

# New Tendencies in Judicial Reform and Where Brazil Fits Among Them

Linn Hammergren

May 22, 2015

# Introduction

- Topic trends in justice/judicial reform since 1980s, in LAC, CEE, but also Global North (GN)
- Reform is not a finite project; it is continuous and for this reason GN still working on its own improvements - often overlooked by donors and Global South (GS)
- In LAC, CEE, rest of GS, two periods – one ending; other just beginning
- Turn to Brazil last, but generally successfully completed first stage, on its own, w/o involvement in regional movement or donor input.

# Early Development of GS Reforms

- In LAC early 1980s; in CEE late in decade
- LAC movement supported but not designed by donors; CEE more direct donor and EU influence
- Still content similar:
  - New/modified constitutions with human rights guarantees
  - Creation of CCs or widening of SCJ review powers
  - Judicial selection – aim to depoliticize and make merit-based
  - Higher budgets/salaries
  - Training programs especially at entrance
  - Judicial councils – half LAC; much more of CEE
  - New codes and institutions (MP, defense)
- Aim to create independent judiciary and judges; guardians of constitution with broader protections to all citizens
- Donors support in many countries, but most funding is national. LAC's cross fertilization

# Balance Sheet by 2004

- Despite criticisms, did make a difference: more financial and physical resources; more staff, judges, work units; more political weight for courts/sector; changed relationships within sector; modern technology; selection systems more transparent with many former vices eliminated
- But – complaints about corruption, delay, politicization continue; with few exceptions, public image remains low; efficacy in combating crime or resolving ordinary disputes questioned.
- Sector is more costly, but was the investment justified?

# What Happened? Part 1: Design Errors and Oversights

- Reforms outdated before their time – context and needs had changed (especially crime and violence but also in other areas)
- Selection systems succumb to politicization – intent or poor planning?
- Disproportionate attention/funds to courts
- Poor structural choices (Guatemala's SCJ, many councils)
- Old habits remain; new laws and training don't change them – police brutality, symbolic orality, pre-trial judges revert to instructional model
- Administrative services generally unattended
- Innovations not used strategically – ICT
- *Achismo* for reform plans – done by lawyers unused to setting objectives and testing for results. Conventional wisdom and “axiomatic principles” inform choices instead.

# What Happened? Part II: Lessons from the Global North

- In GN, resource poverty, political dependence largely resolved, but concerns about performance remain – less corruption, but delay, costs and non-resolution of real disputes for many users
- Resulting attention to four themes:
  - Improved governance and management, if possible by judiciary itself
  - Accountability – transparency plus other issues
  - Public service and user focus – supply and demand side attention (Reduce delay, costs, uncertainty but know the user)
  - Humanizing emphasis – realization that formal proceedings often did not resolve many problems; mix of mechanisms, ADR, small claims, attention to unrepresented user, problem solving courts, outreach and so on

# Governance and Management as the key to others

- Two separate functions with various structural arrangements. Both more pro-active than former practices
- Trends at two levels: system and courtroom
  - Systemic governance/management oversee all performance, identify problems, develop solutions, set goals, manage relations with other PS entities. For this need MIS (major contribution of IT, but rarely recognized)
  - More managerial approach for judges – control case flow, prevent party abuses, meet production targets

# Where does Brazil Fit?

- In earlier reforms, worked above the curve and w/o need for outside push.
  - Courts and rest of sector well-financed,
  - Merit-based selection, corruption less than elsewhere, even under military less obtrusive interference
  - High caseloads and high productivity (but still backlog of unmeasured proportions)
  - Public opinion about judges high – about system not so high (costs to user delays, per M.Taylor, efficiency, not efficacy).



# Where Does Brazil Fit?: 2

- Signs by 2004 that recognizing need for new approaches, including much of GN program
  - National Council as more advanced governance
  - Council's early decisions (nepotism, overly high pensions) and emphasis on performance statistics positive
  - Early adopter (even before) of small claims and mobile courts, ADR
  - Already judges and Ministros seeing need to “manage the caseload,” removing frivolous complaints, controlling appeals and recursos especiais, focus courts on what they do best.
- However, obvious opposition (lawyers, many judges, even government) – question for others: have positive moves continued or are they falling prey to the many vested interests in business as usual? Not a bad business, but still not the best that could be done nor what modern society and citizens most need.