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# Civil Justice Reform: First Steps

**Although the Civil Justice Reform is a key step, the corresponding public policy and design features are those that will actually allow materializing this reform; this includes to outline the expected work load estimates, to professionalize the courts' management, and substantial technological improvements, among others.**

The reform of the Civil and Commercial Justice is by all means an imperative. It derives from the need to rely on a more modern, efficient, close and transparent justice, which allows solving everyday issues occurring in the lives of millions of Chileans, for example, regarding a rental agreement. Therefore, the recent delivery to the National Congress of the bill that creates the Civil Procedures Code (*Código Procesal Civil*) is the first step and one of the most relevant for this reform; although it is not the only one. The reform of Civil Justice concerns legal procedures, but it is also organic, that is, the way we use the different resources allocated to Civil Justice (financial, infrastructure, judges, public officers and administrative personnel hours, technology) to achieve a Civil Justice worthy of the 21st century.

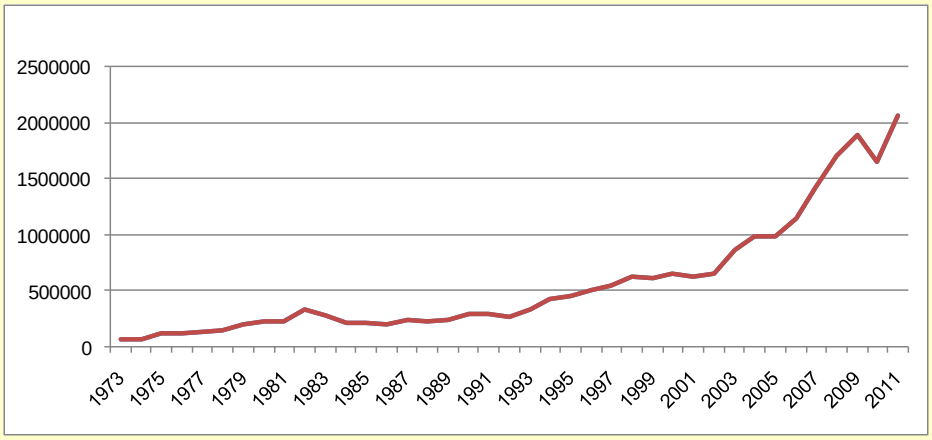
## Empirical Evidence

The last decades have seen a sustained growth in the number of civil lawsuits, a trend that has further increased since 2005 and enables to infer the need and urgency of reforming the civil procedures' system in our country (Chart 1). The lack of rationality in the use of the judicial system, the lack of effective rates or cost for users – it is being erroneously thought that the provision of this good has to be free -, and the lack of predictability of the judgments, among others,

seem to explain this increase[i], which exceeded 2,000,000 new lawsuits in 2011.

Chart 1

NEW CIVIL LAWSUITS TOTAL: 1973-2011




Source: Prepared by LyD with information obtained from the *Corporación Administrativa del Poder Judicial* (Administrative Corporation of the Judiciary).

Although new lawsuits have increased almost every year, it is possible to observe that recently, except for 2010, the annual growth rates have been over 10% and even close to 20%, a situation which is unsustainable in the medium-long term. In 2010, the situation was exceptional and the new civil lawsuits decreased by 12.67% in relation to 2009. This reduction was due to the post-earthquake effect, which derived in the provisional closing of the courts in Región Metropolitana (XIII Region), Región del Maule (VII Region) and Región de la Araucanía (IX Region).[ii]

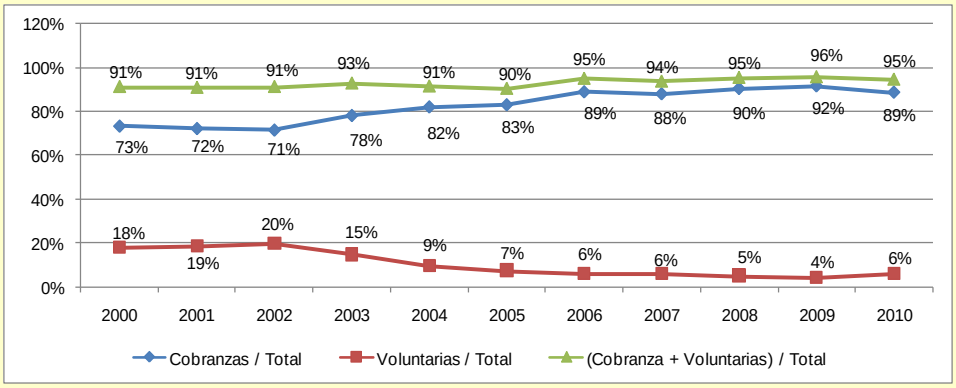
With regard to the new lawsuits' estimates for the following years, EMG Consultores carried out a Survey for "Estimates of New Lawsuits' in the Civil Justice System under the Currently Operating System", prepared for the Ministry of Justice, where it estimates the level of new lawsuits until 2015, through different methodologies and assumptions. Based on the model of total new lawsuits in terms of economic and population variables, it was estimated that new

lawsuits should reach a total of 2.6 million in 2015, that is, 1.5 per 10 inhabitants could present a civil lawsuit.

In relation to the incidence of collection trials (executive proceeding and preliminary arrangements and prejudicial measures) in the total number of new lawsuits, Chart 2 shows that since 2004 already, collection trials represented more than 80% of the total new lawsuits, and that since 2007, this figure increases to almost 90%. Furthermore, concerning voluntary issues (non-contentious), they show a downward trend since 2002, and they stabilize since 2006 in approximately 6%.

Chart 2

INCIDENCE OF COLLECTIONS AND VOLUNTARY ISSUES ON NEW CIVIL LAWSUITS TOTAL: 2000-2010




Source: Prepared by LyD with data from the *Corporación Administrativa del Poder Judicial.*

As for resolved lawsuits, during the last 5 years, they have shown a pretty uniform correlation regarding new lawsuits, accounting for an average 86% of the latter, which allows inferring that the system is quite overloaded, due to the great number of lawsuits being handled, and that apart from the delay times, the percentage achieving a quality resolution (sentence) is low.

In fact, if we analyze the main sentences applied in 2010 for the executive proceeding and the preliminary arrangements and prejudicial measures, we observe that 58.8% of the applied sentences correspond to admonitions for not presenting a complaint and 17.3% correspond to a complaint with no activity, with minimum

possibilities of having more efficient resolutions, such as a definitive sentence or credit payments.[iii]

Table 1

AVERAGE TIME IN SANTIAGO's JUSTICE COURTS, 2009

| Judgment | Time in Days (Average) |
|---|---|
| Executory | 1,070 (with opposition)<br>522 (without opposition) |
| Ordinary | 821 |
| Summary | 227 |

Source: Ministry of Justice, Justice Management and Modernization Department.

Finally, in relation to the trials' duration, Table 1 shows the lawsuits' average time according to the type of judgment in the Justice Courts of Santiago for 2009. This is one of the main changes in the reform, which is going to significantly reduce the resolution times to approximately 170 days, a time even lower then the 1.7 years average in the OECD.

**Bill for the Civil Procedures Code**

In this scenario, the government has introduced a bill that creates the Civil Procedures Code (*Código Procesal Civil*), replacing our current Code of Civil Procedures (*Código de Procedimiento Civil*) which dates back to 1903 and therefore regulates legal tax procedures and institutions representing the political, social and economic society of the 19th century; so the current situation is decontextualized. Consequently, the purpose is to give the country a legal mechanism that replaces the old written, rigid, formal mechanisms in order to replace them by one that substantially reduces the duration of lawsuits, and which has more oral and public content.[iv]

Furthermore, the intention is to give judges a much more active role by replacing the current proceedings, which are essentially written, by proceedings where oral hearings and the principles of equal opportunities, procedural good faith, immediacy and publicity prevail. A more expedite and transparent system is pursued, since today it is inhibited by the number of proceedings, which require many formal

steps and are manipulated by the media, and by a design that has compelled the courts to permanently delegate the judges' roles in public officers or assistants of justice administration (judicial officers), who must perform these roles in view of the circumstances. An additional purpose is to incorporate technologies that allow expediting the trials, thus reducing the proceedings time and their costs, and offering a more equal and efficient access to justice.

Other innovations are the strengthening of first instance through the provisional execution, that is, the immediate enforcement of the judgments as a general rule, even if there are pending recourses, and also strengthening the role of the first instance judge. Data show that most sentences are not appealed, and when they are, they are generally confirmed.

Likewise, the small claims procedure is established. This procedure will enable to give a quick and effective guardianship for the collection of debts up to 500 UTM and having no writ of execution. In this way, a declaratory judgment will be obtained quickly, qualifying it for an executory process later on. It is a way of having greater access to justice, since it facilitates the recovery of small amounts which are today uncollectable due to the high costs and the long proceedings.

Notwithstanding the purely procedural factors described above, there are two organic or structural factors which are at the heart of the reform; they are outlined in the communication of the Code project, specifically indicating that they will be regulated by special laws (not the Code).

In the first place, and considering that the current work load of a civil judge basically consists in acting as administrative officer in collection trials – and the bad experience of specialized executory courts in labor and social insurance issues – the intention is to create the figure of execution court officers, who shall be in charge of the collection order proceedings, including embargo, thus reducing the administrative tasks of the courts. Therefore, it will be no longer necessary to start a trial to demand the payment of a debt, and this court officer shall be entitled to take action, under the permanent control of a judge.

In the second place, Alternative Dispute Resolution (ADR) mechanisms are sought to be strengthened, especially arbitration. As we know, today arbitrations are a quality and timely alternative for

civil procedures in ordinary courts, but they are limited to higher complexity controversies in the business world involving high amounts. Therefore, they are called “boutique justice”. The reform of Civil Justice seeks to massify the ADR.

**Impact on the Supreme Court**

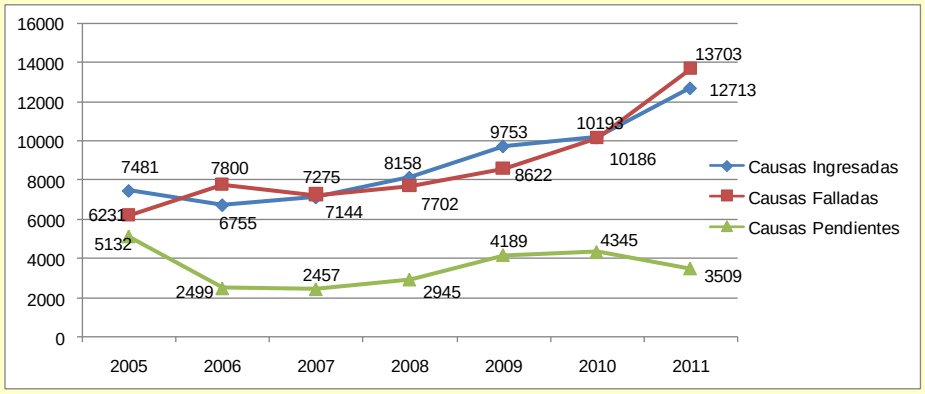
One of the most relevant features of the Code project concerns a “more efficient” use of the Supreme Court, since it is currently a true instance, lacking all possibilities of being a real cassation court with the purpose of standardizing national law.

In this perspective, as observed in Chart 3, in the Supreme Court the evolution of new lawsuits has increased since 2006, and the increase of 2008 (19.6%) and 2011 (24.7% variation in relation to 2010) deserve special attention. With regard to the Supreme Court’s total number of annual judgments, there is also an upward trend since 2007, especially 2011, where total judgments show a 34.5% increase in relation to 2010, even exceeding the total number of new lawsuits in the same year, thus reducing the total number of pending lawsuits by 19.2%.

Despite the reduction of pending lawsuits in the last year, the net increase in the number of pending lawsuits in relation to the period 2006-2008, is alarming. Increasing new lawsuits should entail an increase of resolutions in the same proportion of judgments, because the stock of pending lawsuits generates inefficiencies in the system. In this scenario, the work undertaken in 2011 is worth highlighting, since the total number of judgments exceeded by 990 lawsuits the total number of new lawsuits.

Chart 3

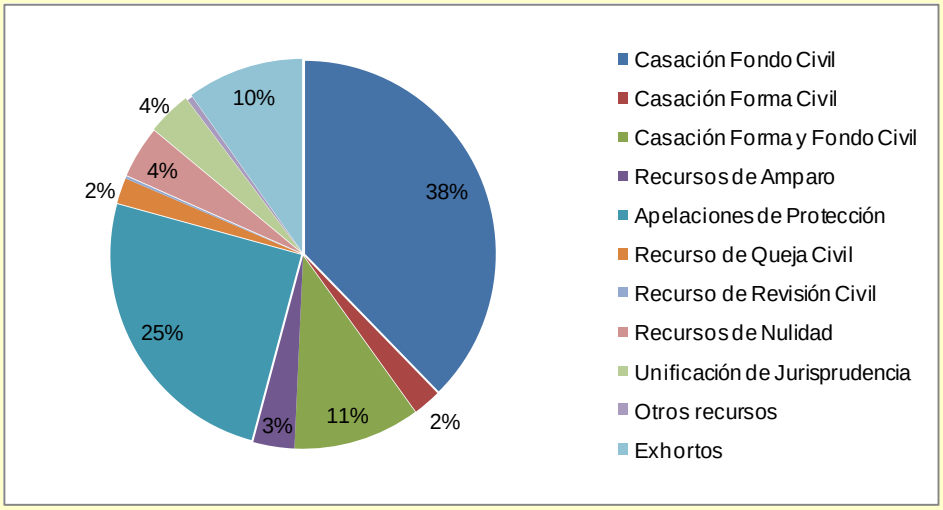
SUPREME COURT's NEW LAWSUITS, JUDGMENTS AND PENDING LAWSUITS 2005-2010




Source: Prepared by LyD with data from the *Corporación Administrativa del Poder Judicial.*

Chart 4

COMPOSITION OF THE SUPREME COURT's MAIN NEW LAWSUITS




Source: Prepared by LyD based on the Annual Report of the Administrative Corporation of the Judiciary 2010.

In relation to the composition of the new lawsuits entering the Supreme Court, Chart 4 shows their distribution according to the main subjects in 2010. As observed, the civil substantive cassation is

the main issue, accounting for 37% of all new lawsuits, followed by remedies of protection with 26%, in 2010; this is due to the boom of legal processes from members against their health insurance institutions as a consequence of the increases in the health insurance plans as a result of the controversial decision of the Constitutional Court on this matter.

Therefore, the Code project proposes, in our opinion correctly – since it is an historical proposal of Libertad & Desarrollo -, to restrict as much as possible the number of remedies taken by the Supreme Court. Consequently, it proposes to eliminate the procedural cassation (whose grounds for annulment are fused into the regulation of the new remedy of appeal, which assumes the condition of appeal for declaration of nullity), and replace the current substantive cassation by an extraordinary recourse, which basically allows the court divisions to freely choose lawsuits. Additionally, the Court will be able to take over the matter, inasmuch as there is a general interest that makes its participation necessary, and with a characterization of grounds which justifies this general interest. The respective court division will decide whether the issue deserves being taken over or not.

**Conclusions**

The reform of the Civil Justice has given its first steps with the introduction of the bill that establishes the Civil Procedures Code. Although it is a key step, the corresponding public policy and design features are those that will actually allow materializing this reform; this includes to outline the expected work load estimates, to professionalize the courts' management, and substantial technological improvements (allowing, for example, a great deal of the legal processes to be made online), among others. Additionally, the design of two essential parts of the reform should be included: the execution officers and the alternative dispute resolution mechanisms.

Nevertheless, the jurisdictional reform of the Supreme Court is no doubt one of the most audacious proposals made by the government. If it is implemented, it will allow the Court to actually play its cassation court role; thereby, it would not have to rule on a great number of lawsuits (13,000 today), but only on the lawsuits (e.g., 300) where the establishment of precedents searching to standardize the law is really at stake.

In Brief:

**CIVIL JUSTICE REFORM:**

- Today, civil courts are overloaded with collection trials which turn civil judges into mere administrative officers who are hindered from exercising jurisdiction, that is, to resolve juridical controversies among parties. This also generates congestion; it is not rare that civil trials last 3 or 4 years in first instance.
- A good deal of the Civil Justice overload is analog to a "tragedy of the commons": the cost-free principle and the lack of a real competition through alternative dispute resolution mechanisms explain the excessive use of the judicial system as a negotiation tool and not as a resolution for juridical disputes.
- The bill which establishes the Civil Procedures Code means a great headway, but it must be considered a first step only. It is necessary to study the public policy and design features involved: expected work load estimates, professionalization of the courts' management, substantial technological improvements, among others. Additionally, the design of two essential parts of the reform should be included: the execution officers and the alternative dispute resolution mechanisms.
- The Code project seeks to limit the number of remedies taken by the Supreme Court by means of an extraordinary recourse, which basically allows the court divisions to freely choose lawsuits.

[i] *Justicia Civil y Comercial: Una reforma pendiente*, José Francisco García and Francisco J. Leturia. November 2006, p.36.

[ii] Survey for Estimates of New Lawsuits for the Civil Justice System under the Currently Operating System. Prepared by EMG Consultores S.A. for the Ministry of Justice. Annex Nr 2.

[iii] Information based on the Annual Report of the *Corporación Administrativa del Poder Judicial* 2010.

[4]Nuevo Código Procesal Civil: Justicia más ágil y cercana a la gente. Ministry General Secretariat of the Presidency. Observatorio Semanal Nr 79.