

Key Functions of Legal Systems with Suggested Performance Measures

By Rick Messick

This is a first draft of an effort to measure the quality of a legal system. It is in two parts. The first asks how well the system as whole is performing four key functions: the deterrence of wrongful conduct, the facilitation of voluntary transactions, the resolution of private disputes, and the redress of governmental abuses of power. The information required for this part consists of questions posed either to the citizenry as a whole or to target groups (government officials, lawyers, judges, and so forth) together with a selected number of aggregate indicators. Many of the questions directed at the general population are taken from a 60 plus country survey conducted for the 1997 *World Development Report*.

The second part attempts to assess how well the key institutions of the judicial system – the courts, the private bar, and the public prosecutors – are working. While much of the quantitative data on the court would require an extensive effort to collect, reasonably accurate estimates can frequently be obtained from informed observers. In place of a detailed breakdown of the caseload of the first-instance courts of general jurisdiction, for example, one might survey a knowledgeable group of court administrators, judges, and attorneys. Other indicators call for the application of judgement, such as the extent to which information about the law is reasonably available to all citizens. Where this is the case, criteria are suggested to guide the evaluation.

Although still very much a draft, this exercise would have tuned out far worse without the help of a number of people with whom I traded e-mails over the past several months. Erik Jensen, Steve Golub, and Santos Pastor's comments were extremely valuable. Jennifer Widner persuaded me that no amount of clever statistical manipulation produce a single number to measure judicial independence and thus the approach she suggests, of asking lawyers and judges whether the courts are more or less independent than they were previously, has been adopted. Katarina Pistor warned about the inadequacy of very basic data in even relatively advanced judiciaries, hence the stress on survey responses despite their obvious weaknesses. The breakdown for assessing the courts is taken wholesale from a conversation with Jose Juan Toharia.

PART I

I. Deter Wrongful Conduct

- 1) Percent of population fearful of crime
- 2) Percent of population expressing confidence in state's ability to protect them from crime
- 3) Degree to which crime and theft are obstacle to conducting business

- 4) Percent of population willing to report crime to authorities
- 5) Number of homicides per 100,000 per year
- 6) Private security personnel per 100,000

II. Facilitate Voluntary Exchange

- 1) Contract intensive money (percentage of the money supply held in bank accounts and as other financial assets)
- 2) Percent of private land formally titled
- 3) Bank/finance company use of secured credit
- 4) Survey questions from Bank surveys of entrepreneurs

III. Resolve Private Disputes

- 1) Percent of population that has submitted private dispute to court system in past 5 years
- 2) Percent of above expressing satisfaction with how dispute handled
- 3) Percent of above reporting dispute resolved timely
- 4) Percent of above reporting dispute resolved at reasonable cost
- 5) Citizen perception of courts' ability to resolve private dispute impartially
- 6) Citizen perception of courts' ability to resolve private dispute timely
- 7) Citizen perception of courts' ability to resolve private dispute at reasonable cost
- 8) Number of Civil Cases Filed per year/Number of Cases Disposed per year [sometimes called the Cappelletti-Clark index]
- 9) Percent of population that has submitted dispute to some form of alternative dispute resolution mechanism within the past five years
- 10) Percent of those expressing satisfaction with ADR

IV. Redress Abuses of Power

- 1) Percent of population that has litigated against government entity (including police) in past 5 years
- 2) Percent of above expressing satisfaction with how case handled

- 3) Percent reporting case resolved timely
- 4) Percent reporting case resolved at reasonable cost
- 5) Citizen perception of courts' ability to resolve dispute with government impartially
- 6) Citizen perception of courts' ability to resolve dispute with government timely
- 7) Citizen perception of courts' ability to resolve dispute with government at reasonable cost
- 8) Parliamentarians' perceptions of courts effectiveness in redressing executive abuses of power [split between government and non-government party members]
- 9) Government administrators' perceptions of courts effectiveness in redressing executive abuses of power

PART II

Key Institutions of a Legal System

1) Courts

Information would be gathered on four dimensions. While some of the quantitative data would call for significant collection effort, in many cases a close approximation can be had by asking either a sample of significant users of the system (banks, government agencies, etc.) or informed observers (lawyers, court personnel, media).

A. Independence & Accountability

- 1) Is the judiciary independent of the other branches of government?

Sub-questions: Is the formal structure for governing judiciary independent of the executive branch in theory? Has there been any press story or other credible report in the past five years stating that this independence has in fact not been honored? How is the budget for the courts determined? Who administers it once it is established? Are there special courts to hear complaints involving the police, the military, or other security forces that are not a part of the judicial branch? How broad is their jurisdiction? In cases where their jurisdiction is contested, who decides?

- 2) Are judges able to decide cases free of outside pressures?

Sub-questions: Are judges tenured? For how long? What percent of judges in office are serving under an exception to the normal tenure rules? Can judges be transferred without their consent? Is their compensation, including pension, fixed while they are in office? Is there a union or professional association of judges? What functions does it perform?

3) How do lawyers, judges, and executive branch personnel's perception of judicial independence compare with what it was five years ago?

4) What are the mechanisms by which the judiciary is held accountable?

Sub-questions: To whom is the judicial branch formally accountable and how? Are judges immune from the criminal law? Civil law? Do the courts publish regular reports that disclose, at least in broad terms, how public funds have been spent and what their caseload has been? Are statistics on the workload of individual judges published? Public? Are proceedings open to the public in all but exceptional cases?

B. Competence of Personnel

1) How does the compensation of judges and other court personnel compare with similarly situated individuals in the private sectors?

Sub-questions: What is the annual salary of a judge of a first instance court and how does this amount compare with either the minimum wage, the average wage, or the average salary for lawyers in the country? What is the annual salary of the lowest level clerk in a first instance court? How does this amount compare with the minimum wage or the average wage?

2) How are judges selected, promoted and disciplined?

Sub-questions: What type of training is required of individuals before they become tenured judges? Is in-service training required before promotion? What methods are there for disciplining judges? How many judges have been penalized under these procedures in the past 5 years? How many have resigned to avoid disciplinary action in the past 5 years?

3) Is there a civil service-like system for hiring and promoting court personnel?

C. Efficiency

1) Who uses the courts and for what purposes?

Sub-questions: What are the five most common type of non-criminal cases heard by first instance courts? What percentage of the total docket are accounted for by these cases? Who are the most frequent users of the non-criminal first instance courts? For what kinds of cases? What is the most common outcome?

2) Are the private and social costs of litigation aligned?

Sub-questions: Do civil litigants have to pay a fee to bring suit? What impact do these fees have on the propensity to sue? How are these fees determined? What share of the civil courts' budget is paid for out of fees collected from litigants? Are there any provisions that require the losing party in a civil case to pay the prevailing party's legal

fees? Are they enforced? When they are, what percentage of actual fees are reimbursed? What percentage of cases are appealed from first to second instance courts? Is there a fee required to appeal? What percentage of those appealed are affirmed? What percentage of cases are attacked collaterally? What percentage of these are affirmed? Is there a fee required to lodge a collateral attack? Where the rules provide an abbreviated procedure for bringing certain types of claims (*amparo*, special writ, etc.), what percentage of such cases are rejected on procedural grounds? Are fees of any kind assessed in such instances? Where a final judgement has been entered invalidating the action of an executive agency, what is the scope of the court's ruling? Does it invalidate the action in all instances? Or only with respect to the party bringing the action?

3) Are the courts able to enforce debt contracts at a reasonable cost?

Sub-questions: What is the average length of time it takes a large bank to recover a debt from a medium sized, solvent, enterprise that has no substantive defense? How many lawyer hours are required? Is interest available from the time the debt arose? From entry of judgement in the first instance court? At what rate?

4) Is the highest court/courts hearing appeals in civil matters able to set policy and rationalize the law?

Sub-questions: How many cases did the highest court hear last year? How many judges does it have? Does the court have any discretion in deciding what cases to accept?

5) Are the courts able to complement the work of the police and the prosecution?

Sub-questions: What is the average time from detention to judgement in a case involving a serious crime (homicide, rape, serious assault)? What percentage of the total prisoner population await trial? What percentage have not appeared before any court?

D. Access

1) How many judges sit for court outside the national capital per 100,000? For federal states, same question per state or provincial capitals.

2) Are citizens able to determine what their rights and duties are under the law?

Sub-questions: Are statute laws and secondary legislation/administrative norms regularly published? Are copies of these laws distributed to courts outside the capital? Have the criminal laws been codified? Those affecting the family (inheritance, child custody, divorce)? Have booklets, information brochures, or other material explaining the law in simplified terms available? Is there an information office/kiosk or other means for informing citizens about the law in first instance court houses in rural areas?

3) In those areas where large numbers of residents do not speak the national language, are court interpreters available?

4) Are methods of alternative dispute resolution available?

Sub-questions: Is there a law permitting disputes to be resolved using alternative dispute resolution methods? Is it considered adequate by lawyers and litigants? Are there informal means (*panchayats*, community councils, *jueces de paz*) for settling family matters, land disputes, and other cases involving the poor? Are they biased against identifiable groups (women, the landless, etc.)?

5) Does the state furnish indigent criminal defendants with a lawyer?

II) Private Attorneys/Notaries

1) Is the market for legal services competitive?

Sub-questions: How many lawyers in active private practice are there per 100,000? Notaries? Are there restrictions on entry into the legal or notarial profession? What are the criteria? Where an examination is required, what percentage of applicants pass the exam on the first try? Subsequent tries? Are legal fees regulated by law? By a professional association? Are lawyers and notaries permitted to advertise?

2) How are lawyers and notaries held accountable for their performance?

Sub-questions: Are there ethical rules governing the practice of law? Who sets these rules? Who enforces them? How many lawyer/notaries have been disciplined in the past 12 months for violating these rules? Do courts have the power to hold lawyers in contempt for failure to appear or failing to file a pleading? Is this power regularly exercised?

III) Public Prosecutors

1) What is the number of individuals with power to charge per 100,000? Number of individuals responsible for prosecuting cases per 100,000?

2) What checks exist on decisions made by these individuals?

Sub-questions: Is the decision to charge recognized as discretionary? Where it is, are there guidelines for how this discretion is to be exercised? Are these guidelines public? Is there a system of hierarchical responsibility for those with the power to charge? Who supervises the department/agency that employs these individuals? How is this official appointed and to whom is this official accountable? Where prosecution and investigation separate, same questions for prosecutors.

3) Are those with the power to charge/prosecute able to exercise independent judgement?

Sub-questions: What is the annual salary of an entry level prosecutor/charger and how does this amount compare with either the minimum wage, the average wage, or the average salary for lawyers in the country? Are prosecutors/chargers tenured? For how long? What percent of prosecutors/chargers are serving under an exception to the normal

tenure rules? Can prosecutors/chargers be transferred without their consent? Is their compensation, including pension, fixed while they are in office? How are prosecutors/chargers selected and promoted?

4) Do lawyers, judges, and executive branch personnel believe the decision to charge/prosecute is more or less influenced by politics than it was five years ago?