long-term societal aspirations purely normative frameworks (i.e., what constitutions or laws say

about these courts) are not sufficient. Instead, the reformers' framework has to look into how these courts operate and the impact court changes may have on users and society at large. That is the practical purpose of some of the literature reviewed for this article: tracking how court performance improvements happen (or not) as a result of a reform process in terms of service delivery and institutional strengthening. [33]

The key determinant for consolidation/implementation is the overall context of a country's political decision-making. A number of scholars trace the connections between political players and the courts: While the courts are supposed to be independent, certain rulings have enormous impact on the political arena (e.g., decisions about elections by the administrative courts), and governments and political parties have a stake in the way judges decide. Other vested interests, such as powerful economic groups, may be equally active in tilting the ground to their own benefit, for instance in large financial disputes under civil courts review.[34] The political nature of judicial decision-making is the preferred area of scholars that have explored the recurrent cycle of politics affecting judicial activity and, in turn, lawmaking by judges affecting politics.[35] This cycle leads to a certain degree of judicialization of public policy, as the courts may turn themselves into policymakers through frequent landmark rulings about basic social and economic rights, particularly in the case of constitutional courts.[36] This high-profile role also runs the risk of further politicizing the courts as more frequent interactions can be expected with the traditional policymakers such as other branches of power and the political parties/interest groups regularly dealing with them.[37]

Within a given political context, any reform proposal that modifies the status quo of a justice system by providing checks-and-balances on the discretion of the political branches should expect strong resistance from vested interests. Scholarly review of "why and how" judicial reforms happen is generally focused on the cases where that resistance is overcome, the reforms pass, and new checks-and-balances emerge. For instance, Constitutional/Administrative Courts are the courts that limit the political discretion of the other Branches of Power so reforms in this area are particularly sensitive for political parties.[38] The conditions to overcome that resistance are determined by decisions of internal and external stakeholders: The judges' commitment to independence is an essential element of the checks-and-balances, but the external influencers (CSO, academia, media) play a critical role for judges' independence to be balanced by accountability. The simultaneous alignment of internal and external stakeholders around reform proposals does not happen frequently but it is typical of transitions from one political system to another, more commonly from dictatorship to democracy or from single party to multi-party rule when a new balance of power emerges.[39]

This literature has found that fully independent, well-managed, accessible, and responsive justice institutions are highly correlated with democratic checks-and-balances. Case studies of major transitions to democracy have explored this phenomenon but have not found a single cause; they agree that a transition to enhanced democratic institutions provides the typical opening for judicial reform as it helps overcoming resistance to change that otherwise is entrenched both inside the judiciary and in the overall political system. Apart from those transitions only limited-scope reforms usually move forward. [40 -41]

Also determinant for the progress of justice reforms is the ability to prevent or mitigate counter-reforms resulting from changes in the political cycle. Some authors have noted that reforming the courts is an intrinsically unstable process as the positive results of an initial reform (for instance, more independent courts) may generate counter-reform efforts from the executive and other political or interest groups that feel their powers have been restrained by an assertive judiciary. The continuous demand for new reforms may then result not from the failure of previous attempts but from their own success in curtailing the powers of the other stakeholders. Reforms can then follow a cyclic/counter-cyclic pattern in which these courts enter into conflict with the groups that benefitted from the pre-reform status quo. The "losers" of a particular reform may become the strongest supporters of subsequent reform proposals designed to undermine the achievements of previous ones. Reforms embedded in constitutional documents may have higher chances of survival than those dependent on lower-level legal instruments. [42]

Another determinant of the chances of success of judicial reforms is the effectiveness of the prioritization/sequencing process. Scholars have found that is easy to identify specific areas in which systemic dysfunctionalities block the achievement of the high-level objectives usually pursued in justice reform programs—independence, management, access, responsiveness—, but also note that some objectives may sometimes enter into conflict and therefore are unlikely to make progress at the same time.[43] Therefore, identifying bottlenecks is part of a prioritization and sequencing process that selects the specific objectives that may advance at a given point. Only over the long term, all objectives may converge as part of a more holistic reform program.[44]

A final determinant of these reforms is the ability to control the behavior of the justice institutions' internal stakeholders, essential to ascertain whether the reforms can achieve the expected results. For instance, the absence of external controls or the institutional leadership inability (or unwillingness) to monitor the actions of judicial staff may block the change process, weaken the formal governance structures, and strengthen informal networks opposed to change. Within the extremes of full-fledged judicial independence and "State capture" (in which political parties or interest groups determine judicial decisions) there may be a number of intermediate steps worth exploring to gauge the ability of the pro-reform forces to counteract such capture attempts and help strengthening the institutions. [45]

The Economists' Literature: The Primacy of a Measurement Framework

The broad scope of the objectives that justice reforms could pursue and the variety of instruments available to that end pose significant challenges to conceptualize improvement-tracking methodologies based on economic principles such as efficiency. The courts feature many overlapping layers of performance areas. For example, certain management improvements may have positive impact on access (new court offices are open) but not on responsiveness (cases continue lagging). Reduced judicial independence may generate perception barriers for access to justice but improved independence does not necessarily mean other barriers (cultural or physical) are removed. Similarly, the reform tools may overlap: The independence/management areas are typically targeted by the strengthening components of a reform program featuring not only small investments in technical assistance and training but also substantial legal changes, while access/responsiveness are more directly addressed by the service delivery components where larger investments in infrastructure and technology are included, but some institutional reforms may also happen. [46] Some authors have noted that because of this complexity measuring court performance is still work-in-progress. [47]

Aware of these constraints, scholars usually limit themselves to observe discrete sets of processes or courts where it is possible to track the improvements achieved as a result of a reform. These authors warn against casting a large net over many processes or courts that could make extremely difficult to determine whether a reform was successful or not and why. However, the same studies also suggest covering a reasonably long period to determine to what extent reforms with short-to-midterm goals were sustainable or supported long-term objectives. [48]

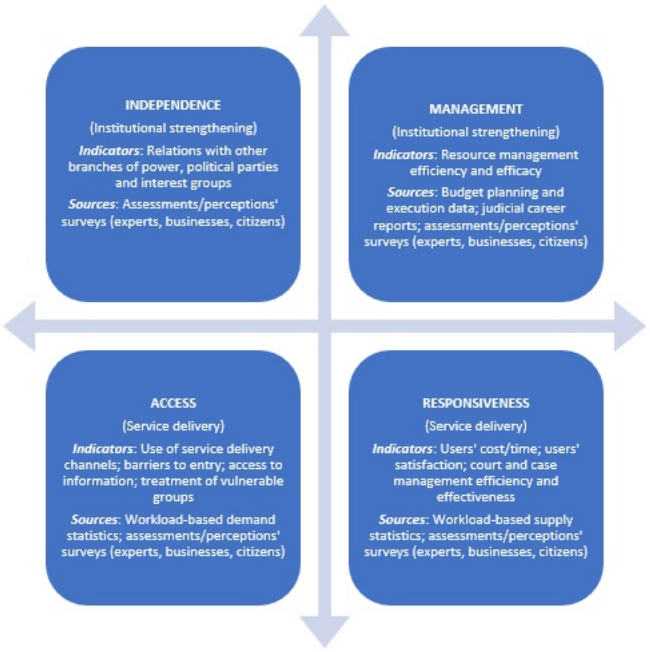


FIGURE 3.
Judicial reforms - Measurement framework (Performance improvement indicators/sources
Source: Author's own elaboration.

Subject to the above caveats, Figure 3 highlights the indicators normally used to measure performance changes resulting from court reforms. Areas other than independence are primarily explored through the analysis of the quantitative data available (mostly budgets, human resources, and workload-derived indicators). Although the access/responsiveness areas benefit mainly from the analysis of budget data or case studies focusing on service delivery, some improvements in the four selected areas can also be traced through perception data. Perception data is useful to trace some progress of institutional strengthening by measuring the overall level of expert/enterprise/citizen satisfaction with court performance. The potential and limitations of the main sources used for the measurement framework are discussed below.

Quantitative Sources

Statistics about workloads (incoming/outgoing cases, end-of-period inventories) are the preferred indicators about court performance improvements in the areas of management, access, and responsiveness. The use of certain indicators developed by CEPEJ such as the partial clearance rate and disposition time is widespread, even though some scholars question these quantitative measures because of potential perverse incentives and distortions.

Executive agencies that deal with the financial and economic aspects of the justice sector (typically the Ministries of Finance or Economy) provide information about court budgets (both for operational and investment expenditures) that are critical to assess management performance. Using that information some scholars have evaluated court improvements via tracing the "macro" connection between the budget allocated to the reform and the post-reform deliverables, as a common explanation for judicial underperformance is the lack of resources. Some studies of judicial budgets have also tried to identify efficiency and effectiveness[51] indicators.[52] Other authors have preferred to look into court performance at the "micro" level through analysis of samples of cases aimed at determining the actual track-record of specific court offices and assessing whether internal process improvements have translated into sustained service delivery achievements.[53-54]

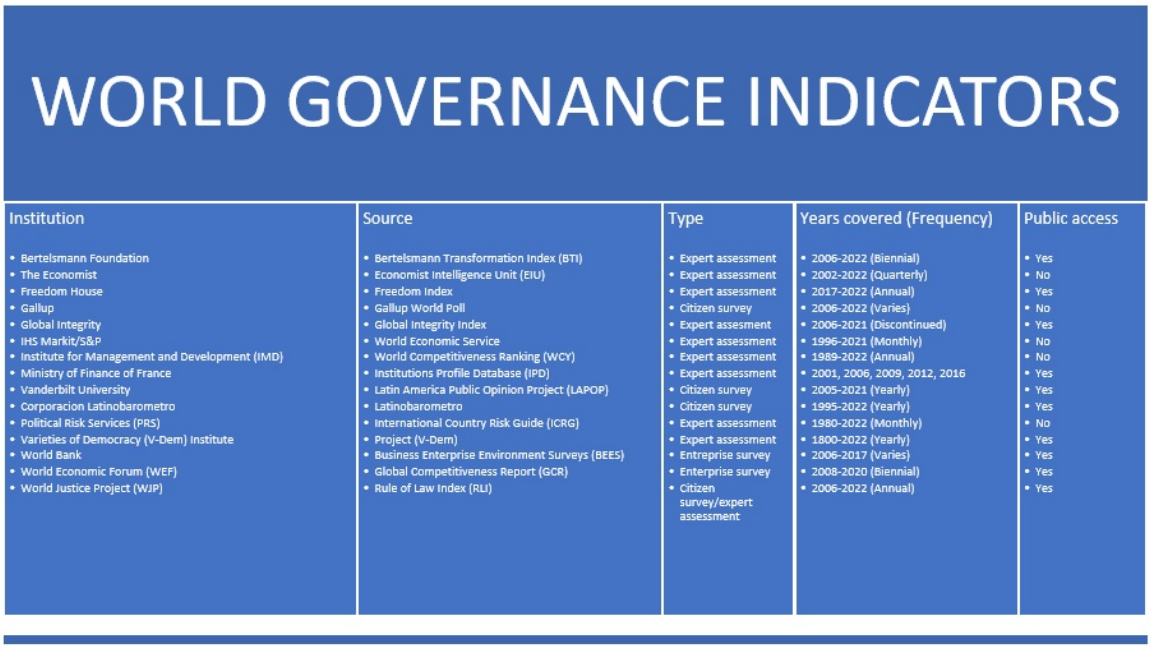
A few studies have explored: (i) How the courts ensured the actual protection of fundamental rights and freedoms or made government officials and institutions accountable to citizens; and (ii) the impact of court decisions on actual government services delivery, i.e. cases where judges have had a major role in facilitating the operation of the state apparatus, for instance by resolving grievances against government agencies and their actions based on individuals' complaints.[55-56]

Finally, some studies have focused on gathering data about how the strengthening of functional capacities of a set of courts occurred by observing only a small number of internal processes (caseload management, judgment generation, settlement incentives). This research was designed to capture what is at stake in a narrow reform setting and what needs to happen to set the foundations for further performance improvements.[57-58-59]

Perception Sources

Some court reform impacts (particularly in the area of independence) can only be measured by the quality of the broad outcomes delivered to society, as assessed by the opinions of experts and users, [60] including in the last category individuals, businesses, and communities.[61] No perception data should be used for management/access/responsiveness, except to confirm that delays/backlogs were the paramount issue in the opinion of experts/citizens.

Particularly useful for the assessment of independence is the surge in the number of sources devoted to ascertaining the progress of democratic governance through perception data that include the courts among the target institutions. For instance, World Bank's (WB) Worldwide Governance Indicators (WGI) have reported aggregate data for six dimensions of governance after 1996, including a rule of law indicator that captures perceptions about confidence in, and compliance with, the basic rules of society, with particular reference to the quality of the courts responsible for contract enforcement and property rights. [62] These aggregate indicators combine the views of fifteen enterprise, citizen and expert surveys produced by a variety of institutes, think tanks, CSOs, international organizations, and private sector firms (Figure 4).[63]



WORLD GOVERNANCE INDICATORS

Institution	Source	Type	Years covered (Frequency)	Public access
• Bertelsmann Foundation	• Bertelsmann Transformation Index (BTI)	• Expert assessment	• 2006-2022 (Biennial)	• Yes
• The Economist	• Economist Intelligence Unit (EIU)	• Expert assessment	• 2002-2022 (Quarterly)	• No
• Freedom House	• Freedom Index	• Expert assessment	• 2017-2022 (Annual)	• Yes
• Gallup	• Gallup World Poll	• Citizen survey	• 2006-2022 (Varies)	• No
• Global Integrity	• Global Integrity Index	• Expert assesment	• 2006-2021 (Discontinued)	• Yes
• IHS Markit/S&P	• World Economic Service	• Expert assessment	• 1996-2021 (Monthly)	• No
• Institute for Management and Development (IMD)	• World Competitiveness Ranking (WCY)	• Expert assessment	• 1989-2022 (Annual)	• No
• Ministry of Finance of France	• Institutions Profile Database (IPD)	• Expert assessment	• 2001, 2006, 2009, 2012, 2016	• Yes
• Vanderbilt University	• Latin America Public Opinion Project (LAPOP)	• Citizen survey	• 2005-2021 (Yearly)	• Yes
• Corporacion Latinobarometro	• Latinobarometro	• Citizen survey	• 1995-2022 (Yearly)	• Yes
• Political Risk Services (PRS)	• International Country Risk Guide (ICRG)	• Expert assessment	• 1980-2022 (Monthly)	• No
• Varieties of Democracy (V-Dem) Institute	• Project (V-Dem)	• Expert assessment	• 1800-2022 (Yearly)	• Yes
• World Bank	• Business Enterprise Environment Surveys (BEES)	• Entreprise survey	• 2006-2017 (Varies)	• Yes
• World Economic Forum (WEF)	• Global Competitiveness Report (GCR)	• Enterprise survey	• 2008-2020 (Biennial)	• Yes
• World Justice Project (WJP)	• Rule of Law Index (RLI)	• Citizen survey/expert assessment	• 2006-2022 (Annual)	• Yes

FIGURE 4.
World Bank - World Governance Indicators (Rule of law indicator sources)
Source: WB n.d.

Among the most relevant sources of WGI for the courts, the executive survey of World Economic Forum (WEF) and the citizen survey/expert consultation of World Justice Project (WJP) include several specific questions about court performance. [64]. [65] The Varieties of Democracy (V-Dem) Institute has developed a methodology to aggregate expert opinions and assess to what extent certain legal provisions are actually enforced such as those related to court independence or access to justice. [66]

Integrating the Analytical Frameworks: The Process-Tracing/Analytic Narratives Methodology

This literature review has shown that a combination of various approaches (legal, political and economic) helps identifying the main drivers and determinants of justice sector reforms, i.e., the multiple sets of factors, external and internal to the court system, that influence whether justice reform moves forward or not. The literature also provides various entry points to answer the main questions posed in the beginning of this review. While legal scholars focus on the normative desirability of reform, political scientists prefer to analyze whether reforms were successful or not, considering the underlying factors. [67] The authors with an economic focus are "solution-driven" and try to generate consensus around small "windows of opportunity" for reform that are supposed to be less sensitive politically but more effective in economic terms. [68]

However, few scholars deal simultaneously with all the dimensions of judicial reforms. A more holistic approach should help connecting the various determinants or drivers into a single analytical model that better explains the complexity of the reform process and helps selecting policy options. It is also clear that the wide variety of reform scenarios has not been sufficiently explored in a literature that for the most part continues attached to a model that privileges a few players like the political parties and judicial elites (large P Politics) but ignores or diminishes the role of other players (small p politics).

Such a holistic approach may be found in the process-tracing methodology proposed by some scholars working on general governance issues [69] that is particularly suitable for judicial reforms. This methodology focuses on the specific historical junctures that reveal the interaction between power balances and economic incentives in determining the scope of the reforms and how the diverse actors constrain the process or allow it to happen. The historical record of the reforms would find the breakthroughs where some particular stakeholders (in the case of the Judiciary civil society organizations, private sector-sponsored think-tanks, judicial employees' unions) shape the content of the reforms.

For process-tracing to work, the justice sector should be positioned as a portion of the State apparatus of a country operating within a larger society and economy in which political and policy choices are continuously made by national level stakeholders. To understand the dynamics of judicial reform the research should look into that larger scenario: Who are those players, which are their interests, how they behave about broader economic and political issues? To that end studies of judicial reform should review the historical events that determined the development of the court institutions following a complementary methodology known as analytic narratives that is based on rational choice theory to explain the inner logic of the reform process, highlighting only the key issues and focusing on the main actors to trace the change process at the level of this subset of State institutions. [70]

Analytic narratives explore the evolution of various stakeholders' interaction during a given period. If such period features a wealth of historical sources, it has to be highly selective for the narrative to provide clear links between the main features of judicial reform and other state institutions and players, at the risk of not dealing with all issues or players. Existent literature has already shown that judicial stakeholders enter into frequent bargains with their peers in other sectors.[71] The narrative would also look into the mid-to-long terms impact of those bargains. Similarly, to assess the reform results, it would present a "before-after" analysis to identify the causes for change in terms of service delivery and management strengthening, or the barriers still blocking performance improvements.[72]

As recommended by the analytic narratives' methodology, the data gathered about key historical events has to be "disciplined" by a theory of institutional development. To understand how judicial reforms happen in a particular country and whether they effectively contribute to institutional development, research has to follow a more flexible model that admits a non-linear progress resulting from the connection between institutional reforms and the changing interests and preferences of the stakeholders engaged in decision-making In fact, most countries have followed an irregular path of institutional development, shaped by evolving political constraints and opportunities. [73]

Process-tracing/analytic narratives may provide the common framework that integrates the lawyers, political scientists and economists' perspectives. Perhaps one of the reasons judicial reforms in some countries continue entangled in a never-ending cycle is the lack of such a multidisciplinary perspective. Some lawyers may believe that justice is the exclusive domain of their profession and disregard the value-added by the political scientists and the economists in the development and implementation of the reform proposals. This professional bias may be implicit in the failure of some reforms prepared by commissions of jurists that limit themselves to propose tweaks in the legislation that are supposed to eliminate the bottlenecks without realizing that the drivers/determinants for the reform to happen and succeed lie somewhere else. Similarly, purely "economic" reforms that are limited to providing additional resources may not address the core issues limiting the performance improvements sought because the incentives and interests of big *P* and small *p* players are not properly addressed.

Conclusion

This review has explored the uneven path of court reforms by tracing the influence of the various political and economic drivers/determinants for the justice system to achieve the high-level goals stated in the legal instruments that provide for the reform (mostly in treaties or constitutions). The complementary viewpoints of leading authorities in the legal, political, and economic sciences have allowed recent research to disentangle the diverse influences interacting with the design and implementation of the reforms, and provided measurement instruments to track progress toward the high-level objectives in a few discrete areas that are critical to determine whether *de jure* reforms translated into *de facto* changes for the institutions and their users.

The review also showed that a mid-to-long-term analysis of the historical evolution of the justice institutions is essential to understanding the different combinations of big-P politics (external to the Judiciary) and small-p politics (internal to court institutions) within a given period and country. Otherwise, it may be challenging to determine whether or not the reforms make real progress around institutional strengthening (in terms of independence and access) or service delivery (where the performance improvements regarding management and responsiveness have an actual impact on citizens). Returning to the seminal distinction between strategy and tactics, several short-term achievements in this field may not be sustainable in the long term. Therefore, an adequate period should be selected to apply effectively any of the different analytical frameworks proposed.

Irrespective of the discipline, most scholars caution against overly ambitious reform proposals that are not aligned with the dynamics of the Judiciary's internal politics or the country's overall political context. For instance, an excessive emphasis on the optimal solutions from the legal point of view may ignore the economic incentives of the various players (particularly internal operators) in implementing the reform and limit the chances of actual improvements. Similarly, a reform that is heavy on providing additional economic resources (budgets and staff) may go against the interests of external players competing for the state budget's scarce resources. More balanced approaches to judicial reforms that can navigate the decision-making process of Congress, the Executive, and the Judiciary, as well as major players in the society and the economy, may have more chances of sustained success.

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Notes

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4 These studies showed a long-term and dynamic relationship between both types of reforms and only found a small positive relationship between them, mainly driven by non-OECD countries. *Cf.* Bernd Hayo & Stefan Voigt, *The puzzling long-term relationship between de jure and de facto judicial independence*, No. 18 ILE Working Paper Series (2018).

5 Broadly speaking, a justice sector includes institutions other than the courts such as prosecutors, public defenders, the police, etc. that are autonomous or belong to the Executive Branch. However, for the purposes of this article any reference to the justice sector is limited to the court system, that constitutes the backbone of the dispute resolution services provided by the State to citizens, and includes the management/governance units of that system. Consequently, the terms "judicial reform" and "justice reform" are used interchangeably.

6 Robert Knox, *Strategy and tactics*, 21 The Finnish Yearbook of International Law 193-229 (2012).

7 CEPEJ, *supra* note 2.

8 CEPEJ (n.d.).

9 World Justice Project (n.d.).

10 For instance in Latin America, citizens trust in these institutions decreased from 32% of in 1996 down to only 23% in 2020. *Cf.* Latinobarómetro (n.d.).

11 James Dixon, *Archaeology, politics and politicians, or: Small p in a big P world*, 7 Archaeology, the Public and the Recent Past 111 (2013).

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15 U.S. Constitution, Article III, Section 1.

16 Declaration of the Rights of Man and Citizen, Articles 1 and 16.

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28 Cesi Cruz & Philip Keefer, *The organization of political parties and the politics of bureaucratic reform*, World Bank Policy Research Working Paper 6686 (2013).

29 Complementing this traditional rationale, recent literature has explored the conditions that sustain and enhance the authority of the judicial bodies. Some studies have highlighted the potential benefits that independent courts may provide to policy-makers in the Executive and Congress while others emphasize the external constraints that keep governments and legislators from undermining the judiciary. Strategic judicial behavior may further maintain and expand the powers of the courts. For instance, the political role of most constitutional courts remains significant in spite of the limited resources allocated to them: In absence of direct enforcement powers these courts have to rely on the willingness of executives and legislators to comply with their decisions. Nevertheless, these courts have been able to attract broad citizen's support by aligning themselves with prevailing public attitudes thereby asserting a more prominent role in democratic policies. *Cf.* Georg Vanberg, *Constitutional courts in comparative perspective: A theoretical assessment*, 18 Annual Review of Political Science 167-185 (2015).

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37 Carolina Arlota & Nuno Garoupa, *Addressing federal conflicts: An empirical analysis of the Brazilian Supreme Court, 1988-2010*, 10 No. 2 Review of Law & Economics 137-168 (2014).

38 Other critical dimension of a modern rule-of-law justice system is to punish the crimes and misdemeanors by elite members under the principle that none is above the law.

39 Robert M. Howard & Henry F. Carey, *Is an independent judiciary necessary for democracy*, 87 No. 6 Judicature 284-291 (2004).

40 Cass R. Sunstein, *Designing democracy: What constitutions do* (Oxford University Press, 2001).

41 Justin Crowe, *Building the judiciary: Law, courts, and the politics of institutional development* (Princeton University Press, 2012).

42 Nuno Garoupa & Tom Ginsburg, *Judicial reputation* (University of Chicago Press, 2015).

43 Even worse, some reasonable reform objectives may generate unwanted externalities. For instance, special courts for commercial cases may offer enhanced access but only to business groups, or widespread access to courts for the enforcement of social and economic rights may unbalance the public budget.

44 Dory Reiling, Linn Hammergren & Adrian Di Giovanni, *Justice sector assessments: A handbook* (The World Bank, 2007).

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46 To track court performance, researchers look for measures of the dependent variables that should be as disaggregated as possible, (i.e., 'what changed') as a basis for analyzing causal drivers in a similarly disaggregated way. In the justice sector it is theoretically possible to move from the aggregate of a whole court system to the particulars of an individual court office or official. Data availability or quality may constrain that possibility. *Cf*. Santos Pastor-Prieto, *Dilación, eficiencia y costes. ¿Cómo ayudar a que la imagen de la justicia se corresponda mejor con la realidad?* (Fundación BBVA, 2003).

47 Nuno Garoupa & Tom Ginsburg, *supra* note 42.

48 Edgardo Buscaglia & Thomas Ulen, *A quantitative assessment of the efficiency of the judicial sector in Latin America*, 17 No. 2 International Review of Law and Economics 275-291 (1997).

49 CEPEJ (n.d.).

50 Other scholars believe that statistical data quantity and quality has improved in recent years but often does not reach a level of detail permitting analysis, and official data may have to be filtered or supported by other sources. These scholars maintain that even with those precautions data issues restrict the ability to conduct a full exploration of certain performance areas or to reach robust conclusions (Hammergren, 2008). *Cf*. Stephen J. Choi & G. Mitu Gulati, *Choosing the next Supreme Court Justice: An empirical ranking of judicial performance*, 78 Southern California Law Review 23-117 (2004). Stephen J. Choi & G. Mitu Gulati, *A tournament of judges?*, 92 California Law Review 299-322 (2004).

51 A group of scholars has noted that these two performance improvement objectives are not necessarily consistent. In particular, effectiveness may not accompany efficiency. Certain reforms may be effective but not efficient if the marginal benefit for the institution or its users is less than the marginal cost imposed on the national budget and/or the service delivery agency. Certain reform options may be ineffective for some stakeholders (for instance, particular groups of users) but efficient for society at large. Reforms aiming simultaneously at effectiveness and efficiency may lead to potentially contradictory results. *Cf*. Joseph L. Staats, Shaun Bowler & Jonathan T. Hiskey, *Measuring judicial performance in Latin America*, 47 No. 4 Latin American Politics and Society 77-106 (2005).

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59 Said & Varela, *supra* note 25.

60 Vivienne Bennett & Jeffrey W. Rubin, *Enduring reform: Progressive activism and private sector responses in Latin America's democracies* (University of Pittsburgh Press, 2015).

61 As noted above (footnote No. 12), a key measurement issue is to get beneath aggregate information to more granular data. The sources that only provide general measures should be used as proxies only when no better disaggregated measures are available. *Cf.* Susan Eckstein & Timothy P. Wickham-Crowley, *What justice? Whose justice?: Fighting for fairness in Latin America* (University of California Press, 2003).

62 World Bank (n.d.).

63 The 2022 WGI update includes some revisions to the underlying sources that affect the data for earlier years.

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71 Eric A. Posner, *Does political bias in the judiciary matter: Implications of judicial bias studies for legal and constitutional reform*, 75 U. Chi. L. Rev. 853 (2008).

72 This process-tracing methodology is not attached to any abstract "model justice system" against which to measure degrees of improvement, a bias that can be observed in most of the literature that uses the normative framework (See pg. 7 above).

73 Brian Levy, *Working with the grain: Integrating governance and growth in development strategies* (Oxford University Press, 2014).

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