

The Contribution of Judicial Reform To The Rule of Law

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Prepared for delivery at the
Conference on New Approaches for Meeting the Demand for Justice
Mexico City, May 10- 12, 2001

Sponsored by Centro de Investigación y Docencia Economicas and The World Bank

Today, nations throughout the Americas are united in pursuing the establishment and maintenance of the rule of law. We understand that democracy requires a judiciary that is committed to applying the law equally to all its citizens, without fear of intimidation from other powerful institutions and forces within society and without regard to financial emoluments or other blandishments. We understand also that efficient economic markets require that all participants in the market know what standards their behavior will be held to, and have confidence that those standards will be applied uniformly to all. All of the countries represented here share these democratic values, and we all struggle to live up to these aspirations for our justice systems in the daily operations of our courts.

All of you who are gathered here for this conference understand also that an *efficient* judicial system is an essential component of the rule of law. Delays in delivering just resolution of criminal cases and equitable outcomes of civil disputes create pressure to evade the judicial system or to seek special privileges from its officers. High costs create barriers to access to the courts for all, and particularly for those with the least resources. A judicial system characterized by delay and high costs will ultimately lose the confidence of the people that is, in truth, the lifeblood of judicial institutions in a democratic society.

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Today, I want to talk to you about the role of judicial reform in creating and maintaining the rule of law. My comments draw on empirical research that colleagues and I at the RAND Institute for Civil Justice have conducted on the U.S. court system over the past two decades, and on related research conducted by the Federal Judicial Center and the National Center for state Courts, two other U.S. institutions that I am sure many of you are familiar with. Because the U.S. judicial system differs in many important ways from the systems of other countries in the hemisphere, I have tried to identify lessons from the U.S. experience that I think can be generalized to other systems. In particular, I want to discuss two aspects of U.S. judicial reform efforts: (1) the introduction of case management into U.S. courts and (2) the use of alternative dispute resolution (“ADR”). As my comments will indicate, my views on both these subjects are somewhat contrarian: I think that we know less about the effects of case management than some judicial reformers claim and I believe that some of the case management approaches that U.S. experts sometimes recommend to courts outside the U.S. may not have the consequences that the experts suggest they will have. I also think that while ADR has many virtues, relying on ADR to improve the delivery of legal services has the potential to threaten the goals of a rule of law. I look forward to debating these ideas with you during the conference.

The Pitfalls of Case Management Strategies for Judicial Reform

Many of you at this conference are familiar by now with the tenets of the court management revolution in the U.S. courts – the idea that courts and particularly judges must take responsibility for ensuring that the litigation process moves briskly along, when necessary, limiting parties’ – and particularly lawyers’ activities with regard to investigating the facts and law pertaining to their cases – what has come to be called “judicial case management” in the U.S. These ideas may seem less controversial to jurists and advocates in civil code countries and countries with strong “inquisitorial” systems than they first appeared to U.S. litigators, who were long accustomed to the notion of a legal process whose pace and scope *they* largely controlled, and to a view of judging that was largely passive and reactive rather than proactive. The culture of lawyer-controlled (rather

than judge-controlled) litigation in the U.S. was strengthened by the adoption in 1938 in our federal courts of procedural rules that allowed for expansive “discovery” – that is, the ability to obtain information pertaining to the case from the opposing party.

In the latter half of the 20th century, as the amount of litigation increased dramatically in federal and state courts in the U.S., and the level of activity associated with these cases also increased (in part, as a result of expansive discovery rules), judges were increasingly called upon to “manage” their cases by setting limits on what lawyers could do in the discovery (investigation) process, by setting strict schedules for moving cases through the litigation process and refusing to grant extensions to that schedule, and by setting firm trial schedules to ensure that lawyers would recognize that if they were not prepared and did not negotiate a settlement of the case they would find themselves in a courtroom – most likely, in the U.S. before a jury – where there would be severe costs for being unprepared. Over time, many judges were persuaded by their colleagues – and sometimes ordered by court rules – to become engaged themselves in helping the parties to settle their cases, so as to avoid the time and expense of trial. By adopting these modern case management techniques, judges and court administrators were told that they could reduce the public costs of operating the court system, while providing swifter justice for citizens. Such advice ignored the possibility that making the court system more efficient might actually encourage more litigation, offsetting any cost savings due to increased efficiencies. Reformers seemed to assume they could improve quality, without attracting new business -- a dubious proposition in most countries, where the demand for conflict resolution outstrips the supply of judicial services.

Much of this conventional wisdom about how U.S. judges should manage their caseloads and courts was just that – notions that judges shared with each other, based on anecdotes and common sense, rather than on systematic analysis of the nature of litigation, the causes of delay and of high costs of litigation, and the consequences of alternative approaches to managing litigation. But occasionally, researchers from institutions like the Federal Judicial Center or the National Center for State Courts or other institutions would conduct studies of court caseloads or of individual courts’ efforts to reduce costs and delay. When such studies

were done, the results were some times quite startling. For example, court programs aimed at increasing settlement rates often had little effect: while many cases would be settled after judges met with the lawyers to help them negotiate, the *rate* of settlement before trial in courts with such programs was not much different from the rate of settlements when the lawyers were left to their own devices in other courts that did not have such programs. Limiting the amount of time that lawyers had for the discovery process would cut the time it took for cases to reach resolution, but sometimes lawyers would actually do *more* discovery (investigation) when they were given less time, rather than less – perhaps because they were fearful that they might miss an important issue in the case and had insufficient time to consider whether particular legal actions would prove useful or not. Moreover, often, case management programs would be adopted as part of a high profile – court campaign to speed case resolution or cut costs. The publicity surrounding such campaigns would direct judges', administrators' and lawyers' attention to the issues of time to disposition and costs. Some courts that changed their rules and practices as part of a reform effort saw time to disposition decrease, only to have those gains erased once everyone's attention moved on to other matters. The erosion of gains suggested that the publicity surrounding reform efforts and the attentiveness the publicity evoked might have been the sources of any improvement in case processing *rather* than the specific programs that have been adopted.

In short, the success of many court management and legal reform efforts was mixed and short-lived. Nonetheless, in systems that are traditionally more responsive to exhortation and anecdote than to sustained empirical analysis, the conventional wisdom that pressing litigants to dispose of their cases quickly and involving judges in managing and settling cases "works" survived, and such programs continued to proliferate.

In 1990, in response to widespread concerns about delay in the federal courts, the U.S. Congress passed a ground-breaking statute called the Civil Justice Reform Act that ordered each federal court district in the U.S. to adopt a plan for reducing time and costs of civil case processing. The statute suggested the management approaches that the courts should adopt to reduce costs and delay. These approaches had been recommended to Congress by

a task force of business and other lawyers, who were among the nation's leading litigators. The approaches reflected the conventional wisdom that I've discussed.

To assess the outcomes of the changes that the task force had recommended, Congress required 10 courts to adopt specific rules and programs, and commissioned a substantial research project to study their consequences. To make this research assessment possible, an additional 10 courts that were not required to adopt specific rules were required to participate in the research -- in other words, to serve as a "control group". The RAND Institute for Civil Justice was selected to conduct the study. This was the largest study of civil litigation in the U.S. courts ever conducted; in the course of the study (which continued for 6 years), information about 12,000 cases was collected from court files and from the judges, lawyers and parties involved in the cases. The study generated detailed findings about specific case management approaches. But I want to focus today on what I think are five important lessons of this effort for judicial reform generally:

- First - and this may have been the most surprising finding to many - the length of time and amount of money it took to process a typical case in the U.S. federal courts were not nearly as great as most lawyers and judges thought. The median time to resolve a civil case in the federal courts was 9 months at the time of the RAND study, and the median legal fees for each party were about \$12,000 (in 1996\$).

Most of those on the task force that recommended the rule changes were thinking of cases that took years to reach resolution and cost millions of dollars (because these were the cases *they* usually participated in). Although these cases constitute only a small fraction of cases in the U.S. courts, the task force meant to deal with *them*, not with the typical case. But no one connected with the reform effort ever identified this as a potential problem. The reforms were applied uniformly across the entire caseload, the research measured their overall effects, and Congress' ultimate assessment of the success of the program (or lack thereof) was based on these overall effects.

- Second, the RAND study found that the factors that explain litigation costs mainly lie *outside* the courts. In other words, at least in the U.S., it is how parties and their lawyers conceive of their disputes and choose to handle them that determine how much civil cases cost. What judges do affects these costs at the margin, but only at the margin. This means that looking to court reform to reduce substantially litigation costs may be futile.
- Third, the study found that judges *can* affect how long it takes to process civil cases. However, unfortunately, the results showed that some forms of judicial case management, such as early case management, increased litigants' costs while speeding case processing.
- Fourth, the study found that many of the practices and procedures that the task force wanted courts to adopt were already being used by at least some judges in most courts. Because the reformers did not recognize this, they had unrealistically high expectations of change.
- Finally, RAND found that simply ordering courts and judges to adopt new practices did not have much effect. Judges handled civil cases pretty much the same way after the statute became effective as they did before it was passed. Those who had used case management practices before the legislation was passed continued to use these practices; those who had not used such practices previously did not adopt them because they did not believe it was important, or necessary, or appropriate to do so.

In sum, the fundamental assumptions about the status of civil case processing in the federal courts that informed the task force's deliberations and Congress' legislation were inaccurate; the task force's understanding of the causes of litigation expense was incomplete; some of its members' beliefs about what courts could do to reduce costs were wrong; and their understanding of how judges managed their cases and how judges might be persuaded to change their management strategies - if indeed, such changes were advisable - left a good

deal to be desired. When Congress received these research results, it abandoned the reform program.

I tell this story not to make fun of what was a laudable effort on the part of many in the U.S. judicial system to improve its delivery of services. Nor do I mean to imply that those who were involved in designing and implementing these programs to reduce costs and delay were foolish or incompetent. Rather, my point is that although most of us think of ourselves as good analysts of human behavior, we often are not. We are impressed by the unusual and atypical – for example, cases that move particularly slowly or cost immense amounts. We extrapolate from these cases to the system as a whole, forgetting that what attracted our attention in the first place was the fact that these were exceptional cases. When we identify aspects of a process that we want to change -"problems"- we move quickly to "solutions" without first analyzing the incentives that produced these problems, forgetting that if we do not understand the incentives that produce the current state of affairs we are not very likely to be able to design effective means of changing it. When we participate in programs that we think should be beneficial (or that we have been assured are beneficial), we persuade ourselves that our efforts have indeed produced the desired benefits – forgetting to stop and think about what would have been the most likely outcome had we not intervened. In short, we are more impressed by vivid stories of problems and enthusiastic tales of solutions than we should be, and we are less inclined to do the hard work of collecting and analyzing data and carefully testing alternative approaches to our problems than we need to be. In addition, we often ignore the lessons of past research: although many in the U.S. were surprised by the results of RAND's 1990s' research on the Civil Justice Reform Act, in many ways these results confirmed past research by the Federal Judicial Center and the National Center for State Courts, which is why I began by describing that research. Finally, and perhaps most important, in our enthusiasm for change we forget the hard work that is entailed in engaging organizations and their leaders in the project of change and we delude ourselves that change will occur simply because we – or some other important group of people - want it to occur.

I tell this story to *this* audience in particular because it seems to me that if U.S. court reformers do not always have sufficient evidence to support their recommendations to U.S. courts – and I think they do not – we (you) ought to be particularly skeptical about claims with regard to the consequences of introducing these reforms into *your* legal system, whose legal regimes may produce very different incentives for judicial, lawyer and party behavior. It is only by understanding the realities of litigation within your own court systems – what is actually going on, and what drives behavior – that you will be able to design programs that improve your systems. Such understanding requires careful quantitative and qualitative analysts. Simply relying on “common sense” will not do, because common sense – however common – is often wrong. It is only by carefully experimenting with new programs and rules in your own systems that you will learn what the consequences of such changes will be. Such experiments require considerable resources and they take significant time to design and execute. But they are the only way to test whether “reforms” will make the difference that you hope for, or whether they will have unanticipated costs -- or even unanticipated benefits. Without such experimentation, you run the risk of wasting scarce resources on ineffective programs; you also run the risk of squandering support for reform, which will diminish over time if the proposed reforms do not have their promised effects. It is only by building a consensus for change, by analyzing the obstacles that stand in its way and developing means of overcoming those obstacles, that you can implement programs that will truly “work.”

Using ADR to Improve Judicial Services

One of the most remarkable changes in the U.S. court system over the past twenty years has been the introduction and growth of alternative dispute resolution – “ADR.” That has now become an almost world-wide phenomenon: it is difficult to think of conference on courts or civil litigation that does not have ADR as one of its topics, whether that conference is held in Europe or Asia or Latin America.

Moreover, unlike other ideas for changing the judicial system – which are often highly contentious – it is hard to find opponents of ADR. I teach a course on ADR at the Stanford Law School and my research on the use of ADR in courts played a small role in encouraging courts in many parts of the U.S. to adopt court-connected ADR programs.

But today I want to warn you of looking to ADR as a means of speeding civil case resolution or reducing the costs of civil litigation. And I want to raise questions about the wisdom of relying on ADR for judicial reform in societies that are still struggling to establish a rule of law.

ADR as an Efficiency Tool

ADR has many forms and many possible goals but within the U.S and in many other courts, ADR has come to mean using mediation or other conciliatory processes in the place of adversarial procedure and public adjudication. In the U.S., many parties, lawyers and mediators believe strongly that substituting these conciliatory procedures for “traditional” litigation offers the possibility of achieving better resolutions for disputes, resolutions that can sometimes satisfy *all* the contending parties and help them to preserve and restore their relationships. This can be particularly useful if the dispute arises in the context of a business, family or other long-term relationship.

However, judges and court administrators in the U.S. look to ADR not so much for better dispute resolution, but rather for *cheaper and faster* resolution. It seems commonsensical that if one substitutes an informal conciliatory process for a much more formal adjudicative process, such as trial, this would produce significant cost savings both for courts and for parties. However, most careful empirical studies that compare the costs and time to disposition of similar civil cases in courts that offer or require ADR and courts that do not offer ADR find that there is no measurable difference in costs or processing time between the cases assigned to ADR and the cases that are not assigned to ADR. Where there are time or cost savings, these appear to be explained by other changes in court rules that were adopted at the same time as the ADR program, rather than explained by the ADR program itself.

What could explain these surprising findings? In the U.S., when a case that otherwise would have been tried is resolved by ADR, it's very likely that there will be significant time and cost savings because trials in the U.S. are relatively expensive and time consuming. If ADR reduces the number of cases going to trial dramatically, it should save parties and courts the expense and time associated with the trials of these cases. But today, in the U.S., very few civil cases in any court ever get to trial - in recent years less than 5 percent of all civil cases filed are ultimately tried. (In some courts, the percentage tried is only about 1 or 2 percent.) This means that almost none of the cases that are assigned to ADR would have been tried; rather, the parties' lawyers would have negotiated a settlement. What the empirical evidence shows is that in most U.S. courts, introducing ADR does not reduce the trial rate significantly - just about as many cases are tried after ADR is introduced. Hence, there are no trial-related savings to the courts or parties overall.

Because so few cases are tried, in most circumstances U.S. ADR essentially substitutes one form of settlement process for another. The only way ADR can save parties time and money in settled cases is if it speeds settlement or in some other way reduces the costs of settlement. But there is no systematic evidence that ADR does speed settlement or reduce litigation costs. As I have indicated, where such savings have been found, they appear to be traceable to other changes in rules and practices that accompanied the introduction of ADR.

Most judges and litigators in the U.S. find these empirical results surprising - indeed, some find them unbelievable. Many of us have talked to lawyers who are *sure* that ADR saved their clients time and money; indeed, many surveys find large percentages of lawyers who assert that ADR *did* save time and money. But the objective data -that is, data from records-contradicts these assertions. Why don't subjective perceptions of ADR's consequences match the objective data that find little or no time and cost savings associated with ADR? I think one answer is that when lawyers are asked about the effect of ADR they forget that the case that they just resolved was unlikely to go to trial and they think only of the difference between trial costs and ADR costs. But as I have said, that is not the relevant comparison for the vast number of cases that would not have been tried -- the proper

comparison is between cases settled with ADR and cases settled without ADR. I think also that large number of lawyers and parties have come to *believe* that ADR is saving time and money and their perceptions are distorted by this belief. In the same way, people in medical experiments who are given a placebo instead of the real drug often believe that their health has improved.

It is important to know if ADR has the efficiency gains that its promoters claim for it before investing substantial resources in establishing a court ADR program. For if ADR does not have those consequences not only will the court not achieve the time and cost savings it is seeking for itself and the parties, the court will also waste scarce public resources that might have been spent on more effective means of promoting efficiency. If your courts have much higher trial rates than are common in the U.S. and if ADR reduces those trial rates substantially – and, importantly, if other factors do not extend the ADR-based settlement process or make that process costly – it is possible that you would see some efficiency gains in your courts as a result of adopting ADR. The important thing for you to know is that in the U.S., where court-connected ADR is widely regarded as producing such gains, it does not. Hence you cannot assume that you know what the efficiency consequences of introducing ADR into your courts will be; the only way to determine those consequences is through true experimentation (that is, experiments using a scientific paradigm).

Even if ADR does not promote efficiency, it may have other positive consequences for parties that argue for including it in a judicial reform program. There is empirical evidence that parties (both ordinary citizens and sophisticated business people) prefer ADR procedures that offer them an opportunity to observe and participate in the process of dispute resolution to settlement negotiations conducted by lawyers, with or without the participation of a third-party, behind closed doors. In the U.S., some forms of ADR offer an opportunity for courts to provide this more participatory process to parties at a lower cost than trial.

The Role of ADR in a Rule of Law Society

As evidence that ADR may not produce the efficiency gains that are claimed for it mounts, ADR proponents have begun to stress other arguments in favor of ADR. In the U.S. it has become popular to promote ADR on the grounds that it permits more informal dispute resolution than traditional litigation and adjudication; that ADR allows the parties to settle their disputes in private and confidentially; and that ADR permits the parties to devise outcomes of disputes that might not be possible in a court of law but seem more appropriate to particular types of disputes. No doubt there are many circumstances in which parties benefit from informality, privacy and creative problem resolution. But these goals are not necessarily consistent with a rule of law.

Formal procedures designed to level the playing field between parties of unequal power and to minimize bias offer obstacles to preferment and privilege. Public processes such as trials ensure that information relevant to a conflict is accessible to the press and to other interested civil society organizations, that decision makers' behavior is open to public scrutiny, and that the outcomes of disputes can survive the light of day. Mediation surrounded by special confidentiality privileges intended to facilitate settlement may also facilitate threats and bribes.

Some legal remedies are *intended* to replace remedies that were traditionally deemed more "appropriate" but that disadvantaged women and members of less powerful groups. Encouraging a return to such remedies may represent a setback for disadvantaged groups, rather than being a mark of progress. "Creative outcomes" that truly do satisfy all the parties at the mediation table are not always in the best interest of third parties who are *not* at the table or in the interest of the public at large.

Private agreements do not offer the opportunity for the judiciary to articulate and reaffirm norms that are intended to guide the behavior of all actors in the society. In the U.S., we sometimes describe mediation and settlement as "bargaining within the shadow of the law". The saying refers to parties' ability to resolve their cases privately, without recourse to public adjudication, when they have a shared understanding of what would be the outcome of their dispute if it were publicly adjudicated. Where there is sufficient law – and high

confidence that the law would be applied fairly by the judiciary if its assistance were sought -- settlement and mediation may offer effective and fair means of dispute resolution. But where it is not clear what the law is or whether and how it would be applied, informal private dispute resolution threatens rather than supports the rule of law.

In some industrializing societies outside the U.S., ADR is promoted as a return to traditional indigenous dispute resolution processes. Such processes may indeed have positive social consequences. But societies sometimes discard “traditional” procedures as they advance because those procedures did not serve all of the society’s members equally well. Decision makers’ ought to be wary of reverting to such procedures in the name of “ADR.”

Conclusion

Litigation has long been castigated as a source of needless expense and delay, often yielding outcomes that seem ill suited to the problem at hand. Judicial reform efforts that aim to improve the efficiency of the courts and to offer a variety of approaches to resolve civil law disputes are laudable. But adopting such procedures without careful investigation of their economic *and* social effects is not laudable and may be counter-productive. As we join together to search for ways to make our courts and legal systems more efficient and more responsive to the needs of economic development and civil society, we must be wary of discounting or discarding those elements of judicial process that promote equal justice under law. In creating a judicial system that works effectively for private interests, we need to be careful not to erect or sustain a judicial system that ignores the interests of the least powerful members of the society and the greater public interest.