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SOUTH AMERICAN LAW AND LEGAL RESOURCES

Justice Systems in Latin America: the Challenge of Civil Procedure Reforms

Abstract: Historically, civil justice has been conceived as a concentration of non–criminal matters, including several heterogeneous procedures, and that is the main reason why it has been subject of study in several countries in Latin America where procedure reforms are being designed, implemented or evaluated. Santiago Pereira Campos examines justice systems in Latin America in collaboration with Alejandra Pírez Ledesma who worked with him on this article.
Keywords: legal systems; civil justice; justice systems; administration of justice; reform; Latin America

INTRODUCTION

The civil procedural systems in Latin America followed the procedural scheme of continental Europe in the nineteenth century, particularly the model outlined by the Spanish Civil Procedure Act of 1855; suffering from all the evils of an inherited process, and thus proving ineffective in protecting the substantive rights at stake.

The main problems arising from this procedural system, which has been defined as "desperately written", were its ritualistic practices and the excessive length of the proceedings. The role of the judges in these written procedures was mainly passive, pending the process of the parties, especially regarding the initiation of the procedure with the lawsuit and the response (both written), as well as the presentation of all the evidence.

Furthermore, the 'immediacy principle' was vulnerated in the written procedures. The judge was not present in the hearings and everything was written, depriving the judge of the opportunity to see and hear the parties, the witnesses and the expert witnesses, creating what can be defined as a "*documentary curtain*"[1].

This led to an excessive delegation of functions by the judge to the employees in his office, even in matters that required immediacy. In addition to this, the multiplication of legal procedures to solve different civil matters was associated with the wrongful belief that every substantive law needed its own structure.

This led to the existence of several different legal procedures that, although interrelated, had different procedural deadlines and specific provisions; the same judge had to deal with different procedural rules.

To overcome these problems Latin American countries have been, for several years now, adopting reforms to eliminate those 'evils' inherited from the Spanish system, but now those countries are also facing new challenges that the reforms have generated.

THE REFORM PROPOSALS

All civil procedure reforms involve at least one of the following methodologies. They either seek a general reform of the non-criminal system of justice (for example, the civil procedure reform of Uruguay in 1989 or the current Colombian reform according to the Model Procedural Civil Code elaborated by the Iberoamerican Institute of Procedural Law); or they seek a transformation in one or more specific matters such as a civil reform, commercial, labour law, administrative, tax law (for example, the Chilean reform, the Peruvian reform and the reform in some provinces of Argentina).

It is important to point out that nowadays almost every country in Latin America is going through a procedural reform in the broad sense. Countries like Colombia, Bolivia and Brazil recently reformed their Procedural Codes and Ecuador is also about to do likewise. After the emblematic reform of Uruguay in 1989, several countries have had similar experiences over the last 20 years (such as Peru and Chile in some areas).

PROCEDURAL CHALLENGES

Contemporary procedural law faces challenges of extreme complexity which, with more or less success, Latin American countries are seeking to resolve.

To the traditional challenges, such as access to justice and the settlement of disputes within a reasonable time, which are still pending issues in many countries, a list of

new problems (and not so new) have been added to which we have sought possible answers.

These new solutions bring new challenges that must be addressed with special care to protect the essential principles of procedural law, particularly the right to a defense. We will point out some of the substantial reforms made by Latin American countries, as well as identifying the new challenges that our countries have to face under the reforms.

A) Redefining the role of the judge

Although there are some differences in doctrine with regard to the role of the judge in civil procedure, the trend of non-criminal reforms is clear in assigning the judge a role as director of the procedure.

The establishment of hearings, combining the best oral and written procedures, assured the direct participation of the judge in the procedures, favouring the immediacy principle.[2] The judge becomes the director of the procedure, leaving behind the previous passive role, which was essentially limited to ruling (without disregarding the due process of law).

Even though the procedure remains predominantly governed by the dispositive principle, the judge becomes an active participant in the process, exercising all of his powers and duties assigned by law. The judge is now able to seek evidence by his own initiative and is capable of taking all the measures needed to prevent the process from stalling.

This new role takes on primary relevance in presenting evidence, but always within the factual framework provided by the parties (the parties bring the facts to the process). Furthermore, the court is assigned an important role as facilitator in defining the object of the process at the preliminary hearing. The judge also has powers and duties regarding procedural control, direction and both prevention and declaration of annulments in an ex officio capacity.

Even with this 'new' power, the judges have some limitations: the facts are proportioned to the process by the parties, they still have control of their case, only the parties can initiate the process, and can exclude factual elements from the object of the process if there is no dispute between the parties.

The judge could not invoke in support of a decision, matters of fact that were not allegated by the parties, having his initiative on evidence limited to the facts allegated by either one of the parties and controverted by the other.

Increasing the powers and duties of judges has proved an effective tool in the procedural dynamic as well as in the realisation of justice in the judges' decisions. In any case, the judges' impartiality remains an essential requirement of jurisdiction. We must not forget that impartiality is essential to the procedure; the judge with these new powers and duties is still impartial, the only change is that he is no longer a 'mere spectator', and therefore contributes to the clarity of the procedure without it affecting the impartiality.

The active role of the judge with regard to the evidence is compatible with the impartiality principle, preserving in full the due process. On the other hand, judges had made moderate use of such instruments (sometimes too moderate), without affecting their impartiality, or the principle of equality of the parties or the due process.

B) Avoiding unfair and dilatory conduct in the process

Some countries have regulated the duty of truthfulness (or the procedural good faith principle) of the parties in a dispute and of their lawyers, thereby generating a debate about whether, in civil procedures as in criminal procedures, the party may refuse or decline to answer questions that might incriminate them (much like the fifth amendment to the United States Constitution); or, whether those rights do not apply to non-criminal cases and the parties have the duty of truthfulness and if the lawyer defending his client should refuse to state facts he knows are not true.

In our opinion, in non-criminal procedures, where the freedom of the litigant is not at stake, the provision should be that the duty of truthfulness is part of what can be called the 'standard of good litigant', similar to the standard of care in tort law. This standard of good litigant, or good litigant standard, is related to the community judgment on how a typical member of the community should behave in certain situations (in this case, while litigating).

In Argentina, Peyrano argues that the imperative to tell the truth is mandatory not only for those who act as litigants in the procedure, but also for all the professionals involved.[3]

The main point is how the violation to the standard will be enforced; there are several solutions and they depend on the regulation each country operates. There are specific penalties (fines, court fees, disciplinary sanctions, etc.) that are defined by each country's regulations. It is important to note that in many systems, the judge, when ruling, has to evaluate the procedural conduct of the parties.

Some argue that the penalties should be specified in the regulations, not only to prevent any breaches to the duty of morality, but also for the parties to know with absolute certainty what will be the consequence of a wrongful act and to assist the judge who has to impose the penalty.

One of the most successful tools of the reforms has been the burden to present or offer, when filling the lawsuit or the response, all the evidence that the party has (known as 'discovery') to avoid surprises and unfounded claims.

C) The Reform to the enforcement procedure

The inefficiency of the enforcement procedure constitutes a drama in almost all parts of the world and especially in Latin America. Even though we came a long way in the civil procedure reforms, enforcing the ruling (when the defendant does not comply voluntarily) is still complex and takes a long time.

It is important to note that the enforcement procedure may vary in different countries, classified broadly into public systems – when the collection is in hands of the judge or a public official or liberal systems – when the collection can be carried our by private enterprises; or a mixture of the two systems.[4] In Latin America enforcement is generally a public system.

Even though there are measures to be implemented to improve the enforcement procedure, the tools regulated in both common and civil law (eg. the provisional execution of the judgment, declaration of debtor's assets, seizure of goods, duty to cooperate subject to the imposition of sanctions, investigation of the debtor's assets by the court) have usually been less effective than expected. This is a matter that is still pending requiring creativity, innovation and simplicity.

The ideal system, following the modern trends, would be to entrust private or specialised officials with the implementation of measures (appraisals, auctions), under the control of the court to provide guarantees.[5]

D) Incorporation of new technologies

It is essential to incorporate new technologies in system design and management, electronic records, electronic notifications (in some countries the mere incorporation of this element involved a significant change) and the method to introduce evidence digitally in the process.

The incorporation of new technologies in different countries is, more or less, at an advanced stage; in some countries, such as Costa Rica, the lawsuit can be filed electronically without having to go to the office in person[6], other countries, like Uruguay, have implemented an electronic notification system; and several countries are working on the electronic record. Naturally this leads to better access to justice, facilitating transparency and resulting in significant savings in time and costs.[7]

However, there are challenges in the implementation of such changes including the need to advance the removal of the record, the making of audio and video recordings of the hearings and the need to train the staff of the courts, as well as the judges and lawyers in the use of these new technologies.[8]

E) Modernisation of the procedural structures

Many of the Procedure Codes in Latin America, that were the heirs of the old Spanish Civil Procedure Act, maintain an unjustified procedural multiplicity while many countries have implemented reforms in some matters (eg. labour law, family law, small claims, tax, etc.) or even general reforms, maintaining a multiplicity of procedures that is not always justified.

In countries that have implemented procedural reforms, one of two methods was followed: general reforms in all matters of non-criminal justice (civil procedure) trying to unify and simplify the procedures; or what we call 'reform by matter' (labour reform, family law reform, small claims, etc.), which generally lead to a greater multiplicity of procedural structures.

An example of this was in Uruguay in 1989 when there was a general reform where the entire civil justice was restructured on the basis of the implementation of hearings and a few procedural structures (General Procedure Code).[9] Recently there were two significant and very polemical reforms: one was the Labour Procedure (Act No. 18.257), seeking greater speed and disregarding some of the provisions of the General Procedural Code, and another reform creating a procedure for small claims of consumers, seeking better access to justice[10].

In our opinion, it is necessary to have a few procedural structures that are efficient, such as an ordinary proceeding, an order for payment procedure (for those cases in which there are indisputable evidence and a low rate of opposition) and eventually, a small claims procedure.

F) Transfer of certain procedures to non-judicial authorities

Latin American countries have a tradition of judicialising in all civil conflicts. However, there is empirical evidence that the judicial procedure is not always the best way to solve the conflict.

Thus, it is postulated in many countries that certain procedures or stages of the procedures should be transferred to non-judicial authorities, (for example: divorce, non-contentious proceedings, etc). In some countries in Latin America this transfer has begun, resulting in a benefit in terms of administration of justice, as it tends to lighten the workload of the courts[11].

We consider that this is a good measure provided that the rights at stake are disposable (the non-disposable rights belong to the judicial authorities) and that the areas to which procedures are transferred are chosen with proper care.

G) Class actions[12]

The classical concepts of procedural law have been jeopardised first by diffuse and collective rights and then by homogeneous individual rights. Finally, the classical formulations of due process, legitimation, res judicata, lis pendens, etc., were insufficient to meet complex collective claims by environmental issues, consumer relations, historical and cultural heritage, the right to health, and so on.

This had led to the need for countries to implement legislative reforms to create a sub-system to respond to these claims, which is an efficient (because it allows small individual efforts to add up into one collective claim) but very complex way of accessing justice.[13]

In this regard it should be noted that Brazil has a large and comprehensive regulation on this matter[14]. However, there are still many Latin American countries that lack any regulation of this subject, or that have fragmented or insufficient regulation.

The risk is that the overly complex design of the solutions can limit access to these instruments. This represents a problem since the classical solutions were not designed for this kind of actions, being impossible to address these disputes with the classical solutions.

THE CHALLENGE OF THE SYSTEMIC APPROACH IN JUSTICE REFORMS

Whatever the scope of the proposed reform to civil justice is, undoubtedly it must have a systemic approach, complex and integral with a public policy perspective. It must also define the various forms of possible solution from the State, articulating the various tools of prevention and conflict resolution. It should also deepen the basic procedural principles observed in disputes, with special emphasis on how to avoid them falling into practice disengagement, and it must define the procedural scheme for cases being heard in courts, both trials and enforcement procedures. Finally, it should propose the implementation of a model of management and information, as well as communication, the technologies required by civil justice, and their financing.

A systemic approach must:

- Have a methodology in design and implementation that ensures the effective incorporation of the main elements of the reform;
- Survey the situation, in order to obtain reliable information to enable a well constructed design for the reform;
- Develop in a comprehensive and systematic mode the changes needed, allowing citizen participation;
- Define the mechanisms required for the implementation of adequate reform, considering the needs of the citizens;
- Design a normative transformation to incorporate the legal tools necessary to implement the required changes;
- Design an organisational restructure to allow the organisation to implement the changes established.
- Establish appropriate tools for the implementation of reforms with clear targets and indicators of efficiency for the system of justice;
- Define the implementation mechanisms;
- Capture the required resources for the implementation of the reform (which can be gradual or immediate);
- Establish procedures for monitoring and evaluation;
- Establish appropriate mechanisms to make the required adjustments to the reform implementation considering predefined goals and indicators;
- Generate areas of dialogue between the key actors of the civil justice, including system operators and potential and permanent users.

The modernisation of civil justice cannot omit an analysis of the judicial organisation (courts, promotion system, judiciary carrier) and the human and material resources (judges, equipment, technology, etc) required to carry out any change.

The hearing process and the "order for payment" procedure are the most attractive structures; coordinated with a justice system for small claims, simple and accessible and an adequate solution for the class claims.

Innovative solutions to the 'drama' of the enforcement procedure must be sought (obtaining a ruling is slow, enforcing it is almost impossible). In this aspect, there are some interesting experiences to adapt to our systems from European countries (such as Germany, Spain, England).

From these elements, a new organisation and management of judicial offices must be considered, alongside the resources that they require, with the help of the new technologies and a suitable training plan (prior, concurrent and ongoing) with all the 'actors' of the system, and with citizens in general, allowing the move to the new model of justice.

The standards of due process cannot be satisfied without the existence of alternative dispute resolution mechanisms, that provide quick solutions arrived at by the parties and not imposed by a judge.

Finally, a modernised civil justice system must have proper legal assistance for citizens, to ensure effective equality for all.

CONCLUSION

We have analysed just some of the many challenges that justice systems of our time have to face. These challenges require multidisciplinary and innovative studies independent of preconceptions, always keeping in mind that behind our uncertainties, our tests and trials, our successes and failures, there are women and men who demand solutions to peacefully resolve their conflicts. This is our duty and responsibility and the challenges are immense and so is the task.

To conclude, there will only be more efficient justice if each country observes its own reality, avoiding automatically transplanting solutions from other countries (which of course will always be a relevant landmark). Every country has to make its own reform from a multidisciplinary perspective, considering the various facets of the problems and their solutions.

Footnotes

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