

# JUDICIAL GOVERNANCE AND THE USE OF ICT

Linn Hammergren

## Introduction

The theme of judicial governance is so large and it's (under) development in Latin America so problematic that I will have to restrict the discussion to what is most relevant to its use of ICT. Nevertheless it will be necessary to begin with some general ideas on what judicial governance means, how its responsibilities and functions have changed in the modern era, and how both have evolved in the Latin American region. That will then lead to a discussion of the themes to be treated for the purpose of this workshop

## Judicial Governance and its Changing Role in Modern Societies

Until the mid 20<sup>th</sup> century, the notion of judicial governance or government<sup>1</sup> really did not exist. Judiciaries were conceptualized as a collection of individual actors (judges) who in the best of worlds, carried out their activities (resolving cases) in relative isolation from each other (as well as from higher ups in the judicial hierarchy, from other branches of government and from anyone else who might attempt to influence their decisions unduly). When a decision at a lower instance was appealed, another set of judges took over, and if a judge was accused of malfeasance, s/he might be investigated and removed, but aside from that, the whole was indeed no more and no less than the sum of the parts.

In this pre-modern world, the judiciary required administration but not management or governance, and administration referred largely to what in English are called “house-keeping” activities – mainly the submission of annual budget requests and the processing of funds provided for recurrent expenses (and occasionally for investments in the restoration of existing facilities or building of new infrastructure). Budgets, as in the rest of the public sector, tended to be historically based—one asked for a little more this year than one got last year, but only because of increasing costs of inputs or the need for to take care of a gradually growing workload. Whether handled by the courts or a ministry of justice, budgeting was simple and planning non-existent.

In the last few decades a series of exogenous factors have required a new look at the issue of how to “manage” the courts. Workloads are growing, sometimes exponentially, as modern societies generate more conflicts. Clients/users are more demanding as in modern societies, time is money and few want to wait decades for a solution to their disputes – time is in fact so valuable that some clients might well prefer to lose now as opposed to waiting years for a

---

<sup>1</sup> There really is a dearth of literature on this topic. While in the general literature, governance and government take on different meanings, here they are virtually indistinguishable. While using the terms governance and management somewhat interchangeably, governance also includes the ability to set overall policy whereas management may have to defer to policy or goal setting by a higher body. In the context of the judiciary, governance belongs to the governance body, administrative to its administrative offices, and management is to some extent shared by both.

positive outcome. This comment also emphasizes a second role of courts – that of strengthening the legal framework through the process of making consistent decisions on similar disputes, and here again the notion of the single judge, working in isolation to produce tailor made decisions

---

### *The Malaysian Reform Program*

*In 2008, the incoming Chief Justice of the Malaysian judiciary began a program to reduce backlog and delay, and increase judicial productivity. The program began with a stocktaking exercise in the 6 largest court complexes in which cases were counted, organized into three categories – closed, “hibernating” and active – and targets were set for eliminating all backlog, first dating to pre-2005, and then to cases over a year old. Civil High Courts (with original jurisdiction for high value cases and appellate jurisdiction for cases coming from the subordinate courts) were reorganized to facilitate the process and judges were given targets for case disposition. Within two years the stock of pending cases had been reduced by half, and an automation program was underway featuring audio-video recording of hearings, an automated case management system, scheduled to introduce e-filing in March 2011, and an automated queuing system for lawyers awaiting hearings. Although paper files will soon disappear a new filing system was also introduced to control the location of physical files. The program is expensive, (US\$40million over three years) but this is partly because of the desire to resolve the problems of congestion and delay rapidly. Automation has been an important element but the Chief Justice notes that only 50 percent of the results can be attributed to it. The rest depended on taking stock of the number and status of pending cases, setting targets for their elimination, setting and enforcing quotas for judges, targeted procedural reforms, and reorganizing the courts to allow a quicker attack on the problems.*

counts less and less, first because it takes too long and second because it can produce less rather than more juridical security. There is still room for the judicial craftsman, but as the Brazilian judge, Sidnei Beneti (2000) has stressed, in the modern world most cases coming before a judge require quick and uniform decisions (justiça de massas) Under these circumstances, the traditional expectations as to how judicial services would be organized and provided are no longer sufficient. Someone (the governance body) needs to find ways to restructure the traditional “business process” so as to improve its ability to respond to new quantities and types of demands.

The first response is usually a more-of-the-same-logic; greater demand implies more of the usual inputs to process it. However, it has become obvious that this response is not sufficient, first because countries cannot afford to keep adding units and staff ad infinitum, and second because some have found a way not only to increase production (just add judges) but to increase productivity (develop means whereby the same number of judges can handle more cases). The cases of Malaysia and Ethiopia are featured here as two examples. In economic terms, this means changing the composition and characteristics of the “factors of production” (labor and capital) as well as the production process (procedures) so as to augment the quantity and quality of the output: add technology to increase the output of each staff member; eliminate unnecessary steps, filter and prioritize the demand so that the most valued elements get more attention and so on. But, this response requires thinking and operating like an organization, not as a number of disconnected elements and that in turn requires a governance body to conduct and oversee it. From administration we move to management and from management to governance.

A further element complicating the picture is the idea that effective governance is also a way of ensuring judicial independence, managing relations with other parties (and branches of government), and seeking cooperation from the latter when required. This tends to

put a premium on self-governance (i.e. by the judiciary itself or some sort of council as opposed to an executive body – a Ministry of Justice). A Ministry could do the policy-setting, planning and ordinary (housekeeping) administration but its ability to represent the judiciary as a corporate body is increasingly questioned.

These concepts and especially the idea of judicial governance as policy setting, planning, problem resolution, and constant monitoring and improvement of its own performance, have often met resistance. Gradually, especially in the developed “North” they have taken hold, both among those responsible for the function and the internal actors who now will be affected by their actions and decisions. As a group of Dutch judges explained their decision to introduce a council to handle efficiency issues, they realized that “if we don’t do it ourselves, someone else will.” It bears mentioning that this simply puts the judiciary in line with overall trends in the public sector, and in addition makes it subject to rules adopted by the other branches as to performance monitoring, development of “key performance indicators” (KPIs), multi-annual planning, and submission and defense of budgetary requests based on all of the above. There is no reason to believe that the courts, as providers of a public service and as critical political actors, should be excluded from these rules and practices. Rather their adoption should strengthen the organization’s ability to defend its own interests while at the same time providing better attention to the citizenry at large.

### **The evolution of ideas about judicial governance and the Latin American Reality**

These modern notions about the role and importance of judicial governance have yet to take hold in Latin America. The reasons are both cultural and historical, the latter arising in the context in which governance bodies were introduced from the 1980s on. Among the various objectives of the region’s post 1980s judicial (not just criminal justice) reforms, one of the most important was increasing the judiciary’s independence from other branches of government. This meant *inter alia* removing any Executive role in administering the courts while strengthening the latter’s explicit role in controlling such factors as the appointment of judges, management of the judicial career, financial administration, and the introduction of legal initiatives affecting its operations. Most often this was done by 1) enhancing a Supreme Court’s performance of these activities; 2) creating a judicial council to carry them out (achieved in about half of the region’s countries); or 3) in those countries where it had traditionally done this (Argentina and Colombia) removing any role for a Ministry of Justice and turning it over to the SCJ or a council. In a majority of countries, financial administration still lies with the SCJ and for those which have councils, the latter’s functions are usually limited to a role in judicial appointments and career management. In only Argentina, Bolivia, Colombia, Ecuador, Mexico, and Venezuela (until 2000 when it was eliminated) was the council given all governance functions, and even there, the division of powers between it and the court(s) remained contested (Hammergren, 2002).

For the most part regional discussions of a new role for judicial governance remained centered on issues of power – how the courts could be further insulated from interference by the other branches of government, especially as they related to the appointment of judges and management of their careers -- and to measures to ensure an “adequate” budget, ideally, according to the judges, by creating a constitutional earmark (a guaranteed percentage of the national budget, something achieved to date by roughly 10 nations; Robledo,2010). For countries that created

councils, debates raged over their composition, and especially over the inclusion of non-judicial members. Two decades into the process, the debates continue, with several countries leaning toward Venezuela's elimination of its council, as well as in attempting to remove Courts or entire benches deemed, by the Executive, to be riddled with corruption and inefficiency.

Possibly because of these distractions, very little attention has gone to the governance body's (wherever located) more pro-active management of the total organization. One can count on the fingers of one hand (and only by adding some state or provincial judiciaries in the federal countries), the governance bodies that have begun to address issues of improved services, multi-year planning, performance monitoring and so on. When members of the council or court are not fighting with each other, with the Executive, or with the other judicial bodies (courts with councils, one or the other with a separate school or even their own administrative offices) with some governance role, they tend to focus only on increasing their budgetary allocations, or on carrying out functions better delegated to their administrators (individualized selection of court staff, granting of leave, and so on). As regards performance improvement and the development of policies to allow it, the principal governance body often dismisses this as "not our responsibility" but rather dependent on laws and budgetary decisions developed by the other branches of government. Governance bodies are often very proactive in seeking more budget, higher salaries, equipment, and buildings, but show little tendency to link this to detailed analysis of the purported problems to be resolved or the setting of realistic objectives (e.g. a 10 percent reduction in average processing times, a 10 percent annual reduction in backlog, higher enforcement rates and so on). There seem to be two factors accounting for these trends:

- Lack of management skills and a planning mentality within the bodies (whose members are usually selected on the basis of other criteria)
- Lack of information needed to carry out these activities

The rest of this chapter focuses on the second item, but obviously it is closely linked to the first. The absence of a management outlook means that there is frequently no recognition of the need for information and thus no effort to ensure it is developed.

### **The Importance of Information for the Judicial Governance Function**

To carry out its new functions, the judicial governance body, wherever located, needs information. Whether the concern is efficiency, delay, quality of judgments, corruption or access, it is hard to plan remedies if one cannot 1) verify the existence of the problem; 2) measure its dimensions; 3) identify causes; and 4) develop measures to assess progress in resolving them. Working on the basis of intuition and "what everyone knows" often provides bad recommendations – since everyone is rarely in a position to analyze an entire system. In a study done in Lima's first instance civil and justice of the peace courts in 2002 (Gonzales et al, 2002), researchers found that contrary to what the presiding Superior Court told them, most JP cases did not involve women seeking child support but rather banks and pension funds attempting to collect small debts. Additionally, and despite the notion that cases dragged on forever, these two types of clients received favorable judgments rather quickly. They often did not bother to enforce them, however, preferring to use the judgments for two other purposes: as assets reported to the bank superintendency and as losses reported for tax purposes.

Absent good information, a problem may never be recognized or one may attempt to resolve a problem that really does not exist. As noted above, on the one hand, the majority clients using Lima's JP courts were not experiencing delay, but the impression remained that they were – and in fact gave rise to the creation of separate commercial courts. On the other hand, enforcement of judgments, never mentioned as a problem, may well be one. Information is also needed for budgeting and forward planning; how does one know whether more judges are needed, where they should be placed, and how to justify their addition, without basic data on caseloads, backlogs, delays, and the level of satisfaction of judicial users? How does one know what clients experience as problems absent performance data, but also without asking them? Ideally, both types of information are needed – eminent jurists frequently make very bad guesses about what court users might prefer, but it is also true that court users may express preferences without understanding the consequences.

It also bears mentioning that information needs interpretation. Although most Latin American courts now can calculate average judicial caseloads, it is perplexing that whether these are less than 200 or over 1,500 annually, they all report an “excessive workload.” This, average times to disposition (which most can't calculate), stock of pending cases (also not adequately covered) and the resulting congestion rates, are just numbers until those reviewing them have an evaluation yardstick. Of course, even within Latin America and certainly worldwide, differences in proceedings, in what gets to court, in the availability of alternative fora (e.g. administrative tribunals, stand-alone ADR, customary or religious courts) and simply the level of development make it difficult to set absolute standards. Still if those interpreting the information use comparable data from other countries and regions, they will be better able to say whether they “have a problem” or not (see for example data in CEPEJ publications).

To date the absence of good information seems not to have bothered Latin America's judicial governance bodies, in part because they do little planning or problem analysis, and in part because they continue to demand what they want (salaries, budgets, buildings and

---

### *The Ethiopian Reform Program*

*As a larger (80 million as opposed to 28 million population), but much poorer country than Malaysia, Ethiopia's reform has had to occur over a longer period. However, its aims are no less ambitious – reduction of delay, congestion, and the age of pending cases,, first in the federal and then in the 9 regional court systems. The program had a manual component, similar to that of Malaysia (involving an inventory of cases and the introduction of a filing system that would avoid loss of files), and an automated component, the creation of an automated database to register all events in the processing of each case. It will be years if not decades before all courts are covered, but for the federal courts and the higher courts in at least half of the regions, it generates roughly 80 reports used by courtroom staff, judges, and the respective governance bodies (the Federal Supreme Court and the Regional Superior Courts) to track and manage performance. Delays and congestion have been reduced, adjournments (major sources of delays) have been cut back, and data are also used to identify additional problems (now, for example turning attention to enforcement). Because it has grown over time, the database includes much more detail than that of Malaysia, but the judiciary as a whole has lower levels of automation, financial limitations being a major constraint. The initial program was developed in cooperation with CIDA and its expansion is now financed through a multi-donor SWAP which also includes funds for prisons, prosecutors and police.*

---

equipment) from a public sector that is no better prepared to assess their situation. However, things are changing, and as the rest of the public sector moves ahead in information-based planning, budgeting and evaluation, the courts may find their requests given less attention. They also will be in no position to defend themselves against the increasing complaints about their inefficiency, corruption, and limited professionalism, and for those truly interested in better service to their clients, they will have little basis on which to construct this.

### **The Importance of ICT for the Creation and Use of Information**

The necessary information can certainly be developed without automation. As the Malaysian and Ethiopian examples suggest, a manual inventory and a good manual filing system can be used to set up backlog and delay reduction programs, and manually collected statistics can be utilized to control delay. However, where goals extend beyond this, the danger lies in setting up programs only on the basis of “what everyone knows” about court services, their failings and their achievements since as commented above this is highly impressionistic and therefore often inaccurate (World Bank, 2002, ) Even methodologies adopted by the World Bank in its Doing Business publications fall into this error – where they estimate times to resolution of cases on the basis of what a small group of lawyers report, a comparison of the lawyers’ estimates with available court statistics suggests the lawyers often guess wrong.<sup>2</sup> Courts and other public sector entities, have alternative means of getting information – studies based on random samples (see World Bank, 2002 for an example), public surveys, expert assessments (like those conducted by Global Integrity, the American Bar Association, and World Justice Project) and techniques based on surveys of local experts (like the Doing Business methodology). However, all these alternatives are either costly, less than fully accurate, or both. Some of them (public surveys) will be needed to provide information on client appreciations, but this is hardly the same as collecting real performance data.

Thus, one of the best, and in Latin America, least developed sources of information comes from statistical databases generated through the creation of automated records. Automation can and does have many other applications (for example digital recording of hearings, video trials and depositions, scanning of documents, e-filing) but arguably the most critical use for management is its generation of information on what is happening to its caseload. Despite seat-of-the-pants-estimates that uploading of scanned filings and related documents will dramatically reduce processing times, this seems highly unlikely unless combined with a means to track real times and disposition rates, procedural modifications based on an analysis of the data (as in both Ethiopia and Malaysia), introduction of standardized forms to control party submissions (so that key information can be automatically transferred to the database and also to reduce irrelevant meanderings), and so on. For example in England’s money-claims-on-line system, whereby even an unrepresented party can file for assistance in collecting a debt up to 100,000 pounds sterling, the time savings is less the ability to e-file (how much time is really saved by sending a document over the internet than filing it in person?) than the standardized format which eliminates the need for review of inconsistently presented demands of various length and allows the typical cases to be processed extremely rapidly without any intervening steps.

---

<sup>2</sup> It appears that after years of resisting the suggestion, Doing Business is finally going to use statistics from courts that collect them.

## **Applications of ICT in the Region’s Judicial Reforms: For What is it Used and Where Do the Uses Fall short?**

After at least two decades of reform programs, Latin American judiciaries do have more information on their performance, but in a majority of cases it remains very basic, cases in and cases out each year, number of judges and staff, and sometimes, but not always, number of cases carried over from one year to the next, disposition and clearance rates for different proceedings, or types of dispositions. Unfortunately, much of this information is of very poor quality, generated manually, and never audited. Studies done by the World Bank and others show enormous variations in statistical reports done by the same country in successive years, indicating that something is amiss in even how these basic figures are collected. It is not uncommon, for example, for courts doing case inventories for the first time to discover that their stocks of unresolved cases are several times larger than they had guessed. However as the inventories also reveal, many of those “unresolved cases” are no longer active and could easily be closed. This is one of the key factors in Malaysia’s ability to reduce the number and age of pending cases so dramatically, even without automation.

Latin American courts also have a considerable amount of automation, some of them having invested substantial time and national funds in introducing it. However, most of this automation has not been used to create improved databases, but rather for word processing of ordinary documents, e-filing and creation of “e-files” which are really only a collection of the traditional documents now scanned and uploaded, retrieval of information on case status by internet, and automated catalogues of archive holdings and/or bar-coding of files and documents. All of this is helpful, but represents bits and pieces of a reform, and in the absence of good data on case flow, it is not even possible to evaluate the impacts. In Brazil, even after nearly twenty years of automation, and the introduction of some state-of-the-art ICT, performance data and statistics remain rudimentary, limited to disposition rates calculated by comparing dispositions with filings for each year, and most courts either do not have or do not use the capacity to do finer analysis. While courts there and in most other countries speak of a goal of reducing delays, they rarely can calculate current average disposition times or the incidence of factors contributing to them. The stock of pending cases is frequently a black hole – no one knows how many cases are included, of what they are composed, how old they are or what tends to get left behind. The automated registries created by many court systems are composed largely of text entries making analysis difficult if not impossible. Cases going from one instance to another rarely retain the same case number making it difficult to track them. All of these omissions represent the most basic elements of any good case management system, but few countries seem prepared to adopt them or see any reason to do so. Instead there appears to be a blind faith in the power of more ICT to fix systemic problems, something which experience suggests is unlikely to happen, and which the very absence of data makes impossible to verify.

### **Conclusions: Contemporary Challenges**

On the basis of the above discussion, it would appear that Latin American courts face three challenges are regards the better use of ICT to improve their performance:

- Changing the notion of what judicial governance should do and what it needs to do it.

- Using automation to create real case management systems, based on the appropriately recorded registry of all case events.
- Using this information to identify problems and be prepared to adopt additional changes to business as usual to resolve them.

As regards judicial governance, enough has been said in the first section to allow this to be treated very briefly. Essentially, those organizations charged with carrying up this function need to adopt a more pro-active vision as to what it entails. The issue is not what is needed, but how to accomplish this essentially cultural change. Possibly donors can provide examples and technical assistance, and the other branches of government can provide a push, but if one is to respect the notion of judicial independence it is the courts themselves that will have to respond.

On the creation of real CMS, since most of the region's courts already have some level of automation, this means that the omitted step, the creation of a database, must be taken a little late, but still needs to be done. To develop models, there is no need to go to Malaysia or Ethiopia as there are already some examples in a few locations in Latin America as well as in some Western European countries, the US, Canada, Australia and so on.

Once the first two steps are taken, the third one can begin, although as in both of the examples given, some early stages can be conducted even before the new system is up and running. It has been my experience that one of the biggest impediments to taking this step is not a resistance to ICT (which seems to be easily overcome once judges and their staff get the equipment) but rather a reluctance to change anything else. On-line filing is introduced, but the use of standard formats for submissions is rejected as violating the lawyers' rights. Automated databases are attempted but no one wants to throw out the old manual registries (which may in fact require legal change). Analysis indicates that certain procedures take up an inordinate amount of time, and moreover may be unnecessary or even contrary to the new accusatory principles (e.g. the practice of what is called *prevención* or the judge's correction of the initial filing<sup>3</sup>). Under the new oral proceedings, parties still insist on presenting, possibly even reading, the same lengthy and disjointed arguments they used to submit in writing. Requests for postponements are freely granted, and even if the automated system can now indicate whether a written document arrived on time, additional time may be allowed, and lawyers who hope to avoid the deadlines simply submit incomplete filings, figuring the judge will give them another chance. The list could go on, but the reluctance to change time-honored practices (and vices) is widespread, and unless some of them can be modified or eliminated, all the automation in the world will not improve the quality or quantity of court offerings. I am frequently told this cannot be because of the law or local culture. However, laws can be changed (certainly judges hope so when they look for higher salaries or a constitutional earmark) and unless local culture prioritized inefficiency then it should not have to be changed to incorporate more efficient practices.

The largest cultural changes required, however, are the understandings that courts must be governed, not just administered, and that information is critical to that process. It may be the

---

<sup>3</sup> Research conducted by the author and WB consultants suggests that this may take up to 50 days in Peru and Colombia, is often not done by the judge but by courtroom staff, and moreover constitutes an "aid" to one party. It bears mention that Malaysia had a similar practice (not mandated by law but just by fussy courtroom staff) which it eliminated with standardized formats and lists of names of judges and other staff (as quibbling over spelling of the same often was the source of the problem).

case, as a lawyer once told me that “if I wanted to do maths, I wouldn’t have studied law,” but unfortunately the innumerate jurists will have to get beyond that justification. Today effective governance (and government) requires both accountability and planning, and neither one can occur without information – to transmit and to use.

## REFERENCES

Beniti, Sidnei. 2000. *Da Conducta do Juiz*. Sao Paulo: Editora Saraiva.

CEPEJ (European Commission for the Efficiency of Justice). 2005. *European Judicial Systems 2002*. Strasbourg: Council of Europe.

[http://www.coe.int/T/DG1/LegalCooperation/CEPEJ/evaluation/default\\_en.asp](http://www.coe.int/T/DG1/LegalCooperation/CEPEJ/evaluation/default_en.asp)

\_\_\_\_\_. 2006. *European Judicial Systems – Edition 2006 (2004 Data)*. Strasbourg: Council of Europe.

[http://www.coe.int/T/DG1/LegalCooperation/CEPEJ/evaluation/default\\_en.asp](http://www.coe.int/T/DG1/LegalCooperation/CEPEJ/evaluation/default_en.asp)

\_\_\_\_\_. 2008. *European Judicial Systems – Edition 2008 (2006 Data)*. Strasbourg: Council of Europe.

[http://www.coe.int/T/DG1/LegalCooperation/CEPEJ/evaluation/default\\_en.asp](http://www.coe.int/T/DG1/LegalCooperation/CEPEJ/evaluation/default_en.asp)

Gonzales Mantilla, Gorki, Jean Carlo Serván, Luciano López, and Hernando Burgos (2002), *El sistema judicial en el Perú: Un enfoque analítico a partir de sus usos y de sus usuarios*. Lima, Peru: draft report prepared for the World Bank. (On file in Bank)

Hammergren, Linn. 2002. *Do Judicial Councils Further Judicial Reform? Lessons from Latin America*. Washington DC: Carnegie Endowment for International Peace, Working Papers, Rule of Law Series, No. 26.

Robledo Monasterio, Jesús. 2010. “Procesos de Reforma de la Justicia,” estudio realizado para la Conferencia de Ministros de Justicia de los Países Iberoamericanos (COMJIB)

World Bank. 2002. *The Juicio Ejecutivo Mercantil in Mexico’s Federal District Courts*. Washington, D.C., The World Bank, Report No. 22635-ME

\_\_\_\_\_. 2004. *Making Justice Count: Measuring and Improving Judicial Performance in Brazil*. Washington DC: the World Bank, Report No. 32789-BR.

\_\_\_\_\_. 2005. *Doing Business in 2005: Removing Obstacles to Growth*. Oxford University Press