Adversarial Criminal Justice in Latin America:

Comparative Analysis and Proposals

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Santiago, Chile

Adversarial Criminal Justice in Latin America:

Comparative Analysis and Proposals[1]

By Leonel González[2] and Marco Fandiño[3]

1 This chapter is the final section of the study "La justicia penal adversarial en América Latina. Hacia la gestión del conflicto y la fortaleza de la ley," which included reports from 19 countries in the region. The publication was jointly organized by the Justice Studies Center of the Americas (JSCA) and the Konrad Adenauer Foundation's Rule of Law for Latin America Program. The full Spanish-language version of the study is available online at: http://biblioteca.JSCAmericas.org/handle/2015/5621. All English-language translations of citations from this text and the others cited in this document are our own.

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ÍNDEX

REGIONAL ANALYSIS OF THE STATE OF THE ADVERSARIAL SYSTEM

1. THE IMPLEMENTATION OF THE SYSTEM AND ITS COUNTER-REFORMS

Latin American criminal proceedings are governed by an accusatory and adversarial system with the exception of Argentina's federal justice system and the Brazilian judicial system, which still use a mixed or moderate inquisitorial system. The entry into force of the new federal Criminal Procedure Code (CPC) passed in December 2014 in Argentina has been suspended[4], and Brazil continues to use a system whose structure dates back to 1941. The latter model was approved under the authoritarian government of Getúlio Vargas in the context of the New State that began in late 1937. Despite the fact that the Brazilian Constitution was reformed in 1988 and very clear guidelines in favor of an adversarial criminal justice system were established, all subsequent reforms were limited to specific adjustments that did not fundamentally change the authoritarian criminal justice structure that is now 75 years old.

In general terms, we can divide the regional evolution of the adversarial system into three very well-defined moments connected not to temporal phases but to stages of development in the discussions and demands of criminal proceedings. Beginning with the entry into force of Guatemala's CPC in 1994, the systems were mainly focused on establishing oral hearings for the trial stage and on giving the Public Prosecution Service authority over criminal action and direction of the prosecution. As a result of the lessons learned during the 1990s, the second period of reforms involved sweeping changes to the organization and internal management of the institutions. In 2000, Chile became a leading example of these changes because it implemented the figure of the court administrator. A second aspect was related to the need to plan the implementation process and create specific entities for this function. For example, Bolivia created the National Implementation Commission as a decision-making body that would also oversee the design of institutional policies in order to ensure that the new system would be adequately implemented, monitor the activities of the Executive Committee, and request reports and issue instructions.

It also created an Executive Implementation Committee as an executing agency under the Ministry of Justice and Human Rights. Nicaragua created a National Inter-Institutional Coordination Commission for the Criminal Justice System. The body was mixed in nature and included all institutions related to the criminal justice system. Beginning with the 2008 reform, Mexico implemented a Coordinating Council for the Implementation of the Criminal Justice System. Its purpose was to establish the national policy and coordination necessary for implementing the criminal justice system in accordance with the terms set out in the Constitution in the three systems of government. The Council was supported by a Technical Secretariat (SETEC) that

4 However, in June 2019, it started operating in the federal jurisdiction of Salta and Jujuy.

TABLE 1. Information on the Adversarial System in the Region[5]

COUNTRY	YEAR PASSED	YEAR OF ENTRY INTO FORCE	IMPLEMENTATION MODE
Argentina (Federal)	2014	Suspended[6]	Suspended
Argentina (Neuquén)	2012	2014	Simultaneous
Bolivia	1999	1999 - 2001 Immediate for the new classification of crimes; 2000 for the regulation of conditions of release, alternative outcomes, time limit for court action and the assets management system; and 2001 for all remaining elements.	Simultaneous
Brazil (Federal)	No The CPC from 1941 is in force[7]	–	–
Brazil (Bahía)			
Chile	2000	2000 - 2005	Gradual by region
Colombia	2004	2005 - 2008	Gradual by judicial district
Costa Rica	1996	1998	Simultaneous
Cuba	No A system introduced in 1973 is in force[8]	1974	–
Ecuador	2009	2009[9]	Simultaneous
El Salvador	2008	2011	Simultaneous
Guatemala	1992	1994	Simultaneous
Honduras	1999	2002	Simultaneous
Mexico (Federal)[10]	2014	2016	By crime or judicial district
Mexico (Nuevo León)[11]	2011	2012	By crime
Nicaragua	2001	2002 - 2004	Gradually by type of crime
Panama	2008	2011 - 2016	Gradually by judicial district
Paraguay	1998	2000	Simultaneous
Peru	2004	2006 - incomplete[12]	By judicial district
Dominican Republic	2002	2004	Simultaneous[13]
Uruguay	2014	2017	Simultaneous
Venezuela	1998	1999	Simultaneous

Source: Developed by the authors.

5 In the case of countries with federal systems (Argentina, Mexico and Brazil), we have decided to refer to the federal justice system and one state that has experienced significant changes.

6 The federal justice system is currently governed by a CPC that was passed in 1888 and partially reformed in 1992. The implementation of the new CPC, which was approved in 2014, has been suspended.

7 Brazil has a single CPC for the federal justice and state justice systems. A reform bill was submitted in 2010 but is still in legislative procedure.

8 Cuba has a mixed model with a written preliminary phase and oral trial. Reforms have been introduced to the procedure law, but none has changed the mixed criminal procedure structure.

9 The Comprehensive Organic Criminal Code was passed and implemented in Ecuador in 2014, but the adversarial model was introduced in 2009 with minor reforms.

10 Various Mexican states reformed their criminal procedure systems during the early 2000s, introducing oral adversarial models. A constitutional reform took place in 2008 that changed ten articles, establishing that all states had to adopt an adversarial model within eight years. As the constitutional reform implementation process progressed, it became clear that it would be necessary to unify criteria and principles among the states. A National CPC was passed in 2004 to be applied uniformly in every state in the country.

11 The Nuevo León Criminal Procedure Code was published in 2011 in accordance with the constitutional reform of 2008. The National Criminal Procedure Code went into effect in 2016.

12 The Peru report states that the new Criminal Procedure Code was implemented in 30 of the 34 Superior Courts (88%) by 2017. The implementation

was created to operate and execute the Council's agreements and decisions and to support the implementation of the accusatory criminal procedure system at the request of local and federal institutions. These were dissolved as soon as the system was implemented nationwide. The agency responsible for this work in the Dominican Republic was the National Commission for the Execution of the Criminal Procedure Reform, which was comprised of all of the institutions with functions related to criminal proceedings. It is worth noting the experience of the Argentine province of Neuquén, where it was reported that the implementation was designed based on various aspects: regulatory (through laws that complemented the CPC); structural (modifying or building structures that could be used for hearings); and human resources (regarding the reassignment of staff and their education and training). The report for the province states that the reform has been studied and planned, and it is understood that a regulatory reform would not necessarily involve a cultural shift. This allowed its implementation to be organized and allowed the operators to intuitively understand what they needed to do. It also meant that the practices had been modified in accordance with the principles and values of an adversarial criminal justice system. During the third stage in the evolution of the system, which is unfolding now, discussions and challenges are developing that are increasing the sophistication of the work. There is also an understanding that there are discussions that have been resolved (such as those mentioned previously). We will mention the current focuses of criminal procedure reform in the next section.

The table on the previous page presents key data regarding the installation of the adversarial system including the year passed, year of entry into force and mode of implementation.

Although most countries have adversarial proceedings, they have been subjected to strong counter-reforms that involved changes whose logic countered the policy and technical foundations of the adversarial model. Based on the information provided by the local reports, we organized these counter-reforms into three major types of changes.

The first category includes those designed to expand the grounds for using pretrial detention. Beginning in 2003, Bolivia approved changes to the CPC that created new types of crimes and/or increased existing sentences, including some additional justifications for requesting and applying pretrial detention. These were based on the dangerousness of the defendant. They also modified the maximum amount of time that a defendant could be held in pretrial detention. In Mexico, the reform brought with it its own counter-reform in the constitutionalization of extraordinary measures such as ex officio pretrial detention, a measure allowed for a range of crimes listed in the second paragraph of Article 19 of the Constitution. In Paraguay, the use of alternative measures and those that would replace pretrial detention in certain cases set out in the procedure regulations was prohibited in 2004. This led to an exponential increase in the prison population. In Venezuela, between 2000 and 2001, the amount of time the supervisory judge had to decide whether or not to release defendants who had been caught in the act was increased, the justifications for pretrial detention were changed and the terms used to determine flight risk were expanded. Furthermore, under the last reform, the maximum period of pretrial detention was extended from two years to the time stipulated as the minimum sentence for the crime for which the defendant was charged, which could be up to 28 years in the case of serious crimes. Under the latest changes, these are

of the NCPP in the Northern Lima Superior Court began in 2018, and the process will continue with the Eastern Lima Superior Court in 2019 and the Southern and Western Superior Courts in 2020.

13 The local author states that while the implementation occurred simultaneously in all judicial districts in the country, some agencies and regulatory figures did not enter into force on September 27, 2004. Instead, they were implemented a year later under Law 278-04. This is the case for the operation of collegiate tribunals, the sentence execution judge, the file and criteria of timeliness, respectively.

limited to economic or political offenses and do not include crimes against physical integrity.

Second, there was a retraction of the use of trial by jury. For example, it was eliminated in Bolivia and Venezuela and its jurisdiction was reduced in Nicaragua. The country report for Nicaragua indicates that the Code was mainly reformed regarding the jury and the number of crimes for which such a model is used has been reduced.

The third type of counter-reforms has to do with measures that increased the use of oral trial. For example, the concluding hearing of the preparatory stage was eliminated in Bolivia, which meant that prosecutors went almost directly to trial. In Colombia, the number of types of cases for which sentence reduction was allowed if the defendant accepted the charges was restricted. As the country report states, these disincentives for early termination have led to a larger number of cases reaching oral trial, which in turn has increased response times and institutional wear. In Venezuela, reparations agreements were limited in 2000 and alternatives for serving sentences were restricted in 2001, among other changes.

All of this is indicative of the tensions around criminal procedure reform and the need to refrain from abandoning its study and empirical analysis in order to correct the mistakes that are being made and reinforce the areas that in which progress has been made in terms of its implementation.

2. THE USE OF ORAL PROCEDURES, QUALITY OF LITIGATION AND TRIAL BY JURY

a) The procedural structure of the adversarial system

One of the key aspects of the introduction of the adversarial system was the substantiation of the process through oral, public and contradictory hearings. Specifically, this model is based on three main procedural stages: the judicialization of the case (formalization of the investigation) for cases in which the Public Prosecution Service decides to undertake criminal prosecution against the defendant; the preliminary hearing, which allows for discussion of the investigative work that the prosecutor has done and to determine whether it merits a trial; and oral and public discussion (trial phase) for cases that have not been resolved through an alternative outcome and can only be cleared through the production of evidence. Although this is the procedural foundation, the adversarial model is based on all of the parties' arguments and all of the jurisdictional decisions must be made in the context of a hearing.

While the use of oral procedures was introduced at the trial stage (because all of the countries have a hearing), there is still a need to strengthen their use in the preliminary stages because local realities show that pretrial hearings are not generally regulated or are weak. The table 2 on the next page presents information on oral hearings regulated in the region's criminal procedure codes.

The design of Latin American CPCs suggests that several trends coexist in the regulation of the procedural structure of the adversarial model. We have identified *three different types of adversarial proceedings*.

The first is the *classic adversarial proceeding*, which consists of the stipulation of the use of oral procedures as a general principle and a varied set of hearings for making jurisdictional decisions during the preliminary stage. This model is used in Argentina (at the federal level –with the National CPC that has not been implemented– and in Neuquén Province), Chile, Ecuador, Mexico, Panama and Uruguay. Hearings for oversight of the legality of detention, the laying of charges, discussion of conditions of release, alternative outcomes and abbreviated trial and arraignment are provided for in all of these countries. In other words, any argument made by the parties is to

TABLE 2. Oral Hearings Regulated in Latin American Criminal Procedure Codes[14]

COUNTRY	MONITORING OF DETENTION[15]	FORMULATION OF CHARGES	CONDITIONS OF RELEASE	ALTERNATIVE AND ABBREVIATED OUTCOMES	PRELIMINARY HEARING
Argentina (Federal)[16]	Yes (72 hours)	Yes	Yes	Yes	Yes
Argentina (Neuquén)	Yes (24 hours)	Yes	Yes	Yes	Yes
Bolivia	No[17]	No	Yes	Yes	No
Brazil (Federal)[18]	Yes (24 hours)	No	Yes	No	No
Brazil (Bahía)					
Chile	Yes (24 hours)	Yes	Yes	Yes	Yes
Colombia	Yes (36 hours)	Yes	Yes	Yes	Yes
Costa Rica	No	No	Yes[19]	No	Yes
Cuba	No	No	No	No	No
Ecuador	Yes (24 hours)	Yes	Yes	Yes[20]	Yes
El Salvador	No	No[21]	Yes	Yes	Yes
Guatemala	Yes (24 hours)	Yes	Yes	Yes	Yes[22]
Honduras	Yes (24 hours)[23]	No	Yes	Yes	Yes[24]
Mexico (Federal)[25]	Yes (48 hours)[26]	Yes[27]	Yes	Yes	Yes
Mexico (Nuevo León)					
Nicaragua	Yes (48 hours)[28]	Yes	Yes	Yes	Yes[29]
Panama	Yes (24 hours)	Yes	Yes	Yes	Yes
Paraguay	No	No	Yes	Yes	Yes[30]
Peru	No[31]	No	Yes	Yes	Yes
Dominican Republic	No[32]	No	Yes	Yes	Yes
Uruguay	Yes (24 hours)	Yes	Yes	Yes	Yes
Venezuela	Yes (48 hours)	No	No	No	Yes[33]

Source: Developed by the authors.

14 This figure alludes to legal regulation of hearings; an explanatory note is provided in cases in which the hearings are held as part of judicial practice but not necessarily regulated.

15 In this column, the maximum timeframe between arrest and the arraignment set out in procedural systems is listed where applicable.

16 Refers to the hearings regulated under the CPC that was passed in December 2014 but that is not yet in force.

17 Article 226 of the Bolivian CPC only states that the person detained by the police or Public Prosecution Service must appear before the judicial authority within 24 hours so that he or she may decide to apply a condition of release or free the defendant due to lack of evidence within the same timeframe. The country report on Bolivia states that no arraignment is held and no written procedure is completed. The time limits are met in the majority of cases, which means that the police or Public Prosecution Service makes the defendant available to the judge within 24 hours, and all cases go directly to the hearing in which conditions of release are requested. When the deadlines are not met, the defense argues that the arrest was illegal –due to defective procedure or failure to comply with or violation of rights and guarantees under Article 169– during the conditional release hearing. However, in most cases the judge orders pretrial detention and the detention becomes legal.

18 Brazil has a single CPC for the federal level and the states.

19 The Costa Rica report states that part of the shift introduced through training that began in 2004 was making judges, public defenders and prosecutors aware that the need to make the right to be heard prior to a decision being made effective is just as delicate as pretrial detention. It was not until the Protection Law was passed in 2009 for victims, witnesses and other individuals who participate in the criminal proceedings that the law was reformed to ensure that a hearing is held in cases in which pretrial detention is requested. In other words, this change came about through practice.

20 Ecuador removed diversion when the Comprehensive Criminal Organic Code went into force. Here we only allude to the regulation of the abbreviated trial.

21 While it is stipulated that arraignment, formalization and conditions of release are discussed in the context of an "initial" hearing in El Salvador, the logic of the process continues to reflect a traditional system in which the first hearing serves to take an exploratory statement from the defendant, after which the timeline for investigation is set (This is referred to as "instruction" in the local system.)

22 The preliminary hearing in Guatemala's criminal proceedings is divided into the stage in which the accusation made by the prosecutor is discussed and the order to go to trial is issued, where applicable, and the hearing in which evidence is offered (to discuss the evidence that the parties will present and that will be allowed at trial).

23 While the defendant is to be brought before the judge within 24 hours in Honduras, the country report states that once the defendant is at court, the statement is taken in a hearing held for this purpose. The judge first informs the defendant of the charges against him or her and their rights. This

be presented at a hearing.

A second model is the *bureaucratic adversarial process*. The distinctive characteristic of this type of proceedings is the survival of elements that are characteristic of mixed or inquisitorial proceedings. While some codes, like that of El Salvador, stipulate that hearings must be held during the early stages of the process, these respond to the logic of the traditional system. Institutions such as the exploratory statement as the initial procedural act are maintained and in some cases this is only held at the prosecution service without the need for a formal arraignment, as occurs in Costa Rica. The traditional logic is also maintained in the regulation of the preliminary hearing. In Guatemala, this phase consists of two hearings. The first is held for a discussion of the admissibility of the case for trial and the second focuses on the evidence that the parties intend to present in order to justify their positions. In Honduras, admissibility is considered during the preliminary hearing and the evidence is discussed at trial. This structure reveals a very weak vision of the preliminary hearing in regard to litigation of evidence, which is strongly limited by being produced after the decision to close the case or proceed to trial. By contrast, in a classic adversarial system, all issues of admissibility should be discussed at a single hearing with the understanding that the evidentiary discussion is decisive for evaluating the viability or success of the case.

The third and final model consists of the *written adversarial process*. Here the majority of judicial decisions at the preliminary stage are made in writing, as occurs in Brazil, Cuba and Costa Rica. In other cases, hearings have become distorted representations of the use of oral procedures. For example, in Brazil the arraignment is focused on a written document (in flagrante detention order) that the police submit to the judge. The country report for Venezuela states that hearings have become the exception even during the trial stage. It is common for the informal conversation about cases to be held between judges, prosecu-

dynamic reflects the logic of an exploratory statement in a mixed procedure system in which this stage is considered to be merely a formal instance in which the statement is taken.

24 In Honduras, the preliminary hearing involves the laying of charges, response to the charges and the order to go to trial. The hearing held to lay the ground work for the discussion (presentation of recusals, exceptions or annulments based on new facts) and the evidentiary hearing (so that the parties present a list of evidence and describe the facts or circumstances that each is meant to show) take place at the oral trial stage.

25 We are solely alluding to the procedural structure of the National CPC that is in effect at the federal level and in all federative organizations.

26 The Mexico country report states that in cases in which the defendant is caught in the act, once the detainee is made available to the Public Prosecution Service by the police or any other party, the Public Prosecution Service has 48 hours to investigate and decide whether to bring the detainee before the judge to review the arrest and determine their legal status. This 48-hour period is known as the holding period. If the Public Prosecution Service decides not to bring the detainee before the judge once that period has ended, there is no judicial oversight of the arrest. It is worth noting that the Public Prosecution Service has the authority to release the person or impose a condition of release during those 48 hours in cases in which ex officio pretrial detention is not merited and it is decided that pretrial detention will not be requested as a condition of release under Article 140 of the CNPP.

27 In Mexico, after the charges are filed, the Public Prosecution Service must request that the defendant be "linked to the proceedings," which means discussing the evidence that the prosecutor has to substantiate that a crime has been committed and the defendant's participation in it.

28 In Nicaragua, the discussion of the arraignment, filing of charges (which is called accusation in the local context) and conditions of release are produced during the preliminary hearing that is regulated under Articles 255-264 of the CPC of Nicaragua.

29 The preliminary hearing in Nicaragua consists of two phases: the initial hearing (regulated by Articles 265 and 272 of the CPC), which focuses on determining whether there is cause to go to trial and begin the process of exchanging evidence (that is, determining the factual basis for the accusation), and the hearing to prepare oral trial (regulated by Article 272 of the CPC), which is held within five days of trial in order to discuss exclusion and agreements regarding evidence.

30 Paraguay's CPC provides for hearings in order to discuss conditions of release, alternative outcomes and charges. However, the country report states that oral hearings are only held at the trial stage, not at the preparatory or preliminary stage.

31 Although Peru's laws do not provide for arraignments, the country report states that after December 2016, a sort of initial regulation of this form of monitoring has been allowed because a hearing is held to monitor the legality of the arrest. However, this only operates in cases in which the defendant was caught in the act and the prosecutor asks the judge for the preliminary investigation within 12 hours of the arrest by the National Police. The judicial detention order must be issued within seven days when the circumstances suggest a flight risk or risk that the defendant will prevent authorities from determining what actually happened. The judge must hold the hearing to make a decision regarding the legality of the arrest, whether or not the defendant's rights were violated and the need to order judicial detention within 24 hours.

32 The country report states that there is no arraignment. This sort of oversight is provided during the coercive measures hearing if the Public Prosecution Service decides to request it. In practice, if a defendant is arrested, the Public Prosecution Service requests the coercive measure. In this case, the Constitution establishes that the Public Prosecution Service has 48 hours to bring the defendant before the judge. Otherwise, he or she must be released immediately.

33 The author of the country report observed that the oral nature of these hearings has been lost, and written acts submitted by the Public Prosecution Service are reviewed.

tors and defense attorneys on the appointed day after which the defendant signs the documents. The clearest evidence of this is that convictions are issued in over 75% of admissions of fact.

b) Quality of litigation during hearings

In this section, we will analyze the main problems and strengths of the dynamic of oral hearings that are currently used in Latin American criminal proceedings based on the qualitative information provided by the country report authors.

Arraignments

Two main problems are observed in regard to arraignments. The first is the very passive role played by the judge in the analysis of the conditions under which the defendant was detained. For example, in Bolivia, the investigating judge does not monitor the duration of the initial detention except at the request of the defense. In the Argentine province of Neuquén, the judge does not automatically determine whether or not illegal actions were taken against the defendant or whether or not he or she was informed of their rights. The Chile report states that the number of arrests that are found to be illegal is low because during the period observed (2006-2015), they do not exceed 1% of the total number of hearings during any year. In regard to the role of the judge, he or she only plays an active role in verifying the circumstances of the arrest in 20% of cases. The judge asks the defendant if he or she understands the reason for the arrest in 53% of cases and asks the defendant how they were treated in 31% of cases. A second problem is the primacy of the written file or absence of a specific opportunity to review the arrest. In Brazil, the judge receives a written document from the Public Prosecution Service and the discussion at the hearing focuses on that file. In Costa Rica, the first contact that a defendant or person under investigation has with the judge is at the hearing at which conditions of release are determined. The authors also refer to issues calculating timelines. For example, in Honduras, the end of the detention begins when the defendant is read his or her rights. This must be overcome per order of the Supreme Court, which establishes that detention begins when the defendant is taken into custody.

Formalization of the investigation hearings

This type of hearing is regulated in ten procedural systems out of the 22 analyzed. Two problems have been identified in regard to this stage of the proceedings. First, formal litigation by the parties mainly consists of the reading of documents or description of the facts based on the logic of the police. In Chile, the parties tend to intervene mechanically. The prosecutor reads the charges during the hearing but makes no comments other than reading the written text. This perception is confirmed using data on the duration of the hearings. The formalization of the investigation hearing took an average of 10 minutes in 2006 and 7.9 minutes in 2015. In Guatemala, the prosecution presents the charges without focusing on the most important facts (the existence of a crime and likelihood that the defendant participated in it). Instead, extensive narratives are developed and discussed (including defense counsel) through the investigation file, which means that the reading of documents persists in some hearings. In Ecuador, there is a tendency for the discourse to start with the police. There is also confusion regarding the discussion of the facts in the context of the formulation of the charges and basis for conditions of release. For example, the Panama report states that there is no consensus regarding the possibility that the defense will discuss and present arguments on the basis of the charges during this stage. In fact, this type of confusion also has emerged at the legal level. In Chile, the Public Prosecution Service has autonomy over this stage while in Uruguay and other countries, judges are required to determine whether they allow it.

Hearings on conditions of release

The hearings on conditions of release continue to present a set of unresolved problems

that have been the object of discussion over the past few decades. The first is related to the absence of a structure that determines when the various discussions are to be held during this stage. This is related to a legal lack like the one seen in Bolivia. The country report states that the CPC does not outline the structure of the hearing and only establishes requirements for applying conditions of release. For its part, in Cuba the verbal hearing for imposing conditions of release was eliminated in 1977 and the prosecutor was given this authority. In 1994, the courts' participation in this process was eliminated, which means that it is currently conducted in writing.

A second area is related to a lack of quality information that can be used to litigate during this hearing. A large amount of information about this was provided in the country reports. In Bolivia, there is very weak discussion of the material supposition while the prosecutor's presentation does not clearly describe the facts, the corresponding legal qualifications and the defendant's participation in the same. In regard to the procedural presupposition, the prosecutor does not offer any evidence or offers very little evidence to establish the procedural risks alleged in many cases. This inverts the burden of proof and it is the defendants who have to provide evidence of their social, family or professional roots through their attorneys. The authors of the country reports also state that the main elements used to configure procedural risks are related to the seriousness of the crime and absence or existence of police or legal records. In fact, one author states that in regard to the evidence used to define professional ties, both judges and prosecutors require that the defense present documents that are very difficult to obtain such as contracts registered with a public entity such as the Labor Ministry. One additional problem in Bolivia is the fact that the prosecutors do not participate in hearings in a high percentage of cases, and simply submit the investigative file and request that a condition of release be imposed. In Chile, the quality of information is low because the prosecution's arguments tend to be limited to the reading of the police report. Furthermore, there is no rigid order to the discussion in the sense of maintaining the ritual of beginning with the material supposition and then the procedural one. On the other hand, defense counsel generally does not provide information or present a theory, and focuses instead on responding to the arguments made by the prosecution. The prosecutor does not present arguments regarding the existence of the act in 40% of the cases observed and does not do so regarding the participation of the defendant in 50% of the cases observed. The prosecution does not comment on the need for conditions in 45% of cases. In Nicaragua, for the purpose of imposing conditions of release, the prosecution service bases its request on the procedural risks on the basis of the accusation, flight risk, the seriousness or magnitude of the crimes, the sentence that could be imposed and the nature of the crime. There are also crimes that must be managed using pretrial detention. In Ecuador, there are problems with the justification for procedural risk. The Public Prosecution Service only indicates that the defense has not established community ties, which is not a legitimate explanation because the prosecution has the burden of proof. In Neuquén, in order to address procedural risks, mainly those linked to lack of community ties, prosecution services tend to have little information about the defendant's personal situation and do not have a service that could handle this investigation. We can thus conclude that this is still a hearing that focuses on traditional elements linked to the laying of charges (type of crime and anticipated sentence) and that the discussion has not shifted towards specific elements related to the defendant's personal situation.

A third and final problem is linked to the fact that no deadlines or supervisory mechanisms are implemented for conditions of release. In Bolivia, it was found that this does not occur in the majority of hearings, while Chile lacks an institution to monitor the fulfillment of the conditions of release. The author of the country report for Chile stated that defense attorneys do not typically ask the judge to set a judicial timeframe based on the specific facts in the

case. When discussions do take place, the majority of the time they are instigated by the judge (52%) while the defense requests this only 32% of the time. In Nuevo León, Mexico, the judge imposed conditions of release without specifying their duration in 5 out of 6 cases and simply said that they would be in place for the duration of the proceedings. There have, however, been interesting experiences related to these last two problems. In Nicaragua, the CPC has regulations designed to provide adequate monitoring and oversight of the conditions of release imposed for each person who is in criminal proceedings. The country has created support offices for judicial work that allow reliable information to be collected regarding fulfillment of conditions of release. For example, the Defendant Oversight Office receives defendants on a daily basis who come to sign-in under the conditions set by the judge. In Panama, a noteworthy practice was implemented in the province of Colón, where prosecutors in the Primary Response Section in which the folder for litigation tasks that will subsequently be conducted by the Early Litigation and Decision Section is sent to the Judicial Investigation Directorate so they can verify that the defendant has a steady domicile, job, family or community ties, his or her medical history and other elements. This information is used to select the appropriate condition of release. The section on the reorganization of institutions describes other experiences that have been developed in the region around supervision of conditions of release other than pretrial detention.

Alternative outcome hearings

In regard to alternative outcome hearings (diversion and reparatory agreements), a central issue emerged: there is no marked trend in the region regarding the need for the judge to take on an active role in resolving the primary conflict. For example, the Costa Rica report states that criminal court judges do not make an effort to use alternatives to trial. Their role is limited to that of an agent that monitors legality and fulfillment of requirements. In Honduras, the judge merely confirms that the formal requests are made to authorize the use of an alternative outcome. The judge does not exercise significant control over the terms of the agreement. He or she only verifies that the defendant is aware of the scope of the alternative measure and that he or she is in agreement with the terms of the reparation of the harm. However, it is important to mention that in Neuquén, a best practice is identified as the judge always ensuring that the defendant agrees to the terms and that he or she explains the purpose and effects of the benefit as well as the consequences of failing to comply with the established rules of conduct. In Chile, in 80% of diversion hearings, the judge asks the defendant if he or she understands the conditions imposed. In 67% of cases, the judge expressly states that the defendant is renouncing their right to oral trial by accepting diversion. In regard to reparations, the judge explains the consequences to the defendant in 72% of cases and asks if they understand the contents and scope of the agreement in 63% of cases. In 80% of cases, the judge allows the victim to speak prior to accepting the agreement and in 77% of cases their statement is taken into consideration when the agreement is approved. In these cases, the most common compensation is a sum of money (58% of cases) and public apology (23%)

The preliminary hearing

The preliminary hearing has not been established as a central space for generating agreements or filtering through evidence prior to oral trial. This statement is mainly based on the information provided in the country reports regarding the low intensity of evidentiary exclusion during this hearing.

In Chile, there is a certain level of fear regarding leaving out evidence at oral trial. The defense counsel does not seem to play a very active role because the defense requests the exclusion of some of the evidence offered by the prosecutor in only 35% of cases and offers its own evidence in only 40% of cases. In regard to the duration of this hearing, it is worth noting that it lasted an average of 37.5 minutes in 2006 and

that number dropped to 16.5 minutes on average in 2014. In El Salvador, not all investigating judges discuss the relevance of the evidence. If the defense does not object to the introduction of evidence, the judge allows it. In Ecuador, the exchanges are formal and superficial for nearly all issues. The evidentiary agreements generally only include formal references. They simply mention that there are no agreements and there is no real attempt at engaging in negotiation. In the Dominican Republic, lack of knowledge of litigation techniques affects the level of depth of the discussions. The role of the judge becomes too passive even though it should be entirely the opposite. In Colombia, numerous steps have been introduced in the preparatory hearing that make it repetitive and bulky. There is confusion regarding the concepts of relevance, appropriateness and usefulness of evidence that generate reiterative discourses that do not contribute to the assessment of the evidentiary debate. This has an impact on the dynamic of the oral trial given that when there is no adequate filtering of evidence, there can be dozens of witnesses out of which just a few have something to contribute. The way in which evidence is introduced at trial is also flawed because testimonies are confused with the reading of reports and interviews that do not guarantee that the principle of contradiction is respected. In Neuquén, Argentina, while the hearing is to be used as the final space in which the parties can reach an agreement (from trial diversion to abbreviated proceedings) per the law, if the parties reach agreements regarding alternative outcomes after that point, the judges accept them. In Guatemala, one of the recurring complaints presented by judges about the preliminary hearing is that prosecutors are unfamiliar with the case, which means that the poor practice of reading the charges at the hearing is common. This problem comes from the Public Prosecution Service management model in which the prosecutor who conducted the investigation does not give the case to the litigating prosecutor who will take part in the preliminary hearing far enough in advance. Two weaknesses have been identified in the hearing during which evidence is offered: that judges do not allow for discussion of the evidence between the prosecution and defense and that procedural subjects provide detailed descriptions of the subject of statements offered by witnesses and experts, which is a negative for the sentencing court because the evidence is frequently contaminated by the time it gets to trial. The Mexico report states that the hearing loses importance given that the discussion is held during the preliminary hearing because of the need to link the defendant to the proceedings. There is a reform underway that would eliminate the connection to proceedings at the initial hearing, which would allow the preliminary hearing to be strengthened.

Other countries have eliminated or considered eliminating this hearing. It has undergone various changes in Bolivia. The CPC approved in 1999 provided for a pretrial hearing, but these were not frequently held. As a result, changes were made to the regulatory system in 2010 to establish the specific dynamic that the hearing was to follow. The country report states that due to administrative problems that generated obstacles to the use of these hearings, the law passed to streamline and increase the effectiveness of the criminal justice system in October 2014 modified the CPC and required the investigating judge to give the accusation to the sentencing judge or tribunal within 24 hours. In other words, the preliminary hearing was eliminated and replaced with direct written submission. In Costa Rica, bills have been proposed by the judiciary that would eliminate this hearing so that cases would go directly from the drafting of the accusation to the oral discussion or trial. In Costa Rica, it is said that, far from being a strategic phase, the preliminary hearing became a mere formality. This has forced trial judges to address incidents of illegal exclusion of evidence, defective procedural activities and even cases that should not have reached this stage.

Oral trial hearing

Finally, even though oral trials have been used in the region for decades, they currently

present two main problems. The first is the active role of the judge in questioning witnesses. In Bolivia, the judge's role during the hearing is not completely passive. The operators interviewed report that judges regularly pose questions to witnesses in order to clarify doubts that they have. In Brazil, a 2008 reform changed the procedural system to incorporate the examination and cross examination technique, but judges play a very active role in questioning witnesses, which in many cases exceeds the depth of the questioning carried out by litigators. In Cuba, a methodological guide to oral trials issued by the Supreme Court tried to correct several problems with the dynamic of the oral trial. The local report states that today the secretary reads a summary of the facts that are the object of the accusation at the outset of the trial. These have been developed by the judge in the case ahead of time, which means that if the parties do not read the documents the parties have no information about the contents of the accusation. Once witnesses and experts are questioned, the courts can engage in questioning, and usually do, in order to arrive at a better understanding of facts. They also may incorporate any evidence that they deem necessary to prove any of the facts that are the object of the documents submitted by the parties when the judge determines that they have not been sufficiently elucidated.

In addition, the quality of litigation during the trial hearing is low. This is based on the situation of several countries. In Chile, there is the perception that the interrogations are mere rhetorical exercises. They are more mechanical and the cross examinations are inconsistent. One piece of information that is important to note is the increase in acquittals. The percentage of convictions in 2006 was 81%, but that number dropped to 65.3% of oral trial sentences in 2015. In Ecuador, cross examination is handled ineffectively. The failure to highlight weaknesses means that the most common outcome is an extension of the questioning. Objections are not used. In Costa Rica, the parties are not allowed to make opening statements. When this practice began in some locations, magistrates who were serving in posts around the country said that the practice was illegal because the rule in Costa Rica is that the prosecutor must read the charges. This led attorneys to abandon the practice. As such, a trial begins with a discussion after the charges have been read, without giving the defense the opportunity to propose an alternative interpretation of the facts. In Honduras, witness testimony continues to be one of the most frequently used type of evidence. It is therefore necessary to improve examination and cross-examination techniques, particularly in view of the procedural regulation of a country that prohibits the formulation of leading or suggestive questions. This is reflected in the courts' active intervention in the formulation of questions that they consider to be timely in order to address missing information (due to the lack of adequate technique) or belief that the parties have not asked the right questions or that they have asked them incorrectly. However, it is important to note the experience of the Argentine province of Neuquén, where the parties generally have a strategy for the case during hearings and the judge takes on a passive role throughout and never asks questions. The implementation of trial by jury has increased the quality of litigation and has led litigators to use plain language.

c) Regulation of jury trials

In the previous section, we discussed the issues that have emerged around oral trials in the region. In this section, we will focus on one of the possible modes for substantiation of the trial: through a tribunal comprised of lay jurors. We believe that this dynamic is one of the most effective mechanisms for expanding the participation of the public in criminal justice and democratizing the work of judicial systems.

The table 3 on the next page presents information regarding the way in which trial by jury is regulated in the region's criminal procedure systems, specifically in regard to the type of crimes for which they are used and the number of jury members.

TABLE 3. Trial by jury in Latin America

COUNTRY	USE OF TRIAL BY JURY	TYPES OF CRIMES FOR WHICH JURIES ARE USED	NUMBER OF JURY MEMBERS[34]
Argentina (Federal)	No[35]	–	–
Argentina (Neuquén)	Yes	Cases with a sentence of over 15 years and crimes against sexual integrity or which result in death or serious injury	12
Bolivia	No	–	–
Brazil (Federal)	Yes	Intentional crimes involving loss of life	7
Brazil (Bahía)			
Chile	No	–	–
Colombia	No	–	–
Costa Rica	No	–	–
Cuba	Yes	All[36]	2
Ecuador	No	–	–
El Salvador	Yes	Assault, serious and very serious assault, aggravated assault, crimes involving personal autonomy and damages and aggravated damages	5
Guatemala	No	–	–
Honduras	No	–	–
Mexico (Federal)	No	–	–
Mexico (Nuevo León)	No	–	–
Nicaragua	Yes	Serious assault, very serious assault and aggravated robbery.	6
Panama	Yes	1. Homicide that is not the product of terrorism, kidnapping, extortion, illicit association, gang activity, drug trafficking or money laundering. 2. Abortion caused intentionally that results in the woman's death due to the means used. 3. Crimes that involve risk to the public and crimes against public health that lead to a death with the exception of those caused by recklessness, negligence or lack of expertise in the exercise of a profession or trade.	7
Paraguay	No	–	–
Peru	No	–	–
Dominican Republic	No	–	–
Uruguay	No	–	–
Venezuela	No	–	–

Source: Developed by the authors.

34 This column presents the number of full jurors who serve at trial.

35 Article 249 of the new CPC provides for a jury whose attributes are outlined in a special law. It states that the trial by jury law will determine the composition, integration, constitution, substantiation and deliberation of the trial in which the jury participates.

36 The author of the Cuba country report states that the proportion in regard to the integration of the courts depends on the jurisdictional level and other conditions of organization. The less complex cases that are heard in municipalities involving sanctions of up to one year in prison are heard by one professional judge and two lay judges. At the provincial level and in the Supreme Court, the panel consists of five judges, three professional and two lay, for a considerable number of cases. However, there are cases in which the panel is composed of three judges. It is important to note that the category of jury is used to identify the citizen members of the jury who issue a binary decision regarding guilt while the citizens who serve as lay judges under the same conditions as professional judges.

Trial by jury in criminal proceedings has been at the center of the design of criminal justice in nearly every Latin American constitution since the early 19th century. Many of them regulate it but have not implemented it, as is the case of Argentina (where the latest constitutional reform passed in 1994 ratified the three articles that provide for this figure), Colombia (juries of conscience are regulated at the constitutional level through Article 116, which states that private parties may be temporarily invested with the function of administering justice as jurors in criminal cases, conciliators or arbitrators authorized by the parties to issue rulings in law or equity under the terms set out in the law) and Uruguay.

Chile used trial by jury for print trials intermittently between 1813 and 1925. The jury was stipulated as part of the protection for freedom of the press during that period in a brief regulation. The use of trial by jury is expressly regulated in Article 20 of Mexico's 1917 Constitution as a guarantee in criminal trials. It has been eliminated in other countries such as Venezuela (the classic model was eliminated in 2001 and the volunteer model in 2012) and Bolivia, where the local report states that the CPC approved in 1999 provided for oral trials with citizen juries in the context of the volunteer tribunal (two technical judges and three citizens) for crimes of public action that could lead to up to four years in prison. After a few years, management problems affected the sentencing tribunal staffing process, leading to significant judicial congestion that had a serious impact on the beginning and prosecution of trials. In October 2014, the Law to Streamline and Increase the Effectiveness of the Criminal Procedure System eliminated the use of citizen judges. In Nicaragua, it has become hard to find citizen jurors for the past few years. The country report suggests that publicity on citizen responsibility for imparting judge has been launched and a radio show called *An Hour with Justice* was created seven years ago. It is broadcast weekly and features judges, litigators and judicial facilitators.

3. THE PROTECTION OF THE GUARANTEE SYSTEM

According to Alberto Binder (2012, p. 167), the guarantee system is a set of principles that are expressed in technical tools designed to protect all citizens from abuses of power. These principles have been built in a historic mode based on specific citizen struggles. This system has three functionally integrated areas: requirements of verifiability (anything related to the need to attribute value of truth to avoid vagueness or confusion), the principles of legality (only acts identified as crimes under the law), culpability (only actions that are avoidable and thus reproachable), damages (not any action, but only one that produces harm) and proportionality (not any harm, but important harm that is related to the type of response), verification conditions (the requirements, forms and standards of action that regulate the way in which the truth is constructed based on the specific obligation of each of the parties), comprised of impartiality (independence, organization, natural judge, stability and suitability), contradiction (right to a single, certain and complete accusation, the right to defense and the right to be treated as innocent), publicity (the hearing as a method in that it goes against the tendency to keep matters secret) and rules of evidence (the set of filters that prevent information from being distorted and manipulated and the set of rules that guide and provide certainty for the construction of the final story) integrated with the rules of evidence, from admissibility through assessment and foundation at oral trial.

In the pages that follow, we will focus on describing the functionality of some of these principles that are interesting to highlight based on the information provided in the country reports.

There is no regional trend in favor of the active exercise of the right to defense counsel. For example, the Bolivia country report states that in the investigation stage, the defense could

play a more active role, mainly in the conditions of release hearing, where the defense attorney can emphasize the lack of information presented by the prosecutor to legitimate the use of pretrial detention. However, they are limited to litigating against the clock, waiting for the defendant to serve for the maximum period so that he or she can request their release. In Nicaragua, professional and private defense services continue to reflect remnant of the inquisitorial system. Defense attorneys spend a lot of time reading reports, mainly use written requests and of course expect written decisions. They also fail to use the opportunities provided by public hearings in which they can and should argue in favor of immediacy, concentration and publicity and ask that the judicial official rule during the hearing.

In El Salvador, the country report points to issues with the initial meeting between defense counsel and defendant because monitored meetings held on the day of the hearing are not productive for the defense. In the Argentine province of Neuquén, defense attorneys normally interview the defendant prior to the arraignment, though they tend to do so minutes before it begins even though they could have scheduled it much earlier. By contrast, a few regional experiences highlight effective work by defense attorneys. In Uruguay, just a few months after the implementation of the system, defense attorneys established a practice of always meeting with the defendant prior to the arraignment to ensure that their right to a defense was fully exercised in that hearing. The Cuban model is also worthy of recognition. The country report states that there are no ostensible barriers to equal access to justice. On the contrary, guaranteeing this right has been a priority of the Cuban government. In that sense, it has strengthened the role of the practice of law in Cuba through the National Collective Law Firms Organization, which combines professional quality law services for members of the public with free criminal representation through legal aid lawyers. The Justice Ministry's mission is to ensure that legal fees do not threaten the principle that inspired the creation of the organization, which was to promote access to quality legal services regardless of the client's ability to pay.

In regard to the role of the guarantee judge during the investigation stage, some countries reported that passivity and confusion persist. In Bolivia, the most serious issue is that the judge does not monitor the duration of pretrial detention. As a result, in many cases defendants are held for longer than the legal maximum of 24 months. Furthermore, judges use language that is difficult to understand when talking with the defendant, including technical terms and legal language. In Chile, the guarantee role is weakened during arraignment. For example, the judge only plays an active role in verifying the legality of the arrest in 20% of cases. In Paraguay, any judicial reasoning linked to the relevance of evidence for its admission is considered to be a preview of the oral and public trial. We understand that this implies an erroneous understanding of the principle of impartiality. In some countries, remnants of the judge playing an active role in the production of information persist during the oral trial stage. In El Salvador, the trial judge receives information prior to the discussion. The country report states that when the trial is held, the judge is already familiar with the case and the evidence because the information is submitted in writing by the Public Prosecution Service, which means that there is a risk that the judge may not be completely impartial when issuing a sentence. In Ecuador, there is a problem with the definition of the judge's role, because they sometimes go against the dispositive principle by forcing the rule in order to play an excessively active role. For example, the law states that clarifying questions may be posed to witnesses and experts during the trial, but this is used to question them and to conduct cross-examinations. By contrast, during hearings like the preliminary hearing, where it would be helpful for the judge to propose possible agreements, they tend to adopt a contemplative attitude. In Costa Rica, the principle of impartiality is violated on a daily basis and there is not enough awareness of it. For example, in some cases, judges examine witnesses or reject ex officio questions. Under the current

federal system in Argentina, there are more significant issues related to judges' impartiality. The local report states that it is compromised at all levels of the proceedings. Due to the procedural design, the investigation is conducted by the investigating judge, who must both do this work and rule, which is the greatest and most palpable impingement on this principle. During the preliminary hearing, the judge asks the Public Prosecution Service to present the charges, which also means that there is a problem with the division of roles between formulating charges and trying the case.

Third, we are interested in highlighting experiences that are currently being developed in regard to the inclusion of the restorative justice paradigm in our region. Restorative justice is a new approach to the treatment of criminal disputes that moves away from the logic of criminal law and focuses on restoring the relationship between victim and victimizer, as we will see below. Mera (2009) offers interesting reflections regarding the connections between the guarantee standards and restorative justice and the proposal to reformulate new standards based on the principles of this model for understanding justice.

In Chile, drug treatment courts engage the principles of therapeutic justice. These entities allow a habitual user of drugs and/or alcohol to benefit from diversion if they agree to seek treatment for their addiction. This experience began in 2002 as a pilot project that was implemented in guarantee courts for adults, and has been used for both adults and adolescents since 2016. In Mexico, alternative justice is regulated under the Alternative Dispute Resolution Mechanisms Law, a single piece of legislation that applies to this area nationwide. The law regulates conditions for the waiving of matters, guidelines for managing cases after the sessions, qualifications and training for facilitators and standards for jurisdiction and conduct for alternative justice programs. By February 2016, 32 federative entities had at least one alternative justice center, and there are 314 throughout the country. They have generated positive results. Since 2016, 84% of the cases handled through alternative means concluded with a reparatory agreement, and the terms of the agreement were met in 87% of cases. In Costa Rica, the Judiciary has a team of professionals from the Judiciary, Public Prosecution Service, Public Defense Service and the fields of social work and psychology who work together to achieve social harmony through the recovery of offenders, victims and communities. They also seek to repair damages through a collaborative process centered on the victims, defendants and community. Institutional support is provided for this work. The team offers support to defendants and victims from the perspective of each of their specialties, holding restorative meetings and monitoring hearings in order to ensure that the terms of agreements are met. The program is used in seven judicial circuits, which means that it has broad but not national coverage. It is used only for cases in which the conditional execution of the sentence can be applied, meaning that the sentence would not exceed three years in prison and can only be used for the primary offender. In the Dominican Republic, it is important to highlight the experience of the Treatment Under Judicial Supervision Project, which was introduced in the Seventh Investigation Court in the National District for minors who have been charged with drug-related offenses. During the preliminary hearing, diversion, abbreviated trial or diversion can be used to ensure a restorative and therapeutic approach to justice. Brazil created a Restorative Justice Center in Bahía in 2010 that focuses on mediation and peace or restorative justice circles that are managed by a team of volunteer facilitators.

4. THE ORGANIZATION AND OPERATION OF INSTITUTIONS

All judicial institutions experienced profound changes as a result of the implementation of the adversarial criminal justice system. These changes initially involved a reorganization of

TABLE 4. Characteristics of judicial institutions

COUNTRY	INSTITUTIONAL LOCATION OF THE PUBLIC PROSECUTION SERVICE	INSTITUTIONAL LOCATION OF THE PUBLIC DEFENSE SERVICE	EXISTENCE OF JUDICIAL OR ADMINISTRATIVE OFFICES	PRESENCE OF CRIMINAL ANALYSIS UNITS IN PUBLIC PROSECUTION SERVICES
Argentina (Federal)	Autonomous	Autonomous	No	Yes
Argentina (Neuquén)[37]	Judiciary	Judiciary	Yes	No
Bolivia	Autonomous	Ministry of Justice[38]	No	No
Brazil (Federal)	Autonomous	Autonomous	No	No
Brazil (Bahía)	Autonomous	Autonomous	No	No
Chile	Autonomous	Ministry of Justice	Yes	Yes
Colombia	Autonomous	Autonomous	Yes[39]	Yes
Costa Rica	Judiciary	Judiciary	No	Yes
Cuba	National Assembly	Autonomous	No	No
Ecuador	Judiciary[40]	Judiciary	Yes	No[41]
El Salvador	Autonomous	Public Prosecution Service[42]	No	No
Guatemala	Autonomous	Autonomous	Yes	Yes
Honduras	Autonomous	Judiciary	No	Yes
Mexico (Federal)	Autonomous	Judiciary	Yes	Yes
Mexico (Nuevo León)	Autonomous	Autonomous	Yes	No[43]
Nicaragua	Autonomous	Judiciary	Yes	No
Panama	Autonomous	Judiciary	Yes	No
Paraguay	Autonomous	Autonomous	No	No
Peru	Autonomous	Executive Branch	Yes	Yes
Dominican Republic	Autonomous	Autonomous	Yes[44]	Yes[45]
Uruguay	Executive Branch[46]	Judiciary	Yes	Yes
Venezuela	*Poder Ciudadano*[47]	Autonomous[48]	No	No

Source: Developed by the authors.

37 Although the Public Prosecution Service and Public Defense Service in Neuquén form part of the Judiciary, the report notes that they are autonomous agencies.

38 The Bolivia country report states that Law 463 on the Plurinational Public Defense Service recognizes that service as a decentralized institution. However, the Ministry of Justice has the authority to appoint its Director and determines its budget, which means that in practice it forms part of the Ministry of Justice.

39 The Colombia report states that while Judicial Services Centers were implemented to handle administrative tasks as a result of the adversarial criminal justice reform, judges' offices continue to have the same structure they did prior to the reform.

40 The Ecuador country report states that the Public Prosecution and Defense Services are part of the Judiciary. The Constitution states that they are autonomous but it also establishes that the Judiciary Council is the government agency that oversees the Judiciary. The Judiciary Statutory Code reinforces this position. We thus listed it as coming under the Judiciary.

41 The local author states that there is a National Criminal Policy Directorate that is intended to carry out this work, but in practice it does not do so.

42 In El Salvador, the Criminal Public Defense Service is located inside the Public Prosecution Service in accordance with Articles 191 and 192 of the Constitution, which states that it will be comprised of the Public Prosecution Service, Human Rights Defense Service and General Public Defense Service.

43 The local report states that the Public Prosecution Service's reform plan includes the installation of this type of unit and other strategies for strengthening crime investigation.

44 The Dominican Republic country report indicates that a key change introduced by the CPC was the creation of the judicial office. This resulted in the administrative functions of judges being reassigned to secretaries and auxiliary personnel. However, a real separation of functions has not occurred, because the latter continue to report to the judge. In fact, the report states that they are required to 'assist the judge.'

45 In the Dominican Republic, the Crime Analysis Unit was created in 2013 to evaluate the social phenomena and conflicts and formulate public policies for managing crime based on that reality. However, the report states that the unit did not achieve the ambitious goals proposed when it was created. Today, it is only a department within the Statistical Analysis Unit of the Public Prosecution Service.

46 However, the Public Defender's Office is a decentralized service with technical autonomy.

47 Venezuela's *Poder Ciudadano* is comprised of the Office of the Comptroller General, the Ombudsman's Office and the Public Prosecution Service.

48 The local report states that the Public Defense Service is autonomous but reports to the Supreme Court in regard to finances.

each entity's functions, assigning exclusive authority over direction of the prosecution to the Public Prosecution Service, support for prosecutors in the criminal investigation to the police, defendant representative services to the Public Defense Service and jurisdictional tasks to judges. The second stage of changes focused on aligning institutional management models with the demands imposed by the use of oral procedures. As such, Public Prosecution Services moved away from the structure that reflected that of the Judiciary and established systems based on much more flexible territorial or thematic flows with a new understanding of criminality. The Judiciary created offices focused on court administration and Public Defense Services organized their units on the basis of specific topics and increased the flexibility with which defense attorneys intervened in the criminal proceedings. In the pages that follow, we analyze the current situation of these institution in regard to four specific areas: the institutional location of public prosecution and defense services, the existence of administrative offices within judiciaries and the presence of criminal analysis units in Public Prosecution Services.

As the table shows, while nearly every country in the region has autonomous Public Prosecution Services, the Public Defense Services continue to belong to other judicial institutions. Out of the 22 systems analyzed, only nine enjoy autonomy. For example, in Bolivia, despite the decentralized nature of the Public Defense Service, the Ministry of Justice has the authority to appoint its director and determine its budget, which means that in practice it reports to the Ministry of Justice. In Chile, for its part, the Public Defense Service is a functionally decentralized and territorially deconcentrated government institution that reports to the Ministry of Justice.

In regard to the internal organization of these entities, we note that some have established thematic or specialized units to address specific groups or types of conflicts. Chile has specialized defense units, the most developed of which are those created for juveniles, members of indigenous groups, gender-based crimes, inmates and migrants. In Nicaragua, public defenders who handle criminal cases are assigned to judicial offices by specialty. Beginning in 2014, the legal system created hearings units (guarantee courts), the adult criminal district unit (serious crimes), the local criminal unit (less serious crimes), the unit for violence against women, adolescent unit, sentence execution unit, objections unit and prison surveillance unit (for the sentence execution phase and security measures). In autonomous regions on the Atlantic coast and in the southern part of the country, there is a defense system for Afro-descendant and indigenous groups. The Family Unit works with the Criminal Unit when a family member is a defendant. In Neuquén, the defense has managed to develop its own investigation lines apart from those of the Public Prosecution Service because the criminal management service is the most innovative element of the Public Defense Service. This service exists to support defense attorneys' efforts to conduct their own investigations, including visiting the crime scene, interviewing witnesses and working with experts. Defense counsel may also seek out evidence regarding the defendant's roots in the community, which allows them to present arguments regarding conditions of release, especially pretrial detention. The Public Defense Service also has an interdisciplinary technical team that provides support and advises public defenders on scientific and technical issues, providing this sort of information.

On the other hand, the table also shows that the differentiation between jurisdictional functions and administrative ones has yet to be implemented in the internal organization of the Judiciary. In Bolivia, the report states that there are no judicial offices or structures responsible for the administrative part of the courts, which means that judges continue to take on this work. This is representative of what is occurring in another ten judicial systems. In other countries, by contrast, progress has been made on the creation of judicial or administrative of-

fices responsible for this area, or the functions have been reassigned to secretaries who can manage the courts without any functional dependence on judges. The case of Chile is noteworthy. The position of court administrative manager was created to handle oversight of hearings, the time set aside for them and judges' workloads. While the administrator is meant to have broad powers, in practice there are limits to their authority because the committee of judges and Chief Justice assess and approve the administrator's proposals. For its part, in Nicaragua, administrative activities within the justice administration system have been delegated to a new judicial office management model comprised of administrative bodies assigned special functions. This allows judges and magistrates to focus on their core functions rather than administrative responsibilities. The system was introduced gradually until the Office Management System had been implemented almost nationwide. It has a structure that facilitates its work, which is mainly comprised of the National Judicial Administration and Career Council (which has four Supreme Court justices), the Director responsible for the General Administrative Secretariat, an assistant director and an advisor. The entity is also broken down into four divisions: legal infrastructure, monitoring and oversight, implementation and judicial support. The plan began as a pilot program in 2007.

Another aspect that we are interested in addressing in regard to the organization of the courts is that overall there are no experiences with judges' organizations that intervene equally in all of the cases that enter the system with the exception of a few provinces in Argentina. The case of Neuquén is important to note, as all of the judges there with the exception of those who serve on the Superior Court, Appeals Court, sentence execution judges and judges who handle children's and adolescents' cases are organized into two organizations. The first has jurisdiction over the First Judicial Region and the other covers the remaining regions. Appeals Court judges are part of an Appeals Board and staff the courtrooms using a lottery system.

For its part, the Public Prosecution Service has undergone very notable changes but has not yet established a strategic vision of criminal investigation. This means that the minority of cases involve experiences with criminal analysis offices or units that have as their main mission moving away from the case-by-base logic and understanding that crime is based on the existence of major criminal structures that operate regionally. In Bolivia, it was reported that the organizational structure of the Public Prosecution Service has changed significantly under the most recent Prosecutor General. However, this change –which includes the creation of important new units and directorates– and the implementation of a new management model, have not substantially impacted how criminal cases are processed by this entity, particularly those of limited social relevance. In 2016, the Prosecutor General announced the creation of a criminal policy analysis commission in the State Public Prosecutor General's Office and the implementation (in the country's nine regions) of Criminal Analysis Units. However, as of this date, none of these measures have been implemented. In Chile, the Public Prosecution Service did not create criminal analysis units until the Public Prosecution Strengthening Law was passed in 2015. The Criminal Analysis and Investigative Focus System incorporated strategies for analysis and investigation of criminal markets and other criminal entities. The organizational structure is led by a Coordinating Unit that reports to the National Public Prosecution Service's Division of Research, Evaluation and Oversight, which is responsible for the implementation, technical guidance, training and evaluation. Each Regional Public Prosecution Service has created a Criminal Analysis and Investigative Foci System comprised of criminal analysts, assistant prosecutors and led by a Chief Prosecutor for Criminal Analysis and Investigative Foci, who reports directly to the respective Regional Prosecutor. The process was implemented gradually until early 2018, and the first national evaluation process was conducted in late 2018.

Finally, we are interested in describing the experiences that are being developed in the re-

gion in relation to the way in which conditions of release other than pretrial detention are overseen and the rules of conduct imposed in the context of diversion. In Ecuador, the Evaluation, Supervision and Monitoring of Alternatives to Pretrial Detention Unit was created in 2013 in the city of Cuenca. Its purpose is to assess the community roots of individuals who have been subjected to measures that do not involve incarceration in order to improve the quality of decisions and monitor the fulfillment of the conditions set. It lasted for four months and it was found that in more than half of cases in which the defendant was caught in the act, the judge issued alternative measures, and of the three cases that went to trial, all of the defendants appeared in court. In Mexico, given that information introduced during the preliminary phase in fundamental to justifying or discussing it, one of the best practices to be highlighted and in which Mexico is a regional pioneer is the existence of the Pretrial Services Model, which is handled by Conditions of Release Units. These institutions were designed to serve two purposes. The first was to assess procedural risk based on data obtained through an interview with the person who has been detained or is under investigation and then verified through field work. Once the risk report is drafted, it is sent to the parties so that they will have the information required to discuss the measure. The second purpose of these entities is to supervise conditions of release, conditions imposed through diversion and reparations agreements with deferred fulfillment. Data from the Criminal Procedure Justice Institute indicate high levels of fulfillment of the conditions of release in nearly every state that are well over 90%, which has led many to advocate for the strengthening of these offices. In the long-term, they are thought to effectively reduce levels of pretrial detention and some think that they could serve as the basis for a reform that would remove ex officio pretrial detention from the Constitution. For its part, Panama has chosen to give this role to the Public Prosecution Service. The entity's Conditions of Release Monitoring Office manages notification records, conducts home visits for individuals under house arrest and holds the passports of individuals who have been prohibited from leaving the country. The system does not have enough resources to provide effective monitoring of other conditions of release. These experiences also are being developed in some states in Brazil and some provinces in Argentina such as Santiago del Estero and Entre Ríos. There have been discussions or attempts to implement them in other countries such as Chile, Bolivia and Peru, though these have not been successful.

PROPOSALS FOR STRENGTHENING ADVERSARIAL CRIMINAL JUSTICE IN LATIN AMERICA

1. PROGRAM TO IMPROVE THE USE OF ORAL PROCEDURES

Oral procedures have undoubtedly been one of the key elements of criminal justice reform processes in Latin America. To begin this section, we could mention dozens of considerations, interpretations and analyses that have emerged on the basis of this emblematic principle of new adversarial systems. In order to move away from references that are most familiar to the public, we will start our analysis with the mention of one of the qualities of oral procedures that is not always recognized: the connection between the use of oral procedures and the idea of the trial.

For Binder (2014, p. 29), when one refers to oral procedures, one is actually referring to the fact that all people have the right not to face a sentence without first going to trial, and the trial is not just any procedure. It is the structure (set of forms connected to acts, subjects, time, space, coercion and case) that sustains impartiality, contradiction and publicity. As a result, the idea of the trial as a "central element of the process" has been hidden both in inquisitorial trial systems and in recent adversarial ones. As such, when we discuss the use of oral procedures as one of the values of the criminal procedure reform, we are referring to this ideal of a pretrial stage in which a series of tools or collateral principles such as immediacy, publicity, contradiction and concentration are deployed.

Based on Binder's reflection, we see oral procedures as encapsulating an ideal of justice that has as its clearest counterpoint the inquisitorial procedure in which the idea of the trial is blurred between mechanical actions that are secret and written. This connection between oral procedures and the institution of the trial which a set of effects (like those mentioned) underlay is the crystallization of the concept of oral procedures as a political principle of criminal procedure reforms. The purpose of this political objective is to unearth the inquisitorial trial model characterized by writing as a form of judging from which other consequences emerge, such as the delegation of jurisdictional functions, the opaqueness of judicial actions and a focus on the judge.

Following Binder (2012) once again, the other major aspect of oral procedures is that it allows us to situate the hearing as the ideal space for resolving the conflict. In contrast to the inquisitorial procedure in which the participation of the defendant and victim was marginal, in the adversarial system, the dispute is acted out in the oral hearing, which allows the conflict to be exteriorized and for discussion and deliberation to take place among the various parties represented. This pacification of the dispute highlights the important of the ritual understood in the sense that the staging transmits a message that impacts the recipients at the social level.

As we will see below, one of the aspects that must be revitalized in contemporary criminal justice is the restorative and reparative ideal through the compositional channels of dispute resolution. The use of oral procedures will be the only tool that allows us to obtain positive results in this important challenge.

Below, we will offer a brief analysis of the areas in which the use of oral procedures is not having the desired development in the current operation of criminal justice systems. We have identified areas that should be strengthened on theoretical and practical levels. To that end, we propose the creation of a Latin American Program for Improving the Use of Oral Procedures as a point of coming together for the institutions responsible for judicial training, the academic world and NGOs that monitor the criminal justice system.

a) The guarantee of the fact

We have observed that in many of the new Latin American criminal justice systems, the hearing held to formalize the investigation has become a fairly formal stage in which the prosecutor informs the defendant of the acts for which he or she is being investigated in the presence of defense counsel. This moment becomes a procedural milestone because it leads to the calculation of timelines such as, for example, the duration of the criminal investigation stage. Furthermore, in many cases this hearing is merged with others, such as the request for a condition of release or alternative to oral trial.

The quality of information about the act that the charges are based on is low in several countries. This may be due to two factors. First, the narrative developed by the Public Prosecution Service tends to be based on information provided by law enforcement. This is problematic because it is assumed that the description of the facts that the prosecutor offers can be biased, which will later impact all of the work conducted in the criminal proceedings. Second, the facts described do not always have the necessary level of clarity and detail. We tend to talk about the need for the facts contained in the formalization of charges to be self-sufficient and at least capable of answering the key questions (who, what, where, when and how).

As such, the hearing should be the ideal space in which to improve and rectify this information from the Public Prosecution Service when it does not meet the standard for formalization of the facts to be investigated. The role of the defense will be crucial for identifying the need for the facts to be detailed, expanded or corrected. The strategic importance of the work of the defense during this hearing is determined by the principle of congruency, which will limit the prosecution's accusation to the facts that were initially formalized. The guarantee judge, for his or her part, should participate in the discussion and ensure that the list of facts has been adequately developed even when the defense has not contested the information (Rua and González, 2018).

If the formalization hearing becomes a ritual to communicate information to the party that is investigated without providing him or her with an opportunity to intervene or modify the description of the facts, it ceases to serve the purpose of fostering a better exchange of information.

The formalization of the investigation is conceived of as a right of the defendant that Binder has called the guarantee of the fact.[49] From this perspective, it will be necessary to identify the problem, which is that in many cases this formalization is immediately followed by a request for an alternative outcome or conditional release. In these cases, the right to know which facts are being investigated in advance requires that we have a reasonable timeframe in which to assimilate the facts and analyze defense strategies before being required to participate in new procedural actions by the Public Prosecution Service.

49 In regard to the guarantee of fact, the requirements of verifiability are key. This is the fact that can be verified –which should respect the principles of legality, harm, immediacy and publicity– and the rules of evidence, which are the rules that operate as a limit for the submission of information at trial (Binder, 2012, 217 and following).

In countries like Chile, discussions have recently been conducted regarding the hypothesis that formalizing an investigation causes significant harm to the defendant, impacting the principle of presumption of innocence in the court of public opinion (Ried, 2017). In that sense, it is important to recall that there are various procedural situations in which oral and public hearings are held with the participation of the defendant as an individual who is presumed to be innocent. A series of accusations are made and in some cases very serious requests are entered, such as pretrial detention pending trial. All of these actions are held publicly so that the community as a whole can understand how disputes are resolved in the justice system. As such, regardless of whether there may be a risk that the defendant's prestige may be harmed due to improper behavior on the part of the media, we believe that this does not justify the suppression of the public nature of this procedural stage. On the contrary, other channels must be developed that do not move against public hearings and that do not involve returning to opaque and secret concepts of criminal investigation. It would seem much more prudent to engage in persuasive and collaborative efforts to educate the media regarding the characteristics of the criminal justice system that have not always taken place.

b) Agreement hearings

The majority of the countries of the region regulate oral hearings for the formalization of agreements among the parties whether they are diversion or reparations agreements. The basis for these hearings tends to be focused on the judge verifying that the procedural requirements necessary for the agreements to be applied have been met.

We have observed that in the majority of cases, the negotiations occur outside of the hearing between the parties. This may involve the prosecution service and defense counsel or the victim and the defendant, as tends to be required for reparations agreements. As such, given that the agreements tend to be discussed in advance, the hearings tend to be short and rarely deviate from the verification of legal requirements.

In order to avoid that logic, agreement hearings are a privileged space for discussing the real causes of the conflict between the parties and especially for generating various options that lead to its resolution. It is very common for the conditions imposed on the defendant to be formulated in an excessively general manner or in a way that is not connected to the original conflict or the resocialization of the defendant. If we insert dispute management agreements into the hearing, we can direct the discussion from, for example, diversion to the use of a condition that could help reduce the level of conflict between the parties and even enter a restorative paradigm, as we will see below.

Judicial work in agreement hearings is often diluted by the erroneous belief that the judge should be passive and should not get involved in the litigation in an adversarial system. On the contrary, at the investigation stage, the judge has a much more active role in the sense of asking for the parties to provide information and in order to encourage the parties to explore various options for alternative outcomes. We are obviously not referring to a judge who approves agreements that have not been authorized by the parties. The judge instead offers the parties the opportunity to explore and discuss these alternatives that procedural legislation offers.

We believe that the judge should not analyze the merits or proportionality of the agreement in each specific case given that the logic of the adversarial system trusts that each of the parties will manage the case based on their interests and the strength of their arguments while the judicial authority must safeguard its impartiality at all times. The judicial authority should only intervene in excessively disproportional cases or those in which one could assume that one party is subjugating or abusing the other (Rua and González, 2017).

c) The use of oral procedures and conditions of release

Currently, conditions of release hearings in most countries in the region do not involve in-depth discussions of the material and procedural supposition underlying the possibility of imposing a condition of release.

Regardless of the fact that pretrial detention has bloomed again due to the implementation of *ex officio* pretrial detention for certain crimes in countries like Mexico or the restriction of alternative conditions of release in cases involving recidivism and crimes against property and the appearance of abstract procedural risks in the anti-crime short agendas in Chile (Fandiño et. al, 2018), it is necessary to highlight oral procedures as a tool for promoting a higher quality discussion based on the configuration of requirements for imposing a condition of release

We still see prosecutors request very intense conditions of release such as pretrial detention, alluding to the gravity of the crime or anticipated sentence length. While this approach does not align with the adequate form of requesting a condition of release, it is also serious to find that the defense does not tend to offer counter-arguments and that the judge does not direct a discussion regarding the need to focus on the configuration of the material and procedural suppositions.

In a conditions of release hearing, the guarantee judge's role is to interpolate the parties in order to ascertain information about the investigation stage. He or she should ask the prosecution service to explain which alleged actions are typified as crimes and the procedural risks set out in the legislation.

Finally, another challenge that should be addressed is the introduction of Pretrial Services or Alternative and Substitutive Measures Offices so that an agency can provide objective information regarding the economic, family and professional situation of the defendant. This would allow the discussion of conditions of release to be based on higher quality information.

d) The use of oral procedures in the preliminary hearing

One of the elements that guarantees that criminal procedure works properly is the preservation of the oral trial as a space for resolving only the most serious conflicts that the Public Prosecution Service decides to elevate due to the criteria of criminal prosecution policy. As Binder (1993, p. 231) argues, many of the most important decisions of procedural policy that shape criminal procedure move through this preliminary phase and the specific way in which the result of the investigation is controlled. In this way, this procedural stage emerges as the last chance for the parties to reach an agreement, monitor the prosecutor's charges or prepare for the oral trial hearing.

As González (2018) has observed, there are three major goals associated with the preliminary hearing: a) improving the justice system's efficiency through opportunities for the parties to reach agreements; b) controlling the quality of the information in the process; and c) discussing the admissibility and exclusion of evidence.

We have analyzed various limitations based on the use of oral procedures at this procedural stage. First, several countries such as Bolivia do not have specific regulations on hearings for this procedural moment. In other countries, such as Guatemala and Honduras, the goals of this stage are spread out across two hearings. As a result, this stage is not yet seen as a key moment of the process in some countries.

Another lack related to this hearing is the participation of judges and their ability to direct the discussion, promoting contradiction between the parties and better quality information. There is a need to expand hearing techniques in order to generate higher quality exchanges at this procedural stage. For example, it is still com-

mon for discussions related to admissibility and exclusion of evidence to be fairly formal and for efforts to filter out low quality evidence not to be made. In this sense, we believe that it is necessary to revisit the evidentiary theory underlying the regulation of the preliminary hearing and identify that the adversarial system calls on us to build standards of admissibility that serve as very strict filters for discussions of evidence. Specifically, there is a need to rethink the criterion of relevance as the key axis around which discussions of admissibility of evidence should take place. In fact, longstanding adversarial systems like Canada's call them the "heart of the admission system."

If we delve deeper into issues with expert evidence, we see that in many countries that have had an adversarial system for over a decade, such as Chile, problems such as low control of the relevance of the expert persist along with the existence of very low quality discussions of admissibility and a lack of support from Appeals Courts for first instance evidentiary exclusion decisions (Duce, 2018).

There is a significant need to restructure training of justice system operators in order to strengthen preliminary hearings, improving the quality of evidentiary discussions. One of the major responsibilities of the guarantee judge to serve as a gatekeeper and intensify the contradictory positions between the parties so that a more intense discussion is produced.

On the other hand, in order for the adversarial logic to obtain better results, the defense also must formulate its own theory of the case and for this to be manifested in the proposal of evidence for acquittal so that it is not subjected to the strategy and evidence presented by the Public Prosecution Service. These aspects are conditioned by a series of prior budgetary and institutional strengthening needs in the case of public defenders.

2. THE WORK AGENDA OF CRIMINAL JUSTICE SYSTEM INSTITUTIONS

As the initial assessment suggested, criminal justice system institutions made profound changes related to the need to move away from inquisitorial work logics and towards adversarial ones. A clear example of this is the Judiciary, where the majority of countries abandoned the traditional vertical judicial organization model and instead chose more horizontal ones such as the Judicial Office. These are characterized by aspects such as the division of jurisdictional and administrative functions. In the case of the Public Prosecution Service, we have found that most countries in the region have overcome what have been called first-generation challenges (JSCA, 2006).[50]

The level of progress on these changes varies widely depending on the country. At the risk of simplifying and generalizing, three major categories can be established.

First, there are countries in which practically no changes have been made, or where the changes have not managed to root out inquisitorial practices. We could say that Brazil, Bolivia, Paraguay, Honduras and Argentina's federal justice system are still at this stage in which the use of oral procedures and the adversarial system have not managed to have a real impact due to the absence of reforms or their ineffectiveness.

A second category includes countries in which institutional reforms have been carried out but have not had the desired impact. In these cases, a profound "duel of practices" between the organizational culture of the inquisitorial system and that of the adversarial system is ongoing. Costa Rica, El Salvador, Mexico, Ecuador and Colombia present these characteristics. This category also could include countries in which institutional changes have occurred more intensely

50 The following can be considered first generation challenges in the Public Prosecution Service: the organization reflects the Judiciary in the Public Prosecution Service, the difficult managing workload, the erroneous horizontal vision of the Public Prosecution Service and problems coordinating with the police, among other aspects.

in one institution than in another. For example, there has been a very profound change to the entire criminal prosecution system in Guatemala, but the Judiciary presents delays.

Finally, there are countries in which wide-reaching institutional reforms have been implemented in all institutions and the changes have had a positive impact on the introduction of oral procedures. This includes Chile, Argentina's provincial justice system[51] and Uruguay.

A few conclusions can be reached based on this context. First, regional discourse must continue to include minimum recommendations to which institutions must commit in order to ensure that the adversarial system functions adequately. Both countries that have made less progress and those that have implemented the most changes must reiterate the validity of some minimum needs so that oral procedures and the adversarial system can function adequately.[52]

On the other hand, over the past few years, we have identified a need to explore new challenges and focus the adversarial system in countries that have evolved more in regard to the initial changes. The proposals described below are meant to allow countries that have managed to move forward with the main changes to have a series of guidelines for continuing to strengthen the adversarial system.

a) Strengthening the Public Prosecution Service as an autonomous agency linked to the community and focused on managing conflicts

Initial motivations of autonomy in the Public Prosecution Service

As was demonstrated in the initial assessment, the Public Prosecution Service is an autonomous agency that does not report to other government branches in most Latin American countries.

At the international level, there are several models related to the institutional placement of the Public Prosecution Service, such as creating it as a dependent of the Legislative or Executive Branch (Maier, 1993). The idea that the Public Prosecution Service reports to the Executive Branch makes sense from the perspective that the government would centralize the establishment of criminal policy and criminal prosecution policy. That model generates various questions, such as the difficulty guaranteeing the functional autonomy of prosecutors when investigations are directed against government officials.

The Canadian experience is interesting. The prosecution service reported to the Executive and the Attorney General served as a member of the Executive and Director of the Prosecution Service. The Public Prosecution Service of Canada was created in 2006 as an independent service responsible for criminal prosecution. It reports to Parliament through the Attorney General, but respect for its independence is guaranteed. In this way, the Public Prosecution Service's Director oversees prosecutors without any intervention or pressure from the Executive.

This would be a good time to ask ourselves why the need for an autonomous Public Prosecution Service was established from the outset of the criminal procedure reform process in Latin America. Duce (2001, p.9) observes that a Public Prosecution Service that is dependent on the Judiciary would run the risk of judicialization and being "absorbed" by that institution to the detriment of the values of the adversarial system. On the other hand, if the Public Prosecution Service were to report to the Executive, it would run the risk of being politicized. This politicization would pose a risk that the Public Prosecution Service

51 The provinces of Neuquén, Chubut, Río Negro, Santa Fe, Salta and La Pampa could be included in this category.

52 The need for judicial offices in which jurisdictional functions are separated from administrative ones, the organizational changes in the Public Prosecution Service to adequately manage the workload, the existence of inter-institutional coordination and others.

would become an instrument of the political class for the prosecution of political enemies and to ensure the impunity of administrative political corruption. We will return to this point later on to analyze whether Mauricio Duce's warnings were manifested in countries that chose to implement models in which the prosecution service reported to another branch of government.

The current need to reinforce autonomy

Over the past few years, various international agencies and civil society organizations engaged in an effort to systematize "International Standards on the Autonomy of Prosecutors and Public Prosecution Services" (2017). We identified the main instruments of the universal and inter-American human rights system that identify the need for autonomous prosecution services.

This autonomy translates into the need for the Public Prosecution Service not to receive direct or indirect pressure or intervention on the part of the Executive Branch and for it not to be subordinate to other government entities. The way of guaranteeing autonomy is based on adequate regulation of certain critical aspects such as the appointment and removal process for the Prosecutor General and the duration of his or her term. We offer the following recommendations in this regard:

- The need to have an adequate description of the Prosecutor General's profile.
- The existence of a procedure that requires qualified majorities of other state agencies.
- The requirement that the process have elevated levels of transparency and publicity.
- The importance of the public and community having the opportunity to participate in the process.

As we have said, the Public Prosecution Services of most Latin American countries are autonomous, and these units report to other agencies, mainly the Executive Branch, in just a few cases. It is important to note that the simple regulation of their autonomy does not necessarily guarantee that the Public Prosecutor's Office is not subject to undue pressure from external stakeholders. For example, in Guatemala, an appointment model based on autonomy like that of the Application Commissions was coopted by groups that sought to influence the daily work of the Public Prosecution Service. The work that the Plaza Pública media company has done to monitor this is worthy of note, as one can see from the interview conducted with activist Helen Mack (Arrazola, 2014).

It is well known that autonomous prosecution services have investigated crimes in which important government officials were involved in criminal acts over the past few years. The investigation of Lava Jato in Brazil had drastic consequences for the political class and was possible because of the constitutional autonomy that the National Public Prosecution Service has enjoyed since 1988.

Guatemala's Public Prosecution Service also achieved historic results during its period of greatest autonomy. Prosecutor General Claudia Paz y Paz secured the conviction of the powerful general Ríos Montt, and Thelma Aldana investigated the La Línea case regarding a complex network of corruption and contraband that were alleged to be directed by the President and Vice President.

The progress made on criminal prosecution of members of the Executive Branch can have a second reading. In some cases, it can be understood as a positive example of the autonomous work of the Public Prosecution Service. However, the inverse may also be true: one might interpret this as the Public Prosecution Service being able to advance criminal prosecution of high profile cases, promoting the interests of other ideological sectors that are against the government forces. The judicialization of politics is at a culminating point in the region, and the Public Prosecution Service should not be used to instrumentalize political power struggles. In-

stead, it should work to ensure that these battles do not impact its decision-making processes because this would gradually delegitimize its autonomy.

It is also necessary to mention what has happened with Public Prosecution Services that remained linked to other branches of government. For example, in Mexico, the Public Prosecution Service was conceived of as an agency that had strong levels of dependency on other branches, especially the Executive. In 2014, 43 students disappeared from a teacher's college in Ayotzinapa, which led to the launch of the investigation of the Iguala case. Various national and international agencies found through their investigations that various institutions were directly involved in the events that led to the students' disappearance, mainly the Army and Mexican law enforcement agencies. Throughout the investigation, the Public Prosecution Service was found to have developed an "official version" of the facts that served the interests of the federal government and exonerated the federal forces implicated from any major responsibility (Fandiño and Doren, 2015). This version of events has been completely rejected by the majority of the specialized agencies and the case generated a sensation of levels of impunity in Mexico because the missing students were never found.

All of this information invites us to reflect on the importance that the Public Prosecution Service can continue to have as an autonomous institution that does not report to other branches of government. In order for it to be autonomous beyond the formal aspect, procedures for appointing and removing Prosecutors General must be strengthened. They are currently fairly opaque and many countries do not provide opportunities for civil society to oversee or monitor them.

The Public Prosecution Service must continue to explore autonomy and must refrain from seeing itself as an autarchy or isolated institution. Rather, it must be conceived of as an agency that has a balanced connection to other branches of government that is free of subordination. The politicization of criminal prosecution would be an erroneous, short-term approach to the autonomy of the Public Prosecution Service. Strengthening these entities as extra-branch agencies is also a way of ensuring that levels of impunity can be reduced in Latin American democracies, which would in turn strengthen the rule of law and legal certainty.

The Public Prosecution Service and the community

As we have examined in greater depth elsewhere, Public Prosecution Services are not only given the main function of safeguarding legality. They are also tasked with defending the interests of the community. This regulation is included in the statutory laws of various Public Prosecution Services but has not yet materialized in the concrete practices that would generate a greater connection between these agencies and communities (González, 2018). There are specific areas in which the role of communities in the exercise of criminal prosecution must be strengthened.

For example, one of the most frequent problems with diversion is that the conditions placed on the defendant are excessively abstract and are not centered on his or her reinsertion in the community. In this regard, the community has specific information regarding the areas in which the defendant may comply with certain conditions in their favor. In the area of conditions of release other than pretrial detention, the community can also work with the Public Prosecution Service. Furthermore, the community can be a source of information on the defendant's personal situation in these cases, and that information can be used in the hearing on conditions of release so that the decision can be made based on empirical evidence.

Another interesting aspect emerges prior to the formulation of the criminal prosecution policy by the Public Prosecution Service. While the National Prosecutor has the authority to

determine what his or her criminal prosecution policy will be, it is important to assess what the community would like to prioritize. An error may be seeking this information in distorted spaces such as the media or from victims who are not always representative of all social demands. Rather, the Public Prosecution Service should hold participatory, open workshops for various community sectors in order to engage in a reliable assessment that allows it to adapt its policy to the demands of the community.

b) A new judiciary for Latin America

The procedure reform movements of the past three decades generated numerous changes in procedure models. However, these technical-legal changes were not always achieved by changes to the macro-structures of judiciaries.

The majority of changes in judicial organization affected the first instance because, generally, the second instance managed to ensure that the reforms would not impact their operating mode. It is important to recognize that these changes included the transformation of judicial offices, which abandoned a model that we have called colonial-pyramidal due to its monarchical and hierarchical nature based on the processing of written files (Fandiño, 2018). Criminal procedure reform movements generated more horizontal judicial organization structures in most countries in which there is a division between jurisdictional and administrative functions. The latter are managed by a professional from a multidisciplinary field called a Judicial Office Director or Manager.

Beyond these changes to the first instance, major changes are still pending in the organization of judiciaries. The experiences of Magistrates' Councils have been evaluated fairly negatively in the majority of countries. There is also a need to expand discussions of judicial government given that, as we have said, confusion between jurisdictional, administrative and governance functions persists in most Supreme Courts (Binder and González, 2018, p. 356).

Another key challenge in the region's judiciaries is the need for greater emphasis on the link between the judiciary and the community. In Latin America, there is still a monarchical vestige in judiciaries at both the macro level and in the exercise of the jurisdictional function by judges. One example of this at the institutional level is that there is still a significant amount of concentration of jurisdictional, administrative and governance functions replicating a model based on the king's power to control and make decisions about disciplinary matters, appointments and the judicial career (Aldunate, 2001). At a lower level, there is a fair amount of rejection on the part of judges when it comes to intensifying their levels of connection to the community in which they impart justice. Again, a colonial logic seems to persist in accordance with the judge is the image of Christ and must only judge cases, remaining distant from the community in which he or she carries out their work[53] (Aldunate, 2001, p. 194, our translation).

The monarchical and obscurantist concept of judicial work must be abandoned by a new model in which judges regularly interact with the community. This involves a paradigm shift in legal culture, which is why we would like to present opportunities for making progress in that direction.

First, there is a need to bring about a new transformation in judicial training in Latin America. As is well known, an important change took place in the incorporation of skills and abilities related to the use of oral procedures. This was incorporated into the practices of various judicial academies (González and Cooper, 2017). With this important precedent, there is a need for greater progress and for judicial training to include the

53 Aldunate goes on to say that, in practical terms, this translates into a true 'social distance' duty imposed on the judge (the legacy of which we can clearly see in our current judicial culture).

social context in which our judges impart justice into judicial training. Latin American societies are characterized by high levels of inequality and cultural heterogeneity, which generates an important need for the judiciary to have all of this information about the social and cultural context of the communities in which they impart justice. The Canadian example is very valuable. Judges are trained on the basis of information related to the sexual, cultural and religious diversity of the people in Canada (Lennox and Williams, 2013). It is important to reinforce the direct lived experiences that judges can engage in with more vulnerable communities, as this will improve the perspective with which they later approach users.

A second aspect in the reengineering of the judiciary is everything related to the incorporation of the community and the citizenry in decision-making. As we stated in the first section, there is a process of recovering the jury as the maximum expression of the criminal trial process in a democratic society. Along with the strengthening of the use of jury trials in criminal cases, it is important for judiciaries to open up new communications channels with communities, such as the creation of community courts which members of the public can help run or neighborhood tribunals for addressing low intensity disputes.

c) Police reform and the connection to prevention and criminal prosecution policies

Criminal procedure reform movements did not involve many changes to police agencies. Instead, they focused on the Judiciary, Public Prosecution Service and Public Defense Service. Over time, it has been possible to identify some limitations on the operation of criminal justice systems caused by the low performance of police agencies. Difficulties related to gathering evidence and securing the crime scene, respect for the chain of custody or low level of police investigation work impact the effectiveness of the region's criminal prosecution systems on a daily basis.

There is thus a need to continue to focus resources on ongoing training of police agencies in order to allow their staff to improve their work processes and reach the level of the other criminal justice system institutions. There is also a need to reinforce official procedural protocols to allow for greater transparency and mechanisms for monitoring the work of police agencies.

In order for all of these efforts to generate the expected results, they must be accompanied by key changes in the structure of Latin American police entities. In many cases, police agencies are not completely under civil control and their leadership continues to be controlled by tightknit and militarized logics. On the other hand, the active levels of transparency of the police continue to be much less developed than they are in the rest of the criminal justice system institutions, generating many obstacles to oversight and monitoring work that can and should be conducted from civil society.

It is also important to refer to the need to create new spaces for coming together and sustaining dialogue around the important preventative work done by police. In many cases, crime prevention and criminality control efforts are not conducted in a concerted manner through dialogue. Even in areas marked by reform, the opportunities for discussion are fairly differentiated and there is insufficient exchange of ideas between these two worlds.

We believe that it is vital to begin to create more specific sectorial connections between crime prevention and the institutions responsible for criminal prosecution. The Public Prosecution Service should be interested in preventing crimes and police agencies should be interested in ensuring that all crimes can be effectively prosecuted.

d) Strengthening and autonomy of public defense

Latin American Public Defense Services have traveled a difficult path towards the

strengthening of their organizations and creating the institutional management tools necessary for the proper performance of their mission to guarantee the right to defense in their countries.

Along that path, several first generation challenges were identified, such as the establishment of supply and demand assessment tools and tools for the organizational design and oversight of management that would provide greater institutional efficiency (JSCA and UNDP, 2006).

The new challenges that the entity faces continue to be related to the ongoing need for institutional strengthening and budgetary parity with other criminal justice system agencies.

First, we should mention the work that has been done to identify the standards necessary to reach effective criminal defense levels (Binder et al, 2015). These standards will help us to move away from the formal idea of defense that has been present in many of our countries.

Another aspect of the development of the defense has to do with its focus on certain groups that receive preferential attention, such as the at-risk groups mentioned in the 100 Brasilia Rules. In this sense, Public Defense Services should incorporate specialized units for providing services to migrants, members of indigenous groups, inmates, women, older adults and youth offenders, among others.

Finally, a challenge regarding which there is still a great deal of work to do is the autonomy of the Public Defender's Offices. As we demonstrated in the first section, many of these services still form part of the Executive Branch or Judiciary. There are several reasons to demand the institutional autonomy of this entity, including the need for it to participate in public discussions of criminal policy in defense of guarantees, that there be an institutional correlate to the principle of equality of arms, or that they can protect the functional autonomy of public defenders' work (Moreno et. al, 2018).

3. PUBLIC POLICIES FOR ESTABLISHING THE ADVERSARIAL SYSTEM

a) The transversalization of the gender approach in criminal justice

In Latin America, there is a fair amount of specialized bibliography on the phenomena of the criminalization and invisibility of women who come into conflict with the law (JSCA, 2010). Over the past few years, these studies also have studied how LGBTQ groups are treated by the criminal justice system.

The issue of discrimination against women also has been addressed by the universal human rights protection system since 1979, when the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) was signed. For example, Article 15.2 emphasizes the fact that the courts must provide equal treatment without gender-based discrimination.

The phenomenon of gender violence has been addressed in various international human rights instruments, including the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, known as the Convention of Belém do Pará, which was adopted in 1994. In addition to defining violence against women, this convention generates a series of obligations for States related to the need to provide measures to protect and defend the rights of women (many of them in the judicial sphere) along with public policies that should be progressively implemented.

However, limited attention has been paid to the connection between the criminal procedure reform agenda and the feminist movement and demand for women's rights. From here we wish to suggest some ideas for expanding these efforts over the next few years.

In the area of criminal litigation, it would be important for the work of preparing the case theory conducted by the Public Prosecution Service

and defense counsel to be conducted in a manner that includes the gender perspective when women or members of the LGBTQ community are part of the criminal proceedings. When configuring the factual elements (which comprise the case theory along with legal and evidentiary elements), we should identify all of the aspects that are related to the individuals involved, such as their capacity and the way in which they express themselves, in order to highlight the findings that impact the case theory (Pérez, 2018).

In the area of alternative outcomes, there is a fair amount of controversy in Latin America regarding the opportunity to promote their use in cases of gender violence. Some countries have opted to prohibit this option while others are more permissive in this regard. One of the ideas or principles that tend to govern the area of conflict management is that violence cannot be measured. This idea has been refuted from some areas of restorative justice that have had successful results even in such paradigmatic armed conflicts as the ETA in the Basque Country or the IRA in Ireland. In the area of interpersonal conflicts, it is important to recall that cases of gender violence are characterized by a high level of inequality among the parties, which suggests that collaborative mechanisms would not be an appropriate option. In spite of this, the problem that we find here is that we often find conducts such as threats, which do not necessarily involve physical violence, in the category of gender violence, and the opportunity to resolve a conflict is not being used.

In the area of judicial public policy, over the past ten years we have witnessed the proliferation of gender units in judiciaries as well as institutional measures designed to promote respect for women's rights. In spite of this, we note that as long as there is not a balanced presence of women in the leadership of justice sector institutions (as is the case in lower agencies), we will continue to see problems in the incorporation of the gender perspective in the daily work of the justice system.

Some countries such as Mexico, Bolivia and Brazil have developed protocols for courts with a gender perspective. These instruments are extremely valuable because they generate specific recommendations on a very complex issue: How do we address structural inequities deriving from the gender of individuals in the complex process of making judicial decisions in the context of a judicial process? The protocols contribute various recommendations in each procedural stage. Many of them are related to asking questions (in an appropriate manner) of justice system users to obtain information about their personal situation that elucidates their unique characteristics deriving from gender inequality.

b) The restorative paradigm in primary dispute resolution

Regarding the goals of the criminal justice system

When we refer to the objectives of the justice system, we have traditionally distinguished between the objective of dispute resolution and the objective of policy implementation through the application of the law to the specific occurrence (Damaska, 1986). Our positioning is in the conceptualization of the criminal justice system as a conflict management paradigm as opposed to the habitual paradigm of order (Binder, 2015). In that sense, when discussing conflicts, we want to emphasize the primary dispute that causes a secondary conflict to appear, which would be the crime that the defendant commits by failing to follow the law dictated by the legislator.[54]

54 There are two basic and opposing ways of understanding criminal law. One, which is called criminal law of conflict, involves intervening in social conflict through the selection of conflicts regarding which 'there is no other choice' but to intervene with the criminal justice system. The reasons for this choice are complex and regulated by various principles that create the universe of criminal law as the final ratio. The other vision –which has inquisitorial roots– sees criminal law as focused on infractions and disobedience. The focus is not the primary conflict, but the secondary one. The case is not John hitting Peter and hurting him (base conflict), but John disobeying the law by hitting Peter and failing to follow the order not to cause harm (secondary conflict). Two world views about criminal justice that have been competing for over 100 years dominate here (Binder, 2014, p. 35).

However, it is important to note that the objectives of the criminal justice system should not be seen as exclusive, but instead complementary. As such, the adversarial system has a strong commitment to the truth even though it is different from the way in which we approach it. Following Binder (2012, p. 21), the judge's commitment to the truth in an adversarial system should be so great that it is not necessary to seek it out. Based on their strong commitment to impartiality, the judge should demand the truth of the accuser so that evidentiary standards are exceeded and the truth of the accusations is proved.

Tensions between retributive and restorative justice models

The criminal procedure reform movement resulted in the implementation of the adversarial criminal justice system in Latin America. The process began in 1994 in Guatemala and ended in Uruguay in 2017. During that time, an adversarial or accusatory criminal procedure system based on the issues and specificities of Latin America was established (Langer, 2008).

However, it is interesting to look at how this adversarial trial model has taken up the tension between two opposing visions of criminal law: one based on retributive justice that confers an exemplary value on the sentence and that of restorative justice, which seeks to allow the parties to resolve their dispute and work together to manage the consequences based on forgiveness and repentance.

Today, we can see how adversarial systems have aligned with retributive justice, potentially due to the vision of alternative outcomes as forms of reducing congestion in the justice system that are not linked to the solution to the conflict or because a certain more belligerent social discourse regarding crime has prevailed.

In addition, adversarial systems in Latin America offer a series of alternatives to judicial process within what has generally been called the diversification of the responses that the justice system offers. The most common and regulated alternative outcomes in all countries are reparatory agreements and diversion. These institutions have a double foundation: one the one hand, the judicial system offers more adequate responses in function of the characteristics of the conflicts and, on the other, it improves the justice system's efficiency given that these outcomes have shorter processing times.

We have found that alternative outcomes are being applied in an effort to reduce congestion in the system, and there is very little emphasis on whether or not these solutions will actually resolve disputes. This is seen, for example, in the use of excessively abstract conditions that are not connected to resolving the primary conflict in the case of diversion. Furthermore, the regulation itself has been fairly restrictive in regard to the types of crimes, procedural stages or solutions to conflict that it offers (Rua and González, 2017).

In addition to traditional alternative outcomes, some countries have incorporated more sophisticated mechanisms like restorative justice. This can be defined as a theory of justice that is not based on imposing punishment or pain (Christie, 1984) but that is instead based on reconciliation, forgiveness and healing among the parties, who jointly address the consequences of the conflict. One of the most important experts on this topic, Australia's John Braithwaite (2008), also found that restorative justice offers a great opportunity to reestablish trust in the democratic system because it is based on citizen participation in dispute resolution. Countries such as Mexico and Costa Rica have incorporated various mechanisms and techniques into their legislation that fit within the idea of restorative justice.

In order to address this situation and strengthen the paradigm of the justice system as a mechanism for dispute management, we propose two major lines of reform of Latin American justice systems:

Comprehensive criminal justice system reform for the incorporation of the restorative paradigm

The only way to obtain good results by implementing modes of restorative justice is to adopt a public policy reached by consensus among all justice system institutions, the Executive Branch and the Legislative Branch. The only way to achieve a culture and practices based on the fulfillment of institutional goals and the vision of alternative outcomes such as reducing congestion is by working together. Below we outline some of the areas to be considered in this comprehensive criminal justice system reform:

On the legislative level, there is a need to regulate dispute resolution as a principle of the system as set out in Article 12 of the Neuquén (Argentina) Criminal Procedure Code. It is also necessary to make the available procedural alternatives more sophisticated, including restorative justice techniques such as family group conferences, restorative justice circles or panels or mediation (Soleto and Fandiño, 2017). In contrast to alternative outcomes, which follow the logic of negotiated justice, these mechanisms allow for better treatment of the dispute from a restorative perspective.

In the area of training, justice system operators (judges, prosecutors and defense attorneys) must be taught to recognize and use the techniques necessary to solve disputes through restorative justice. Judicial system operators are often resistant to this sort of change because they lack information about them or do not have the necessary tools.

From a public policy perspective, restorative justice units must be created and staffed by specialists with psychosocial training. In regard to institutional location, any agency could work. It is, however, fundamental that there be agreements among all of the institutions because they will all benefit from the proper functioning of these ways of treating cases. Furthermore, given that the treatment of disputes with this paradigm requires more hours of work, justice system operators see negotiated justice as a mechanism that is limited to a transaction among the parties. It is thus fundamental for institutions to reach inter-institutional agreements in which they establish which conflicts will be prioritized and how operators will work, generating specialized entities wherever possible.

Finally, the main tensions generated through restorative justice must be analyzed because there may be a conflict when applying the typical criminal justice principles or standards such as due process or determination of the truth. In that sense, it would be important to generate new performance standards that can provide minimal regulations for the way in which action is taken through these mechanisms (Mera, 2009).

Plan for revitalizing and reconfiguring alternatives to criminal proceedings

As we mentioned above, in the majority of the countries in the region, alternative outcomes continue to be applied with a logic of reducing congestion and with a very marginal vision regarding their potential to serve as mechanisms for conflict management. Again, we come up against the challenge of proceeding through a comprehensive reform in which all involved institutions participate. We outline the main changes that can be implemented in order to achieve results in this area below:

From the regulatory perspective, the legal requirements for opting for one of these outcomes must be reduced. There is also a need to avoid requiring that processes be completed in advance, such as formalizing the investigation, because this is a bureaucratic hurdle that limits the opportunity to address conflicts early.

From a practical perspective, justice system operators must be aware that alternative outcomes can work with the goal of helping to solve disputes among the parties. The conditions imposed in the case of diversion or a reparatory agreement must be discussed and agreed upon

based on how they will help solve the parties' primary dispute. It is thus necessary for all parties to have reliable empirical information so that they can make these decisions and discuss them in the context of the hearing. Agreements based on fulfilling conditions or measures that are excessively abstract and not related to the parties' primary dispute must be eliminated.

This comprehensive plan for revitalizing alternative outcomes comes up against an issue that we will explore further below that is related to the results that the system produces and how we can determine if these are of good or poor quality. Traditionally, it has been thought that alternatives to criminal procedure were good quality results because they produced advantages for the system in terms of efficiency and are based on agreements between the parties, which suggests that there is satisfaction with the result. One of the limitations of this approach is that it only addresses the final result or end that is produced without considering the unique characteristics of that specific case or the likelihood that it will end the dispute. It is thus necessary to combine the habitual indicators of result (30% of cases terminated through diversion) with procedural indicators (30% of cases managed through various mediation sessions). In the next section, we will delve deeper into these new tools related to the improved quality of the results of the criminal justice system.

c) Policy for improving the quality of criminal justice system results

One of the major successes of the criminal procedure reform movement in Latin America was that it created modern procedural systems that allowed much higher levels of efficiency to be achieved than those present in inquisitorial systems. In several countries, criminal justice was the jumping off point for a complex process of incorporating the Judiciary into its performance evaluation and the fulfillment of specific institutional objectives, as occurs in other State institutions.

In that sense, there have been numerous advances, such as the creation of judicial offices, the figure of the court administrator or hearing management offices. In all of these cases, fundamental ideas were established such as the need to separate jurisdictional and administrative functions and the incorporation of professionals from other areas of judicial work.

In the context of the Public Prosecution Service, the results in terms of efficiency have been notable. In fact, one of the first generation problems, the inability to manage the prosecution workload (JSCA, 2005) has already been overcome in most countries in the region. They can now at least manage their workload by applying discretionary authority that is offered under the new adversarial system. The Public Defender's Office also has created mechanisms to increase efficiency, such as defense agencies that specialize in specific procedural stages or support units like Chile's Public Criminal Defender's Office Research Divisions.

All of the aforementioned efforts have been very valuable, and they serve as a basis for the operation of the modern criminal justice model in that they allow the results of the system to be produced within reasonable timeframes, which is a guarantee in and of itself and also provides major societal benefits through the provision of quality public justice services.

Unfortunately, in spite of all of this, some countries have achieved quantitative results without looking at their quality. The cases of Chile and Mexico have been very meaningful in terms of how the emphasis on achieving goals based on indicators has been promoted, resulting in a greater emphasis on quantitative elements as compared to qualitative ones. For example, the performance assessment system that Chile created for the Public Prosecution Service promoted the use of diversion. In this way, all prosecutors who were able to terminate cases using this outcome had strong performance evaluations. However, there was concern about the low quality of those diversions given that they did not

solve the primary conflict, the conditions were not monitored and a perception of impunity was created among the members of the public (JSCA, 2017).

It is important to note that the criminal justice system must evaluate its results (which are mainly quantitative) because this allows us to show that the institutions can adequately manage their workload and provide responses within a reasonable timeframe. If we analyze the measurement indicators generally used in criminal justice, we see that the majority are presented as results indicators that measure how the case was terminated (ex. With a conviction) and not necessarily the content that would allow us to better appreciate the quality in those terms.

In the pages that follow, we offer recommendations for improving monitoring efforts and directing their use towards results that allow us to demonstrate higher quality work of the criminal justice system.

First, the results indicators are often not built in accordance with any objective and are thus empty indicators or only reveal the efficiency of the system (such as the number of convictions). There is a need to move towards a resignification of those indicators using a logic of procedural guarantees, genders or human rights, for example.

A second idea is related to indicators of results, which have historically been built on the basis of quantitative elements that must be complemented by a qualitative approach. This allows us to obtain more profound information related to the quality of the provision of justice services from the user perspective.

Finally, in addition to the usual termination indicators that would allow us to identify how many cases ended with a judicial or non-judicial outcome, procedural indicators must be incorporated, which again tend to focus on the characteristics of the procedure and the level of user satisfaction. These indicators will be very useful, for example, when we evaluate the quality of the service provided through mediation or a restorative justice mechanism.

d) From inter-institutional coordination to governing the reform

Criminal procedure reforms were conceived of as government policies that could reach cross-cutting agreements among diverse political forces in the context of the recovery of democracy and strengthening of the rule of law. One could say that this type of government policy is part of a political context of consensus based on democratic governability, which is defined as a state of dynamic equilibrium between societal demands and the capacity of the political system (state/government) to legitimately and effectively respond to them (Camou 2001, p. 36).[55]

As a result, the implementation of the adversarial and guaranteeist criminal trial system was always conceived of as a consensus based on a State policy in which contrary ideological sectors such as the liberal right or progressive left were involved, driving these processes as government and opposition forces. The examples of Chile and Uruguay are illustrative in regard to the cross-cutting consensuses generated among diverse ideological currents. Unfortunately, when the counter-reform processes that we described in the first section of this report developed, none of these ideological sectors had qualms about going against essential principles of the adversarial system such as the presumption of innocence or exceptionality of pretrial detention.

55 Camou's idea of governance (2001) allows us to overcome the dichotomous idea of governability and ungovernability and to analyze various levels of depth based on three elements: a) the level of political culture; b) the level of inter-institutional rules and the political game; and c) agreements around the role of the State and public policies.

Another achievement of the criminal procedure reform movements was to propose these changes to the justice system as a minimum component of the reconfiguration of Latin American democracies. In Guatemala, the first country to adopt an adversarial criminal procedure code, the justice system reform was a fundamental element of the Peace Agreements55 that set the stage for the post-conflict period and new democracy.

Inter-institutional coordination and criminal procedure reform

One of the main tools for successfully addressing criminal procedure reform was the creation of formal inter-institutional coordination entities among the criminal justice institutions For Vargas (2005, p. 83), in order for these entities to be more efficient, they should be formal, meet periodically and have representatives from operational levels. It is important for them to generate written agreements and for these to be monitored.

If we wish to offer an overview of the recommendation offered by Vargas, the regional experience is clear. The countries that planned the implementation of the criminal procedure reform through inter-institutional coordination agencies obtained better results in the performance of the new adversarial system. By contrast, the countries with null or weak coordination entities were presented serious operational issues and in some cases reported critical situations in regard to working with the new oral systems.

It is also necessary to note that inter-institutional coordination entities were weakened after the completion of the implementation process, and the adversarial system is operational. In countries like Mexico, the decision was made to eliminate the agency responsible for implementation (SETEC) when the implementation process was thought to be complete. Other countries, like Chile, maintained inter-institutional coordination panels but these were much weaker, lacking technical teams and presenting a much more formal logic that made it impossible to identify concrete problems.

The examples offered above are symptoms of the lack of a clear agenda regarding the role that inter-institutional coordination agencies and monitoring commissions should play in the post-reform contexts in which the adversarial criminal justice system has been implemented. One of the results of this lack of clarity and discussion is that coordination entities have disappeared and those that remain are diluted and relegated to a formal role.

In that sense, we believe that Lindblom's approach to incremental public policies may be interesting because it proposes a decision-making model based on empirical assessment of past decisions and the achievement of intermediate objectives that offer us to achieve more ambitious objectives in a concatenated way (Lindblom, 1992). This approach will allow us to identify which aspects of the adversarial system are already established and which require our efforts in a realistic manner based on empirical evidence.

Towards governance of the criminal justice system

There are various contradictory visions of the concept of governance. In spite of this, there is an important perspective that conceives of it as an overarching paradigm of governance produced by the increase in social demands, weakening of the margin of the work of the State and the failure of centralized regulation (Merrien, 1998 cited by Hutfy et al, 2006).

To a great extent, the gestation of the idea of governance emerged from attempts to introduce structural reforms following World War II that in many cases did not have the expected effect and that questioned the effectiveness of the State in the formulation of said policies. As a result, people began to identify the need for non-governmental stakeholders to work with the State, including businesses or unions, for

example. There are various ways of carrying out the formulation of policies or strategies based on governance, but one of the requirements is that power be distributed in society, but not in a fragmented or inefficient manner (Mayntz, 2001).

These notions related to the paradigm of governance as opposed to governability can be the inspiration for identifying how various institutional and social spaces can generate an agenda for efforts to strengthen the adversarial criminal justice system in Latin America.

The inter-institutional coordination entities proposed in a formal logic as the sum of the Executive Branch, Judiciary, Public Prosecution Service and defense should open themselves up to new institutional and social stakeholders that have a great deal to say in regard to the practical operation of criminal justice. For example, there is no major connection between coordination entities and the Legislative Branch, which has a significant impact on the workload of the justice system through its criminal inflation processes and creation of crimes. In this sense, legislative reform projects (procedural or substantive) should always be accompanied by assessments and impact studies that would allow us to identify the empirical evidence for the reforms and that would allow us to anticipate the economic and practical consequences. While these legislative technique recommendations can be applied in any context, in the work of the criminal justice system they present complete urgency and relevance so that they can be applied.

On the other hand, crime prevention entities in which the police participate, often in coordination with community representatives, do not tend to be represented in criminal justice system coordination panels.

As such, new spaces and governance panels for the criminal justice system should be created that allow other stakeholders necessary for the correct consolidation of the adversarial criminal justice system to be included. These spaces can be used to persuade new interlocutors such as the media, regarding which there has always been a certain amount of resistance about working together. As a result of that distance, there has not always been an adequate relationship between the media and new criminal justice systems.

In addition, it is fundamental for civil society entities that are not only observers but also monitors and that have a real capacity to impact the design of intervention policies and strategies to participate in criminal justice system monitoring and coordination units.

Together with proposing the creation of governance panels for the criminal justice system that are as open as possible at the national and local levels, we can also point to the importance of classic institutional stakeholders understanding the roles that they should continue to play. For example, in an agency that has as its purpose the design of strategies for monitoring criminality in a specific territory, it would not be reasonable for the judiciary to play a role given that it must preserve its impartiality.

Our Latin American societies grow more open every day, which means that there will be more stakeholders and social representatives who will have to do their part to strengthen the republican and democratic trial model and resist attacks from both the inquisitorial model that we have moved away from and the new enemies that appear on the horizon.