How Some Reflections on the United States’ Experience May Inform African Efforts to Build Court Systems and the Rule of Law

JENNIFER WIDNER

The ambition of this collection is to examine the contribution of courts to the rule of law and governmental accountability. By ‘rule of law’, scholars and policymakers usually mean that (1) government officials and others act in accordance with the letter of the law, (2) people accused of crimes or civil infractions under the law receive due process, and, more controversially, (3) the laws themselves accord with some universal standards of justice, often captured in United Nations covenants. We typically think that accountability improves when rule of law exists. That is, members of the public may be able to make officials responsible by challenging infractions in courts able to provide a fair hearing. Citizens may also block laws that conflict with principles stated in constitutions by triggering judicial review of legislation. If elections provide citizens one way to remove politicians who engage in malfeasance or fail to manage collective resources competently, the courts provide an alternative avenue for such action between campaign periods.

This happy state of affairs does not materialize automatically, of course. Judicial independence is an important background condition: the contribution of courts to the rule of law is higher when judges are not subject to partisan influence in particular cases. Effectiveness is another element. It is all very well and good to have independent courts, but congested dockets and poor training can create injustice through delay and create opportunities for the manipulation of outcomes short of intimidating or buying a judge. Public awareness is a third factor. It is perfectly possible to have independent and effective courts that do little to enhance governmental accountability because citizens are unaware that they may challenge the constitutionality of legislation or bring grievances against public officials to the judiciary for resolution.

This essay differs from others in this volume because it asks how court systems capable of holding public officials accountable evolve. Although its main purpose is to inform the way we understand this process in Africa and
other parts of the developing world, the analysis tries to make general points by way of a short, idiosyncratic excursion through United States judicial history. The challenges that many countries face today are very similar to those encountered in the period of the westward expansion in the United States. It is all too easy to forget that the American government once lacked effective control over territory and over its own agents in the judiciary. Recapturing this experience provides some useful insights and cautions for contemporary policy makers. The purpose is to provoke more careful reflection about the propositions and prescriptions we often entertain with respect to developing countries, neglecting the lessons of a related and not so distant past.

The Big Picture

A simple theory about the relationship between courts and the rule of law might posit that as income to be derived from trade, production or innovation increases, the incentive to build effective mechanisms for dispute resolution also rises. That is, seeing they can improve profits, private entrepreneurs push public officials for fair and efficient ways to resolve disagreements about contracts or employment. Appropriate institutions eventually materialize, shaped by the available technology and by politics. This story accords with the broad-brush account in Douglass North's writing about the rise of the western world.\(^1\) But this simple proposition leaves out the most interesting part of the story.

How people convert incentives, like the prospect of greater profit, into social action and institutional change is really what is of interest in practical policy making. We want to know more about the 'politics' that remain a black box in the standard economists' account of the rule of law. One theory currently in vogue posits that independent courts arise when political party systems are highly competitive. Under these conditions, the story goes, no party would want incumbents to be able to change the outcomes of court decisions in ways that undermined ability of the opposition to compete for office or easily and selectively reverse rules for which important constituents have lobbied. Thus, they opt to delegate dispute resolution to independent courts and take steps to guarantee that independence. They may also invest in improving court capacity so that delay cannot be used strategically to accomplish the same nefarious ends as a breach of independence. This argument is plausible on its face. Ability to use office in order to win judgments that barricade others from the corridors of power is a worry to opposition parties everywhere. Some recent studies claim to find strong empirical support for the proposition.\(^2\)

The US Experience and African Court Systems

The problem with such accounts is that they accord rather poorly with the history of most countries that have fairly high levels of judicial independence and judicial capacity today and they don’t always appear to help us understand intra-regional variation. Elsewhere the writer has proposed an alternative argument, which contends that (1) the starting points for building independence tend to be idiosyncratic and highly contingent, (2) through their ability to shape procedural rules and to project legal norms to the larger community, judges themselves have played important roles in making short-term delegation of authority from a quixotic executive more enduring, and (3) regional and international bodies can be helpful in providing protection or surveillance of reform-minded courts, in the short run.\(^3\)

The purpose of this analysis is to look still more closely at important aspects of explanation. Although the case used to illustrate the theoretical points is the United States, the point is not to suggest that reform in developing countries must follow American paths. Presumably there are many routes to successful change depending on local circumstances. Rather, the aim is to show that reform requires more than an incentive to seek change. Leadership, appropriate framing, a supply of ideas, and institutional capacity all matter too. Rarely do these things come together at the same moment, although happy conjunctions are more likely to occur in some political systems than in others. Change happens slowly, in fits and starts, with the benefits realized only after the ingredients are all assembled. Whether it is possible to sustain the impetus for reform while the pieces come together may depend heavily on the existence of organized civic groups and the links between the members of these groups and those in power. Thus, the essay tries to provide an antidote to the analytically elegant but overly simple models often purveyed. It also suggests that a better understanding of the complexity of the relationships we want to understand, as well as their strategic character, opens up possibilities and potentially creates a basis for hope in parts of the world that seem inhospitable to current objectives.

The Setting

The performance challenges that developing country judiciaries confront now are similar to those that American courts faced during the nineteenth century. If we could block out names and dates, it would be hard to distinguish a contemporary account of justice system performance in Africa or Latin America from the complaints that filled pamphlets and political speeches in nineteenth-century America.
At the time, the United States shared some geographic characteristics common in Africa now. Much of the population was concentrated in a few cities on the Atlantic coast. Vast territories to the west were thinly populated, and it was both difficult and expensive to maintain a state presence there. Police and 'justice' operated beyond the direct control or scrutiny of central authority. Judges rode circuit to hear cases in outlying areas and often swept into town with lawyer-friends and marshals in tow, sacrificing the appearance, if not the reality, of the separation of powers.

Partisanship entered into the courts in several ways. For at least the first 30 years of the life of the American court system, several prominent judges gave political speeches from the bench. There was little agreement among elected officials on the need for independent courts, although the demand for such had featured in revolutionary-era writing. The courts were in ill repute generally, and the Supreme Court met in a noisy room underneath the stairs of the capitol building, so unimportant in the country's political life did it seem.

Court performance left much to be desired. Some problems originated in the law itself. Procedures were archaic and cumbersome. In the late 1800s, appeals on procedural grounds were common, and the ratio of reversals to affirmations ran about 5:1, exposing the courts to charges that they dealt mainly in technicalities, not justice, and opening them to fierce criticism. The absence of pre-trial discovery rules meant that 'trial by ambush' prevailed, as it does in many developing countries today. That is, instead of exchanging information before trial, lawyers constantly produced new witnesses and evidence at trial, and their opponents demanded frequent continuances to respond, causing delay. Statutory limits on the jurisdiction of courts also created difficulties. In inflationary periods, Congress failed to adjust the limits on amounts-in-controversy that lower courts could hear, flooding the upper courts with petty civil suits instead of leaving these cases for resolution at the lowest levels. Congestion interfered with fairness.

Senior judges had no power to 'manage' their courts. Chief justices had little authority to move judges with low workloads to congested courts in order to relieve their over-worked brethren and reduce delay. There were no court administrators who could manage case flow. Clerks were usually elected officials who used their powers to benefit their supporters. Corruption naturally entered the picture as a result. In New York, the site of some of the earliest agitation for reform, the 'Tweed ring' bought judges and law enforcement. Railroads also purchased decisions in some of the state courts. Similarly, on the frontier the appearance of fairness suffered from the occasional, spectacular scandal, the case of Judge Roy Bean being one of the best known.

Frontier justice suffered a number of other difficulties familiar in developing countries today. The challenges of building an organizational presence and of ensuring accessibility were considerable. Low population density meant that courts were geographically dispersed. Although justices of the peace were usually within a single day's travel for most people, the superior state courts and the federal courts usually lay at a considerable distance. Witnesses had to make long journeys and sometimes failed to show up, forcing continuances or adjournments. Today the equivalent problem in African countries is a major source of public criticism.

Inconsistency in the application of the law was a severe problem, because few really knew what the law was. On the frontier, it was hard to find copies of either the statutes or the law reports, which contained the decisions that constituted binding precedent and were an integral part of the law in common law countries. Early colonial governments had subsidized private printers to produce these, but the system fell on hard times after the Revolution, and it wasn't until the very end of the 1800s that extensive publishing of reports began again, possibly fueled by an increase in the number of lawyers in the country. The situation has parallels in the collapse of law reporting in Africa from 1980 until about 1995.

Finding judicial talent was a severe problem. Service in remote areas was unpopular with many, especially because the pay was low. At mid-century, at the lower levels of the judiciary, most of the men who served had little or no legal training. Only about 45 per cent had formal schooling beyond basic reading and writing skills. They relied on 'Justice of the Peace' manuals, one of the first mass-produced legal documents in the new United States. In several parts of Africa magistrates have similarly found themselves forced to rely on their school notes or on abridged versions of the law that donors helped to organize and publish.

Despite all of these flaws, the few systematic studies available suggest that most of the people who occupied these positions performed adequately, mastered basic legal principles, and offered quick, cheap dispute resolution at about $1 per case. For simple, run of the mill cases, the arrangement seems generally to have worked. As economies grew more complicated, change grew necessary, as it is in Africa and Latin America today.

The beginning of pressure for change initially took the form of popular grumbling about law and lawyers. Lawyers were in the forefront of the American Revolution. But both before and after independence, the legal profession and the courts were also objects of attack. In the early years of the republic debt collection was one of the main tasks lawyers carried out, and debt collection won few admirers. Capturing popular sentiment, in 1808, author George Watterston published a tract, The Lawyer, or Man as He Ought Not to Be. Although lawyers' reputations improved in the 1820s,
dissatisfaction resurfaced in the middle decades, so that by the end of the century even the leaders of the emerging profession argued that the integrity of practitioners had seriously collapsed. Complaints about delay, corruption and bad law appeared in newspapers and publications such as the Green Bag and the World's Work. In the 1920s, Moses H. Grossman, a former judge, reported lawyers' concern that three-year delays in the courts would soon lead to revolt. The American Law Review opined that populism had filled 'the bench with political partisans, the minor legal offices with political hacks, and the bar with an indiscriminate herd of camp followers'.

All of these descriptions resonate with citizens of developing countries today. Interviews with ordinary people, lawyers and magistrates turn up the same sorts of comments. But what explains the lower incidence of such problems in most US courts now, compared to several decades ago? And can we learn anything from the American attempt to address these sorts of problems historically?

The American Experience with Judicial Reform, 1835–1940

In the United States, grievance built up for some time before small episodes of reform began to metamorphose into sustained, broad-based collective action. Bar associations, organized by people who had improvement of the judicial system as an important ambition, formed only in the 1870s, and their activities and membership were fairly limited until the turn of the century. Other civic associations focused on the legal system gradually appeared thereafter. The major procedural reforms and management innovations took place in the 1920s and 1930s, or 60 to 70 years after fervour for reform had first made itself felt.

It is instructive to consider why the intensity of reform increased when it did and why reformers experienced varying levels of success.

Leaders Are Not Always Available When Needs Arise

There is no necessary relationship between grievance and action. It takes energetic and savvy leadership to mobilize support for reform. Not only must the people at the forefront of the movement understand the problems the courts and their users confront, they also need to know how to win the attention of the people who can make a difference: elected politicians, senior judges and opinion-makers. The capacity to spend time planning, consulting, and lobbying is also critical. And people who have these kinds of knowledge and skills, plus time, are rarely in abundance. Therefore, an understanding of successful reform must include an account of the supply of leadership, a subject on which western political scientists are notoriously reluctant to hypothesize.

In the American case, the intensity of reform activity grew at the very end of the nineteenth century and into the first decades of the twentieth century. Why did it do so then when, at least on the surface, no one individual could benefit from the work he or she invested in trying to move reform ahead? The timing of change may provide some clues:

- High volumes of railroad litigation and increasing numbers of disputes that affected people across state boundaries brought greater awareness of the variety in substantive law and judicial performance within the United States. Comparison bred ferment, but more to the point, the complexity of handling legal cases that crossed jurisdictional boundaries highlighted the problems in the system.
- More practitioners could support themselves comfortably than had been true earlier. Many of the people who became leaders of the reform movement were from well-to-do families, had steady incomes from representing railroads, or were beneficiaries of economic expansion. With financial comfort came more leisure for civic pursuits. Even if the supply of potential leaders was constant throughout the nineteenth century, the capacity to act was not.
- Participation in professional associations and scientific organizations was more acceptable than it had been earlier. Just after the Revolution, egalitarian sentiment militated against the creation of bar associations or movements that might reproduce privilege. Lawyers and lawyers' library societies were targets of public disfavour. But by the 1870s, the tide had turned.

The attitude toward mixing law and politics had also shifted. As the nineteenth century progressed, lawyers began to draw more distinctions between law and politics. They sought to portray themselves as neutral technicians, partly to distance themselves from earlier, post-revolutionary criticism that they were merely the agents of a corrupt, moneyed elite. This image also described the new roles elite lawyers had assumed: roles which emphasized drafting, negotiation and counsel over courtroom advocacy. Yet law work inevitably focuses attention on legislation and on the political world. Leadership of independent commissions and civic groups met the need to exert influence without seeming partisan. It made participation in reform more palatable to some, while others continued to seek political office in order to make a difference.

As a result of these changes, legal reform provided an avenue for younger men of ambition to advance. The reformers often came from distinguished legal families and had to struggle to make their own mark. They likely grew frustrated with a system that privileged knowledge of the
intricacies of arcane procedural codes: knowledge best acquired over time. Corruption also lessened the appeal of law as a career open to talent. Thus, younger elite lawyers had incentive to invest in reform, they had somewhat greater means than many of their predecessors, and organizing fellow practitioners on behalf of reform had grown more acceptable.

The genesis of the American Bar Association was a case in point. In the mid-1870s, there were seven small city bar associations in existence and eight state bars. Most were not very active. The Bar Association of the City of New York had been in existence only a few years, inspired by the fight against the 'Tweed ring' and corruption. There was no national bar, nor was there a national movement for legal and judicial reform. In late 1877, 38-year-old Simeon Eben Baldwin, then the dean of the four-person faculty of the Yale Law School, attended a meeting of the American Social Science Association, a reform-minded body that included jurisprudence as one of its four departments. Out of that meeting he appears to have hatched the idea of a national law association that could promote uniformity of legislation, help raise standards of legal education, and promote sensible reform of the courts.

Although he practiced law on the side, Baldwin found time to persuade the Connecticut bar to permit him to organize a national meeting. He sent out letters to try to obtain the support of distinguished practitioners and ensured that prominent reformers were on his list of founders. He approached the prosecutors of 'Boss Tweed' and the 'Whiskey ring', a president of a civil service reform association, and the man who had re-written the Pennsylvania criminal code. Once he had these men on board, he wrote to 100 other lawyers to persuade them to attend a meeting in Saratoga, New York, a popular summer resort town.

Over the next half century, other societies with related functions began to emerge. For example, the American Judicature Society, the enduring organization centrally preoccupied with judicial system reform, got its start at the University of Michigan law school in 1913. Would-be reformers joined forces with a lumber magnate who had lost a contract case as a result of a corrupt southern state judge. In return for suggesting removal of the case to federal court (where the litigant subsequently won), the reformers received financial support for a new organization that would focus public attention on court reform.

**Status and Numbers Matter**

Although calls for judicial reform grew throughout the nineteenth century, change occurred only sporadically through much of the period. One of the reasons for the slow response was that some lawyers profited from the archaic procedures others wanted to abolish. To make a living, a lawyer could either collect more fees for handling drawn-out cases or increase the volume of cases he handled. Relatively few lawyers outside commercial centers could hope to increase the volume of business significantly, and they had invested heavily in learning the elaborate procedural codes many courts used. Even for major litigants, such as the robber barons, manipulating procedure to delay a competitor was often more important than efficient dispute resolution. As late as 1906, 20 years after the creation of the American Bar Association (ABA), Roscoe Pound's speech on the 'Causes of Popular Dissatisfaction with the Administration of Justice' was considered so controversial that the ABA leadership refused to print copies and referred the proposals the speech contained to a committee for deliberation sometime in the future.

It took a critical mass of well-placed reform-minded elite lawyers to overcome the objections of fellow practitioners. The stature of reform advocates, coupled with other changes in the political landscape and in the character of disputes, made it less acceptable for professionals to oppose the cause of reform. Judicial reform became an important cause among literati and important public figures. William Howard Taft brought the issue centre stage in the 1908 presidential campaign, declaring that 'the greatest question now before the American public is the improvement of the administration of justice ... both in the matter of its prompt dispatch and the cheapening of its use' Others took up the refrain. For example, in 1912 the former president of Harvard, Charles W. Eliot, exhorted the Massachusetts bar to accept the need for change, citing problems of delay, contentiousness, poor attorney preparation, excessive numbers of appeals and retrials, and other challenges. It grew less and less acceptable for lawyers to object to the changes proposed to solve these problems.

**The Supply of Ideas and Practical Proposals is not Guaranteed**

A reform movement usually has to do more than grumble to be successful. Most policy-makers and politicians lack the time to develop concrete proposals and deliberate carefully about their pros and cons. Movement leaders who can generate and package ideas are more likely to have an impact than those who do not. But developing ideas takes time, and few practitioners had spare time in the 1800s.

The American judicial reform experience depended heavily, though not exclusively, on the rise of the law school. For decades after the Revolution, one became a lawyer in the United States simply by reading. There were no admissions requirements. There were no real law schools and those that called themselves law schools lacked coherent curricula. But by the late
1800s, universities were beginning to develop law programmes. In lieu of working in the office of another lawyer or reading law on one's own, a student could participate in group study, still loosely organized, at one of a handful of new programmes.

The new institutions altered the possibilities of reform. Law teachers had to prepare lectures and write books. They could justify time spent in careful analysis of statutes and decisions from a variety of jurisdictions. Their need to schematize material for their students meant they were more likely to chafe at inconsistencies and idiosyncrasies than others were.

The presence of law teachers in the new reform movements was remarkable. A large proportion of the people who showed up to the first organizational meeting of the ABA in Saratoga were law teachers. Soon thereafter, the ABA leadership issued explicit calls for law teachers to develop opinion on broad legal issues. In 1901, James Barr Ames, the dean of the Harvard Law School, pronounced that judges could never hope to be serious scholars, but ‘the professor, on the other hand, while dealing with his subject in the lecture room, is working in the direct line of his intended book.’ Law teachers had an interest in playing this role, but so did law schools, then new, often on fragile footing in their respective universities, and bent on finding a clear way to express their mission.

Law schools also provided shelter for would-be reformers. In 1906, when Roscoe Pound’s address on the need for judicial reform left the ABA leadership chagrined, Northwestern University’s law school and the University of Chicago offered Pound a base from which he could prepare practical proposals for solving the problems he had identified in his speech. The University of Michigan allowed the American Judicature Society to work from its basement, in the early 1900s. The University’s president, Harry B. Hutchins, observed in his 1913 commencement address, ‘If some of the thinking that in recent years has gone into legal manipulation on behalf of great interests had been devoted to judicial reform and to reconstruction of both substantive law and procedure ... much of the criticism to which courts and the profession have been subjected would have been avoided.’

Whose Ideas Matter Depends on Access and on Having the Right Networks

Legal reformers in the United States included prominent politicians in their ranks, and that meant that the ideas central to the movement often had a receptive audience in the White House and the Congress. Herbert Hoover sat side by side with Charles Evans Hughes and an array of reform-minded lawyers at the initiation of the American Arbitration Association. William Howard Taft had a long history of involvement in the reform movement. The ideas were not imposed on them. They had helped to carry them forward.

Crisis Can Help Create Opportunity

The fifth lesson of the American experience is that crisis can create opportunity. The federal courts came under attack in the early part of the twentieth century because judges used powers of judicial review to strike down statutes designed to regulate labour practices. For much of the nineteenth century the power of judicial review John Marshall had created in Marbury v. Madison remained mostly unused in the federal courts. But at the end of the century and in the early 1900s, the Supreme Court began to use the power to strike down laws, and it did so in a way that favoured the interests of business over workers. The famous 1905 case of Lochner v. New York, coupled with the nullification of federal child labour statutes, galvanized organized labour into action.

In 1912, Wisconsin’s Senator LaFollette argued that ‘the judiciary has grown to be the most powerful institution in our government ... Evidence abounds that, as constituted today, the courts pervert justice almost as often as they administer it. Precedent and procedure have combined to make one law for the rich and another for the poor. The regard of the courts for fossilized precedent, their absorption in technicalities, their detachment from the vital, living facts of the present day, their constant thinking on the side of the rich and powerful and privileged classes have brought our courts into conflict with the democratic spirit and purposes of this generation.’

President Theodore Roosevelt ultimately took up the cause. The ‘progressives’ called for popular sovereignty and restriction of the courts. Later the American Federation of Labor (AFL), strengthened during the First World War, called for an end to judicial review. It helped to trigger a national movement to permit popular recall of judges and of judicial decisions.

Within the bar, the movements for judicial recall and an end to judicial review met with considerable opposition. The ABA cited several reasons for standing fast against these popular demands and focused particularly on threats to judicial independence and on the risk that recall would undermine the ability of the courts to protect minority opinion from the tyranny of the majority. Lawyers commissioned surveys of public opinion to better pinpoint the source of public dissatisfaction and used the results to argue that people wanted better performance but thought insistence on more stringent standards of appointment preferable to recall. The influence of
these opinions spilled over into the public arena. The 1924 election focused partly on policy toward the courts.

Although no more than six states ever adopted recall measures and the appeal to end judicial review generated few important political allies, these debates placed the performance of the judiciary squarely on the public agenda. The reform movement lawyers had launched years earlier gained momentum. Supreme Court Chief Justice William Howard Taft used the furor to move ahead with his own agenda. He reached out to allies in the press and in the bar both to defeat the more radical reform bid and to advance his own reform proposals. At the urging of the bar and of influential members, Congress began to enact a series of statutes that gave the federal courts more power to handle the workload effectively.

Radical reform proposals lost support, partly as a result of wavering progressive leadership, but also partly because of actions taken by the courts itself. Signs of a changing jurisprudence and better drafting of new bills meant that the Supreme Court began to exercise its powers of judicial review in a manner more in line with popular opinion.

Framing and Timing Make a Difference

The recall movement failed, while its twin, focused on enhanced effectiveness, persisted. Why? The answer appears to rest partly with the congruence between the cultural heritage of the political elite and the norms embedded in alternative proposals. Progressive leaders thought courts were important and worried about upsetting the separation of powers and system of checks and balances. They grew unwilling to support the more radical calls for change. The ideas of the mainstream reform movement were more palatable, given the values of most legislators and pundits at the time.

Similarly, the introduction of the Commerce Court at the federal level in the late 1920s met with failure. The record of the Supreme Court at the time led people to believe the court would be under the thrall of big business. Although there was no strong evidence that it was so, its future was tainted, and it eventually collapsed.

Civic Organizations Keep Issues on the Agenda, and Experience Abroad Can Provide a Push

The movement for judicial reform in the mid-1800s received a push from abroad, and it was sustained in part by an increasingly dense network of specialized civic associations. Judicial reform and law reform were both on the agenda in England at roughly the same time they surfaced in the United States. In 1869, a year before the creation of the New York City Bar Association and the decade that saw the creation of the ABA, England had created a royal commission to inquire into the operation of its courts. Earlier proposals for procedural reform and changes in substantive law had traveled back and forth between the two countries. Although the proposals were not always apposite, the appearance of a "wave" of change provided ideas, reinforcement, and perhaps a certain cachet to judicial reform that it had not enjoyed earlier. By the end of the 1800s, many American states had set up judicial reform commissions, and the ABA had created a committee to think about the subject. The founders of the American Judicature Society were explicitly motivated by the example of the English judicial reform movement.

The increasing density of civic organizations dedicated to judicial reform helped sustain the movement over decades and created both a watchdog capacity and a source of ideas. Almost 70 years elapsed between serious reform legislation passed and the time David Dudley Field made some of the first proposals to clean up the system and 50 years elapsed between the legislation and the founding of the bar association movement. Although reform was on the public's mind, the foundation of very strong, stable civic associations helped keep the issues and proposals at the forefront and centre.

Courts Must Have the Organizational Capacity to Reform

Capacity to implement proposals does not arise spontaneously. American reformers were intent not only on promoting procedural change, more stringent selection procedures, and better management but also the ability for courts to put changes into effect. Change proceeded in phases, beginning with the legislation that created circuit courts of appeal to relieve pressure on the justices of the supreme court, vesting rule-making authority in the judiciary, and creating an administrative office for the US courts. The administrative office came into being in 1939, many years after it was first proposed by reforms in the ABA. Provision for legislative liaison materialized in 1948, and it was not until 1967 that capacity for research and education was put in place. The creation of management capacity at the state court level proceeded slightly more rapidly.

Judicial Reform and Alternatives to Courts go Hand-in-Hand

In discussions of the rule of law in developing countries today, it is common to hear policy makers counterpose assistance to judicial reform and the creation of alternative forums for dispute resolution. To paraphrase, 'If the courts do not work, then we should invest instead in the creation of new institutions.' But in the American experience, the development of the courts and of alternatives generally went hand-in-hand. Many of the same people
most active in changing civil procedure and developing better court management were also involved in promoting private commercial arbitration and specialized forums to handle particular kinds of cases.

The interest in alternatives to courts, or in specialized courts, had several sources. As in many developing countries today, the legal culture at American independence stressed the desirability of settling disputes without resort to lawyers or courts. Many of the religious communities that settled in the territory during the 1600s emphasized settlement of conflicts through negotiation and disapproved deeply of those who sought the help of law. These systems broke down as populations in the colonies grew more diverse and interaction expanded. But trust in law and lawyers remained low.

More important, merchants had their own tradition of private arbitration, which they brought with them, too. In England, trade guilds had responsibility for resolving commercial disputes, and merchants decided disagreements that occurred in markets and fairs. Only in the 1890s did England’s state courts begin to play a role, and initially, that role was mainly to record the settlements merchants had effected, which coincidentally gave the state courts an opportunity to collect a fee and raise a little revenue. Many of the colonists had rebelled against the intrusion of the British government on their lives and favoured the practices with which they were more familiar. Arbitration was also the practice in the Netherlands, and New York City, originally New Amsterdam, became home to the first arbitration tribunal in the Americas in 1647.

Chambers of commerce provided arbitration services in the early years. Stock exchanges began to provide similar forums as merchants began to organize themselves. For example, the Philadelphia Stock Exchange, organized in 1790, provided for arbitration, as did others, later. Laws of many states and territories stipulated that disagreements about trespass, fence keeping and taxes would be subject to arbitration.

These ideas never disappeared, and reformers drew on them as the need and opportunity arose. For the poor, court congestion meant that reconciliation, or conciliation, held out some promise as a means for resolving disputes. Conciliation services developed in conjunction with crowded small claims courts. In most regions of the country it remained relatively unpopular, at least until succeeded by modern mediation services.

Labour arbitration attracted interest in the late 1800s as violent clashes between workers and businesses heightened anxiety that a society fresh from war over slavery might plunge into a new kind of conflict. Voluntary associations such as the Chicago Civic Foundation tried to find Christian alternatives to violence and found them in arbitration. There was talk of borrowing compulsory arbitration statutes from New Zealand, the first country to enact them. Labour groups worried that underlying inequalities might put workers at a disadvantage in these proceedings but gradually grew more receptive, especially after stronger unions emerged in the twentieth century.

Commercial arbitration expanded during the early 1900s. The conditions that supported its success reappeared with the increasing organization of industrial sectors in the 1920s. Just as organization made it possible to promulgate codes of ethics for different industries, so did it facilitate private dispute resolution within particular lines of business. Delay in the courts made these services attractive to entrepreneurs, but the privacy of the proceedings helped too.

But in business, although the space for arbitration remained large and use of arbitration expanded, the courts remained an important feature of the legal landscape. Surveys of firms at the turn of the century suggested that arbitration was sometimes a tool for extracting information, prior to a legal suit, and that where delays in the courts were low, entrepreneurs preferred to use the courts. In less organized trades, new areas of economic activity or transactions between new types of actors, arbitration was not always feasible or desirable.

The same people who championed court reform were also leaders in the movement to expand alternative dispute resolution. For example, the impetus for reform of arbitration in the 1920s came from the bar of New York, the bar of New York City and the Chamber of Commerce of New York, working in concert. Charles Evans Hughes and other distinguished lawyers and businessmen organized to create the Arbitration Society of America, which organizes a “People’s Tribunal” to support quick settlement of civil disputes. An alternative association, which excluded lawyers, formed in 1925. The two organizations merged to form the American Arbitration Association in 1926 – appropriately after arbitration of the differences of opinion between lawyers and businessmen.

**Drawing Lessons**

Change does not take place in the same way in different periods or places. The possibilities alter with shifts in economic and social structure, with the incentives political institutions create, with the availability of models and with new ideas. There is no such thing as a theory to guide us in all times and countries. Nonetheless, reformers everywhere face the same basic challenges: leaders must appear, they must have a way to support themselves and their ambitions through the reform process, and opportunity must arise. It is worth reflecting on four issues with particular relevance for court-watchers in developing countries today.
Where are the Leaders? What Helps a Would-be Reform Leader Assume Responsibility?

Latent leadership may exist in developing countries, as it did in the United States. Many lawyers around the world have stuck their necks out to secure change. But in some places latent leaders do not begin to take the steps necessary to build pressure for reform. And the American example may suggest some reasons why. First, the economic pressures many lawyers in developing countries face are such that it is hard to invest in activities that will not return an income. The demand for legal services in many places is not strong enough to make law a viable vocation for very many. Latent leaders may have less incentive to invest as a result.

Second, in many countries the legal and judicial communities are small. The likelihood that a reformer will appear before a given judge is quite high. And lawyers worry about their ability to win decisions on their merits after having said something in public that might have offended a member of the bench. Conversely, magistrates comment that they are disinclined to impose sanctions for delay because they might soon find the lawyer so sanctioned a colleague or a superior. The American lawyers had some greater benefit of anonymity as a result of their geographical dispersion and the higher volume of court business even in a single urban area. But they also sought to detach extracurricular ambitions from courtroom practice by speaking as a group, and that is something not all developing country legal reformers have done.

Is There a Clash of Big, Organized, Economically Central Interests to Keep the Issue on the Public Agenda?

In the American case, businesses and workers both focused on the courts as central to their ability to resolve disputes effectively or to the balance of power between social groups. That clash of titans kept judicial reform on the agenda in a democratic system. But in many parts of the developing world, non-competitive political regimes keep these interests from being heard, and often natural constituents like business and labour in the US case, are not much in evidence.

Interests are often as much a matter of ideas – of what people come to think is important or of how they define their identities – as they are material. Latent constituencies for more effective courts exist in developing countries, especially among the candidates sponsored by new opposition political parties and among new firms that lack the patronage connections of their older counterparts. But they do not always see the relationship between their interests and the judiciary. Where important constituents are not in evidence, funding for courts gets little priority.

Are there Concrete Proposals Available and Are They Acceptable Within Local Discourse?

New law school faculty became an important source of reform plans in the United States, supplemented extensively later by think tanks or law-focused non-profit organizations such as the American Law Institute, the American Judicature Society, and the bar associations. In developing countries, law faculty sometimes play a similar role, but the collaboration between reformers and the international community often gives recommendations a foreign feel and means they lack the concreteness or specificity required to make them work locally. It is not that borrowing is bad. Everywhere the history of law is partly the history of transplants. But what is too often missing is the local deliberation and fine-tuning that make for appropriation rather than imposition. The African Economic Research Consortium (AERC) is a partial solution to the analogous problem in the field of economics. An AERC-equivalent for law might go far in the effort to boost the supply of ideas.

Is There Internal Capacity to Carry Out Reform?

One of the biggest differences between the American experience and developing countries today lies in restructuring the internal management of court systems so that chief justices and their deputies are not overwhelmed by reform demands. Over a period of decades, reformers and reform-minded senior judges in the United States worked to obtain changes in rules and institutional design to free up the labour to make the courts work. By contrast, developing country reform initiatives generally give no heed to the problem of centralizing responsibility in a single person, usually the chief justice, and his or her small staff. Implementation of other changes is slow, uneven and often of poor quality, as a result. Thus, human capital per se is often not the limiting factor in judicial reform. Sensible strategies for dealing with time-demands on the judges managing change are.

Do these reflections mean that our existing theories about judicial independence and effectiveness have little to contribute to our understanding changes taking place around the world today? Do competitive party systems have nothing to do with the creation of independent judiciaries? Clearly not. Under the right conditions, party competition creates an incentive to delegate authority to independent courts. Its more important function may be to create a bulwark against the dismantling of such courts. But party competition is certainly not a sufficient condition for courts to exercise their accountability function, and it is quite possibly not a necessary condition either. Successful efforts to build independent, effective courts people will use to make officials
accountable all encounter some shared challenges, however, including the need to reduce points of potential interference, enhance monitoring within the judiciary itself, and build a popular following. But we also must be mindful of the important roles of leadership, timing, ideas, framing, networking and internal capacity. Too often donor-inspired reform programmes ignore these elements of institutional change, without which the US courts would not be what they are today and without which not much progress toward accountable government will take place in Africa, Latin America or Asia. Moreover, Americans have much to learn from current experiences abroad. Eternal vigilance is the price of liberty, as one American patriot proclaimed. Human nature being what it is, lapses in the horizontal accountability courts provide will take place in the best of circumstances. There is plenty of room for an exchange of lessons across national boundaries as across time.