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Reforma de la justicia penal en América Latina: Una perspectiva panorámica y comparada, examinando su desarrollo, contenidos y desafíos

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Criminal Justice Reform in Latin America: A Panoramic and Comparative Perspective Examining Its Development, Contents, Results and Challenges

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Resumen

Desde mediados de los años 80 se han realizado esfuerzos significativos y sistemáticos en la mayoría de las naciones latinoamericanas para abordar la reforma de la administración de justicia. Parte importante de ese trabajo se focalizó en una minuciosa reforma del sistema penal. Los esfuerzos para reformar la justicia penal en la región no sólo han incluido mejoras técnicas a la administración de justicia, sino que forman parte de un marco de trabajo mayor de reconfiguración, modernización y democratización del Estado. El artículo describe el proceso de reforma del sistema penal en la región, sus más importantes resultados y los desafíos pendientes. El paper concluye que la reforma al sistema penal en América Latina está lejos de ser un proceso cerrado, sino que más bien debería ser percibido como un proceso que ha entrado a la adolescencia, con todo los problemas que eso conlleva, donde el trabajo exitoso será la clave de cómo se comportará el sistema en su madurez.

Abstract

Since the mid 1980s very significant and systematic efforts have taken place in most Latin American nations to address reform of the administration of justice. An important part of such work has focused on detailed reform of the criminal procedure. The efforts to reform the region's criminal justice systems have not involved merely technical improvements to the administration of justice but are part of a larger framework, that of reconfiguring, modernizing and democratizing the state. The article describes the region's criminal justice system reform process, its most significant results and its remaining challenges. The paper concludes that the reform of criminal justice in Latin America is far from being a closed process; rather, it should be perceived of as a process that has entered adolescence with all the problems that involves; where successful work will hold the key to how the system will behave in its maturity.

1. INTRODUCTION [1]

Since the mid 1980s very significant and systematic efforts have taken place in most Latin American nations to address reform of the administration of justice. An important part of such work has focused on detailed reform of the inquisitorial process, a criminal procedure that had been adopted by almost all countries in the region after the colonial period and characterized by strong authoritarian precedents (Maier, Ambos and Woischnik 2000). The efforts to reform the region's criminal justice systems have not involved merely technical improvements to the administration of justice but are part of a larger framework, that of reconfiguring, modernizing and democratizing the state. In this sense, reform has involved a public policy within the justice sector deemed key in adapting the region's criminal justice systems to the demands of modern democratic states.

This paper will attempt to describe the region's criminal justice system reform process, its most significant results and its remaining challenges. [2] Before proceeding with a substantive discussion of its evolution, it is worth pausing to explain the extent which the idea of reforming criminal justice enjoys. For a reader in the United States the idea of reforming criminal procedure is probably understood as a series of small changes intended to improve the functioning of a firmly established system characterized by recognized practices generally accepted by society as legitimate. In other words, the idea of transformation is tied to the notion of fine tuning institutions and procedures that have been in place and functioning for a long time. The notion of reform in Latin America is totally different. In that region, the perception of the changes initiated during the past twenty years has been associated with structural transformation of the systems of criminal justice and the complete replacement of exiting systems and procedures by new and different institutions and processes. In that sense, the reforms discussed in this paper can be described as radical changes at all levels of the criminal justice system.

In order to understand this concept, the descriptive scheme posited by Stanford Law Professor Lawrence Friedman concerning the components of a legal system (Friedman, 1998) provides a useful guide. According to Friedman every legal system is characterized by three elements: (1) structure, (2) substance and (3) legal culture. The structure is the system's skeleton, the durable part, that part which provides the system with form and definition as a whole (*i.e.*, the institutions which comprise it). The substance of the system consists of the existing rules, norms and patterns of individual behavior within the system. Finally, the legal culture includes individual attitudes towards the legal system and related beliefs, values, ideas and expectations. When processes of criminal justice reform undertaken in the region are analyzed, one observes that the reformers' objective has been to effect radical changes at these three levels in order to drastically change the system's configuration. That is how the old structures have been eliminated and new institutions created; that is also the effort to produce a complete replacement of the constitutional and legal rules that govern the sector, and finally the expectative of producing a fundamental modification of the work-practices, habits and routines of the system's principle participant's in order to improve the system's public perception and societal assessment. It

is in this context that the concept of criminal process reform in Latin America should be understood.

Because of the substantial difference in scope and meaning that criminal justice system reforms have had in the region, it is necessary to review some general questions that will help in understanding the reformed processes prior to analyzing its specific aspects. A paper focused exclusively on the technical and procedural aspects of the transformation would ignore a more global aspect making it more difficult to fully understand its meaning; consequently, the principle characteristics of the region's prior systems of criminal procedure will be briefly described in an initial section in order to permit the reader to appreciate the magnitude of the changes involved in the reforms. The second section will focus on analysis of the general characteristics of the process of change as well as on identifying the main forces and factors that have impelled it, demonstrating the complexity of the reform process which has far exceeded technical and legal considerations. In the third section the substance of the principle changes effected will be examined with the objective of contrasting the current systems with their predecessors as well as with other comparative systems, especially that of the United States. Finally, in the fourth section, some of the results to date as well as the challenges this transformational process is expected to face in the future will be examined. As will be seen, the process is far from concluded.

2. CRIMINAL PROCEDURE IN LATIN AMERICA PRIOR TO REFORM

As a result of the exportation of political and juridical institutions to Latin America by continental European colonial nations during the period from the Spanish conquest until Latin America's independence, the region's systems of criminal justice were organized on the same basis as those that existed in continental Europe at the beginning of the eighteenth century, a tradition known as the *inquisiorial process*. The inquisitorial process evolved from older trial methods based on divine providence or trial by combat theories (Esmein 1913); consequently, the basic purpose of the inquisitorial process was the discovery of real or historical facts associated with the commission of a crime through an investigative process conducted by agents of the state. Only after the truth had been established in such manner was the system capable of arriving at decisions. Because of that the process was structured on the basis of a bureaucratic system of criminal prosecution, *i.e.*, where amply empowered judges were responsible for conducting criminal investigations without requirement for a directly interested victim. Another procedural aspect involved the use of secrecy (even as to the identity of those being investigated) facilitated through reliance on an inquest or written record of all the actions and proceedings conducted, where the same investigative judge was also responsible for ultimate resolution of the case, thus concentrating all functions of investigation and resolution in the same person.

In this context, the accused's confession became the principle means of investigation since it was obviously the most direct source of knowledge concerning the events in question; so much so that it became known as the "queen of evidence" (Maier 1996: 297). This, among other things explains why torture was considered a legitimate and useful investigative technique during the several centuries that the inquisition process was in effect in Europe and Latin America (Langbein 2005). To this must be added the fact that the defense had severely limited rights of participation during the investigative stage and

a relatively small participatory role during final judgment of the case. All of the foregoing resulted in replacement of the ideal of a public trial as the focus of the criminal procedure in Latin America by inquisitorial process models based on presentation of arguments and debate through written motions. In this procedural model, the investigative stage became the most important stage of the process (Maier 1996: 296).

Finally, a very important aspect of Latin American inquisitorial processes involved the ample grounds available for review and reversal through the exercise of varied recourses and means of rebuttal, review facilitated because the record was the primary source of information through which the system's decisions were adopted. The most common form involved the right of appeal which permitted review by the superior tribunal not only of the proper application of law to the substantive case but also to review of the case *in toto* and *ab initio (*reconsidering its findings of fact as well). Even more radical, many of the region's countries established compulsory judicial review of sentences by superior courts empowered to increase the severity of sentences against convicted persons. This broad power of revision by superior courts reinforced the pyramidal and hierarchical nature of the region's judicial organizations (Maier 1996: 299).

It was very natural during the colonial period for Latin American institutions to follow the continental European model very closely, especially Spain's, since there was a temporal and ideological consistency with that model. The curious thing is that those criminal justice system institutions were retained after independence[3] given the existence of a strongly liberal ideological disposition, even within the legal system (for example, various national constitutions required the use of jury verdicts). It was even odder since continental European countries had effected fundamental changes in their systems at the beginning of the nineteenth century. Nonetheless, most countries in the region maintained structures very similar to the historical inquisitorial process until the end of the twentieth century. Obviously such structures were subject to changes, evolution and adaptation, however, in the main, they retained the premises and logic inherited from the colonial era (Duce 1999).

Because of the foregoing, the Latin American criminal procedure process diverged from the evolution experienced by continental European countries, thus, at the end of the twentieth century, a young German or Italian lawyer would have perceived the English system as more familiar to his traditions than the systems of countries such as Chile, Ecuador, Venezuela or Costa Rica. Indeed, continental European procedural systems experienced profound transformations starting in the nineteenth century. One of the first occurred as a result of reforms inspired by the liberal movement symbolized by the French Revolution (Merryman 1985: 126). A second, starting in the middle of the twentieth century, was influenced by the work of the European Human Rights Tribunal. Consequently, analogizing criminal procedure in Latin American countries prior to the reform process with contemporary criminal procedure in European countries is a gross error. That factor must be born in mind when evaluating the reasons the region's countries undertook the current changes as well as their substance.

Understandably, the historical design of criminal procedure in Latin America is the product of a very different juridical tradition than is criminal procedure in the United States.

In fact, with the passage of time Latin American countries diverged from the continental European traditions that served as their model as the latter started a process of closer convergence with Anglo-Saxon traditions. As a result, towards the end of the twentieth century the difference between procedural models in the great majority of Latin American countries and those existing in the United States were immense, while the distance between the latter and those existing in continental European countries had narrowed in a significant manner.

3. THE REFORM PROCESS: ITS MOTIVATING CHARACTERISTICS AND FACTORS

One of the most distinctive aspects of the region's criminal justice reform efforts since the end of the twentieth century is the fact that they were not isolated efforts by different countries directed towards purely technical improvement. On the contrary, it is notable that reform has involved coordinated activities directed towards a truly regional effort at political transformation. It has not been the result of coincidence but rather the consequence of diverse factors and social pressures concurrently present in the region explaining why different countries have advanced in a homogenous fashion and parallel form. The main characteristics of this process of change and the factors and forces that have impelled it will be developed below.

3.1 The Criminal Reform Process as a Regional Movement

Criminal justice reform in the region can be described as a common movement rather than as a series of isolated efforts realized in a different manner in each country. In fact, it would be accurate to state that certain common elements comprising a kind of spinal column underlie the region's reforms. Thus, the existence of a broadly shared negative opinion concerning the tangible manner in which the system of criminal justice had functioned in the region's different countries was a key initial element.[4] The common diagnosis identified structural systemic design deficiencies rather than specific shortcomings as the more culpable causes which led to the conclusion that, due to its inability to function reasonably from the perspective of criminal prosecution as well as from its incompatibility with basic values of democratic systems, the inquisitorial system constituted a source of structural problems. While it was acknowledged that there were serious problems caused by a lack of adequate sector resources, the perception was that while additional resources might improve some tangential issues, they would not be sufficient by themselves to impact the principal problems.

Faced with this critical diagnosis, the strategy for dealing with changes coalesced into the idea that only the complete elimination of the inquisition process could lead to resolution of the system's problem, an objective soon embraced in most countries. The reform strategy was accordingly premised on the need to undertake a radical transformation of existing procedures and institutions and to replace them with new and different ones. In response to that strategy, an alternative model for change took form focused on the concept of an adversarial system. Reformers believed that the fundamental changes in practices needed to satisfy the minimum requirements of such process and to assure efficacy in criminal prosecution could only be accomplished in a system of that nature. From that

perspective the reformers' goal was to move toward the progress experienced in continental European countries rather than to import ideas from the United States.

Another very significant aspect of the reform process was its regional scope. Debates started in the mid 1980s that led to significant changes in criminal procedure in almost all of the continent's countries. A quick review of the regional map highlight the reforms realized as well as the fact that reforms have been adopted in most countries in the region. The following table illustrates this situation.

Table 1
The State of Criminal Procedure Reform in Latin America

Country	**Year in which Reform Effected**	**Comments**
Argentina	Various	Federal system, implemented at the provincial level, *e.g.*, Buenos Aires 1998, Córdoba 1998 and Chubut 2006
Bolivia	2001	No comments
Chile	2005	Gradual implementation by territory concluded in 2005
Colombia	2005	Gradual implementation by territory, not yet concluded
Costa Rica	1998	no comments
Ecuador	2001	no comments
El Salvador	1999	no comments
Guatemala	1994	no comments
Honduras	2002	no comments
México	Various	Federal system; constitutional reform introduced in 2008. Reform has been made at the state level in stages, *e.g.*, Nuevo León, 2005 and Chihuahua, 2007.
Nicaragua	2002	No comments
Panamá		Gradual Implementation by territory begins in September 2009
Paraguay	1999	No comments
Peru	2006	Gradual implementation by territory not yet concluded.
Dominican Republic	2005	Implementation of reformed procedural rules was completed in stages and the new code is currently in effect.
Venezuela	1999	No comments

As can be observed, the only countries that have not initiated criminal procedural reforms are Uruguay and Brazil where for diverse reasons it has not been possible to adopt changes similar to those effected in the neighboring countries. [5]

Perhaps even more interesting than the geographical extent of these movements is the existence of extremely close links between them which created a kind of community of reformers sharing a common vision concerning the need for and magnitude of the changes. They use the same experts to develop their reform models, gather periodically to exchange experiences and use similar sources to guide their work. In addition, this network has recently started to evaluate the results of the reforms and to inject new ideas for improved results into the system.

Finally, it should be noted that a change in the approach towards reform is shared by most countries involved. Traditionally, legal reforms in Latin America have been conceived of as involving techno-juridical or doctrinaire problems with no consideration of the political implications that changes in law connote for social life. Thus, the predominant ideology in relation to reform of procedural criminal law has traditionally been to treat it as a problem of modifying technical aspects of a legal phenomenon. The traditional regional perception of criminal procedure as a very formalistic discipline, primarily concerned with the study of procedural rules, procedures and proscriptive periods provided for in the codes was a factor contributing to this narrow concept of changes in the legal system. Notwithstanding the fact that an approach developed during this process incorporating political variables and other technical aspects of the changes more strongly, in practice, one of the principle problems that has confronted implementation and operation of the reformed system is that a great part of the reform process has been limited to purely legalistic changes. Most of the changes have not been subjected to nor evaluated on a strong empirical basis. This highlights an important difference in the approach to similar reforms one might find in the United States. The topic will be addressed in the section dealing with challenges.

3.2 Reform as the Result of a Combination of Factors

Criminal procedural reform in Latin America is largely the result of a complex combination of sometimes contradictory political and social forces. With differing emphasis, they have been present in most of the region's countries since the reform debate started and throughout the implementation of the process of change. The weight that each factor or force has had on the transformation process has varied with the actual situation in each country; nevertheless, such factors and forces regularly and consistently appear throughout the continent. The principle factors will be identified and the manner in which they have served as driving forces for advancement of the reforms will be explained below.

a) The Democratization Process and Revaluation of Human Rights:

Reform of criminal procedure coincided with the process of democratic recovery in Latin America after decades in which authoritarian or dictatorial governments were the regional norm. The Latin American political landscape experienced a radical change during the period from the mid-1980s through the end of the twentieth century while at the same

time and in a parallel fashion reform of regional criminal procedures became a topic of discussion. The transition process posed diverse challenges for the new governments, requiring adjustments in many areas of social life based on the region's new forms of political organization. In this context, one of the major challenges involved the reconstruction and establishment of institutional structures compatible with democratic values. Among them, reform of the judicial system was included in the agenda of practically every regional government program since it was agreed that healthy and efficient judicial systems were an essential requirement for a democratic state and a stable legal system.

Discussion of the exact relationship between the structure of the judicial system and transition to democracy is not within the scope of this paper nor is whether these reforms, in and of themselves, have been capable of producing true democratization of the region. The point that bears stressing is that beyond their consequences, the idea that these changes were necessary as a condition to strengthening the rule of law has been a very significant element in development of public policy during the last decades. In this context, the criminal justice systems have been a favorite focus of attention because, due to their authoritarian structure, they represented a paradigm requiring profound reform within the process of democratization.

Hand in hand with the foregoing, human rights have been another very relevant factor in the regional criminal justice reform process. There are several areas in which the new concern for human rights and democratic transition processes converged to directly influence the adoption of criminal procedure reforms. In the first instance, after a period characterized by massive human regional rights violations, the new democratic governments reacted by adopting policies to improve institutional mechanisms for their protection. This reaction was very strong because in good measure the legitimacy of the new democratic governments initially rested in demonstrating their ability to substantially improve protection for such rights and to render such protection a fundamental objective of their mandates. This was particularly clear in countries such as Guatemala and El Salvador where transition took place within the context of overcoming serious internal conflicts (in the case of El Salvador, see Popkin 2000).

That general policy was especially important with reference to institutional restructuring of the foundations and procedures of the judicial systems which had demonstrated an absolute incapacity to confront systematic violations of the most important human rights during the years in which non-democratic governments ruled the region. Along these lines, reform of the criminal justice system was one of the objectives as it had proved incapable of investigating or punishing the most serious violations committed during the recent past. That does not imply that the inquisitorial process was cause of the human rights violations or responsible for the impunity with which they were committed, rather, the point worth considering was the resulting political rhetoric that justified judicial reform in general and criminal procedure reform specifically on the basis of the example cited, although undoubtedly, failure by Latin American criminal justice systems to prosecute and punish violators of basic human rights involved reasons more profound than defects in the procedural models current in each such country at the time.

During this same period, most countries began to incorporate international human rights treaties into their domestic legislation and various countries became parties to the American Convention on Human Rights (Treaty of San Jose, Costa Rica) and to the International Covenant on Civil and Political Rights after democracy had been reestablished. Incorporation impacted criminal justice reform on several levels. On the one hand, it allowed the establishment of an international supervisory system policing compliance with the system's basic guarantees. On the other, it provided reformers with new standards of comparison on which to base criticism of the inquisitorial system and to argue that its reform was necessary for compliance with the international obligations imposed when their countries signed the respective treaties. Thus, for example, the concept of due process strongly affirmed by such international treaties contrasted significantly with the inquisitorial system and its practices. In that manner, human rights emerged as a new platform of advocacy for criminal procedural process reform.

b) Economic Development and State Modernization:

Concurrently with the democratization process most of the region's countries initiated important economic reforms during the 1980s directed at balancing budgets, reducing the size and impact of the public sector and opening domestic economies to international commerce (Rowat 1997:17). The strategy adopted made it clear that economic development of Latin American countries required not only transformation of the traditional economic sector but that strengthening of state institutions was an essential component of economic growth (one of the aspects most frequently considered deficient in the region having been the inability of public institutions to promote national economic growth; Peña 1999: 104). In this context judicial reform was considered a key element for economic development since the judicial sector was seen as one of the areas of the state most capable of creating positive conditions for economic development (*e.g.*, by providing individual traders with clear signs of certainty, transparency and predictability). Thus, a significant factor supporting judicial reform was the fact that judicial reform was viewed as a public policy that would help develop institutional conditions required for economic development.

Along with the foregoing, the reform process was a result of a broader process of state reconfiguration, the so called state modernization process. A juncture of political, economic and social factors (*e.g.*, the decreasing role of the state and the increasing role of the private sector in the economy) pressured the region's countries to redefine the size and role of state mechanisms and institutions (Peña 1999: 98-99). Because the administration of justice was considered to be one of the most backward state sectors in most of the region's countries (having for the most part, maintained the same structures adopted during the colonial era) it became a prioritized focus of attention within the framework of these strategic definitions. In some countries these two factors were also relevant motives for reform of the criminal justice system because they allowed certain sectors that had not traditionally participated in reforms of that nature to become involved in the process (*e.g.*, economic groups and sectors of the public administration involved with economic management). These sectors provided political support for change while, at the same time, suggesting related novel techniques.

c) Negative Perception of the Judicial Systems, Collapse of the Inquisition System and Public Insecurity:

The lack of prestige and negative perception in which judicial systems were held towards the end of the twentieth century is a widespread regional phenomenon that has, unfortunately, not abated. Various sources reveal many areas in which people express strong discomfort with the performance of judicial systems in Latin America. For example, results of a survey conducted by Latinobarómetro[6] designed to measure public confidence in the judicial system disclosed that since 1996 in almost all countries of the region the level of public confidence has been approximately 30% (Justice Studies Center of the Americas 2005: 32-33), an extremely low percentage when compared to similar surveys in other regions. A good part of this perception is based on a set of systemic flaws. Among them, the most relevant ones that tend to be reflected in the results of several public opinions surveys are lack of access to justice, the excessive length of proceedings, and bureaucratic corruption. In addition, during the final decade of the twentieth century the press began to play a very important role in dissemination of information involving the judicial system which reinforced the negative perception reflected in public opinion. During the past few years judicial activity has, for the first time in the region, become headline news. While the problems described were relatively old in Latin America, their social prominence greatly increased.

The real problems faced by the system, when added to the negative perception of its performance, led to mobilization of various organizations (*e.g.*, universities and non-governmental organizations) and interested groups that demanded tangible change (Pásara 2003). Coupled with such increased participation by important social sectors, the will of the political class was energized in terms of willingness to propose and adopt efficient measures (mainly legal reforms) to deal with the social problems that concerned the citizenry. Consequently, the judicial system's crisis contributed to reform of the criminal justice system through the creation of positive political and social conditions for the initiation of changes.

In the specific area of criminal justice, the system's negative perception was reinforced by growing public concern with public safety (Alvarez, 2007). During the end of the twentieth century a very widespread perception evolved to the effect that while crime rates had drastically increased, the inquisitorial system had been unable to cope with the situation, especially regarding violent crimes where statistics portrayed the region as among the world's most violent (Morrison, Buvinic and Shifter 2003). Naturally, this concern resulted in a significant growth in citizen demands for changes to improve criminal investigation and punishment system efficiency (Duce and Pérez Perdomo 2003: 84), amidst arguments that a collapse of the inquisitorial system's effectiveness was a main reason for the region's public safety problems and responsible for the unacceptable degree of impunity. While such arguments paved the way for the region's criminal procedural reforms[7], they also raised complex expectations for the new system.

d) Globalization and Convergence

Modern legal systems possess various characteristics that reflect tendencies towards convergence or uniformity. Merryman (1981: 358-359) suggests that it is possible to identify significant tendencies in Western societies[8] towards convergence as well as divergence but that those oriented towards convergence are much more powerful.

Various specific factors can be identified as leading towards convergence of Latin American legal systems. In the first place, political and economic integration through international agreements "… has served as a driving force or catalyst for domestic legal change". Such international agreements include NAFTA, MERCOSUR, CARICOM and other agreements of a multilateral and bilateral character (Fix, Fierro and López, Ayllon, 1997: 795). In the second place, the increasing role of human rights and the emergence of a regional supervisory system is another important factor in the convergence process (more recently, the International Criminal Court has been created, although in a context where most criminal procedural reforms were already implemented).

In the procedural field, a strong tendency towards convergence among the region's different procedural systems can also be observed. The work of international academic institutions stands out with the most recognized project being the one undertaken by the Ibero-American Institute of Procedural Law. During the 1980's, the institute drafted model civil and criminal procedure codes for use by the national legislatures in the region. The success of this endeavor will be discussed below in conjunction with use of its model criminal procedure code as one of the main sources of the region's reform processes.

e) Role of International Players

Another element that bears consideration in the regional reform process is the participation of assorted international agencies which have cooperated in the formulation and implementation of wide ranging reform projects. While the extent of their contributions presents a very delicate and controversial issue; in general terms this cooperation has been very important in many of the region's countries.

Participating international agencies have been varied. In the first place there are cooperative organizations from different countries. [9] International banks constitute a second category (although much less important and with belated participation in development of the regional reform process). Finally, certain agencies affiliated with the United Nations or with regional organizations promoted the processes in specific countries and in some cases, throughout the region.

International cooperation agencies played the most significant role. The countries that provided the most important cooperation programs were Germany, Spain and especially the United States. The latter's cooperation has without doubt played a major role in the region for several decades. Since the end of the 1950's, North American governmental cooperation has been led by the United States Agency for International Development (USAID). USAID's initial programs focused on improving legal education and

strengthening institutions; however, the strategy for cooperation implemented at the beginning of the 1990's was developed within the framework of a global strategy for reform of the region's judicial systems. The influence of these programs has varied with the specific situation in each country. Thus, there are some cases where the level of USAID's leadership in the process of change has been very profound (*e.g.*, Bolivia) while in many other cases, USAID's cooperation programs have been quite flexible and provided their local administrators significant discretion in determining the program's specific direction in accordance with their own needs (*e.g.*, Chile). Whatever the model of participation followed by USAID in the different countries of the region, it's participation in the reform processes has been decisive. By 1999, USAID had expended $300 million on judicial sector projects and police reforms (Bhansali and Biebesheimer 2005: 306).

In contrast, the role played by multinational banks in criminal procedural reform tends to be over emphasized by those who argue that it amounted to imposition of a self-serving agenda, a claim that does not correspond with what actually occurred. In the first place, banks have only included the issue of administration of justice in Latin America as part of their regional policies during recent years. When judicial reform became part of the banks' agenda, it initially resulted in participation in civil justice reform and in the general restructuring of the judicial system. In contrast, criminal justice reform was not an area of immediate concern but rather, has been only timidly addressed and only since the year 2000. During the initial period of their participation banks merely implemented a few specific or isolated programs, none of which addressed a general systemic change, consequently, from a temporal perspective, their participation took place long after reform had become a very extensive regional public policy and actually after reform had already been implemented in several countries.

A third and final category of institutions that bears mention in this brief analysis is comprised of international organizations affiliated with the United Nations, the most important of which are the United Nations Verification Mission in Guatemala (MINUGA), the United Nations Observer Mission in El Salvador (ONUSAL) and the United Nations Development Programme (UNDP).[10] In this context, a new regional institution concerned with judicial reform deserves special mention: the Justice Studies Center of the Americas (JSCA) created in 1999 by resolution of the General Assembly of the Organization of American States (www.cejamericas.org). JSCA was created for the purpose of promoting judicial reform in the Americas through training, production and dissemination of information, and technical cooperation. Notwithstanding the fact that its mandate refers to judicial reforms in general, the promotion, support, monitoring and evaluation of criminal justice reform processes initiated in the Americas during the past decades has been one of the JSCA's working priorities. In light of its relatively recent creation the JSCA was not an original participant in the reform process. At the time of its founding most countries in the region already had reform processes in operation or in advanced stages of development; however, the different activities initiated by the JSCA have enabled it, in a short period of time, to play a very important part in revitalizing those transformative processes and reinforcing the interchange of experiences between diverse processes of change, as will be demonstrated.

To summarize this section, the part played by international players in reinforcing political resolve favoring reform as well as in helping cover its economic costs and providing the technical support required for its development has been very important and it is reasonable to assume that these institutions will continue to have a very important role in future stages of its development. However, it would be difficult to say that they have been the catalysts for reform or even that they played a leading role in transformation of the region's criminal justice process.

g) The Role of a New Reform Elite

A final factor that bears emphasis because of the impact that it has had involves the existence of a very technically competent professional elite (principally attorneys but also including professionals from other disciplines) that has promoted the reform process in the different countries of the region. This is not meant to indicate that reform has mainly been the product of this group of professionals' work but rather, to indicate that under certain circumstances, a technical elite can play a decisive role in the formulation and implementation of legal reform and that such seems to have been the case with criminal justice reform in Latin America. Understanding legal reforms of the criminal procedural reform's magnitude in the region necessarily involves reference to macro factors that played a part in or promoted its development; however, there are also very relevant micro factors. That appears to be the case with the role played by this elite group.

In many countries in the region reform was initially led by a very small group of people who were able to convert existing social and technical demands into a solid and coherent argument for reform. That group also played an important role in development of a technical and political consensus relating to critical diagnosis of the inquisition system and proposals to replace it. Finally, that group was able to incorporate public authorities in the reform efforts and to create a type of international working network comprised of reformers from different countries in the region (for a detailed analysis of this network, see Langer 2007).

4. SUBSTANCE OF THE REFORMS: THE NEW SYSTEMS

The goal of this section is to briefly and generally review the procedural model that several countries in the region have endeavored to establish as a consequence of the previously reviewed reform movement. This description provides a more specific view of the magnitude of the changes implemented as well as of the breadth of the reform and contrasts it with other comparative models. The intent is to review the basic scheme without going into details of the differences in specific institutions among the countries in the region since notwithstanding such differences, the general structures are common and those will be the focus of this section.

Prior to beginning it is necessary to put a previously mentioned point in perspective. One of the central reform premises has been replacement of the inquisitorial process by one of an adversarial nature what is called by reformers in Latin America as an accusatorial process; however, its scope must be focused in order to avoid confusion, especially among

readers from Anglo-Saxon traditions. "acussatorial process" is the term used to refer to an "adversarial process" in the continental European tradition. As Damaska has indicated, the contours of the adversarial system are unclear (1983: 24). In many cases, the notion of the adversarial process has been identified with the criminal procedure process in the United States and England. However, its meaning as used in continental Europe and Latin America is different from and not synonymous with the Anglo-American criminal procedure process. In the case of reform in Latin America the acussatorial system concept refers to the procedural model established in continental Europe at the beginning of the second half of the twentieth century and not the model one might find in the United States or England. In fact, the model implemented in most countries in the region has as its base the proposal developed by the *Instituto Iberoamericano de Derecho Procesal* (the Ibero-American Institute of Procedural Law) during the mid 1980's, which was developed primarily on the basis of the process then in place in Germany. Portuguese and Italian legislation has also been very influential (both being procedural codes adopted in 1889).

A number of countries (especially Colombia and Chile) have adopted different aspects of their criminal procedures from the Anglo-Saxon tradition, which is consistent with the convergence of the continental European model with Anglo-Saxon tradition (Jörg, Field and Brants 1995). In this context, criminal procedure reform in Latin America has not been an attempt to "Americanize" criminal justice in the region; rather, the countries in the region have worked to "modernize" their criminal justice administration systems principally following the evolutionary path of the continental European tradition, and, through that route, incidentally attaining greater convergence with the Anglo-Saxon tradition.

The reform model's principle characteristics have been: establishment of public hearings as the central element in the process; separation of judicial and prosecutorial functions and roles, granting prosecutors limited discretion in order to permit them to make prosecution more efficient and less time consuming; and finally, recognition of basic due process guarantees for persons subject to criminal prosecution. Due to their generality, these characteristics probably do not clearly delineate the contours of the new system; consequently, they will be analyzed in more detail below.

4.1 General Characteristics

The new regional criminal procedure systems exhibit two general characteristics that mark very significant changes from the prior model and which fundamentally affect its dynamics. The first involves the introduction of oral processes. The second involves a change in the roles and functions of various participants, mainly involving the transfer of power to decide whether or not to proceed with prosecution to prosecutors. That means that prosecutors rather than judges are now responsible for the investigative phase and, that they have been conferred with discretionary powers that permit them to select which cases to prosecute.

The introduction of oral proceedings is a symbolic aspect of the regional reform program as it represents abandonment of the backbone of the prior inquisitorial system: its

secret character. That's why an important part of reform debate was identified with the slogan "*oralidad*" which means the idea of creating oral procedures. At this point explanation of the conceptual scope of that reform is appropriate. The introduction of oral processes represented a fundamental change in system decision making methodology. Inquisitorial procedure methodology was based on compilation of written information on which the judge bases decisions, *i.e.,* it involved a process whose principle activity was development of a judicial record or written file which constituted the sole source of information on which decisions relevant to the process (including the sentence) were based. Because of this, development of the file was the core of a criminal tribunal's work and the principle focus of the work performed by judges and judicial bureaucrats. The litigants, for their part, were limited to working with the information accumulated in the file and worked to assure that it best reflected their version of the case. Consequently, the omnipresence of the file in the process created a litigation culture better associated with bureaucratic and administrative proceedings than with the popular imagery of legal work performed by attorneys (*e.g.,* oral argument).

By contrast, oral proceedings are based on the premise that the institutional mechanism that permits judges to reach decisions is a hearing at which the parties can face their opponents and present evidence that supports their position or counters that of their opponents and conduct their arguments, orally. For those educated in the Anglo-Saxon procedural tradition that idea may seem simple and self evident but it constituted a revolution in the manner in which systems functioned in Latin America where the idea that cases should be resolved through public hearings was not envisioned by the pre-reform regional procedural codes.

Reliance on primarily oral proceedings did not mean (as has been misinterpreted in some sectors) that every vestige of written procedures disappeared. In fact, all systems in the region maintain diverse procedures and methods for generation of files and records under the control of the different participants; however, the purposes and uses of such written materials and records were expected to change. In the new systems, evidence presented at hearings, rather than a reading of a compiled written record, is the primary source of evidence on which judicial decisions are to be based. The best example of this understanding of the new process is provided by the adoption in every country of oral (or public) trials as the centerpiece of the new procedure. However, there has been less success in the introduction of hearings at pretrial stages (*e.g.,* to resolve pretrial detention of persons under investigation), which has presented a problem in the operation of the reformed systems, as will be seen a bit further on.

Understandably, as reflected by this initial feature, an important convergence in the region's criminal procedures is taking place with models based on Anglo-Saxon roots. However, the limited introduction of oral proceedings at pretrial stages reflects an important difference between the Latin American reformed model and the day to day functioning of the American system (since, in Latin America, the handling of a case during the pretrial stage remains similar to the former practice of compiling files).

The change in prosecutorial functions has been a second definitive characteristic of the region's new criminal procedure. This will be analyzed in further detail later; however, at this point it is worth stressing one specific aspect of this change: the transfer of power to select cases to be prosecuted to prosecutors. During the primacy of the inquisitorial process, the fundamental governing principle was the "principle of legality" (mandatory prosecution principle). That principle required criminal prosecution agencies to investigate crimes until they were resolved, with no authority to abandon them except for lack of evidence. That principle imposed formalistic and bureaucratic dynamics that impeded design of transparent policies for control of the system's caseload. Every case had to be fully investigated regardless of its importance. In contrast, the reformed models, while maintaining the principle of legality as a general rule, have recognized that prosecutors now have varying levels of discretion (generally referred to as the "principle of opportunity"). According to the principle of opportunity, prosecutors may dispense with criminal prosecution under varying circumstances including the absence of a public interest in prosecution and considerations of the minimal nature of the crime or the minimal role of the accused in the commission of the crime. The rationale behind the new systems is that such powers provide prosecutors with the ability to streamline the system's workload and focus perpetually scarce resources on the most socially relevant crimes. That is why it is now common to find newly emerging practices such as diversion and different types of plea bargaining among the region's reformed processes (Stippel and Marchisio 2002).

This second characteristic also involves a convergence with Anglo-Saxon tradition, especially with that of the United States where prosecutors have always enjoyed broad discretion regarding conduct of their cases; however, the discretion conferred on Latin American prosecutors is much more limited. First, such powers involve exceptions to the still current rule of mandatory criminal prosecution, and, in addition, their exercise tends to be subject to diverse judicial controls that do not exist in a system such as that of the United States. That means that in practice, it is much easier for a prosecutor in the United States to refrain from bringing charges against someone or to engage in plea bargaining than it is for a prosecutor in Latin America.

4.2 Procedural Structure

From the perspective of the procedural structure, most of the reformed systems divide the process into three main stages. The first stage involves collection of information concerning a crime and is referred to as the *preliminary investigation* or *investigative phase*; a second phase which occurs after conclusion of the initial phase is referred to as *preparation for trial* or, as the *intermediate stage* and the final judgment phase is referred to as the *Public* or *Oral Trial*.

Despite public perception of the public trial as the most innovative feature of the reforms, the experimental changes in the investigative phase (non-existent prior to the reforms) are equally significant. The structure of this post-reform phase is radically different than under the prior model. The main change involves the roles and powers of the different participants. In this area, the principle change has been to separate the judicial functions from those involving criminal prosecution. The result is that in the reformed

systems, prosecutors, with the assistance of the police, have been assigned the responsibility for conducting criminal investigations and investigating magistrates (still active in countries such as Spain) have been eliminated. The powers of judges have been limited to assuring that prosecutorial investigations are conducted according to law (*e.g.*, authorizing search warrants) and authorizing measures that might affect constitutional rights (*e.g.*, preventive detention); however, they maintain no investigative roles permitting prosecutors in Latin America to emerged as figures with leading functions in the process for the first time. In addition, most countries recognize that to those being investigated and their attorneys have broad rights of participation during the investigative stage, eliminating the unilateral character that such phase of the investigation enjoyed under prior inquisitorial logic. In this context, activity during this phase of the investigation is focused on the compilation of evidence by prosecutors and police in order to allow them to establish the basis for an indictment and then to bring the case to trial. The information collected is (subject to exceptions) normally accessible to the accused early on during the criminal investigation marking an important difference with discovery rules in the United States. Judges only intervene to the extent that prosecutors require judicial authorization to conduct investigative measures or where a relevant issue of rights arises. In several countries judicial intervention at this phase involves adversarial hearings; however, there are many countries where because of either legal regulations or course of practice, judges continue to resolve issues through exchange of written motions and reading of a written record which, as discussed, tends to reproduce the old dynamics of transforming the process into collection of records.

As can be observed, the foregoing description buttresses the perception of a convergence between the model implemented in Latin America and what one might find in countries such as the United States; however, there are some fundamental differences. Perhaps the most important involve the investigative powers of prosecutors and their relationship with the police. In general the region's procedural laws provide the police with few independent powers of investigation and establish a much deeper level of police dependence on prosecutors. Thus, for example, the police must almost always promptly advise prosecutors of the commission of a crime (usually within 24 hours after they become aware of it or receive a complaint). This results in prosecutorial participation from a very early investigative stage. Prosecutors have the power to either conduct investigations on their own or to require police to undertake them. In fact, prosecutors in many countries have authority to discipline police agents who don't follow their orders. Another difference involves the fact that applicable laws tend to deprive police of discretionary authority to dismiss cases. That is a function that lies exclusively in the hands of prosecutors which is why there are strong rules requiring police to forward prosecutors information on all cases they investigate at inception, even if they quickly determine a case is not viable. While in practice the system may seem to provide police with significant opportunities for independent action and allow them to exercise powers delegated by prosecutors, the legal structure discloses an extreme lack of confidence in police work in most countries in the region.[11] In short, prosecutors have an important presence and role in the initial stage of investigation in the Latin American system, whereas in the United States, the general rule is that such task is exclusively a police function.

As to the general dynamics of this stage, it is worth noting that once a complaint has been received, whether directly by a prosecutor or through referral from the police, the initial activity involves determination of whether the case should be investigated or dismissed. If the prosecution elects to proceed, it will then gather evidence to enable it to establish charges and take the case to trial, although such evidence will not have probative value in the sense of being admissible at trial nor will it be evaluated at such time by the court. If during the investigation it becomes necessary to undertake action that affects the constitutional rights of the accused, the prosecutor will require prior judicial authorization from a judge. In such manner, prosecutorial investigative powers are subject to judicial restraints.

Most of the region's reformed criminal procedures establish a prosecutorial obligation to advise the accused of the nature of any preliminary charges prior to making a decision to proceed to the trial stage. Its purpose is to serve as a guarantee providing the accused with the opportunity to obtain legal advocacy and initiate defense activities as soon as charges have been formulated. Normally, that activity sets off a series of procedural events (*e.g.*, starts a designated period during which the investigative phase must be completed). However, the act of formulating charges is not a judicial decision concerning the merits of the case or the rights of the accused. Thus, if a prosecutor determines that preventive detention or other restrictive measures are necessary, it must request and justify such action on an independent basis, based on evidence beyond the mere fact of having informed the accused of the charges.

It is possible during this phase for the accused to negotiate with the prosecution or the victim for resolution of the case through alternative non-trial means such as reparation agreements for the victim or conditional dismissals subject to supervision and retained jurisdiction. Reformers have, in a significant manner, placed their hopes for improved system efficiency on the availability of these kinds of mechanisms as well as on the appropriate use of the discretionary powers granted to prosecutors. However, as already noted, the powers granted prosecutors to negotiate cases are very limited when compared with what prosecutors in the United States can do. They normally relate to offenses involving medium or low penalties and are always subject to strict judicial scrutiny.

If an investigation is completed without a negotiated settlement, the prosecutor must decide whether to bring the matter to trial or to end it. If a decision is made to proceed with the case, the second stage (denominated the intermediate phase) begins. In this stage the prosecutor prepares a written instrument, the *accusation*, clearly stating the allegations formulated against the accused, the prosecution's interpretation of the applicable law and the corresponding penalty being requested. This involves a second communication of charges to the defendant and serves the function that an *indictment* or *information* would play in the United States.

Because of the serious nature of cases which prosecutors decide to bring to trial, in most of the region's countries the main objective of this second phase is the establishment of an element of judicial review. Consequently, it is normally treated as a stage initiated through a hearing where the prosecutor defends the accusation by introducing supporting

evidence and where the defense attempts to demonstrate the weakness of the case and the absence of justification for a trial, all on the basis of a record made available to a judge for purposes of reaching a decision. If the judge concurs with the defense the case is dismissed but if the judge agrees with the prosecution, the case is forwarded for trial. In the latter event, an additional objective of the hearing is to adequately prepare for trial by establishing which facts will be at issue between the parties and determining what evidence the parties may present at trial. In some countries, Chile for example, this is the stage at which the parties argue concerning the exclusion of evidence obtained in violation of constitutional rights.

This stage clearly presents certain functional similarities with grand jury or preliminary hearing in the United States but it has significant differences. In general, it involves a more delayed hearing than corresponding American proceedings (normally investigations take several months) and deals with more issues, *e.g.*, everything involving admissibility of evidence and the determination of the facts to be debated at trial.

The trial constitutes the final phase and the focal point of the new regional procedures even though a relatively small percentage of cases are resolved in this manner. As will be seen, the trial is primarily conducted by panels of professional judges without prior involvement in the proceedings. The basic structure of the trial involves an adversarial public hearing, *i.e.*, where the parties have a right to introduce evidence and to rebut the evidence presented by their adversaries. It is also normal for parties to present opening statements and closing arguments. Nevertheless, most countries in the region retain elements of non-adversarial proceedings that differentiate them from the concept of proceedings in countries like the United States. Thus, for example, in many countries (*e.g.*, Costa Rica, Peru and Guatemala, among others) trial judges retain important power to introduce evidence beyond that presented at hearings by the parties. In other instances, judges maintain a certain prominence during questioning of witnesses and parties (for example, they can directly ask a witness questions before the party introducing the witness has an opportunity to do so). Finally, many countries permit relatively broad opportunities for introduction of evidence through judicial notice and to permit the introduction of transcripts of testimony taken during earlier stages of the proceeding in lieu of current live witness testimony. Another significant difference involves statements of the accused made at trial which are subject to very different rules than those applicable to other witnesses; as a result, it is very common in Latin America for defendants to testify at trial. As a result, to someone used to the adversarial American tradition, trials in countries featuring these characteristics retain a strongly inquisitorial flavor that would differentiate them from what would be deemed appropriate practices under the American system.

Because of nuances from country to country, some trials have features similar to the adversarial American model (*e.g.*, where the method for taking witnesses testimony is through examination and cross examination by the parties, as in Chile and Colombia), while many others involve trials conducted in a manner strongly tied to the most classic continental European tradition. This is obviously an area with considerable divergence beyond basic general principles. One common element at variance with the United States system is that the trial is normally the only instance where the parties debate relevant

evidence, whether to establish culpability or innocence of the accused or to determine the applicable sanction; consequently, no bifurcated proceedings are involved (*i.e.*, with different trial and sentencing phases). To a large extent this is because the judges that conducted the trial and decided the verdict determines also the applicable sanction in the event the accused is found guilty.

Once argument at trial is concluded the court deliberates in private. After reaching a decision concerning the accused's guilt or innocence (which does not normally require a unanimous decision of the judges comprising the panel but rather a mere majority), the decision is announced orally in the courtroom. Usually trial courts then have a brief time (usually seven to ten days) in which to render the parties a written decision explaining in detail the basis for the orally communicated decision and indicating the penalty in the event of a finding of guilt. In its analysis, the court addresses the evidence relied on and the legal and doctrinal basis supporting the decision. Such decisions in writing are very important aspects of the continental tradition that have survived the region's new emphasis on oral trials. This reflects an important difference with the United States where juries are not obligated to justify or support their decisions related to the guilt or innocence of the accused; however, one area where there has been convergence is in the standard of proof required for conviction, usually stated in terms equivalent to "beyond a reasonable doubt".

The party against whom judgment is rendered, whether the accused or the prosecution, can obtain a review of the ruling by superior courts. The trend of the reformed model has been to limit the availability of review in order to strengthen the trial concept and trial level decisions. Consequently, review procedures tend to grant superior courts power to correct errors in interpretation of applicable law or violations of fundamental rights but not to re-decide the facts of the case, as was the case under the inquisitorial system. The goal is to impede the ability of superior courts to change the weight of the facts without having directly evaluated the evidence since otherwise, analysis of record evidence would be preferred over oral evidence at trial depriving this central component of the reform process of its value. While this aspect seems to point at convergence with the appellate process in the United States, the fact that it deals with a broadly available review procedure, even by the prosecution against the accused, differentiates it in an important manner.

4.3 New Participants

The new procedural design has resulted in an important change in the relationship of the participants and of their roles in the process. One of the most salient characteristics of the inquisitorial process was that it concentrated very important functions in the person of the judge who was responsible for conducting the investigation, deciding (in many cases) whether or not to accuse, and then, trying the case. In contrast, the new procedures have effected a radical separation of these functions among three principal participants. [12]

In the first place, as has been discussed, prosecutors are responsible for conducting the criminal investigation and supervising related police functions. As has also been discussed, prosecutors have been granted discretionary powers to determine which cases the system will take cognizance of and to undertake the criminal prosecution in cases where it is

deemed appropriate. Finally, prosecutors are charged with representing societal interests at trial. Prior to the reforms the functions assigned to prosecutors in the context of inquisitorial systems were very secondary. Prosecutors performed functions linked to control of the legality of the judicial process and not related to the active investigation which was by rule assigned to investigating magistrates but in practice undertaken by the police. Under the most favorable hypothesis, the role of prosecutors under the inquisitorial model could be described as minor participation in the judicial investigation through provision of certain background information and assistance, with participation in investigative tasks by request to judicial authorities which the investigating magistrate could discretionally grant or deny. In theory, the prosecution's main role took place during the trial where it was expected the prosecution would play a leading role as society's representative. However, the reality was that the investigative (instructional) stage constituted the core of the process and that judges assumed the leading role in the production of evidence for the trial so that in this stage as well, prosecutors were relegated to a secondary role. This has changed as a result of the new powers granted prosecutors. The logic behind the new system operates on the premise that a strong institution will be in charge of conducting the investigation, formulating charges against the accused and representing society in the trials. Without a powerful prosecutor's office able to carry out these tasks, it is impossible to conceive of the new system operating properly as the accusatory role would not be adequately embodied. That is why most of the reforms have involved strengthening of the institutional prosecutorial role through legal reforms and significant budgetary increases (Duce and Riego: 2006).

The new system has divided the role of the judiciary into two basic functions. First, the judges in charge of the pre-trial stages (usually referred to as the judge guarantor or the examining magistrate) are professional judges whose function is to assure that prosecutors and police are conducting the investigation legally and to make any judicial decisions required during this stage (*e.g.*, preventive detention, if it is requested). The main difference between them and the investigating magistrates under the former system is that they do not have investigative powers or any responsibility for criminal prosecution. Second, during the trial stage, the general rule in the region is that trials are conducted by panels comprised of three professional judges with one normally presiding over the tribunal. The exception involves trials of minor offenses, commonly tried before a single judge. Thus, the general tendency in Latin America is to rely on a system of professional judges rather than on a jury system. While the introduction of jurors has been discussed in several countries, they have been introduced in only a small percentage of cases such as in Nicaragua or in Cordoba Province in Argentina. Some countries have introduced mixed panels comprised of professional judges and citizens serving as lay judges such as Bolivia.

The fact that most of the countries in the region rely exclusively on professional judges influences not only the system's institutional organization but also deeply impacts its procedural design. Thus, for example, the rules of evidence in most countries in the region are extremely simple and are incorporated in procedural codes. That is because it is understood that professional judges require less guidance to admit and evaluate trial evidence. That contrasts with the case in the United States where rules of evidence comprise a field of legal development distinct from purely procedural matters, a difference closely linked to the existence of lay jurors.

Most reform procedures have included an institutional process strengthening public defense systems (Justice Studies Center of the Americas: 2006). In some cases (*e.g.*, Chile), the reform process was an outgrowth of the creation of a new institution replacing the former public defense system. While there is no single organizational model, the most common organizational form involves the existence of a public organization providing defense services, *i.e.*, a state office that employs a number of lawyers and bureaucrats working as civil servants to provide defense related services. More recently, mixed systems have been developed that provide private attorneys the opportunity of providing public defense services; however, that development is in the minority.

Finally, an additional participant has compellingly emerged as a result of the procedural changes: the victim. Indeed, one of the goals behind the regional reform process has been to provide the victim with a greater role and prominence in light of the very unfavorable analysis of victims' roles under inquisitorial procedures. This has resulted in the inclusion of victim's rights in most regional codes including the right to be advised of related developments, the right to reparation in the proceedings, adoption of victim protection measures and the right to be treated with dignity and respect as a victim. In addition to such general requirements, most of the reformed criminal procedure allow the victim to participate as a part of the criminal prosecution and even to litigate as a party in the trial (if represented by an attorney) with standing to present evidence different from that presented by the prosecution. Many countries also allow the victim to prosecute civil actions adding civil responsibilities of the accused as a component of the criminal process. As can be seen, these involve very interesting procedural rights of intervention marking an important difference with victim's roles in the United States. In practice, however, only a small percentage of victims avail themselves of the opportunity to intervene.

5. REFORM RESULTS AND EXPECTATIONS

Notwithstanding the fact that the reform process is still ongoing, the time that has transpired permits a general evaluation of its most important results as well as identification of the principle challenges that it is likely to encounter. Both will now be considered.

5.1 Evaluating the Impact of Reform:

The first observation that can be made with respect to the impact the reform process has had in the region is that it has introduced real rather than cosmetic changes in the region's systems of criminal justice. While this achievement may seem obvious to the reader, the mere fact of having attained the current basic levels of reform represent a very significant improvement over prior efforts. Those were, for the most part, merely paper changes or pilot programs incapable of effecting real changes. In contrast, the current reform process has meant very significant changes for the region's legal systems, completely reconfiguring the criminal justice systems through approval of new procedural codes, constitutional reforms and other relevant laws. Together with the foregoing, the reform has also produced important improvements in the sector's institutions. Thus, as a product of the reform, prosecutors have increased their powers and human and fiscal

resources (Duce and Riego 2006); Public defense systems (Justice Studies Center of the Americas 2006) and the judiciary have enjoyed similar benefits (Vargas 2003: 70); and, all of them have attained significant improvements at professionalizing their management.

Changes have also taken place at other levels, thus, for example, little by little, the role of oral (public) trials as the focal points of criminal procedures are crystallizing as a tradition. Today, all of the reformed countries regularly use oral (public) trials, although in some cases, subject to serious obstacles. In this manner, what was once regarded as a paradigm shift has resulted in a different attitude towards how criminal procedure in the region should be structured. Today, no one in the legal media seriously disputes that the reformed model legitimately reflects the modern state-of-the-law. This has led to the emergence of a new generation of participants in the system, academicians, and to the growth of strongly committed public support for reform ideals.

The change has also been reflected in specific improvements in several tangible indicators of system performance. While the lack of reliable and comparable data hinders this exercise, there is a wide range of information that takes such indicators into account. In several countries for example, the reforms have resulted in very significant reduction in the use of preventive detention as well as in important reductions in the length of the process (Bhansali and Biebesheimer 2005: 313-316 and Riego and Duce 2009: 69). There are also a number of countries where reform has resulted in significant sector indicator improvement in specific areas, especially when compared with results from the prior system. Finally, there are particular countries,[13] *e.g.*, Chile, where reform has made significant changes and improvements in all areas of operation.

Notwithstanding the foregoing, the truth is that along with these achievements there has been a sense of dissatisfaction with the results to date. The perception that reform has not generated the results anticipated and that in some specific cases has demonstrated important levels of failure, is widespread in the region; a view supported by empirical studies. A study undertaken from 2001 through 2004 involving the criminal reform process in nine of the region's countries (Argentina, Bolivia, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Paraguay and Venezuela) disclosed the continuing existence of serious problems in attaining the core results that procedural change was intended to achieve, with substantial variation in accomplishments existing among the various countries (Riego and Vargas 2005). Although specific data concerning the criminal justice sector is unavailable, this situation explains, at least in part, why despite the reforms, Latin American confidence levels concerning functioning of judicial systems has not grown significantly in recent years. From another perspective, it is worth considering that the ability to produce significantly radical changes over a short time is limited, especially if those changes are focused too much on purely legalistic transformation.

Among the difficulties encountered by the reform movement, four areas are especially relevant. The first involves oral proceedings limited impact. As previously indicated, introduction of an oral tradition was considered a paradigm of the core logic underlying implementation of the new procedures. However, in reality, implementation has

encountered a number of problems. The first deals with a point already addressed: in a significant number of the reformist countries, oral hearings during the investigative phase have not successfully replaced the written-record system. That has resulted in serious bureaucratization problems and the absence of meaningful supervisory systems to guarantee individual rights, perpetuating many of the former systems' vices and negatively impacting public perception of the legitimacy of the reforms.A related problem involved important obstacles implementing the trial system in several countries. In many places, the percentage of scheduled trials that don't take place because of organizational problems is much larger than those that actually do take place (Riego and Vargas 2005: 160). During the trial are problems related with the real publicity of them and also problems with practices that tend to diminish the principles of inmediacy of the evidence and adversariality.

A second problem involves the limited use that reformed systems have made of the discretionary powers granted to prosecutors in order to make the system's workload more effective. Available statistics show that with some exceptions, prosecutors tend not to use these mechanisms (*e.g.*, making use of the alternative resolution options the system has made available) and thus are not effectively reducing the number of cases they prosecute (Riego and Vargas 2005: 215). This has resulted in several negative consequences among which the most important is that the absence of clear case selection policies has impeded the ability of the system to focus its resources in order to improve the quality and efficiency of its work. The perception by system personnel that they are overworked continues to be one of the largest problems in the region.

A third problem area involves modernization of institutional management in the criminal justice system, particularly in the prosecutory, judiciary and public defense establishments. As previously mentioned, reform included strengthening of those institutions through increases in personnel and budgets; in addition, in many cases management was improved through introduction of non-attorney professionals with specialized expertise. However, when these institutions and their operating procedures are analyzed, the changes have had little real impact because the institutions and their operating procedures are still structured in much the same manner as those of the pre-reform era and since their inception, there has been very little innovation.

It was anticipated that a new working environment would develop as a result of the oral and public nature of the new procedures and that legal professionals would be incentivized to significantly change their work practices. Working by means of a written record is totally different than litigating in a wide -ranging variety of oral hearings; accordingly, it was supposed that operating efficiently in the new environment would involve a significant change in the way everyone's work was organized. While the logic behind the system has changed radically, the way in which its participants work has not visibly changed in any meaningful manner, reflected in continuation of practices the system was designed to replace.

A fourth problem area deals with the weakness that the public defense component of the new systems has generally exhibited. The problem does not involve institutional

weaknesses but rather the lack of clarity in defining the proper defense role in a more adversarial model of procedure. In many countries public defenders are bureaucrats more loyal to the system's interests than to those of their clients, are very passive in conceptualizing their jobs and demonstrate little independence (*e.g.*, in the conduct of independent investigations that allow for presentation of additional trial evidence). This impacts both the rights of the accused and the system as a whole. An adversarial system characterized by a weak defense structure makes the work of prosecutors and judges less challenging with a resulting deterioration in the quality of the whole system.

As can be seen, while the reformed systems represent a great improvement over prior systems, implementing the logic underlying the new system has encountered serious problems, as has meeting the expectations raised when they were first considered. It is difficult to identify or explain the causes of this phenomenon in a manner that reflects all the variables involved, however, a tentative explanation may be that it involves problems on three parallel levels: normative design; lack of implementation; and, a failure to change prior practices.

Analysis of a specific country, Ecuador, may prove enlightening as it is one of the region's most problematic cases.[14] At the normative design level the model developed under the Ecuadorian Code provided certain options that hindered the change in logic on which the system was to operate. The reforms failed to introduce clear procedures for selecting cases or electing alternative means of resolution depriving prosecutors of the ability to develop clear policies to effectively manage caseloads. Case management retained strong traces of the inquisitorial system's trial model with ample opportunities for substitution of direct oral evidence through development of written records and with very important judicial roles in collection of information (Baytelman and Duce 2004).

One of the major difficulties in implementing change in Ecuador was that existing institutions and structures were not conformed to the logical basis of the new system. At least during the initial stage, reform has had to operate in the absence of significant changes in institutional management or structural infrastructure and without a training process to methodically prepare participants to work effectively in the new system. Evaluations of the new system (Fundación Esquel 2003 and 2006) have reported that changes have not been effected in participants' work habits or organization which remain more appropriate to the inquisitorial system than to the requirements of the new one.

Problems of the kind described in Ecuador have negatively impacted the new system's anticipated results. For example, the new system has been unable to reduce the rate of persons incarcerated while awaiting trial, which is among the highest in the region (during 2000, 63% of all prisoners had not in fact been convicted of anything and by 2004 that rate had climbed to 65%; Zalamea 2005a: 53); and, the reform has failed to significantly increase the system's ability to conclude cases (during 2001, the system was only able to conclude 2% of the total cases opened, a percentage that increased only slightly, to 8%, in 2004 but which at any rate leaves more than 90% of cases opened unresolved; Zalamea 2005b: 82); all of which has significantly undermined the legitimacy of the reforms.

In varying degrees, the confluence of problems at these three levels has become an obstacle in several of the countries that have reformed their criminal justice systems.

5.2 Challenges to the Future of Reform

The scenario described above has generated confusion as to where efforts to modify certain aspects of the reforms should be concentrated. The current question is not whether reform is necessary or whether it is taking place, that is already an established fact; nor is it a matter of drafting or proposing major legal reforms to establish the basic operating parameters for the new system. That has already been accomplished and the political will and momentum that made adoption of the new codes possible no longer exists, or is at least much weaker. It also seems unlikely that the key to improving reform results is to be found in design of a new system implementation process as reformed systems have been functioning in most of the countries involved for some time.

At this stage of its development reform seems to require a new working approach involving the design of methodologies and forms of participation that will allow introduction of changes and corrections specifically related to the system's operations and to its ability to impact key areas. This presupposes an important change in the logic underlying the work that has been taking place in Latin America. So far reformers have focused on legislative change as the tool for systemic transformation; however, while that was necessary when existing laws clashed sharply with the system's objectives, that is not currently the case. Undoubtedly, the reformed systems could benefit from a number of legal adjustments. Nevertheless, the nature of the problems and the sector experience acquired suggest moving forward with other tools. The experience with more focused reforms and more specific objectives in countries like the United States may prove extremely useful for Latin American reformers.

During the past few years notable progress has been evident in diverse projects seeking to improve the reformed systems. At first sight, they might seem very simple but they have had a significant impact on the system's general results. Perhaps the best example of this approach involves the "Pilot Plan for Enhancement of the Accusatorial System in Mar del Plata" effected during 2005 through an agreement between the JSCA (the Justice Studies Center of the Americas) and local justice sector institutions. Its purpose was to consolidate changes to the accusatory system first established in the province of Buenos Aires, Argentina, during 1998, which had encountered numerous problems and failed to attain satisfactory results largely due to severe design and legal implementation defects. Through the pilot program, agreement was reached on initiating a procedure for prompt oral hearings dealing with street crimes, a legally required procedure theretofore ignored in practice. The program developed an operating agreement between local participants modifying the way prosecution, defense and judicial labor was organized, and changed some aspects of the existing infrastructure. Within eight months after its inception (March, 2006), the project had achieved a 400% increase in the systems ability to conclude cases and between a 2000% and 3000% percent reduction in case turnaround time depending the type of procedure used, results that maintained for two years as of July, 2007. An improvement

from the perspective of individual rights was also evident, *e.g.*, a decline in the use of preventive detention (Hazan and Riego 2007). As a result of the pilot program's success, during 2006 authorities in the Province of Buenos Aires undertook the challenge of extending it throughout the province (Argentina's largest, with a population of approximately 15 million inhabitants), a process which remains fully in effect. Similar experiences have also taken place in countries such as Guatemala (Duce 2007a), Costa Rica (Duce 2007b) and Ecuador (Zalamea 2005 a and b), in each case with very positive results.

These experiences have taught some basic lessons useful in guiding future reform efforts. They all demonstrate that a new strategy to strengthen the reform process and improve its results must include several key elements. First, system problems and bottlenecks susceptible to solutions must be very specifically identified. This means the ability to produce facts and figures about system operation permitting the adoption of a clearly empirical approach concerning their operation must be developed. Development of mechanisms to better understand how the systems work will prove a significant task and a challenge for the region's future. In order to succeed, it t is imperative that sector institutions pursue a policy of transparency allowing open access to information concerning management performance and that results be made available for study and external evaluation. Then very specific programs must be designed to address the specific problems identified. Faced with a specific problem, tangible answers must be devised (*e.g.*, through design of new working procedures, development of new means of coordination between participants, through training programs designed to correct very specific weaknesses, *etc.*); then, a strategy to implement such response must be devised. The strategy should include building a consensus among those involved so that they perceive of the change as their own idea and thus commit themselves to it. Finally, a follow up and evaluation program should be developed providing for acknowledgment of accomplishments and problems in a manner permitting correction of problems, strengthening of good practices and development of accurate projections for the future.

As can be seen, the challenges ahead are many, but so are the possibilities of generating real change that will improve the quality of people's lives and strengthen regional democratic institutions. In this regard, the reform of criminal justice in Latin America is far from being a closed process; rather, it should be perceived of as a process that has entered adolescence with all the problems that involves; where successful work will hold the key to how the system will behave in its maturity. This also means it is an extremely interesting process for study and comparative analysis and for learning lessons that can help future regional reform efforts and attempts to effect change in other countries, even countries like the United States.

Notes

[1] Translated by Guillermo Alfonso Calvo-Mahe, Manizales, Colombia and Ocala, Florida.

[2] It seems impossible in a project of this nature to address with equal rigor all of the reforms experimented with by Latin American judicial systems in their varying dimensions; consequently, this project concentrates on a single aspect, the transformation of the criminal procedure process.

[3] Most countries in the region attained independence during the first half of the eighteenth century.

[4] The common assessment was that the inquisitorial system had proved absolutely incapable of effectively protecting individual rights or effectively prosecuting crimes.

[5] For different historical and cultural reasons (e.g., a different language), advances experienced in the Brazilian criminal procedureremained unconnected to those in the rest of the region. For that reason, developments in that country are not dealt with in this paper. The case of Uruguay on the other hand is totally different. That country has debated the need to implement reform similar to that in the rest of the countries in the region; however, neither the political nor the technical consensus necessary to bring reform to fruition has been attained.

[6] Latinobarómetro is an annual public opinion survey of approximately 19,000 interviews in 18 countries in Latin America representing more than 400 million inhabitants, see http://latinobarometro.org/index.php?id=149.

[7] The arguments were particularly effective in justifying changes in the countries that took longest to initiate reforms, e.g., Mexico and Colombia, where the goal of combating impunity more aggressively was a key element.

[8] Basically the continental European and Anglo-American systems.

[9] The United States Agency for International Development (USAID) has been the most prominent and consistent over time. European cooperative agencies from countries such as Germany and Spain have also participated. Finally, during the last few years, the Canadian International Development Agency (CIDA) has started to take on a role in this process.

[10] The first two worked in Guatemala and El Salvador, respectively. These institutions were created with the objective of participating in the pacification process in both countries after several years of civil war. Criminal justice reform was part of their working agenda. In the case of the UNDP, its office for the Caribbean and Latin America has for some time promoted projects geared towards improving protection of fundamental rights.

[11] One must bear in mind that in many countries, police have a long history of abuse of power and corruption, thus, the new prosecutorial functions are also seen as a means to better control police work.

[12] Analysis of the police as participants is not dealt with as this book contains other articles that deal with that topic more specifically.

[13] Although they are relatively exceptional cases at the regional level.

[14] It is necessary to indicate that in addition to problems at the levels identified, in the recent past Ecuador faced serious institutional problems which weakened the institutional stability of the justice sector. However, dealing with problems in the Ecuadorian judicial system not limited to the criminal justice system are beyond the scope of this work.

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