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Reforming civil justice systems: trends in industrial countries

Civil justice reform efforts in industrial countries face common problems in increasing access to justice and reducing costs and delays. These efforts also confront a common obstacle—the legal profession's interest in the status quo.

Courts are the backbone of the rule of law, underpinning the institutional arrangements essential for a well-ordered and thriving society. But around the world, resolving disputes over contracts, property, family relations, and other noncriminal matters remains excessively expensive or inordinately protracted—putting courts beyond the reach of most citizens and undermining public confidence in the civil justice system.

A recent survey examined problems with and reforms of civil justice in 3 common law nations—Australia, England, and the United States—and 10 civil law countries—Brazil, France, Germany, Greece, Italy, Japan, the Netherlands, Portugal, Spain, and Switzerland (Zuckerman 1999). All reported a continuing search for ways to improve the delivery of justice, but in most the history of reform has been disappointing. Problems have proven hard to solve despite repeated attempts over long periods.

One constant that emerges from the survey is that the economic interests of the legal profession explain many of the costs and delays in litigation and that overcoming these interests is difficult. A second is that both civil and common law countries are resorting to greater judicial control of the litigation process to control lawyers and their clients. A third is the appearance of a new theory of civil procedure: one that stresses that the resources devoted to resolving a dispute should be proportionate to the interests involved and that systemwide resources should be allocated fairly across all disputes.

Enhancing access to justice

Many countries are trying to ensure fairer, faster, and more affordable access to justice

Access to justice is a cause of great concern in all the countries surveyed. Although it is accepted that all citizens must have equal access to courts, in many countries access is an aspiration rather than a reality. In some countries the cost of litigation places courts beyond the reach of most citizens. State-funded systems for assisting poor litigants have experienced serious problems or have failed altogether.

The most instructive case is England's, which until recently had among the most generous provisions for the poor. Poor people were offered the same standard of legal services that affluent litigants would reasonably expect. But the relative ease of obtaining legal aid—combined with the fact that lawyers were paid by the hour regardless of the outcome, and with no upper limit—resulted in ever rising costs. Although successive administrations have tightened eligibility requirements for legal aid, the financial burden has proven unsustainable.

Recent legislation has drastically reduced the right to legal aid by denying it for most money claims. People with such claims must find lawyers willing to represent them on the understanding that the attorney will be paid only if the client wins. In Australia, too,

the availability of legal aid has been seriously curtailed. In the United States public funding of civil litigation has always been sparse, leaving indigent litigants to search for lawyers willing to represent them without charge as a public service or with payment contingent on winning the case.

The legal aid situation is even worse in civil law jurisdictions. In Italy it is hardly available. In Greece, Portugal, and Spain lawyers who provide legal assistance to the poor receive such low remuneration that publicly funded legal services are inferior or even unavailable. Only Germany and the Netherlands seem to have well-balanced systems. These are also the systems with reasonable costs and delays and relatively high public satisfaction (see below).

Litigation is made less useful by high costs and long delays

Causes of excessive costs and delays

Access to justice is affected by the cost of litigation. In this respect there is a marked divide between common law countries and civil law countries. Costs are much higher in common law countries, where it is possible for the cost to each party to exceed the value of the subject matter in dispute—and even to surpass it by a large margin. Such high costs are rare in civil law countries. But the delays experienced in some civil law countries (Brazil, Italy) are alien to common law countries. Thus in many countries the utility of litigation is undermined by prohibitive costs or long delays.

Most countries report highly complex procedures. This is rather paradoxical because it seems to be independent of the intricacy of the procedural rules of a given system. Although on the face of it there is a deep divide between civil law and common law procedures, and although there are considerable variations within these groups, the structural differences are limited.

All the systems conform to the basic requirements of procedural justice. Claimants must initiate proceedings by setting out the grounds of their claims. Defendants respond, accepting or denying the claimants' allegations. By these means the issues are defined, in some cases with judicial assistance. Although there are variations in the processes of accumulating and presenting evidence, the basic exercise is not especially complicated. It consists of some method by which the court acquires the needed information from witnesses, documents, experts, and the parties.

Yet despite the simplicity of the underlying structure of all the procedural codes surveyed, in most systems the civil process can be painfully intricate and protracted. The immediate causes vary by system. In some countries, such as Brazil and Spain, the process is governed by such a variety of anachronistic rules and local regulations that the civil process has become a normative jungle. England, by contrast, has simple rules. Yet the adjudication of substantive issues between parties tends to be overwhelmed by interlocutory or satellite litigation about technical matters—such as squabbles about conformity with time limits or other procedural requirements. Whatever the source of complexity, it is one of the main causes of high costs and long delays.

No system sets out to produce difficult or intricate procedural arrangements. Thus we need to look elsewhere to find the reasons for complex rules or litigation processes. These emerge quite clearly from national reports. The first reason arises from the interest of one party in dragging out litigation. Defendants may want to delay to put off paying what they owe. Or parties may hope that by complicating the process and making it more expensive, they can deter their opponents from persisting with litigation—or at least induce them to enter into an unfavorable settlement.

The second reason arises from the legal profession's economic interest in complex and protracted litigation. In England and other common law countries, lawyers are paid by the hour, without an upper limit, and regardless of whether their client wins or loses. In such a system, lawyers have an economic interest in complex and long proceedings, because the more forensic activity is required, the more they earn.

Consider England. Even in simple disputes over modest amounts of money, the

legal fees payable by each party can exceed the amount in dispute. As a result the unit cost of publicly funded legal aid rose during a period when eligibility was shrinking and the number of cases was falling. In Italy, by contrast, the unit cost of litigation is modest, but lawyers make up for it by keeping many cases on their books, which causes great delays in processing individual claims. Even in Germany, which is one of the best countries at providing civil justice, the economic incentives of the legal profession influence forensic practice.

Opposition to and strategies for reform

In all the countries surveyed the legal profession has vigorously resisted reform that threatened its economic interests. In some cases reform was blocked; in others it was defeated by spoiling tactics. Thus it seems that improvements in the delivery of justice are almost impossible without the cooperation of lawyers—and such cooperation is not forthcoming when the changes threaten their interests.

Given this obstacle, many legislators have opted for a strategy that avoids a direct challenge to the economic interests of the legal profession. The strategy involves curbing the scope available to lawyers and their clients to enhance the complexity, cost, and duration of litigation. There is an almost universal trend of imposing judicial control over the litigation process and restricting party freedom. The United States has led this trend among common law countries, but Australia and England are following in the same direction. Judges in these countries have been given unprecedented powers over the process, intensity, and pace of litigation. At the same time, common law systems show an increased willingness to rely on written materials in place of oral testimonies and arguments. That is because judges who want to control litigation must have advance knowledge of the issues, evidence, and arguments that will be raised.

Increasing judicial control is also evident in civil law countries. In France, Italy, Portugal, Spain, and even Germany and Japan there are moves to strengthen judicial supervision of litigation. In these countries there is also a realization that if litigation is to be conducted efficiently and effectively, it must be managed by the courts rather than by the parties and their lawyers.

Judges who are not only adjudicators but also managers need a theory of management and a set of objectives—in short, a new theory of procedure. This new theory has received its most explicit elaboration in England's new civil procedure rules. It is based on two notions: proportionality and fair allocation of resources. The procedure adopted for resolving a given dispute must be proportionate to the value, importance, and complexity of the dispute.

Thus, for instance, low-value or simple disputes may be resolved using simpler and faster procedures that consume fewer court resources. Fair allocation of resources requires that the limited resources for the administration of justice be fairly distributed between all those who require access to justice—not just the litigants before the court. Avoiding backlogs may require rationing the court time devoted to a given case so that those at the back of the queue are not subjected to ruinous delays.

The ideas of proportionality and fair allocation of resources are becoming widespread in both common law and civil law systems. At the same time, this new approach is requiring a reassessment of the balance that every procedural system must strike between the measures used to reach correct decisions and the duration and cost of proceedings. There is a growing realization that improvements in the civil justice system may require different priorities and necessitate new compromises.

For instance, many civil law systems recognize a right to appeal by way of rehearing, which is effectively a new trial. The right to a retrial reflects a willingness to use an additional level of adjudication to reduce erroneous outcomes. Indeed, to avoid mistakes, the first instance judgment in such systems is not enforceable before the appeals process has been exhausted. But many countries are

The legal profession has vigorously resisted reform that threatened its economic interests

reassessing the cost and time benefits of such arrangements. The trend is toward restricting the right to such appeals, either by requiring the court to approve them or by limiting appeals to questions of law.

Among the countries surveyed, Germany and the Netherlands are the most successful examples of this new approach, mainly because both countries have addressed incentives. In both, litigation is affordable and expeditious. In Germany this is achieved through state control over litigation fees, which are fixed as a small share of the value of the dispute. In the Netherlands it is achieved by opening legal services to competition from nonlawyers.

Many countries are pinning their hopes on court management of civil litigation, which offers the prospect of better use of court resources. But whether this will be enough to render civil litigation more affordable, improve access, and reduce delays is hard to predict—especially if lawyers retain incentives to protract and complicate litigation.

Further reading

Zuckerman, Adrian A.S., ed. 1999. *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure*. Oxford: Oxford University Press.

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If you are interested in similar topics, consider joining the Legal Institutions Thematic Group. Contact Geoffrey Shepherd (x31912) or Richard Messick (x87942) or visit http://www.worldbank.org/publicsector/legal/

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