

**New York State Bar Association
International Section, Seasonal Meeting 2011
Panel 8
Emerging Reforms in Latin American Civil Justice Systems**

Part III of presentation:
Maintaining Perspective in Encouraging Reforms: Guiding Principles
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September 2011

Introduction

It is every society's goal to have an efficient court system that safeguards the rights of all citizens, in which decisions are made fairly, at reasonable costs, and without delay. The countries of Latin America have been working towards modernizing their judicial proceedings in response to the values they seek to protect (e.g., access to justice) and the problems that afflict their judicial systems (e.g., congestion, slow processes, and a lack of transparency).¹

In light of the difficulties of assessing progress across Latin American countries that have varied widely in their judicial reforms, proponents of judicial reforms called for a system of collecting and analyzing information in the region. In 1999, the Organization of American States established the Justice Studies Center of the Americas (JSCA) in an effort to provide new impetus for judicial reform in the Americas and make use of the synergies that regional work can generate in this sector.² By resolution, JSCA's objectives are to facilitate the training of justice sector personnel; to facilitate the exchange of information and other forms of technical cooperation; and to facilitate support for the reform and modernization of justice systems in the region.³

As reforms to Latin American civil justice systems are occurring, it is important to consider the foundations that these legislative and institutional changes should be based upon. The following represents a brief overview of the Justice Studies Center of the Americas' views on the guiding principles that are crucial both to the functioning and the success of these reforms.

A. Enhance prevalence of due process in civil proceedings

The idea behind due process is that a person's rights or obligations cannot be determined without a prior process that meets certain minimum requirements. These rights consist of a combination of basic standards and legal requirements that should be met to assure that the determination of the rights in question have been made fairly.

¹ Duce, Marin, & Riego, *Reforma a los procesos civiles orales: consideraciones desde el debido proceso y calidad de la información*, 14, in *Justicia Civil: Perspectivas Para Una Reforma en América Latina* (2008) ("Justicia Civil").

² Statute of the Justice Studies Center of the Americas, AG/RES. 1 (XXVI-E/99), OAS General Assembly (Nov. 15, 1999).

³ *Id.*

The American Convention on Human Rights⁴ and the International Covenant on Civil and Political Rights⁵ establish that in determining a person's rights and obligations in a civil suit, all persons are entitled to: (1) a fair trial, (2) via a public hearing, (3) by a competent, independent, and impartial tribunal previously established by law, and (4) within a reasonable time.⁶

The countries of the region have not adequately applied the notion of due process or its guarantees to civil proceedings, even if they may have been adopted constitutionally or legislatively. For example, Chile's Constitution refers to the requirement of a just and rational proceeding,⁷ but in practice this concept is almost impossible to find in the traditional civil courts, where proceedings are primarily written, secretive, excessively lengthy, and where all of the important evidence-gathering phases are handled almost exclusively by clerks, i.e., there is no direct contact between the parties and the judge that makes the decision. Within court proceedings, this direct contact is key in that it provides the court first-hand knowledge about the real circumstances of the case and the persons involved, rather than the artificial reality that emerges from written presentations.⁸

Further, it is important to note that assuring that due process is met in civil proceedings is not contrary to many of the new proceedings that are being implemented in the region, e.g., simplified processes in small claims courts or removing claims from the scope of the judiciary to administrative processes. Due process can be met by a combination of conditions, whereby many factors are taken into account, with varying degrees of strength, by applying a criteria of reasonableness under the circumstances. The same level of due process in proceedings to argue a parking ticket, for example, is not the same as what should be required in a proceeding for unpaid wages or benefits.

JSCA believes it is important that the countries looking to reform their civil proceedings keep the notion of due process at the forefront of these reforms, in order to assure that their practices meet international norms, and also to safeguard their citizens from procedures that do not meet these basic minimum requirements of fairness and justice.

B. Improve access to justice

The second principle that civil justice procedure reforms should be guided by is citizens' access to justice. Access to justice contemplates having speedy procedures and low transaction costs so

⁴ American Convention on Human Rights, art. 8.1, Nov. 21, 1969, 1144 U.N.T.S. 143.

⁵ International Covenant on Civil and Political Rights, art. 14.1, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 ("ICCPR"). Limitation on public hearing: "The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

⁶ Not explicitly in ICCPR, art. 14.1, but arguably under fair hearing requirement.

⁷ Constitución Política de la República de Chile [C.P.] art. 19, clause 3.

⁸ See Felipe Sáez García, *The Nature of Judicial Reform in Latin America and Some Strategic Considerations*, 13 Am. U. Int'l L. Rev. 1267, 1302 (1998).

that vulnerable groups will not be hindered from bringing claims, as well as having less formal and more flexible proceedings that can address distinct judicial needs.

Delays and high costs to bring civil claims generate advantages for the party in a better position to withstand these costs and discourage parties from bringing claims. One way to reduce the costs associated with bringing a civil claim is providing for less formal or nonjudicial proceedings that can handle claims more efficiently. Because they provide greater access to justice and reduction of litigation costs, JSCA encourages the creation of small claims courts and the use of alternative dispute resolution methods whenever possible. However, it should be noted that these simplified or alternative nonjudicial avenues should complement the existing judicial proceedings, not replace those that are facing challenges. Countries should strive to have effective judicial and nonjudicial systems, maximizing citizens' access to justice.

C. Improve management and incorporate information and communication technologies to benefit the system as a whole

The next issue that should be considered in judicial reforms is improving case flow management and incorporating information and communication technologies (ICTs) in ways that ensure the efficient use of judicial resources and make any improvements for the benefit of citizens. In the past few decades we've seen many countries modernize their judicial institutions by investing large sums of money in new technology. However, the improvements have generally not been related to the needs of citizens. There have been large investments in very poor countries, with poor institutional management, in work settings that use very outdated written proceedings. For example, many judicial institutions will now scan and PDF the thousand pages of a written file and thus allow the judge to see it on a computer screen—which simply reinforces the traditional written proceedings in which the judge has no contact with the parties—or create websites that publish a myriad of institutional expenses and case statistics in the name of transparency, but still contain no mention of how to file a claim.

JSCA believes that the modernization that countries strive for should be guided by certain minimum standards required under the concepts of due process and access to justice. Each country's judicial institutions should improve management and administration of proceedings to reach dispositions efficiently, keeping the needs of citizens at the forefront of any changes.

D. Ensure high quality information during judicial proceedings

The next idea that governments should keep in mind when initiating judicial reforms is that material information regarding each dispute should be both obtainable and admissible during civil proceedings. There are two ways in which this objective may be broken down: (1) providing for oral proceedings, by which evidence can be effectively evaluated for its probative value, and (2) assuring the competency of the litigators and other justice system personnel.

i. Oral proceedings

The first key to ensuring high quality material information in civil proceedings is encouraging the use of oral proceedings, but importantly, oral proceedings through which the relevant evidence can be evaluated for its probative value. In this sense, a hearing should be used as a tool to extract the pertinent information from which to make a judicial determination. Many of the reformed civil proceedings in the region are implementing oral hearings to replace traditional written proceedings. Although this serves as an important first step, there are a couple of other issues legislatures should consider when reforming proceedings to make sure the information at these hearings is of good quality. A few of these include:

Making hearings continuous. For example, in Chile’s new family courts, implemented in 2005, hearings are scheduled in 30-minute time blocks. A case is assigned a 30-minute window once a week for as many weeks as it takes to conclude. As one can imagine, this lack of continuity makes it difficult for any evidence—provided by witnesses or other sources—to be evaluated and remembered in a meaningful way, especially considering that the family court judges manage overlapping caseloads and handle multiple cases at the same time.

Allowing the free evaluation of the evidence. Rules prescribing the probative force of evidence, or what constitutes *legal proof*, should be replaced by rules that allow for a judge to freely, but rationally, evaluate the evidence presented before him or her, a concept known as *sana crítica* in Latin American civil justice systems.⁹ This concept can be most accurately translated as “sound judicial discretion,” and states that a judge can evaluate evidence without legal constraints as to their probative value, but must respect the rules of logic and experience, and must also state the grounds for evaluating evidence. In other words, a judge must be *rationally persuaded* by the evidence, but will not be instructed how to value it. On the other hand, the traditional method of legal proof strictly governs how much probative weight can be assigned to an evidentiary item, and may force a judge to issue a decision based on abstract rules about a person’s credibility. A common example of such a rule is that a confession by the accused constitutes binding “full proof” of a matter.¹⁰

Abandoning strict inadmissibility of evidence rules based on credibility. Directly related to the concept of *sana crítica* discussed above, rules that exclude evidence based on its pre-established credibility should be abandoned, and judges should be allowed to evaluate any relevant evidence for its value. For example, a commonly used rule under the legal proof doctrine prohibits any close relatives of a party or any person who has an interest in the outcome from being an admissible witness, regardless of their probative value, under the presumption that the information these witnesses would provide would be biased. This is known as the system of *reprochas* or *tachas*, which raises doubts not only about the credibility of interested witnesses, but also in the ability of a judge to correctly evaluate their credibility. Likewise, under many traditional civil justice systems in Latin America, the parties to a judicial proceeding cannot testify at all, under the presumption that they will simply lie in their favor. Reformed

⁹ Justicia Civil, *supra* note 1 at 60-61. For an explanation of the evaluation of evidence concepts in English, see generally, Álvaro Paúl, *Sana Crítica: the System for Evaluating Evidence Used by the Inter-American Court of Human Rights*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1804066 (May 2011).

¹⁰ See, e.g., Código Civil (Civil Code), art. 1713.

proceedings should adapt the definition of a witnesses to include *any person* who has personal knowledge of any matter relevant to the case (with exceptions for opinion testimony of expert witnesses). A judge should give a party to a case or an interested witness the opportunity to speak if he or she offers relevant testimony, and only then should evaluate whether the testimony is credible.

Rules of Evidence. Legislatures should establish rules of evidence to control how the evidence is presented at trial. An advanced probative system establishes clear mechanisms that allow the parties to present, analyze, and value the information that enters a hearing. These rules should reinforce the objective that the information that the judge possesses in reaching a final decision on a matter should be of high quality. These rules should be composed of regulations which establish: (1) the timing by which evidence may be presented; (2) the form in which evidence may be presented; (3) the methodology that the parties and the court should use to extract and control the information presented by the evidence; and (4) the form by which the court may assign probative value.¹¹

Finally, and generally speaking, reformed judicial systems should consider three additional aspects of a fair and functioning oral hearing: opportunities during civil proceedings to cross-examine witnesses; including a discovery phase within the proceedings; and ensuring that all of the evidence used by a judge to reach a decision should be that presented in the hearing.

ii. Competency of justice system personnel

When legal procedures change—whether by law or by institutional regulations—all of the actors in the systems are expected to change with them. However, we have seen that all over Latin America there have been issues with training the justice sector personnel for the reforms. For example, having rules of evidence won't ensure that high quality information is considered during a hearing if the system operators (e.g., attorneys and judges) cannot apply them. Most of the lawyers in the region were not educated under the reformed legal systems with adversarial processes; the same is the case with judges. Instead, legal education in the region was based on learning civil code and civil practice was (and still is) based on written procedures in which the lawyer did not have active roles. Thus, there is a general lack of litigation abilities by the lawyers of the region that must be resolved before the reforms can be fully implemented.

The countries of Latin America should ensure that their law students receive up-to-date legal education based on current practice, while also ensuring that current justice system operators are trained on not only the recent judicial reforms but also the theories behind them and their practical implications.

E. Strengthen the enforcement of judicial decisions

Finally, judicial reforms should provide effective methods for enforcing civil judgments granting monetary relief. Without efficient enforcement methods, all efforts put into judicial reforms will be severely undermined. One question that should be answered by governments is whether they want to leave enforcement within the scope of the judicial system—requiring further court

¹¹ Justicia Civil, *supra* note 1 at 47.

procedures—or in the hands of sole practitioners (whether it be civil servants or private professionals). In either case, litigants should have access to fair, fast, and efficient enforcement remedies.

JSCA believes that unless there is a legitimate legal dispute regarding a judgment, judges should not be responsible for overseeing enforcement proceedings. Likewise, judges should not have to oversee other non-contentious proceedings, including debt collection, that take up a significant percentage (oftentimes more than 50%) of all civil proceedings. Without a legitimate legal dispute, these types of cases should be resolved by administrative agencies under the control of the Judiciary, promoting efficiency in the use of judicial resources.

Conclusion

JSCA believes that adhering to the aforementioned principles is paramount to achieving successful judicial reforms within Latin America's civil justice systems. Providing all of its citizens with due process and access to justice, as well as judicial systems that respond to citizen's needs by its management, high quality judicial proceedings, and enforcement mechanisms, are all key steps to safeguarding citizens' rights and improving the region's judicial systems.