

Guiding Principles for Civil Justice Reforms*

Principios rectores para reformas a la justicia civil

Natalie J. Reyes

Attorney at the Justice Studies Center of the Americas. At the Center she has conducted extensive research and policy work on issues related to both civil and criminal reforms in Latin America. She is currently a member of Chile's Ministry of Justice's Panel of Experts to develop a model for the establishment of an enforcement officer in the context of Chile's Civil Procedure Reform.

Dado que las reformas a los sistemas de justicia civil en las Américas están en marcha, es importante tener en cuenta los fundamentos que deben regir estos cambios legislativos e institucionales. Este artículo presenta una breve descripción de los principios rectores que son cruciales para el funcionamiento y el éxito de estas reformas.

En primer lugar, es importante que los Estados que buscan reformar sus procedimientos civiles mantengan la noción de debido proceso a la vanguardia, con el fin de asegurar que sus prácticas cumplen con las normas internacionales, y también para proteger a sus ciudadanos de los procedimientos que no cumplen con estos requisitos mínimos de equidad y justicia. En segundo lugar, los Estados deben maximizar el acceso a la justicia de los ciudadanos esforzándose por contemplar procedimientos menos formales y más flexibles. Los Estados deben otorgar procedimientos rápidos y con bajos costos de transacción para

que los grupos vulnerables no sean limitados de presentar reclamos. En tercer lugar, durante la modernización de los sistemas judiciales, las instituciones judiciales deben mejorar la gestión y administración de los procedimientos utilizando las tecnologías de la información y la comunicación para llegar a las disposiciones de manera eficiente, manteniendo las necesidades de los ciudadanos como objetivo central de los cambios. En cuarto lugar, la información sustancial con respecto a cada controversia se debe poder obtener y ser admisible en los procedimientos civiles. Hay dos formas de asegurar que este objetivo se cumple: (1) proporcionar procedimientos orales, por los cuales la prueba puede ser efectivamente evaluada por su valor probatorio, y (2) asegurar la competencia de los litigantes y demás personal del sistema de justicia. Por último, las reformas judiciales deben proporcionar métodos eficaces para la ejecución de las sentencias civiles que conceden compensación monetaria o de otra índole.

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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. For the last several decades, Latin American states 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 As reforms to civil justice systems in the Americas continue, 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 guiding principles that are crucial both to the functioning and the success of these reforms.

A. Due process

The American Convention on Human Rights² and the International Covenant on Civil and Political Rights³ both outline the minimum legal requirements for ensuring due process. 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.

Although many states in the region have applied the notion of due process and its guarantees to civil proceedings through changes at the constitutional or legislative level, most have not applied them to these proceedings in practice. While the legal framework of a state may require a fair and rational proceeding, the practical application of this concept is difficult to observe in the traditional civil court system, 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. This direct contact is essential 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.⁴

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, such as simplified processes in small claims courts, or removing certain claims from the scope of the judiciary to administrative processes. Due process requirements are met if the proceeding is reasonable under the circumstances, thus in designing the process a state should examine a combination of conditions and take into account varying factors. This allows the state to differentiate civil conflicts based on the level of due process that is necessary to ensure a person's rights are protected. As an example, the same level of due process called for in proceedings to resolve a minor noise complaint between neighbors may not be the same as what should be required in a proceeding for unpaid wages or employment benefits.

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

3 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."

4 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).

It is important that the states looking to reform their civil proceedings keep the notion of due process at the forefront, 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. Access to justice

The second principle in guiding reforms to civil justice procedures is access to justice. Access to justice contemplates having speedy procedures and low transaction costs so that vulnerable groups will not be hindered from bringing claims, as well as having less formal and more flexible proceedings when appropriate that can address distinct judicial needs.

Delays and high costs to bring civil claims generate significant advantages for whichever party is in a better position to withstand these costs, thus discouraging other 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, governments should contemplate the creation of small claims courts and the use of alternative dispute resolution methods, such as mediation and arbitration. However, it should be noted that these simplified or alternative nonjudicial avenues should complement existing judicial proceedings, not replace those that are facing challenges. States should strive to have effective judicial and nonjudicial responses to civil conflicts, maximizing citizens' access to justice.

C. Management and information and communication technologies

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 improvements for the benefit of citizens. In the past few decades many states have modernized 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. For example, we have witnessed large investments for technological upgrades in certain countries where institutional management is still in need of improvement, and where outdated written proceedings are still being used. Many judicial institutions will now scan and PDF the thousands of pages contained in a written case file to allow the judge to view it on a computer screen. While admirable in the use of new technology, this type of investment only reinforces the role of traditional written proceedings in which the judge has no contact with the parties. As another example, judicial institutions will spend a lot of resources to 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.

Investments need to be assessed for their functional contribution to enhancing the nature of civil reforms. In striving for modernization of the court systems, 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. High quality information

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 to ensure this objective is met: (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 disputes is encouraging the use of 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. Hearings should be held continuously and without breaks to the extent possible, in order to avoid gaps in evaluating evidence and unnecessary delays. For example, some of the region's courts schedule hearings in 30-minute time blocks, whereby 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 recalled during later sessions in a meaningful way, especially considering that each judge manages overlapping caseloads and handles multiple cases at the same time.

Allowing the “free” evaluation of the evidence. Under the traditional written system in use in Latin American states, rules prescribe the probative force of certain evidence based on pre-established and inflexible criteria under the legal proof doctrine. This doctrine does not further due process goals because it limits the independence of judges to evaluate evidence presented before them. For example, under the legal proof doctrine governing how much probative weight can be assigned to an evidentiary item, a judge may be forced to

issue a decision based on abstract rules about a person's credibility. Judges should be free to rationally evaluate the evidence presented before them—a concept known as *sana crítica* in Latin American civil justice systems.⁵ This concept can be most accurately translated as “sound judicial discretion,” and states that a judge can evaluate evidence without legal constraints as to its probative value, but must respect the rules of logic and experience, and must state the grounds for evaluating evidence. In other words, a judge must be *rationaly persuaded* by the evidence, but should not be instructed how to value it.

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 probative 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 in the specific case, 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, the parties to a judicial proceeding cannot testify at all, under the presumption that they will simply lie in their favor. Reformed proceedings should adapt the definition of a witness 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

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⁵ 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).

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 a hearing. 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 caliber. These rules should be composed of regulations that 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 or decision-maker may assign probative value.⁶

Finally, and generally speaking, reformed judicial systems should consider three additional aspects of a fair and functioning oral hearing: ensuring opportunities during proceedings to cross-examine witnesses; including a discovery phase within the proceedings; and ensuring that the only evidence used by a judge to reach a decision is limited to the evidence that was presented at 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, many states have encountered difficulties in figuring out how to implement on-the-job training to personnel in the judicial sector. For example, new rules of evidence established by the legislature will not automatically ensure that high

quality information is considered during a hearing if the system operators (e.g., attorneys and judges) cannot apply them as the legislature intended them to be applied. Most of the lawyers currently in practice in the region were educated prior to legal systems being reformed to include adversarial processes; the same is the case for most judges. Instead, prior legal education focused on learning civil code and civil practice was (and still is to a large extent) based on written procedures in which the lawyer did not have active roles. Thus, lawyers in the region must receive the tools and training to learn new skills that are specific to the adversarial process, such as in-court arguments during litigation. The need to retrain attorneys and judges must be resolved before the reforms can be fully implemented.

The states 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. Enforcement of judicial decisions

Finally, judicial reforms should provide effective methods for enforcing civil judgments granting monetary or other relief. Without efficient judgment 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 judgment enforcement within the scope of the judicial system—requiring further court procedures and specialized judges—or in the hands of enforcement officers (whether it be civil servants or private professionals). In either case, litigants should have access to fair, fast, and efficient judgment enforcement remedies.

⁶ Justicia Civil, *supra* note 1 at 47.

Unless there is a legitimate legal dispute regarding a judgment, judges should not necessarily 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 the majority) of all civil proceedings. Short of a legitimate legal dispute, these types of cases can be resolved by administrative agencies under the supervision of or cooperation with the judiciary, promoting efficiency in the use of judicial resources.

Conclusion

Adhering to the aforementioned principles is paramount to achieving successful judicial reforms within Latin America's civil justice systems. Each state must provide all of its citizens with due process and access to justice, as well as work to establish judicial systems that respond to citizens' needs. Adopting sound management practices, high quality judicial proceedings, and ensuring judgment enforcement mechanisms are all key steps to safeguarding citizens' rights and improving the region's civil justice systems.