THE FUTURE OF IRAN: JUDICIAL REFORM

Judicial Reform: Lessons from Latin America

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This note offers a brief overview of the Latin American experience in judicial reform. Its objective is to highlight aspects of the reform process that countries, such as Iran, may want to take into account when they decide to launch similar processes.
IN GENERAL

In the early 1990s most countries in Latin America launched comprehensive programmes of legal and judicial reform. The three factors underlying this process were: the acceleration of economic globalization, which prompted governments to update state economic institutions; the collapse of dictatorships, which brought about a wave of democracy and made elites aware of the importance of stable political and legal frameworks; and the proliferation of human rights abuses during the 1970s and 1980s, which persuaded governments to strengthen their legal and judicial institutions in order to punish and prevent further human rights abuses.

OBJECTIVE OF THE REFORM PROCESS

One of the main aims of the reform process was to achieve judicial independence. The expectation was that an independent judiciary would strengthen the democratic process by effectively protecting human rights and controlling public authorities. An independent judiciary would also benefit the economy because it would protect private property rights and contribute to the enforcement of contracts.

MAIN COMPONENTS

The reform process has focused on technical issues relating to the administration of justice, including establishing better and more transparent systems of judicial appointments; strengthening the administrative capacity of courts; establishing training programmes for judges and judicial personnel; improving the IT provision of courts, encouraging judiciaries to compile, distribute and monitor judicial statistics; improving the procedural mechanisms relating to the enforcement of judgments; establishing or expanding public defender offices, creating and/or supporting the role of public prosecutors; improving access to justice; and, in some countries, establishing a comprehensive programme to move from an inquisitorial to an accusatorial system of criminal justice.

OUTCOMES

It is perhaps too early to judge whether this ambitious reform process has been successful. There are, undoubtedly, many areas in which significant progress has been made:

• Judicial independence – some countries have made significant progress in improving or consolidating the independence of courts such as Brazil, Chile, Colombia, and Costa Rica.

• Constitutional standards – today constitutional standards are more widely respected than in the past, thanks mainly to the strengthening and/or the introduction of judicial review procedures. In some countries, such as Colombia and Costa Rica, the constitutional review procedure has made a significant contribution to protecting and enhancing civil, political and social rights.
• Resources – today most courts, especially higher courts, have more financial resources than in the past and most courts are better equipped and are making good use of the latest advances in digital technology.

• In most countries courts are better managed and delays in processing cases have been drastically reduced.

• The reform process has given courts an international outlook, thus abandoning the parochial inclinations of conservative Latin American judiciaries. Judges, especially members of Supreme Courts and Constitutional Courts, are better informed about important cases decided by courts in other countries and are better disposed to learn from the experience of other countries. This international outlook has had an enormous positive impact in the area of human rights.

• The reform process has made governments realise that in order to secure long-term improvements in the effectiveness of courts, it is also necessary to improve the governance and operation of other institutions, notably the police and prison services.

• Today, citizens in Latin America are more aware that the legal system and courts can and should be used to protect individual and collective rights (the case of indigenous groups and ethnic minorities).

SHORTCOMINGS

In a comprehensive reform process there are, undoubtedly, many areas where the reform process falls short of expectations. Here follow some areas where achievements have been disappointing:

• Despite efforts in many countries to improve the criminal justice systems and policing methods, public security has deteriorated and hence ordinary citizens tend to feel more vulnerable to crime and other abuses – this is especially the case in Mexico and some Central American countries.

• Although in some countries judicial independence has improved, the executive branch continues to pose a direct or indirect threat to the independence of judges – Argentina under Menem, and Venezuela under Chavez.

• Despite strong initial commitment to the reform process enthusiasm has declined. Given the long-term nature of the reform process this is not surprising; nevertheless, it might well have negative consequences. Civil society organizations have an important role to play in keeping the pressure on governments and courts to renew their commitment to the reform process.

• Despite the remarkable progress made in some areas, such as criminal justice, other areas such as labour law and family law have been neglected.

• The reform process has focused mainly on urban areas, thus neglecting the countryside, where people are in desperate need of fair and more efficient procedures of conflict resolution.
The reform process has concentrated on securing improvements in formal courts, thus neglecting the variety of “non-state” or “informal” justice systems that are active both in poor urban centres and in remote rural areas.

The reform process has not focused on improving the quality of legal education. Rote learning is the main feature of legal education. In general, most law schools discourage critical thinking and teach law in a doctrinal and formalistic manner, without taking into account the social and economic context within which the law operates.

INSTITUTIONAL REFORM IS SLOW AND DIFFICULT

The shortcomings of the reform process are not surprising. Short of a social revolution, institutional change is always slow and difficult to manage. In the case of judicial reform, the process of change is especially difficult because courts are by nature resistant to change and respectful of tradition. These otherwise praiseworthy attributes can become major obstacles to change when the reform process requires judges to learn new rules, adopt new procedures and employ complex technology. In the case of judicial reform, the difficulties in managing the process of institutional change are further compounded by the fact that, in most countries, there is a dearth of information about the way courts actually work, and about the impact of their decisions. Moreover, promoters of judicial reform also have difficulties persuading judges and court personnel to change because they often attempt to impose laws or decision-making models from abroad without consulting all the relevant stakeholders. As a consequence, they expose themselves to the allegation that the reform process is top-down (undemocratic) or that they have not adequately taken into account local conditions. Although in some instances this argument is valid, in many instances it is little more than an excuse to oppose change.

JUDICIAL REFORM IS POLITICALLY SENSITIVE

Legal and judicial reform is politically sensitive because law is an essential component of the political system. Indeed, it is worth remembering that, throughout most of the twentieth century, development agencies and practitioners regarded legal and judicial reform as falling outside their remit. It was regarded as political, rather than technical. The political nature of law is underscored by the fact that in Latin America, and in most developing countries, the popular perception of the law is largely negative. Law is seen as a tool of elite domination rather than as an instrument to safeguard freedom and self-determination. Indeed, most ordinary people believe that the law inevitably favours the rich, especially in the area of criminal law.

LAW IS UBIQUITOUS

Law is a complex and ubiquitous artefact. It is not merely a set of rules, but is part of a complex set of institutions and social actors. It includes formal and informal practices that shape the interpretation and enforcement of rules. Law is also a specialized form of reasoning that requires specialists. Finally, law is also an ideology that embodies individual and collective aspirations that are never entirely fulfilled.
MANAGING LEGAL PLURALISM

Lawyers tend to regard state law as the sole source of law. Yet, in most countries the legal order of the state is but one of many competing legal orders. In some cases, non-state rules may have religious origins. In other cases, ethnic minorities and/or the very poor make use of alternative legal orders or informal practices with or without the acquiescence of the state. The existence of competing legal orders, generally described as legal pluralism, adds a layer of complexity to any judicial reform process. Accommodating competing legal orders within the constitutional framework of a secular state where the people are sovereign is a major, but unavoidable challenge.

LINKING JUDICIAL REFORM TO POLITICAL REFORM

The judicial reform process is both technical and political. It is technical because it requires detailed knowledge of local rules, procedures and institutions. In this respect it requires the participation of competent lawyers and other professional experts. But, it is also an intensely political process. A well-designed judicial reform process has to take into account the variety of ways in which the legal and judicial systems are connected to state institutions and to other institutions in society.

POLITICIANS – INDISPENSABLE, BUT NOT ALWAYS RELIABLE

It is generally agreed that one of the preconditions of a successful judicial reform process is to ensure that the government and senior court officials are firmly and unequivocally committed to its successful implementation. This commitment, often described as political will, is usually robust at the outset, but tends to wane as years go by or when the reform process runs into the inevitable problems common to most attempts at reforming complex institutions. Here are some reasons why most politicians – good and bad – tend to lose interest in judicial reform:

• It does not yield immediate electoral benefits in the way that building new schools, roads or hospitals do.

• It does not provide opportunities for patronage in the way that large public work projects do.

• It is often not consistent with politicians’ populist tendencies – in many countries the public often believes that the government should be tougher on crime and criminals and hence demands lengthy custodial sentences or other forms of punishment that are not always consistent with basic human rights.

It is also likely that in times of fiscal austerity politicians will assign low priority to judicial reform projects – if the trade-off is between more elementary schools or hospitals and more and better equipped courts, which option would the electorate choose?
JUDICIAL INDEPENDENCE

Judicial independence, one of the main pillars of modern constitutionalism, embodies the complex relationship between law and political processes. While it acknowledges adjudication as one of the main functions of the state, it also assigns it to specialised institutions that are meant to remain separate and distinct from the other two main political organs of the state. Under this scheme, the judiciary as an organ of the state is part of the political system, and as such, accountable under the constitution. Yet, because of the nature of its functions it is expected to enjoy autonomy.

At one level, the meaning of judicial independence is quite simple. It means that courts must be free from government intervention. Yet, because courts are part of a larger ensemble of state institutions, the precise limits of the independence of courts are not always easy to identify. A state where the administration of justice is merely a political function carried out by judges appointed by the government without any technical expertise or financial autonomy is clearly an example of a state where judicial independence does not exist. The difficulty, however, is that some states allow the judiciary a margin of autonomy in certain "non-political" areas, while they reserve more sensitive areas (national security and military justice) to tribunals controlled by the executive or outside the judicial system (religious courts). Thus, although the absence of judicial independence is easy to recognise, the concept of judicial independence is complex and difficult to quantify.

The concept of judicial independence involves at least two other aspects that are often neglected: independence of judges from the parties who appear before their courts and independence of the judges from the court hierarchy. Where courts are not seen as honest brokers – that is, where courts are seen as having a bias in favour of the rich and powerful in society – their legitimacy and authority are seriously compromised. Likewise, if judges do not feel free when they adjudicate, either because they do not enjoy security of tenure or because of the authoritarian culture within the judicature, they cannot be said to be truly independent. Thus, it is not only governments that pose a threat to judicial independence. Inequalities within civil society and authoritarian practices within the judicature also threaten judicial independence.

LEGAL CULTURE

The concept of legal culture is often used to refer to the peculiarities of legal systems. It refers to ideas, attitudes, expectations and opinions about law held by people in a given community. It is expressed, for example, in the approach of judges to legal interpretation, in the excessive formalism of legal opinions, in the prominence in certain
legal systems of public notaries, in the tendency of individuals to resolve their disputes through litigation, in the content and style of legal education, and in popular beliefs about the authority of law generally.

The concept of legal culture, though imprecise, refers to the way things are done locally. In the context of legal reform, it is generally used to warn would-be reformers that imported models of law or legal reasoning do not take root easily in every country. In other words, the notion of legal culture is often invoked to point out that universal models of legal reforms do not always offer the best solution and will probably not work when exported from one country to another. Although discussions about legal reform often exaggerate the importance of legal culture, it would be a mistake to ignore its existence. Legal cultures are real and must be taken into account as they often play a critical role in facilitating, or frustrating, judicial reform objectives.

**WHEN SHOULD JUDICIAL REFORM BEGIN?**

At one level, the answer to this question is simple: The ideal context for the launch of a wide-ranging process of judicial reform is a democratic context in which there is overall consensus on the main features of the proposed reform. In the absence of consensus the reform process is likely to fail or, worse still, may generate political tension that could, potentially, undermine and discredit the reform effort. Thus, if conditions for a truly democratic process of judicial reform are not auspicious, as is the case in contemporary Iran, it would be unwise to attempt one. Nevertheless, those committed to bringing about meaningful improvements to the justice sector in such countries should endeavour to learn about the experience of judicial reform in other countries. They should also try to gather information and encourage serious academic reflection on the way the legal and judicial systems operate in their country. This knowledge will prove invaluable when the time comes to launch a comprehensive process of judicial reform under a democratic framework based on the supremacy of a secular constitution.