CRIMINAL PROCEDURAL REFORM AND THE MINISTERIO PUBLICO[*]: ¡Error! Marcador no definido.

TOWARD THE CONSTRUCTION OF A NEW CRIMINAL JUSTICE SYSTEM IN LATIN AMERICA[*]

By

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[*] *Ministerio Publico* is the most common name of the Public Prosecutor Office in Civil law countries, the literal translation in English is Public Ministry which lacks technical sense in the American criminal justice system. In this paper I will use *Ministerio Publico*, but in some occasions I will quote opinions from authors that refer to the *Ministerio Publico* indistinctly as Public Ministry or Public Prosecutor Office.

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PART I

CHAPTER I

WHAT ARE WE REFORMING?: TOWARD A HISTORICAL UNDERSTANDING OF THE CRIMINAL PROCEDURE IN LATIN AMERICA

The aim of this chapter is to present a brief historical review of some aspects in the setting of the Latin American criminal procedure that are indispensable to provide an accurate picture about the real content of it as well as a description of its main characteristics. This common background will allow us to discuss the current movement for the reform of the criminal procedure in Latin America and will also help us to understand its meaning and extent.

The necessity to develop a chapter focused on the historical antecedents of the criminal procedure in Latin America is a consequence of a problem often found in the comparative literature in English upon the criminal procedure in Civil Law countries. This is a tendency to automatically identify the Latin American model of criminal justice with the current model of European-Continental countries such as Germany, Italy and Spain.[13]

One explanation for this situation is that both Latin America and Europe belong to the same legal tradition, the so-called Civil Law tradition, and thus share similar legal systems and legal cultures.[14] Hence, a trend in part of the comparative literature is to generalize the description of the criminal justice system in the Civil Law countries. This generalization rarely takes into consideration important historical, cultural, political, economical, and legislative factors that are sources of enormous differences between Latin American and European criminal justice systems.

The promiscuous use of the concept "inquisitorial system" to label the criminal procedure of Civil Law countries is probably another cause that explain this phenomenon.[15] The common use of this concept embraces very different models of procedure from the point of view of the development of the criminal justice in Civil Law countries.[16] My point is that

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[13] For examples of this tendency to generalize the analysis of the criminal procedure in the "Civil Law World" see MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS, 94-96 (1982); JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION, 124-132 (1986); and William Pizzi, *Understanding Prosecutorial Discretion in the Unites States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J.1325, 1331-1336 (1993).

[14] *See* JOHN HENRY MERRYMAN, *supra* note 13, 1.

[15] For an example of this promiscuous use see Michael R. Pahl, *Wanted: Criminal Justice-Colombia´s Adoption of a Prosecutorial System of Criminal Procedure*, 16 FORDHAM INT´L L.J. 608, 613 (1993).

[16] There is a long debate about the proper use and extent of the concept "inquisitorial system" that I will not explain in this work. In general terms "inquisitorial system" is commonly employed to describe the continental model of criminal procedure in opposition to the concept "adversary system" which is commonly used to depict the

the broad use of the term covers systems that are very different and not possible to be automatically assimilated, such as the contemporary criminal procedure in Western Europe and the current procedure of some Latin American countries.[17]

To distinguish between the current model of criminal procedure in Western Europe and the Latin American model that is in process of being reformed, I will use the term "Latin American inquisitorial model" in contrast with the term "continental criminal procedure".

This differentiation is not a semantic problem. In my opinion, it is a crucial aspect to make a clear depiction of the system in Latin America. Therefore, it is the previous step that will allow us to understand the underpinnings of the reform movement and the meaning of the legislative proposals. Only when we have an adequate understanding of our current system is it possible to think about its reform and alternative models to do it.[18]

The differences between the Latin American inquisitorial model and the continental model of criminal procedure are not only at the level of law in action[19], but also in the formal rules, the theoretical analysis of that rules, and even at the level of principles that are behind these systems.

It is true that Latin American countries share with their European counterparts certain common features in the structuration of their legal systems, in fact many of the Latin American legal systems were built by copying the European legislation. However, in criminal procedural matters, as well as other relevant fields, the development experienced in Latin America has followed a different path since independence. Latin American reformers of the nineteenth century copied the continental model of criminal procedure, but they

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Anglo-American model of criminal procedure.

[17]Several criticisms have been made concerning the use of "inquisitorial system" to label the current criminal procedure of Western European countries. One example is the following passage:

> ...in relation to present Western Europe, the inquisitorial process does not make any sense as a label. Damaska is right when he concludes that the inquisitorial system is an unsuitable concept for contemporary criminal procedure. The inquisitorial system can maybe be seen best as a kind of common inheritance of countries like France, Spain, Portugal, Belgium, and the Netherlands from the sixteenth century, of which only some elements can nowadays still be seen as parts of features of an inquisitorial style of procedure. But as a system in itself the inquisitorial system is only a historical system that does not exist anymore.

Johaness F. Nijboer, *The American Adversarial System in Criminal Cases: Between Ideology and Reality*, 5 CARDOZO J. INT´L & COMP. L.79, 92 (1997).

[18]According to Jacob "Innovation is usually thought to involve at least two stages. The first is the identification of a problem that involves a serious performance gap requiring a solution. The second is the formulation of the solution". HERBERT JACOB, SILENT REVOLUTION, (1988) cited in STEWART MACAULAY ET AL., LAW & SOCIETY, 316 (1995).

[19]It is a platitude to say that the institutional and social conditions of Europe are different in Latin America, but the impact of these differences on the concrete operation of legal systems has not been always recognized by legal scholars.

embraced a very different model than the current one: they took the European model before the reconfiguration of the system generated for the big liberal reform of the nineteenth century[20] and, also, before the constitutional and human rights revolution of the post second World War II era that has again reshaped the criminal procedure in Europe.[21] For that reason it is difficult that a young German or Italian lawyer could identify, for instance, the Chilean or Paraguayan current criminal procedure, as something equivalent or even similar to the criminal procedures under which they work.

This incorrect identification of the Latin American Inquisitorial model with the continental model is also a trend in some influential scholarly literature in Latin America.[22] For years many scholars have maintained that the model adopted in nineteenth century by the Latin American countries was the continental model created after the enactment of the liberal reform in countries like Germany (1877) or Spain (1882), the so-called mixed system or reformed inquisitorial system.

This situation has generated a misrepresentation about the structure and institutions that compose Latin American criminal procedures and also has created a misrepresentation about the necessity and goals of the reform. One common criticism of the reform has been on its identification with an effort to "americanize" our criminal procedure. This situation has had ideological as well as practical consequences that have been an obstacle for the change.[23] I would say that rather than looking for an "americanization" of our procedures, the Latin American reformers have tried to follow the development experienced in Europe since nineteenth century, but also have introduced some particular features of the American criminal procedure.[24]

Another problem generated by this misrepresentation, clearly related to the one described above, has been a tendency to challenge the necessity of the reform, arguing that if we already have a system which has been adequate for the development of European countries, why it is necessary to change it radically for a new experiment.

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[20]*See* JOHN HENRY MERRYMAN, *supra* note 13, 128-129.

[21]*See* Maria Ines Horvitz, *La Influencia de la Convencion Europea de Derechos Humanos y la Jurisprudencia de sus Organos en el Proceso Penal Europeo*, *in* PROCESO PENAL Y DERECHOS HUMANOS, 373, 375-376 (1994).

[22]*See* JULIO MAIER, DERECHO PROCESAL PENAL, 408 (1996) (hereinafter DERECHO).

[23]One example of this affirmation is the document of observations to the Chilean reform proposals made by some professors of procedural law from the Law School of Concepcion University. In this document they indirectly argued that the reform is an initiative of the Chilean government imposed by Unites States to become member of the NAFTA agreement. This example represents an extreme, in my opinion even paranoic, case of what I am trying to explain. *See* Observaciones al Proyecto de Ley que Establece un Nuevo Codigo de Procedimiento Penal, Concepcion-Chile, July 1995, 1-2 (unpublished document on file with the author).

[24]In fact the main legislative source in the reform proposals of most of the Latin American countries has been the Model Code of Criminal Procedure for Iberoamerica, which is mostly based on the current German legislation. *See* Cristian Riego, The Chilean, *supra* note 6, 3 and Linn Hammergren, Code Reform and Law Revision, 8-9 (1998).

In the following pages I will make a brief review of the historical development of the Latin American inquisitorial system.

1.- The Inquisitorial Model of Criminal Procedure[25]

The sources of the inquisitorial model of criminal procedure can be traced to late medieval Europe and more precisely to the ecclesiastical regulation of what has been known as the Inquisition. The political context in which the system grew up was the process of the expansion and the necessity of centralization of the power of the Catholic Church. Both constituted powerful reasons to look for a new procedure that could ensure the exercise of power for the central authorities of the ecclesiastical hierarchy and control the bad behavior of the clergymen. Pope Innocent III (1198-1216) started the transformation of the canonic criminal procedure in the thirteenth century by taking the late imperial Roman law.[26] The new procedural system was consolidated with the creation of the Tribunal of the Holy Inquisition.[27]

The new system represented a complete change of the previous situation. Private prosecution was replaced by prosecution by church officials in secret. These officials were called inquisitors and also played the role of judges. The system also introduced rational rules of evidence as a reaction against the ordeals. In addition, the procedure was written and highly hierarchical. The scope of this new system was the prosecution and punishment of matters related to religion such as heresy and witchcraft, but also covered matters that today we would consider as secular.[28]

In the fifteenth and sixteenth centuries the canonic inquisitorial system was adopted by most European continental countries as their official system for secular matters. This process coincided with the rise of new national states and their efforts to concentrate their power. One of the tools employed in this process of centralization of power was the inquisitorial procedure.[29]

In the case of Spain, the inquisitorial procedure for secular matters was formally adopted through a major collection of laws known as *Las Siete Partidas*[30], commonly

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[25]For a general explanation of the main characteristics of the inquisitorial system and its development and evolution in Europe see JULIO MAIER, DERECHO, *supra* note 22, 288-360.

[26]*Id*. at 291-292.

[27]*See* ALEJANDRO CARRIO, CRIMINAL JUSTICE IN ARGENTINA, 11 (1989).

[28]*See* JOHN LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE, 133-134 (1977).

[29]*See* JULIO MAIER, DERECHO, *supra* note 22, 288-289. *See also* FRANCISCO TOMAS Y VALIENTE, EL DERECHO PENAL DE LA MONARQUIA ABSOLUTA (SIGLOS XVI, XVII Y XVIII), (1992) (the author describes the situation of the Kingdom of Castile and shows that one of the main efforts of the Catholic Kings was the concentration of power through the imposition of the inquisitorial procedure).

[30]*See* ALEJANDRO CARRIO, *supra* note 27, 11.

attributed to the work of King Alfonso X between 1263 and 1265.[31] In the case of Germany, the most important legislative body that introduced and regulated the inquisitorial system was the *Constitutio Criminalis Carolina* in 1532. Other European countries also adopted the system, for instance, the Netherlands Criminelle Ordonnancien of 1571.[32] In the case of France, different legal bodies in 1498 and 1539 introduced the inquisitorial system; however, the Ordonnance of 1670 was considered the main expression of the inquisitorial system in that country.[33]

The criminal procedure was organized under the same principles of the canonic inquisitorial system. Langbein, following Schmidt, said the two cardinal and interconnected features of the inquisitorial system were the *offizialprinzip* ("the duty of governmental organs to conduct the entire proceeding ex officio by virtue of office"[34]) and the *Instruktionsmaxime* ("refers to the duty of these organs themselves to investigate judicially...and to establish the substantive facts and the objective truth."[35]) Other striking features of this model of criminal procedure include: (1) the concentration of the power in a single judge that performed the jurisdictional as well as the prosecutorial functions; (2) the written character of the procedure; (3) the secrecy of the investigatory phase even for the defendant and his lawyer; (4) the limited rights of the defense counsel; (5) the nonexistence of an "oral trial"; (6) the compulsory character of the criminal prosecution (the legality principle); (7) the use of torture as a way to investigate the offenses[36]; and (8) the broad possibility that higher courts have to control the decisions of lower courts.

It is important to stress that the political and ideological environment in which the inquisitorial system was adopted in Europe was an authoritarian conception of the State in which context the interests and rights of the citizens were subordinated to the State interests. Historically, the development of the inquisitorial system is also prior to the development of the theory of individual rights. Consequently, the recognition of these rights as relevant elements in the configuration of the system was not part of the ideology at that time.

2.- Imposition of the Spanish Legal System into the Indies and the Adoption of the Inquisitorial Model of Criminal Procedure in the Independent New Latin American States

[31] *See* FRANCISCO TOMAS Y VALIENTE, MANUAL DE HISTORIA DEL DERECHO ESPAÑOL, 237.

[32] *See* Johaness Nijboer, *supra* note 17, 91.

[33] For a detailed explanation of the development of the French inquisitorial system and the inquisitorial system in Europe see A. ESMEIN, HISTORY OF CONTINENTAL CRIMINAL PROCEDURE, (1913). *See also* JOHN LANGBEIN, *supra* note 28, 174-202 and 211- 248. For an explanation in Spanish see JULIO MAIER, DERECHO, *supra* note 22, 303-323.

[34] *See* JOHN LANGBEIN, *supra* note 28, 131.

[35] *Id.*

[36] For an explanation of the law of torture and the evidence rules see JOHN LANGBEIN, TORTURE AND LAW OF PROOF, (1974).

As Julio Maier said[37], the starting point of historical studies of criminal procedure in Latin America is the system that was imposed by Spain in the colonies due to the fact that native legislation existing prior to the conquest was irrelevant in the construction of the criminal justice system in the "new world".

The Spanish kingdom brought to the Indies (American colonies) not only its citizens and ideas but also its law. The basic body of laws that were applied during the colonial period in Spanish-American colonies were regulations enacted in Spain for the Spaniards and the Indiano Law (the law created specifically to regulate the colonies in the Indies). The role of the laws of native American people was minor.

> A basic colonization principle of the Indies was to apply the laws and institutions of Castile, modified only to meet local needs and characteristics....Despite the prevalence of the metropolis legal institutionality, the Council of the Indies developed an abundant body of legislation specifically applicable to the Indies territories. Some of it dealt with minor details, the most fundamental one being the protection of the indigenous and local populations.[38]

Las Siete Partidas was the main legislative regulation applied by Spain in the American colonies.[39] Chapter Seven regulated criminal law and criminal procedure. This chapter was the basic body of rules applied during the colonial period in these matters. Therefore, the criminal procedure was almost the same inquisitorial system that Spain had developed in the late medieval age and kept until the reform of the nineteenth century.

The independence from Spain produced in the first decades of the nineteenth century represented a big political change but was not independence of the legal rules that were applied in the new states. Spanish laws were effective in the new states for several decades after the formal declaration of independence.

The period that followed independence was characterized by political instability, social disorder, revolutions and internal wars. For instance, in Perú between 1826 and 1866 the country had thirty-four presidents,[40] and, in Honduras between 1827 and 1900 there were ninety-eight presidents and 213 civil war actions.[41]

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[37] *See* JULIO MAIER, DERECHO, *supra* note 22, 328.

[38] Felipe Saez Garcia, *supra* note 1, 1278.

[39] *See* JULIO MAIER, DERECHO, *supra* note 22, 333.

[40] *See* LINN HAMMERGREN, THE POLITICS, *supra* note 1, 47.

[41] *See* LUIS SALAS & JOSE MARIA RICO, LA JUSTICIA PENAL EN HONDURAS, 23, (1989).

According to the traditional historical interpretation in Latin America, the effort to codify national laws was not a priority of the different governments due to the political instability. The main concern during the period that followed the independence was the consolidation of the independence process and the structuration of the new states. For that reason the legislative efforts were focused to draft Constitutions capable of regulating the organization of the power and of providing the basic rights of the citizens.[42]

In general terms the codification process in Latin America occurred mostly in the second half of the nineteenth century or at least many years after the independence.[43] Between the independence and the codification of national laws, the Spanish laws that were effective before the independence were applied in the new Latin American states.

The codification of the criminal procedure was a later process within the codification evolution in Latin America.[44] Usually the first codes enacted for the new states were the civil and commercial codes, and then the codes of criminal procedure. Chile and Perú represent good examples of this trend. The Chilean Civil Code was enacted in 1853 and the Code of Criminal Procedure was sent to the Congress for its discussion in 1894 and enacted only in 1906. The Peruvian Civil and Commercial Codes were enacted in 1852 and 1853 respectively, and the Criminal Procedural Code followed several years later in 1862.

The main influence in this codification was the Spanish legislation[45], but the legislation prior to the liberal reforms of the nineteenth century originated from the ideas of the French Revolution. The ideas of the French Revolution had a tremendous impact on the reconfiguration of criminal procedure in Europe during the nineteenth century. The systems in Europe evolved from orthodox models of inquisitorial procedure to the so-called mixed system or reformed inquisitorial system. This system was characterized by the recognition of more rights of the defendant (torture in general was abolished before), the introduction of oral trial as the central step in the procedure, and the separation of power in the criminal process through the creation of a new official agent in the system, the *Ministerio Publico*[46], responsible for filing charges against defendants and representing the society in trials.[47]

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[42]In the Peruvian case see FERNANDO DE TRAZEGNIES, LA IDEA DE DERECHO EN EL PERÚ REPUBLICANO DEL SIGLO XIX, 151-165(1980).

This thesis requires some qualifications because in many countries of the region the situation of instability also survived in the second half of the nineteenth century. The explanations of the late codification must be found in some additional aspects of the development of the Latin American countries during the nineteenth century.

[43]For example in Argentina the first Code of Criminal Procedure was enacted in 1882, in Chile in 1906, in Costa Rica in 1836, in Guatemala 1877, in Honduras in 1880, in Paraguay 1890, and in Perú 1862.

[44]*See* JOSE MARIA RICO & LUIS SALAS (EDITORS), LATIN AMERICAN CODES OF CRIMINAL PROCEDURE, 4, (1996).

[45]*See* Alejandro M. Garro, *On Some Practical Implications of the Diversity of Legal Cultures for Lawyering in the Americas*, 64 REV. JUR. U.P.R. 461, (1995).

[46]*See infra* I.4 D.

[47]*See* JULIO MAIER, DERECHO, *supra* note 22, 361-366.

However, the French Revolution failed in the abolition of the old inquisitorial model. Rather, it reshaped it for a new model known as a reformed inquisitorial procedure or mixed system, because, on the one hand, the investigatory phase kept the basic features of the inquisition and, on the other, the written trial phase was replaced by a real public and oral trial. The pioneer country in Europe to change the inquisitorial system was France by the famous Napoleonic *Code d`Instruction Criminelle* of 1808. The changes were also spread in all Europe, for instance, in Austria in 1873, Germany in 1877, Spain in 1882, and Norway in 1887 among others.

Even though liberal ideas about the structuration of the criminal procedure were common in the Latin American liberators and the framers of the constitutions of the new states[48], these ideas were not reflected in the subsequent codification of the criminal procedure. Rather, Latin American countries followed the inquisitorial model determined by Spanish legislation prior the reform of 1882, in many cases even *Las Siete Partidas.*[49]

There were countries like Costa Rica and Perú, whose codification process was finished before the concretization of the liberal reform in Europe, that adopted in their codes the model effective at that time in Spain. Other countries, like Chile and Argentina, whose codification was realized after the changes experienced in Europe, deliberately chose to follow the old model.[50]

One explanation about why the Latin American countries codified the old inquisitorial model is associated with the historical fact that, at least for one group, the codification was done before the codification of the reform in Europe. In other words, the countries that made earlier codification did not have a codified reformed model to copy. However, this explanation is not entirely accurate. I mentioned that the first legislative model of the mixed system was drafted in 1808 and besides that, and probably more importantly, the idea of regulating oral trials or trials by jury was already known in Latin America according to the constitutional debate mentioned above. Another evidence of the

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[48] These ideas were particularly reflected in a strong discussion about the introduction of the trial by jury in Latin America. An extended trend in the early constitutions of Latin American countries was to have provisions that introduced the trial by jury in different hypothesis. A couple of examples are the Chilean Constitution of 1828 that established the trial by jury for libel cases and the Constitution of Guatemala in 1838.

Probably the most striking case is constituted by the Argentinean Constitution of 1853, which with some reforms still rules the country. This constitution has two different provisions related to the trial by jury as a general principle for the organization of the criminal procedure in Argentina. Despite this constitutional norms, until now Argentina has not implemented a jury system.

[49]The unique exceptions were Cuba and Puerto Rico whose independence were achieved later than the introduction of the liberal reforms in Spain and which received oral trials and other innovations from there. *See* Cristian Riego, The Chilean, *supra* note 6, 2.

[50]*See* ALEJANDRO CARRIO, *supra* note 27,13-14 and Andres Jose D´Alessio, *The Function of the Prosecution in the Transition to Democracy in Latin America*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY, 189 (1993) (both authors referring to the Argentinean case); CRISTIAN RIEGO, EL PROCESO PENAL CHILENO Y LOS DERECHOS HUMANOS, 13-18 (1994)(referring to the Chilean case).

unsatisfactory character of this explanation is the fact that some countries that had an earlier codification reaffirmed their inquisitorial systems by subsequent reforms in the nineteenth and twentieth century. Such is the case of the Colombian Constitution of 1886[51], and the case of the Code of Costa Rica of 1910.[52]

The answer to the question of why Latin American countries adopted the inquisitorial system in their codes is not that the framers lacked the knowledge of alternatives.

Taking the risk of going off the main point of this section I would like to mention a tentative explanation of this phenomenon. In my opinion it is plausible to argue that the explanation of this situation is linked to the kind of modernization that the Latin American states had in nineteenth century. This process has been called by the Peruvian author Fernando de Trazegnies the "Traditionalist Modernization."[53] His point is that the process of modernization in Latin America in the nineteenth century was paradoxical in the sense that the idea of the elites was to make changes in the political, economical, and legal system to adapt the countries to the new era but, at the same time, without altering the social structures and hierarchies of the society. In other words, the modernization of the legal system was required for the political and economic changes in Latin America, but the elites that ruled the countries did not want to change the social structures.

This process of traditionalist modernization represents a conservative approach that could explain why Latin American elites decided to adopt the old inquisitorial system instead of a more liberal version of criminal procedure effective in Europe at that time.[54]

If the traditionalist modernization is not an accurate explanation of the phenomenon that we are studying, some available evidence shows that the adoption of the old inquisitorial system was associated with very conservative ideas about the structure of the criminal justice system in Latin America. For example, in the Argentinean case, these conservative ideas were expressed by the drafter of the Code of Criminal Proceedings of 1888, Manuel Obarrio, who said in the introductory message of the Code: "One could say that a country like ours which has only recently adopted free institutions and, although it is painful to admit it, is still not accustomed to self-government...."[55] He continued:

> Transition would be too fast and too dangerous to attempt to advance from the rudimentary way in which our democratic existence is developing and the

[51] *See* Michael R. Pahl, *supra* note 15, 614.

[52] *See* Luis Paulino Mora, *Los Principios Fundamentales que Informan el Código Procesal Penal de 1998*, in REFLEXIONES SOBRE EL NUEVO PROCESO PENAL, 15, (1996).

[53] *See* FERNANDO DE TRAZEGNIES, *supra* note 42, 30-35.

[54] For example, in Costa Rica one of the major goals of the politicians and lawyers in the nineteenth century was to keep the public order and to avoid social conflicts. *See* JOSE MARIA RICO ET AL., LA JUSTICIA PENAL EN COSTA RICA, 47 (1988).

[55] *See* Andres Jose D´Alessio, *supra* note 50, 189.

> reigning chaos in its present criminal proceedings, to the most perfect society and its habits of self-government required by the jury in order to be a viable and effective institution. Large reforms, even more so in newly formed countries like ours, cannot be introduced abruptly; they must spring forth spontaneously, if that expression may be used, as the result of a gradual and progressive process of evolution, in the pursuit of perfection.[56]

Chile represents another example of these very conservative ideas. In the message that the Chilean President Jorge Montt gave to the Congress when he sent the project of Code of Criminal Proceedings for its discussion in 1894, the main justifications of the adoption of the inquisitorial system were related to practical matters, such as the isolation of the national territory and the lack of economic resources that the implementation of an oral trial required in a country like Chile. He concluded his remarks about this topic saying: "In Chile it seems that the occasion to make this advanced step has not arrived, and I hope that this will not be reserved for a too remote time."[57]

As we can see, the model adopted by the Latin American countries in the nineteenth century was something different than the model that was effective in Europe at that time. These differences were expressed not only in the legal design of the codes but also in the ideological settings of them.

The adoption of a mixed system was a reaction of the European countries against the absolute power and represented an attempt to change the procedure of the "Ancién Régime" for a system inspired in a different conception of the State and the citizens. Paradoxically, Latin American countries in the post-independence period, which is usually identified as period of expansion of liberties in the region, decided to retain the basic structure of the system developed in late middle age in Europe.

3.- The Evolution of the Latin American Inquisitorial System in the Twentieth Century

Despite the fact that many countries have introduced reforms in their criminal procedures since the nineteenth century, the evolution of the criminal procedure in Latin America has been characterized by the conservation of the main structures that came from the inquisitorial system adopted after independence. There are different levels of change that were introduced in the system according to the political, economic, and cultural development of each country; however, this evolution did not affect the core of the inquisitorial procedure in the region.[58]

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[56] *Id*. at 189-190.

[57] *See* CODIGO DE PROCEDIMIENTO PENAL (Code of Proceedings in Criminal Matters) 13, (1990) (translation by the author).

[58] *See* ALBERTO BINDER, LA REFORMA PROCESAL EN AMERICA LATINA, IN JUSTICIA PENAL Y ESTADO DE DERECHO, 204 (1993) (Hereinafter LA REFORMA).

One extreme case in this evolution during the twentieth century is Chile. Chile enacted its Code of Criminal Proceedings in 1906 after several years of discussion in the Parliament. This code regulated an inquisitorial procedure, based mainly on *Las Siete Partidas* and local laws enacted in the second half of the nineteenth century, which incorporated certain new individual rights. Since then, the main structure of the procedure has been the same.

Reforms introduced in the past few years have increased the protection of certain individual rights but without affecting the structure of the procedure. On the contrary, the most important reform of the Chilean criminal procedure reinforced the inquisitorial components of the system with the elimination of the public prosecutors in 1927 and the subsequent concentration of prosecutorial and jurisdictional power in hands of a single judge.[59]

As a consequence of this evolution, some Chilean scholars have characterized the system as a "reinforced inquisitorial system" instead of a "reformed inquisitorial system", stressing the regression experienced in the country in contrast to the evolution of the criminal procedure in Europe since nineteenth century.

There are also many other countries in the region that have kept their original codes from the nineteenth century. In Paraguay the Code of Criminal Procedure has ruled the country without important modifications since 1890.[60] In Nicaragua the current code is from 1879 and in Honduras the code ruled the country from 1906 to 1984.[61] The Argentinean Code of Criminal Proceedings of 1888, in spite of several minor reforms, governed the federal system until the reform of 1991.[62]

During the first half of the twentieth century countries like Costa Rica (1941)[63] and Colombia (1938)[64] completely reformed their old codes, but did not transform the inquisitorial components of the system.

In the middle of the twentieth century several Latin American countries made more important reforms in their codes of criminal procedure. Perú in 1940 and Venezuela in 1962

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[59] *See* Mauricio Duce & Cristian Riego, *La Reforma Procesal Penal en Chile*, in SISTEMA ACUSATORIO PROCESO PENAL JUICIO ORAL, (1995) 151.

[60] *See* Juan Enrique Vargas, *Reforma Procesal Penal en America Latina: La Adecuacion de las Legislaciones al Programa de Derechos Humanos*, in PROCESO PENAL Y DERECHOS FUNDAMENTALES, 304-305, (1994).

[61] *See* LUIS SALAS & JOSE MARIA RICO, *supra* note 41, 36.

[62] *See* ALEJANDRO CARRIO, *supra* note 27, 14.

[63] *See* Luis Paulino Mora, *supra* note 52, 17.

[64] *See* Michael Pahl, *supra* note 15, 614.

enacted new codes that introduced a sort of oral trial and other minor innovations, but the impact of these reforms was also limited.[65]

The most profound effort toward the reform of the criminal procedure in the twentieth century was initiated in the province of Cordoba in Argentina. Cordoba enacted a new code in 1939 that introduced a mixed system in which "oral trials" were the central part of the procedure. This effort was followed by Costa Rica through the adoption of a new code of criminal procedure in 1973 based on the model of Cordoba[66], and by several provinces in Argentina that also reformed their legislation.[67] These reforms are often mentioned as the precursors of the current effort to transform the criminal justice system in Latin America.[68]

To conclude this historical part, it is possible to say that Latin American countries adopted an orthodox model of inquisitorial criminal procedure in the nineteenth century, a model that had already been reformed in Europe by the adoption of liberal ideas from the French Revolution. After the codification period, Latin American countries kept the basic inquisitorial structures adopted in the nineteenth century and also the ideology that had inspired the development of the inquisitorial system in late medieval Europe. Successive reforms in the twentieth century made some changes the extent of which depends on different variables, but in general terms did not replace the core of the inquisitorial procedure.

4- Description of the Main Features of the Latin American Inquisitorial Criminal Procedure

Latin American countries developed a particular form of criminal procedure, a model that I have called the "Latin American inquisitorial system". In my opinion it is not possible to identify this model with the current system of Western European countries nor with the historical system created by the inquisition and adopted in Europe in the late Middle Age.

That historic inquisitorial procedure is the direct and the most important source in the configuration of the Latin American criminal procedure, but the natural evolution of the system and the cultural context in which it has been applied prevent us from making a total identification of both. However, many of the ideological underpinnings that inspired the historic model are still present in Latin American criminal procedures and have constituted the core of the system.

The main components of Latin American criminal procedures need to be understood in this ideological and cultural context. Particular procedural devices cannot be explained

[65] For a description of the Peruvian Code of 1940 see LINN HAMMERGREN, THE POLITICS, *supra* note 1, 117-137.

[66] *See* Luis Paulino Mora, *supra* note 52, 17.

[67] *See* JULIO MAIER, DERECHO, *supra* note 22, 415-424.

[68] *See infra* II.1.

only as technical aspects: they must be studied in context to understand their role in the system.

In the following pages I will highlight the main features of the model of criminal procedure effective in most Latin American countries before the reforms introduced since the mid 1980s. I will attempt to show the basic scheme of the different systems without entering into the analysis of particular features of each one.

The general structure of the criminal procedure in Latin American countries is very similar, but at the same time specific rules that regulate particular problems differ in intensity from country to country. Therefore, the emphasis of this section will be on the most characteristic features divided in four topics: power of judges, general characteristics, procedural structure, and inquisitorial culture.[69] I will also add a section oriented to describe the situation of the *Ministerio Publico* in this procedural context.

My aim is not only to present an explanation of law in books, but also the way in which these rules work in the actual practice of the system, that is, law in action.

A.- Power of Judges

In regard to the actors of the system, the most striking feature of the Latin American criminal procedure is the protagonist role played by professional judges. The figure of a professional judge dominates the entire procedure as the inquisitor did in the thirteenth century. Latin American judges have concentrated powers that are divided among different agencies and courts in other systems.

In the investigatory phase judges perform not only jurisdictional matters, but also they assume prosecutorial functions. These judges are usually called investigatory magistrates. They conduct judicial investigations while at the same time they control the legality of these investigations.

This model used to be the general rule in the organization of criminal procedure in Europe but has been abandoned in several countries in recent decades. For instance, Germany, Italy, and Portugal gave the responsibility of the investigation to prosecutors.[70]

[69]For a more detailed explanation of the procedure in different countries see ALEJANDRO CARRIO, *supra* note 27, (for the Argentinean case); LINN HAMMERGREN, THE POLITICS, *supra* note 1, 121-127 (for the Peruvian case); Cristian Riego,The Chilean, *supra* note 6, 3-11 (for the Chilean system); Michael Pahl, *supra* note 15, at 614-615 (for the Colombian system). *See also* John Maull, *The Exclusion of Coerced Confessions and the Regulation of Custodial Interrogation Under the American Convention on Human Rights*, 32 AM. CRIM. L.REV., 90-96 (1994)(for a general description of some common features related to the rights of the defendant).

[70]Mireille Delmas-Marty said "...the institution of the *judge d´instruction*, has been challenged in all the countries that imported it from France. It has practically been abandoned in Germany, Portugal, and more recently in Italy. In France even is progressively marginalized". MIREILLE DELMAS-MARTY, TOWARD AN EUROPEAN MODEL OF CRIMINAL TRIAL, IN THE CRIMINAL PROCESS AND HUMAN RIGHTS, 193 (1995).

Even though most countries in the region have *Ministerio Publico*, their role in the criminal procedure is minor.[71]

Another trait that contributes to this intense concentration of power is the division of roles between judges in charge of the investigatory phase and judges in charge of the trial phase. Several European countries made this division of functions since the reform of nineteenth century and even introduced lay juries or at least mixed panels in charge of the trial phase. In contrast, in several countries of the region it is still common that the same judge performs both functions in all type of cases (i.e. Chile, Paraguay, and Uruguay among others) or at least in some specific type of cases (i.e. Argentinean federal system). This situation aggravates the concentration of power because in these processes the same judge is not only in charge of the investigation but also of the final decision. Lay juries and mixed panels are exceptions in Latin America.

The Chilean criminal procedure is probably the most radical expression of the absolute concentration of power in hands of a single judge in Latin America. In Chile there is neither prosecutor nor separation of functions between judges in the different stages of the procedure. Thus, the same judge makes the investigation, formulates charges against the defendant, and finally decides the case in the trial phase that includes sentencing. In the trial phase the defendant confronts a judge who at the same time has played the role of his or her prosecutor.

In addition, one extended element of the organization of the Latin American criminal courts that reinforces the concentration of power of judges is the lack of professional staff in charge of the administration of courts. Therefore, the administrative functions are also part of the judge´s responsibilities. From the organizational point of view, judges are kinds of general managers of their courts and every administrative decision must be taken by them.

B.- General Characteristics of the Procedure

There are several fundamental characteristics of the criminal procedure in Latin American countries that are relevant to get a basic idea of the context in which the system works.

A very distinctive feature of the criminal procedure in the region is its written character. This means that all aspects of the criminal process must have a written version. This written material constitutes a file or dossier of the case, the so-called *expediente*. All the legal proceedings and resolutions of the case must appear in written form. Even the witnesses´ oral statements are transcribed and then incorporated in the *expediente*. In this way the *expediente* contains all of the relevant elements of the process, in a chronological order. The *expediente* is a mirror that reflects the reality of the procedure.

The *expediente* is the basic material that judges have to consider to reach the decisions of the case, including the final sentence. A latin aphorism that came from the

[71] *See infra* II.4 E.

inquisition time describes the importance of the *expediente* in the criminal procedure in Latin America: *Quod non est in acta non est in mundo*[72] (which is not in the file is not in the world). This means that only the facts that are in the *expediente* should be considered by judges at the moment they adopt their decisions. Therefore, a main objective of the criminal process in Latin America is the construction of the *expediente*. The backbone of the criminal procedure in Latin America is the inquiry directed by judges in the construction of the *expediente*.

The written character of the procedures is also associated with another relevant feature of the criminal procedure in Latin America: the delegation of functions. An extensive practice in the region is the delegation of jurisdictional power of judges, as well as some other functions, in low-level employees of courts called *actuarios*.[73] They perform activities that are legally duties of judges, such as the interrogation of the defendant and witnesses or the adoption of some jurisdictional decisions.[74] "The written procedure permits the judge to assign to the employees different tasks, the results of which they record in the files, which the judge then reads. In common practice, the court functions with a group of employees who make and record the different steps in the procedure...."[75]

The nonexistence of formal discretion is another common element of the criminal procedure in Latin America. The codes of criminal law and criminal procedure of the region rarely allow discretion to judges and prosecutors to dismiss cases before the trial stage. The principle that regulates this matter is called "Legality Principle" (*Principio de Legalidad* in Spanish). According to this principle the State´s agencies in charge of the criminal prosecution must continue the prosecution of every case until the final stages of the procedure, unless there is not enough evidence to do that. However, in actual practice the system has developed different kinds of informal and even illegal devices which are the functional equivalents of discretion. The main problem of these devices is that they are neither transparent nor controllable because they occur under the shadow of the official system.[76]

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[72] *See* Alberto Binder, *La Justicia Penal en la Transicion a la Democracia en America Latina*, in PROCESO PENAL Y DERECHOS FUNDAMENTALES, 527 (1994).

[73] *See* ALBERTO BINDER, INDEPENDENCIA JUDICIAL Y DELEGACION DE FUNCIONES: EL EXTRAÑO CASO DE DOCTOR JEKYLL Y MR. HYDE, IN JUSTICIA PENAL Y ESTADO DE DERECHO 75-92 (1993) and ALBERTO BINDER, DEL CODIGO MENTIRA AL SERVICIO JUDICIAL, IN JUSTICIA PENAL Y ESTADO DE DERECHO 93-122 (1993).

[74] Empirical studies made in Chile show that in important percentage of cases judges recognized that their *Actuarios* performed many of the duties that the law expressly orders judges to perform. *See* MARIA ANGELICA JIMENEZ, EL PROCESO PENAL CHILENO Y LOS DERECHOS HUMANOS ESTUDIOS EMPIRICOS , 184-191 (1994).

[75] *See* Cristian Riego, The Chilean, *supra* note 6, at. 6.

[76] Empirical studies made in Chile show that only a small percentage of the cases that the system reviews reach the final stage of the procedure and that the highest portion end in the pre-trial stage because of different "legal" reasons that reflect some use of discretionary power by judges. *See* Cristian Riego, *Aproximacion a una Evaluacion del proceso Penal Chileno*, in REFORMAS PROCESALES EN AMERICA LATINA: LA ORALIDAD DE LOS PROCESOS, 267-272 (1993).

This situation is not only a common feature of Latin American systems, but also in more developed

The extended use of pre-trial detention is another traditional aspect of the criminal procedure in Latin America. The rate of people in pre-trial detention per 100,000 inhabitants varies from country to country, but is usually higher than any Western European counterpart.[77] In addition, the percentage of people in pre-trial detention among the total number of inmates represents the highest percentage of the inmate population.[78]

With regard to the objectives of the pre-trial detention, a problematic aspect in Latin America is that pre-trial detention is used not only as a device to ensure the presence of the defendant during the process, but also as an informal means to punish people.[79] This phenomenon has been called *presos sin condena* (inmates without sentence) and is one of the main traditional criticisms that Latin American scholars have of their criminal justice systems.[80]

A final common trait of the Latin American criminal procedure is the broad possibility to get hierarchical control of the decisions reached by lower courts.

The organization of the criminal justice in Latin America is pyramidal and highly hierarchical. Higher courts have the possibility to review almost all the important decisions taken by investigatory magistrates and by judges of the trial phase. There are also several remedies that parties can invoke to get revision of the superior courts and there is even an automatic review (in Spanish called *consulta*) for some judicial decisions that are considered especially relevant.[81]

Many of these common characteristics have a direct link with some structural features of the historic model of the inquisitorial system. For instance, the written character, the nonexistence of discretion, and the intensive intervention of the superior courts are "innovations" that were introduced by the adoption of the inquisitorial procedure in the region. It is true that many of these features still have a lot of influence on the configuration

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countries. For instance in the case of England see John Baldwin & Michael McConville, *Plea Bargaining and Plea Negotiation in England*, 13 LAW & SOCIETY REV. 287 (1979).

[77]*See* Statistic appendix in ACERCA DE LA CARCEL (1993).

[78]Between 47% and 87% of the inmates in Latin American prisons are people in pre-trial detention according to a study conducted by ILANUD in the 1980s. *See* Horst Sconbohm & Norbert Losing, *Proceso Principio Acusatorio y Oralidad en Alemania*, in SISTEMA ACUSATORIO PROCESO PENAL Y JUICIO ORAL EN AMERICA LATINA Y ALEMANIA, 43 (1995).

[79]*See* CRISTIÁN RIEGO, LA PRISION PREVENTIVA EN CHILE, (1990).

[80]*Id*. *See also* Alberto Bovino, *El Encarcelamiento Preventivo en los Tratados de Derechos Humanos*, in LA APLICACION DE LOS TRATADOS SOBRE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES, 429, 430 (1997) and Luis Paulino Mora, *Garantias Constitucionales en Relacion con el Imputado*, in SISTEMA ACUSATORIO PROCESO PENAL JUICIO ORAL EN AMERICA LATINA Y ALEMANIA, 23-25 (1995).

[81]In Chile, in 1994, 48% of all the cases that the Court of Appeals of Santiago reviewed (Civil and Criminal) were *Consultas*. *See* Mauricio Duce and Cristian Riego, *supra* note 59, at 158.

of the European systems, but the intensity that they have in Latin America represents a big difference between these continents.

C.- Procedural Structure

Criminal procedure in Latin American countries is commonly divided in two phases: the investigatory phase, called *Sumario*, and the trial phase, called *Plenario*.

The main objective of the *Sumario* is to collect evidence to prove that a crime was committed and could be attributed to a specific person or group of people. In other words, during the *Sumario*, judges accumulate the evidence that will support the accusation against the defendant during the *Plenario*.

All the activities of the *Sumario* are, as a general rule, conducted in secret. The secret character of the *Sumario* not only affects third parties (press and society), but also the defendant and his or her lawyer. The temporal limit of the secrecy depends on different countries but usually covers a significant part of the *Sumario.*[82]

The *Sumario* could be initiated ex-officio by judges or by a complaint presented on behalf of the victims in the criminal courts or police precincts. In the typical case, the state agency that has first knowledge of the commission of a crime is the police. The police have the legal duty to communicate this information to the appropriate judge within a short period of time.

Once the judge receives the *notitia criminis* (acquired knowledge that a crime has been committed), the formal judicial investigation starts. As we have seen, the responsibility of the criminal investigation is in the hands of judges. Therefore, during this stage of the procedure judges not only have the legal duty to decide about the rights of the defendant and the other parties, but also the responsibility to conduct the investigation, collect the evidence, and control the legality of these activities.

Despite this formal responsibility, the investigation is normally delegated to the police. The police conduct the main part of the investigation, first when they receive the complaint and then when the judges give them orders to make investigations in the respective cases. After the police finish with the specific proceedings, they communicate the results of their investigation through written reports that are later incorporated into the *expediente*.

One of the most important judicial decisions during the *Sumario* is a sort of preliminary indictment, usually called *Auto de Procesamiento*. Through the *Auto de Procesamiento* judges declare the existence of important presumptions of guilt against a specific person who from this moment will be formally subjected to the process. The main effects of this declaration are the pre-trial detention of the defendant and the restriction of other rights. After this resolution, the defendant and his or her lawyer have very limited

[82]In Chile there are formal rules that establish a temporal limit for the secrecy, but in practice the *Sumario* is usually secret forever.

access to the information contained in the *expediente*. In addition, their rights are mainly subordinated to the interests of the investigation. This declaration "...is commonly seen for the public as the most important effect of the procedure because the delay of the final decision transforms the effects of it, especially the pre trial imprisonment, in the real punishment."[83]

During this stage of the procedure prosecutors also have a limited role. At most, their principal function is to present requests to the investigating magistrate for the collection of evidence that they consider useful to support the accusation during the trial phase. Judges are the exclusive officials with power to decide about these requests.

As a consequence of the dynamic created by the judicial character of the investigation, the delegation of functions, and its written character, the *sumario* has become a bureaucratic and formalistic phase of the procedure. The *sumario* is a ritualistic accumulation of evidence and shaping of the *expediente*. It is not a dynamic stage in which there are permanent interactions between the participants in the process.

When the investigation ends, the file is put at the disposal of the prosecutor who has the duty to study its content and make the determination of asking for a release (*sobreseimiento*) or filing charges against the defendant (*acusacion*). In Chile, the same investigating magistrate is in charge of these decisions.

If an accusation is filed against the defendant, the second phase of the procedure, the *Plenario*, starts. The *Plenario* is the adversarial phase of the procedure in which the defendant has access to the evidence collected during the *Sumario* and then has the possibility to present his own evidence and arguments to the court.

In many countries this stage of the procedure is entirely written. This means that the arguments are presented in written motions and the court must resolve the case after reading the *expediente,* without a hearing.

In other countries the *Plenario* is a sort of oral and public trial, but very different from an American type of trial. This trial is not a condensed hearing in which the parties present their evidence and their arguments before the court. First, the presentation of the evidence is commonly divided into several hearings without continuity among them. The content of the hearings is mostly a reproduction (even a literal reading[84]) of the evidence accumulated during the *sumario*. In the typical case there is no evidence presented other than the evidence collected in the investigatory phase. In addition, it is not necessary to introduce the evidence in an adversarial form.

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[83] *See* Cristian Riego, The Chilean, *supra* note 6, at 8.

[84] "Often a trial judge will simply read the written statements and render a verdict without ever seeing or personally speaking to the defendant, witnesses and victims". Michael Ross Fowler and Julie M. Bunck, *Legal Imperialism or Disinterested Assistance? American Legal Aid in the Caribbean Basin*, 55 ALB. L. REV. 815, 836-837 (1992).

Judges have an active role in this phase of the procedure. They conduct the *Plenario* and also formulate the questions to witnesses, expert witnesses, and the defendant. There is no cross-examination and parties play a minor role. Judges also have access to the *expediente* several days or weeks before the trial starts.

The *Plenario* ends with the elaboration of the sentence, which is delivered to the parties in written form several days, weeks or even months after the hearings or the deadline by which the defendant´s written conclusions were presented to the court if there were not hearings.

D.- The Concept of the Inquisitorial Culture[85]

The description of the Latin American inquisitorial model of criminal procedure is not complete if not include at least a brief mention of the culture generated by this system. Alberto Binder[86] has pointed out that the inquisitorial system is not only a way to organize the criminal procedure and the administration of justice, it is also a system that has produced a particular culture, the inquisitorial culture.

This culture implies a particular way to conceive the criminal justice system and constitutes one of the reasons that has allowed the survival of the inquisitorial procedure for almost five hundred years in the region.

According to Binder[87], the inquisitorial culture is characterized by a highly formalistic and bureaucratic mentality. Judges and lawyers regularly consider the form more relevant than the substance and usually expect that the ritual accomplishment of the forms will solve the problems that are presented before the criminal justice system. Hence, for example, in Chile a case can easily be declared void if the judge has not signed specific parts of the file, but it is almost impossible to annul the same case as long as the signature is there, regardless of whether the judge was physically present.

Other relevant aspects of this culture are a frightful attitude toward innovations and a conservative approach to changes. Creativeness and innovation are risks for lawyers and judges, therefore the solutions that they create to solve problems tend not to alter the *status quo*. A common attitude of judges and lawyers is to reject the new solutions and reforms.

This culture has also developed a ritual language only comprehensible for the "initiates in the science". Several words in Latin and legal jargon obstruct the access of people to the system.

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[85]Basically I am referring to the legal culture created by the inquisitorial model of criminal procedure. I understand legal culture to be "...the ideas, values, attitudes, and opinions people in some society hold, with regard to law and the legal system". Lawrence Friedman, *Is There a Modern Legal Culture?*, 7 RATIO JURIS 118, 118 (1994).

[86]*See* ALBERTO BINDER, LA REFORMA, *supra* note 58, 204-208.

[87]*Id.*

All these characteristics have produced the effect of isolating the system from the society. Society has very limited knowledge about the system and perceives it as something strange or at least difficult to understand.

The so-called inquisitive culture is an important part of the criminal justice in Latin America. A serious effort to reform the criminal procedure in the region has to consider that this cultural element is as much part of the basic structure of the system as are the substantive rules and legal procedures.

E.- The Situation of *Ministerio Publico* in the Latin American Inquisitorial Criminal Procedure

Although there is debate about the remote antecedents of the *Ministerio Publico* in the Civil Law tradition, most authors agree that in Roman Law it is possible to find several institutions that present similarities to the current configuration of the *Ministerio Publico.*[88]

In addition, evidence shows that during the late Middle Ages many European countries had several functionaries that played roles similar to those played by the current prosecutors (*fiscales*) in those countries.[89]

However, the *Ministerio Publico*, in terms of the role that it plays in the modern criminal procedure, is a recent creation. Many authors believe that the *Ministerio Publico* has its origins in the French legal systems in the early nineteenth century.[90] *Ministerio Publico* has been called the "Son of the Revolution" to emphasize that its participation in criminal procedure is a consequence of the reconfiguration of the European criminal justice after the French Revolution.[91]

A German scholar, Claus Roxin holds such position. He said that the reform of the criminal procedure in Europe in the nineteenth century not only had the introduction of orality, publicity, and lay participation in the administration of justice as main objectives of

[88]Among them the *Procuratores Ceasaries* and the *Advocati Fisci*. *See* JULIO MAIER, EL MINISTERIO PUBLICO: UN ADOLESCENTE?, IN EL MINISTERIO PUBLICO EN EL PROCESO PENAL, 15, 22 (1993) (Hereinafter EL MINISTERIO). *See also* Alex Carocca, *El Ministerio Publico en la Historia y el Derecho Comparado*, in ESTUDIOS DE DERECHO PROCESAL, 273, 279-281 (1994)(Carocca argues that it is possible to find some antecedents as far back as Egypt 4,000 B.C.)

[89]*Id.*

[90]*See* JULIO MAIER, EL MINISTERIO, *supra* note 88, 29; JOSE LUIS AULET, JUECES, POLITICA Y JUSTICIA EN INGLATERRA Y ESPAÑA, 625 (1998). Carocca argues that, at least in Spain, there were also important local influences in the development of the *Ministerio Publico* that can be traced in the high Middle Ages. *See* Alex Carocca, *supra* note 88, 284-294.

[91]Maier said that this name could be misleading because the introduction of the *Ministerio Publico* in the French legal system was produced only a couple of decades after the revolution, more precisely in the French Code of 1808. However, he considers that this name is correct if we understand that the *Ministerio Publico* is a consequence of the configuration of the rule of law developed in Europe, in which the French Revolution was the starting point. *See* JULIO MAIER, EL MINISTERIO, *supra* note 88, 29.

the change, but also included the creation of the *Ministerio Publico* as an indispensable actor of the new criminal procedure.[92]

Roxin argues that the main goals originally pursued with the creation of the *Ministerio Publico* were (1) the abolition of the old model of inquisitorial procedure, (2) the creation of a custodian of the legality of the judicial process, and (3) the establishment of a controller of the police work.[93]

According to these roles, prosecutors were not conceived as parties in criminal procedures, as they are in the American criminal justice system.[94] Rather, they were conceived as quasi-judicial, impartial, and objective functionaries. Their basic roles in criminal procedures were, on the one hand, to control the legality of the judicial process (especially the legality of judicial decisions) and, on the other, to represent the society through the formal responsibility of filing charges against the defendant and representing the public interest by being the accusatorial party at the trial.[95]

This particular configuration of the *Ministerio Publico* transformed it in a *sui generis* institution. For that reason it is common to find scholars who describe it as an ambiguous institution[96], a hybrid[97] or even an adolescent[98], pointing out that the design of the *Ministerio Publico* presents several internal contradictions that have been important obstacles to its development as a relevant player in the criminal procedure of the "Civil Law world".[99]

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[92]*See* Claus Roxin, *Posicion Juridica y Tareas Futuras del Ministerio Publico*, in EL MINISTERIO PUBLICO EN EL PROCESO PENAL, 37, 39 (1993).

[93]*Id*. at 40-42.

[94]Even though in the American criminal justice system there are some standards that define the role of the prosecutor as an "administrator of justice" or his duty in the criminal procedure as to "seek justice", I am basically referring to the role played in the practice of the system by this institution.

With regard to this topic Thomas Weigend said that "In marked contrast to American prosecutors, who are cast in a strictly partisian role, continental prosecutors display a strong affinity with the judiciary". Thomas Weigend, *Prosecution: Comparative Aspects*, in ENCYCLOPEDIA OF CRIME AND JUSTICE VOL. 3, 1296, 1297 (1983)

[95]Prosecutors also performed important functions in civil and administrative matters, such as the judicial representation of the state in cases that involved economic detriment to the public patrimony.

Many of these functions are still part of the responsibilities of the *Ministerio Publico* in several European and Latin American countries.

[96]*See* Alex Carocca, *supra* note 88, 276.

[97]*See* JULIO MAIER, EL MINISTERIO, *supra* note 88, 32.

[98]*Id*.

[99]According to Weigend, many of these characteristics can be explained as part of the judicial heritage of continental prosecutors. In his opinion prosecutors were "created from the rib of the judge". Thomas Weigend, *supra* note 94, 1297.

The role of the *Ministerio Publico* in the investigatory phase of the mixed system or reformed inquisitorial procedure is minor. Prosecutors have more bureaucratic functions than active roles in the investigation, which is conducted by judges (investigative magistrate) and performed in the practical operation of the system by the police. During this stage of the procedure, prosecutors are more reactive functionaries than proactive investigators. As we have seen, the main actors at this stage are the investigating magistrates.

During the trial, the intervention of prosecutors was essential to transform the inquisitorial model prior to the reform of the nineteenth century because trials required the presence of two parties. However, the historic tendency in the practice of the mixed system has been the assumption of an active role by judges and consequently a limited or only formal role for prosecutors. For instance, cross-examination was not a common practice in the trials of the reformed inquisitorial procedure. On the contrary, in many countries the trial judges were responsible for interrogating witnesses in the first place and then they gave the other parties power to do it.[100]

The situation of the *Ministerio Publico* in Latin America prior to the current reform movement was aggravated by the fact that, as we have seen, the region kept a more inquisitorial model of criminal procedure than Continental-Europe.

Most countries in the region established a *Ministerio Publico* in the late nineteenth or early twentieth century. However, its role in criminal procedure has not been important. Because of its irrelevance in the context of the Latin American inquisitorial procedure the *Ministerio Publico* constitutes the "fifth wheel of the judicial carriage."[101]

As a direct consequence of this irrelevance, several countries eliminated the *Ministerio Publico* in their criminal procedures giving judges the prosecutorial functions. One example of this situation is Chile. Chile eliminated the office of the *Ministerio Publico* (called *Promotores Fiscales*) by Decree Number 426 of 1927. Article One of the Decree established the vacancy of all prosecutor positions because they were not "indispensable".[102] Since then, judges have assumed both roles in the Chilean criminal procedure.[103] Another example is Peru, which also eliminated the *Ministerio Publico,* but only for a short period of time between 1975 and 1980.[104]

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[100]This is still the rule in countries like Germany.

[101] *See* Jose Andres D´Alesio, *supra* note 50, 191.

[102]Decree Number 426 of 1927, published in the Official Newspaper, March 3, 1927.

[103]*Ministerio Publico* was considered an expensive and unnecessary office that could easily be replaced by the judges. For a historical explanation of the environment in which the elimination of the *Promotores Fiscales* in Chile was produced, see Armando de Ramon, *Promotores Fiscales su Historia (1876-1927)*, in BOLETIN DE LA ACADEMIA CHILENA DE HISTORIA NO. 100, 315-336 (1989).

[104]*See* LINN HAMMERGREN, THE POLITICS, *supra* note 1, 84.

However, the elimination of the *Ministerio Publico* was not the common rule in the region. Rather, most Latin American countries retained this institution but kept its profile low. The existence of the *Ministerio Publico* has thus not been more than a legal abstraction in most of the region.[105]

An extreme case of this formal existence was the situation of the *Ministerio Publico* in Guatemala prior to the reform of 1992[106]. In February of 1991, the office of the *Ministerio Publico* had only 24 prosecutors for all the country which had a population of over nine million.[107] Observers reported that "...when *fiscales* appeared in court, judges sometimes asked who they were and what they were doing there."[108]. Similar opinions about the condition of the *Ministerio Publico* before the current process of reform can be found in many countries of the region.[109]

The marginal role of the *Ministerio Publico* in criminal procedure also has an impact on the organization of that office in the region.

> ...even where a Public Ministry existed, its traditional organization was weak. Whatever logic lay behind its structure was more congruent with the inquisitory role. Where "prosecutors" were not expected to do much, there was no need for an organization to support or monitor their work. Budgeting, personnel, procurement, and planning systems were almost nonexistent. Mechanisms for assigning or tracking cases were similarly undeveloped. Often the highest ranking organizational members, assigned to appellate courts, had minimal case loads, and routinely dedicated themselves to other activities... There was no mechanism for setting organizational policies, and when leadership intervened in cases, it was most often to favor friends of the government. Organizational poverty was the general rule, and usually more extreme than that of the courts.[110]

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[105] *See*, El Ministerio Publico en el Proceso de Reforma Penal en America Latina, interview with Julio Maier, Pena y Estado No.2 at 173. *See also* Linn Hammergren, *supra* note 16, 8.

[106]For a general evaluation of the *Ministerio Publico* in Guatemala before the reform of 1992 see Ralph Smith, et al., Analysis of the Public Ministry of Guatemala, (1991) (unpublished study for USAID/Guatemala on file with the author).

[107]*See* Michael Ross Fowler and Julie M. Bunk, *supra* note 84, 823.

[108]*See* LINN HAMMERGREN, THE POLITICS, *supra* note 1, 84.

[109]For the description of the situation of the *Ministerio Publico* in El Salvador, Panama, and Colombia see Linn Hammergren, Institutional Strengthening and Justice Reform, 37-48 (1998) (hereinafter Institutional). For a description of the *Ministerio Publico* in Honduras before 1988, see LUIS SALAS & JOSE MARIA RICO, *supra* note 41, 79-93. For a description of the *Ministerio Publico* in Costa Rica before 1988 see JOSE MARIA RICO ET AL., LA JUSTICIA PENAL EN COSTA RICA, 103-109 (1988). For a general description of the situation of the *Ministerio Publico* in Bolivia see Rosaly Ledezma, *El Ministerio Publico: Perspectivas y Disyuntivas en la Reforma de la Justicia Penal en Bolivia*, Pena y Estado No. 2, 125, 126-129 (1997). For a description of the *Ministerio Publico* in Guatemala before the reform of 1992, see Ralph Smith et al., *supra* note 106.

[110]Linn Hammergren, Institutional, *supra* note 109, 36.

Under these conditions, it is not strange that the *Ministerio Publico* has not been an object of concern in Latin America. *Ministerio Publico* has been an institution not required by the system for its practical operation. In fact, the design of the Latin American inquisitorial system excludes any relevant role of the *Ministerio Publico.*

CHAPTER II

THE REFORM OF THE CRIMINAL PROCEDURE IN LATIN AMERICA

Attempts to reform the inquisitorial criminal procedure are not new in the region. The earliest efforts were made during the independence period and, as we already saw, generated a strong debate among the framers of the new republics. This debate was reflected in several constitutions enacted during the first half of the nineteenth century that regulated the trial by jury.

Despite the fact that these efforts were not successful in determining the final configuration of the criminal procedure in the region, they probably constituted the first "movement" for judicial reform in Latin America. This movement had a regional character, was inspired by similar ideas and principles, and pursued a similar goal: the transformation of the inquisitorial procedure.

From then to the mid eighties, innumerable reforms were made in Latin America whose purpose was the replacement of the "old" codes or, in many cases, the introduction of minor changes to solve specific problems of the system. The success of these reforms must be measured in accordance to their goals, but in general terms any of them transformed the inquisitorial criminal procedure.

In countries like Chile and Colombia, important efforts were made to introduce more significant changes, but, for different reasons, these projects were not even implemented. In Chile during the 1960s, two projects intended to introduce a mixed system but they did not find political support to be implemented.[111] In Colombia, the Constitutional Court declared unconstitutional a reform that attempted to give more power to prosecutors in 1979.[112]

These legal reforms and projects, with exceptions, were isolated efforts that could hardly be described as a common movement or trend in the region. Many of them neither followed a common pattern of reform nor were inspired by similar ideas and principles. In addition, from the point of view of its timing, they corresponded to different stages of development of the system in each country.

This situation has changed since the mid eighties. Now, most Latin American countries are involved in a substantial reform of their criminal justice system. The aim of this chapter is to analyze these efforts to transform the criminal justice system in the region. I will show the common characteristics of this process as well as an overview of the current situation of the reform, explaining the complex set of factors and ideologies that are behind it. Finally, I will briefly describe the new model of criminal procedure introduced by the reform.

1.- The New Regional Movement for the Reform

[111] *See* Mauricio Duce & Cristian Riego, *supra* note 59, 161-162.

[112] *See* Michael Pahl, *supra* note 15, 614.

The roots of this new movement can be traced to the Code of Criminal Proceedings of the Province of Cordoba, Argentina, of 1939. This was the first code in South America that introduced "oral" trials.[113] The Code of Cordoba represented the first step in the reform of the inquisitorial system in the continent and also the most serious effort to introduce the mixed system in the region.[114]

The Cordoba´s Code of Criminal Proceedings had a significant influence on subsequent reforms in Argentina and in other countries of the region, particularly in the case of the Code of 1973 in Costa Rica. However, the most important link between this reform and the current movement is a generation of legal scholars that grew under the influence of the Cordoba reform. This generation of legal scholars started to advocate for the introduction of the orality in the criminal procedures in Latin America, and after a couple of decades their ideas were spread in the region, constituting the milestone of the current movement.

One of the most influential legal scholars educated in this tradition is Julio Maier. Maier is the main author of the Argentinean project of the federal criminal procedural code of 1986. This project was the first attempt in Latin America to introduce a system based on the principles of an accusatorial model[115] of criminal procedure following the footsteps taken by Cordoba forty seven years before.[116] Maier also had a decisive participation in the drafting of Model Code of Criminal Procedure for Iberoamerica of 1988 elaborated by the Iberoamerican Institute of Procedural Law. This Code was based on the Maier project of 1986 and, as mentioned above, constitutes the main legal source in the current reforms in Latin America. Finally, Maier also had personal intervention in the elaboration of several reform projects in the region.[117]

In the following pages I will briefly analyze the distinctive traits of the current efforts to reform the criminal procedure in Latin America. These traits allow us to regard the reform of the criminal justice in the region as a common movement and not as a group of isolated efforts made separately by each country.

These elements also constitute a sort of backbone of the efforts made in the region. However, it is necessary to clarify that, to a certain extent, these characteristics represent an

[113]The authors of the Code of Cordoba were two of the most important Argentinean legal scholars of that time, Sebastian Soler and Alfredo Velez de Mariconde.

[114]*See* JULIO MAIER, DERECHO, *supra* note 22, 415.

[115]In chapter II.4 I will explain the meaning of this concept in the context of the reform of the criminal procedure in Latin America.

[116]For diverse political and technical reasons the project of 1986 was rejected and was replaced by the so-called "Levene Project" which contained a more conservative model based on the Cordoba code of 1939. This project was enacted in 1991 by the Argentinean congress. For more information about the reform of the criminal procedure of the federal system in Argentina see JULIO MAIER, DERECHO, *supra* note 22, 424-436.

[117]Maier participated in the elaboration of the projects of Guatemala and El Salvador, among others.

idealized version of the reform process. In many countries of the region it is difficult to identify some of these traits. In others they seem to be mixed with elements that I will not analyze in this paper.

Taking into account these limitations, I will describe the main traits of the movement that are useful to have a better understanding of the reform process and that also represent distinctive elements of the current efforts with regard to previous attempts made in the region.

A.- A Shared Diagnosis

A key element of this movement is the similar evaluation of the performance of the criminal justice system. According to this common evaluation, the current system is incapable of protecting the most basic due process guarantees while at the same time is incapable of achieving minimum results from the point of view of the prosecution.

The main cause of the incompetence of the system is also part of the common diagnosis in the region. An extended idea that inspired most reforms in Latin America is that the problems of the system are generated by the design of the inquisitorial criminal procedure. The idea is that the inquisitorial system constitutes a structural source of problems because of its inadequacy to have an efficient performance from the perspective of the prosecution and to fullfil the values of a democratic society.

In contrast to this diagnosis, the traditional view of the failure of the criminal procedure in the region has been the lack of economic and human resources in the implementation of the system.[118] The consequence of this traditional explanation is that the most important public policies in the area of criminal justice have included the investment of more economic resources and the elaboration of proposals oriented to make partial legal reforms to adapt particular components of the system.

The supporters of the reform also consider that these elements are relevant sources of problem in the system; however, they are not enough to explain the magnitude of the problem.

B.- Similar Strategy and Proposals[119]

[118]Paradigmatic in this point are the opinions of the former Chilean Supreme Court Justice German Valenzuela Erazo. *See, German Valezuela Erazo: Gobierno se Apodero del Poder Judicial*, LA TERCERA (Santiago), January 8, 1998. Available at <http://www.tercera.cl/diario/1998/01/08/33.html>.

[119]Despite the fact that most reforms in the region follow a very similar model, there are divergent models of criminal procedure in Latin America. The most important cases are the reforms of Colombia and Uruguay.

Beyond the differences in the design of the criminal procedure in these countries, the justifications of the change are very similar in all the region. Moreover, the divergent countries usually identify their reforms within the general trend in the region.

As a consequence of the similar evaluation of the failure of the system, the strategy toward the reform has been defined in a different direction than the traditional reforms in the area. A shared goal in the region is the complete elimination of the inquisitorial system.

The common strategy in Latin America is to make a radical transformation of the system and replace it by a new one based on an accusatorial model of criminal procedure.

Partial changes or more evolutionary reforms have been discarded because reformers think that they are not enough to produce a real transformation of the system. One concern of the supporters of the reform is that cosmetic or partial changes will not produce the deep transformation required by the system. On the contrary, these partial changes could allow the survival of the inquisitorial system with a renovated image and new legitimacy.

This strategy is also based on the idea that the object to be reformed is not only the procedure but the entire criminal justice system. Proposals presented in several countries of the region have a systemic view of the reform that includes changes in the procedural rules as well as in the institutions, actors, and substantive rules of the system.

C.- Regional Extension and Links Among Reforms

A striking element is the regional extent of the movement for the reform. This is probably the first trait mentioned to describe the current situation in the region. Almost every country on the continent is involved in a substantial transformation of their criminal procedure. A quick review of the Latin American map shows that reforms have been made or are in the process of being implemented in Argentina, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela.

More interesting than the extended geographical character of the reform is the existence of close links between the reforms in various countries. These links have created a sort of international network of reformers. They include not only the utilization of similar sources in the legal design of the reform projects, but also the exchange of experiences, technical support, and human resources. Hence, it is possible to talk about a community of people on the continent who are working in the same direction and with strong connections among them.

D.- Political Dimension of the Reform

Legal reform in Latin America has been traditionally conceived only as technical task without consideration of the political implications that legal changes have in the social life. Hence, the predominant ideology in the area of criminal procedure has been to make reforms considering only the technicalities of the legal phenomenon. Contributing to this narrow focus is the traditional understanding of the criminal procedure in a formalistic fashion in the region.[120]

[120] *See* Mauricio Duce & Felipe Gonzalez, *Policia y Estado de Derecho: Problemas en Torno a su Rol y Organizacion*, Pena y Estado No. 3, 51, 52 (1998).

A significant trait of the current reform movement is the attempt to change this limited conception of legal reform, taking into account that the criminal justice system is part of a more complex social and political system that will also be affected by the reform. The incorporation of the political dimension of the reform has several manifestations.

The first manifestation is at the level of the general goals of the reform. From this perspective the reform is conceived as indispensable to adapt the criminal justice system to the values of a democratic society.[121]

A second manifestation is that the reform also means redistribution of power among various structures of the State and people. In other words, "Judicial reform is political, not in the sense of partisan preferences, but because it like politics is about the authoritative allocation of values or who gets what, when, and how."[122] This aspect of the reform is a sensitive element of the change.

The recognition of the political nature of the reform is important not only in understanding the role of the criminal justice system within a broad context, but also in understanding different scenarios that involve the work for the reform. This is a third manifestation of the political character of the reform that has been an important element of the movement. The process of reform involves several stages of work with diverse emphases in each one. In some stages of the reform political components are crucial (for instance the legislative task) and in other technical elements are the main factors to consider (for instance the drafting of legal rules). The identification of clusters of political sensitivity and then the construction of a discourse capable to confront these clusters have been part of the strategies of the movement for the reform that differentiate it from previous efforts in the region.

E.- Multidisciplinary Approach

In close relation with the previous point, law reform has traditionally been a monopoly of lawyers and specialists in legal fields in the region. I mentioned that the culture developed by the system imposes several obstacles to "strange people" to access and understand the working of it.

The consequence of this narrow conception is that reforms of the criminal procedure have been mostly made by lawyers using traditional tools available in the legal discipline. One explanation of the limited impact of previous reform in the area is probably linked with the fact that other relevant elements involved in these changes were not considered in the design and implementation of these reforms.

A significant trait of the current movement in several countries is a change in this traditional conception through the integration of task forces that worked in the reform with

[121]For more details about the relation between the reform of the criminal procedure and the democratization process in the region, *see supra* II.3 A.

[122]*See* Linn Hammergren, *supra* note 1, 8.

professionals from disciplines that are outside the traditional legal field. An important role has been played by economists, engineers, architects, and specialist in organizations, logic design, and so on.

The incorporation of professionals from diverse disciplines has been one innovation in the elaboration of public policies in the judicial area in the region introduced by the new movement for the reform of the criminal justice.

2.- Overview of the Situation of the Reform in Latin America

An important difficulty to present an accurate picture of the state of affairs of the reform of the criminal procedure in the region is that "Characteristics of this process are that it is lengthy, tedious, and moves through various emphases and problems."[123] For that reason, I will follow Binder´s[124] distinction of the different stages in which the reform can be divided. He distinguished six different stages in this process: (1) sensitizing; (2) awareness and design; (3) involvement and struggles with the legislature; (4) planning and start up; (5) implementation; and (6) adjustment stage.

The first two stages are chronologically the first steps of the process for the reform. They involve the construction of the crisis of the criminal justice as an important social problem, then capturing the attention of relevant people and institutions about the existence of this problem and the necessity to resolve it, and finally suggesting solutions that are within the capacity of the relevant institutions and people.[125] The reforms of the criminal justice in the continent are beyond these initial steps which in general terms have been successfully finished.[126]

The stage of involvement and struggle with the legislature is one of the most "...tortuous and complex..."[127] stages. This stage represents a change in the strategy and the kind of work developed in previous stages. The technical debate that is the core of the design stage is replaced by the legislative debate which is by contrast highly politicized. Hence, this stage is composed by successive negotiations between members of the congress, politicians, public authorities that support the projects, and technical teams that worked in previous stages of the reform.

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[123] *See* Juan Enrique Vargas, Lessons, *supra* note 7, 18.

[124] *See* Alberto Binder, *Reflexiones sobre el Proceso de Transformacion de la Justicia Penal*, in IMPLEMENTACION DE LA REFORMA PROCESAL PENAL, 47 (1996)(Hereinafter *Reflexiones*).

[125] *See* WENDY GRISWOLD, CULTURES AND SOCIETIES IN A CHANGING WORLD, 114(1994).

[126] One of the most successful examples in this regard is Chile. A good indicator of this is the number of publications in the written media about the reform of the criminal justice system there. In Chile, between 1954 and 1973, 612 notes were published about the judicial system and most of them were not related with the implementation of general policies in that sector. In contrast, between 1994 and 1996, 533 articles were published only about the judicial reform. *See* Juan Enrique Vargas, *La Reforma a la Justicia Criminal en Chile: El Cambio del Rol Estatal*, in LA REFORMA DE LA JUSTICIA CRIMINAL, 107 (1998) (Hereinafter La Reforma).

[127] *See* Juan Enrique Vargas, Lessons, *supra* note 7, 18.

The stage of involvement and struggle with the legislature can take several years. At this moment many countries of the region are discussing the enactment of the reform before their parliaments. Bolivia, Paraguay, and Chile are examples of that. In the case of Chile, this stage has already taken four years, and it is expected that at least one more year will be required to enact all the projects that the reform includes.

After reforms are approved by the parliament or when they are in an advanced stage of the legislative debate, the stages of planning the start up and implementation of the reform begin.

The most important component of these phases is the technical work conducted by teams in charge of the various concrete aspects that the regular working of the system will require. The experience in Latin America has shown that these stages are crucial to the success of the reform. As I already mentioned, one criticism to the reform is that their implementation in the region has been poor and in no few occasions improvised.[128]

At this moment Venezuela is working on the implementation of the system that will begin to work in July 1999. Other example is Uruguay, whose start up originally planned for July 1998 was recently postponed for second time.

The reform process is not finished after the implementation of the system. On the contrary, the experience in several countries of the region shows that the reform requires many adjustments to solve innumerable practical problems that are only possible to discover after the system is implemented. The magnitude of the task implies that the reform of the criminal justice in Latin America can only be developed in a long term period that could take several years or even decades. This period represents the last stage of the reform process, the so-called adjustment stage.

The adjustments of the system usually take the form of legal proposals, administrative changes, and design of new programs. The reform in Colombia went into effect in July 1992 and has been object of various changes since then.[129] In Argentina the reform of the federal criminal procedure went into effect in September 1992 and several laws have been enacted since then with the goal to complement it.[130] In Guatemala the new criminal procedure went

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[128]Vargas said:

> ...a principal impediment to reforms can be found in the lack of planning capacity in the judicial branch, all the more since the judiciary is able to create reality and seldom concerns itself with trivial matters. This is exacerbated by institutional and cultural improvisation: delays in appointing officers, scarce training, inadequate physical space and facilities, and very limited understanding of problems which will surface through the implementations of reforms.

Juan Enrique Vargas, Lessons, *supra* note 7, 12.

[129]Currently the Colombian Judiciary is developing a complete plan for the development of the justice system, see PLAN DE DESARROLLO DE LA JUSTICIA 1995 - 1998, available at <http://www.fij.edu.co/pldsjs/intrdccn.htm>.

[130]Current legislative proposals are the creation of summary procedures and the introduction of professional

into effect in July 1994 and also since then several legal and administrative changes have been made.

The recent start up of the new criminal procedure in Costa Rica (March 1998) and El Salvador (April 1998) situate these countries in a situation in which the adjustments will be required soon.

3.- The Movement for the Reform: A Complex Set of Factors

The movement for the reform of the criminal justice in Latin America is product of a confluence of several factors that justify its necessity from diverse perspectives. The reform process must be understood as a result of the interaction of these different and sometimes contradictory lines of justifications.

The variety and intricacy of these elements allow us to regard the reform movement as a complex set of ideologies, goals, and other factors. The weight of each factor depends on the particular circumstances of each country. In some countries specific factors played a decisive role, but the same factors did not have similar relevancy in others. On the other hand, it is difficult to isolate one factor as the most important catalyst of the reform or identify the reform just with one ideology of the criminal procedure and its goals.

In the following pages I will identify and discuss the main impulses that have been present in the efforts toward the reform of the criminal justice system in the region. I will emphasize the factors of the reform that seem to represent common trends in the region rather than particular circumstances of specific countries. These factors are: The democratization process; the influences of the human rights movement; the new development strategy in the region and the efforts toward the modernization of Latin American states; the negative perception of the judicial system and the failure of the inquisitorial procedure; forces toward the convergence of the legal systems in the region; the role played by international organizations; and, the role played by a new elite of professionals.

A.- Democratization Process

Since the mid eighties the political landscape in Latin America has experienced a radical change. Today almost all countries have democratically elected governments. Prior to this period of political changes different kinds of dictatorships and authoritarian governments governed the destiny of Latin America. This process of political transformation in Latin America is usually referred to as the transition from authoritarianism to democracy.[131]

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managers in charge of the administration of the courts, see MINISTERIO DE JUSTICIA DE ARGENTINA, PLAN DE ACCION, available at <http://snts1.jus.gov.ar/plan/plan/htm>.

[131] *See* IRWIN P. STOTZKY & CARLOS S. NINO, THE DIFFICULTIES OF THE TRANSITION PROCESS, in TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY, 3 (1993).

This process of transition has imposed various tasks to the new democratic governments in many areas of the social life that required adaptation to the values of the new form of political organization.[132]

One of the major challenges in this period of transition has been the reconstruction and stabilization of institutional structures compatible with the democratic principles. In this context, the reconfiguration of the judicial process has been part of the agenda of almost all governments in the region.[133]

I will not discuss the exact relationship between the structure of the judicial process and the transition to democracy nor will discuss whether these reforms are capable by themselves of producing the democratization of Latin American states.[134] My point is that despite the real consequences that the judicial reform could produce in the democratization of Latin American countries, the idea of its necessity as an institutional pre-condition to strengthen the rule of law and the democracy has been a significant element in the elaboration of public policies in the region in the last decades.[135]

Within this context, the criminal justice system has been identified as one of the areas of the judicial process that requires immediate attention because of its authoritarian structure. The reform of the criminal justice is considered a paradigmatic component of old institutionality that requires a deep transformation from the perspective of the democratization process.

Paradoxically, this powerful discourse has not had a significant impact on the introduction of one particular device that is usually associated with the democratization of the criminal process, the jury.[136]

B.- Human Rights and Reform

Human rights also constitute an important factor in the process of the reform of the criminal justice system in the region. There are several areas in which the human rights

[132]For a general analysis of the main political and economic choices that transitions to democracy have to confront in Latin America, see ADAM PRZEWORSKI, SUSTAINABLE DEMOCRACY, (1995).

[133]For bibliography about the judicial reform in Latin America *see supra* note 1.

[134]For a discussion of this relationship see Stephen J. Schnably, *The Judicial Process in Context*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY, 175 (1993) (The author had a skeptical point of view about the impact of the judicial process in the democratization of Latin America and suggested that a direction for future studies of this relationship should be limited to Roberto Unger´s notion of formative contexts).

[135]A good example of this is the Plan of Action signed on April 19, 1998, by the heads of States and Governments participating in the Second Summit of the Americas celebrated in Santiago. This document contains the governments´ will to reform the justice systems and judiciaries of the continent in Chapter II called "Preserving and Strengthening Democracy, Justice and Human Rights." See, Santiago Summit Plan of Action, available at <http://www.usia.gov/regional/ar/summit/act.htm> (hereinafter Summit).

[136]I will analyze with more detail this aspect. *See infra* II.4 A.

movement has influenced the adoption of the reform as a general public policy in Latin America.

First, after decades in which the policy of Latin American countries with regard to human rights was characterized by extensive violations of them, a basic platform of legitimacy of the new democratic governments has been to assume the improvement of the institutional protection of human rights as one of the most important objectives of the transition to democracy.

This general policy has had special emphasis on the institutional reconfiguration of the structures and processes of the judicial system because they showed an absolute incapacity to deal with the most important human rights violations produced during the non-democratic regimes. The criminal justice system became one of the central targets in this process of institutional reconfiguration because of its lack of capability to investigate and punish the human rights violations of the past.[137]

The influence of the human rights movement on the reform of the criminal justice in the region has erased the national boundaries and constitutes an element of the international agenda of Latin American governments. This agenda contemplates the reform of the administration of justice as one of the areas in which there is an urgent necessity for multilateral cooperation.[138]

Another factor related with the human rights movement that has contributed to the reform of the criminal justice system in the region has been the process of incorporating Latin American countries into international treaties of human rights. After returning to democracy, many countries signed the American Convention on Human Rights (hereinafter the American Convention) and gave jurisdiction to the Inter-American Court on Human Rights to hear individual cases of violations of the convention. Many countries also signed the International Covenant on Civil and Political Rights (hereinafter the ICCPR) and gave jurisdiction to the Committee on Human Rights to hear individual complaints from citizens of these countries.[139]

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[137]One burden that the new democratic governments of the region has carried is the situation of impunity of human rights violations. The Inter-American Commission on Human Rights has recommended to several countries in the region the adoption of measures to investigate and punish these violations as a way to comply with the international obligations assumed by them after they signed the American Convention of Human Rights. For instance see CASES Nº 10.843, 11.228, 11.229, 11.231, 11.982, INTER-AM. C.H.R 1996 (all against Chile).

[138]The Plan of Action of the Second Summit of the Americas contains the following statements with regard to this matter:

> Expedite the establishment of a justice studies center of the Americas, which will facilitate training of justice sector personnel, the exchange of information and other forms of technical cooperation in the Hemisphere, in response to particular requirements of each country.

See, Summit, *supra* note 135.

[139]Two examples are Argentina and Chile. Argentina in 1984 (a year after it returned to democracy) ratified the American Convention and the ICCPR. Chile finished the incorporation process of both treaties between 1989 and 1991.

The incorporation of these instruments into the internal legislation of Latin American countries has several effects on the reform of the criminal justice system. First, it opened up the opportunity of international supervision in the compliance of Latin American countries with international human rights law.[140]

A second influence of the incorporation of human rights has been in the construction of a diagnostic of the current system and the design of the reform proposals. International treaties and the case law developed by their organs have produced new parameters to contrast the criminal procedure in Latin America with standards of due process adopted by the international community. This comparison has allowed, on the one hand, the identification of the structural incompatibility of the current model with human rights and, on the other, a solid advocacy for a reform oriented to comply with them. From this perspective the discourse of the reformers is that the reform is a mandatory consequence of the incorporation of international human rights law in the internal legislation. Hence, the incorporation of international standards gave the reformers a new platform of legitimacy to advocate for the reform.

C.- Economic Development and Modernization of the State

Together with the democratization process almost all Latin American countries have initiated important economic reforms oriented to balance the budget, reduce the size and influence of the public sector, and open the economy to the international commerce.[141] Some of these reforms were initiated in the early 1980s but most of them started in the last years of that decade.[142]

According to this new strategy, the development in Latin America requires not only the transformation of the traditional economic sector but also the adaptation and strength of all state´s institutions as an essential component for the economic growth. From the point of view of this new strategy, one traditional problem for the economic development of Latin American countries has been the incapability of public institutions to support this process of economic growth.[143]

[140] With regard to the Inter-American system, Miller argues that it is not realistic to expect the same level of supervision in the Americas as the supervision made in the European system of protection of human rights because of the minor involvement of the United States in the system. The main argument is that part of the effectiveness of the judicial reform from the point of view of human rights will depend on the policy of the United States toward the strengthening of the system. *See* Jonathan Miller, *The Latin American Reformer´s Stake in U.S. Human Rights Policy*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY, 156 (1993).

[141] *See* Malcolm Rowat, *La Reforma Judicial en America Latina y el Caribe: Implicaciones Operativas para el Banco*, in Reforma Judicial en America Latina y el Caribe, 17 (1997).

[142] *Id.*

[143] See Carlos Peña, La Modernizacion de la Justicia, 8 (1999) (unpublished paper on file with the author).

In this context, the reform of the judicial system is a key element for the success of this new development strategy. The judicial system is considered one of the most relevant institutions of the state that creates positive conditions for the economic development (e.g. certainty, transparency). "The consolidation of democratic government and the operation of the market forces require an independent, reliable, strong, efficient, equitable, and modern judicial system that not only ensures access to justice and protecting citizens rights, but also ensures a good climate for investment and growth."[144] Hence, a significant factor of the judicial reform is the fact that it is also seen as a public policy oriented to improving the institutional conditions for the development process.[145]

The reform of the judicial system can also be seen as a part of a broader process of reconfiguration of the state, the so-called process of modernization of the state. Several political, economic, and social factors (e.g. decreasing role of the states in the economy, higher role of the civil society in that area, etc.) are pushing for a redefinition of the size and role of the states in the region.[146] One of the challenges to Latin American countries in this context is to make a strategic adaptation of the public institutions to improve their performance according their new role. This process includes the reconfiguration of the administration of justice as a significant element of the modernization.[147]

The new development strategy adopted by Latin American countries and the process of modernization of public institutions have represented relevant impulses for the reform of the criminal justice system. This is not only because they reinforce a general trend in that direction, but also because they convoke to this process new actors that traditionally did not intervene in reforms of this nature, such are economic groups and sectors of the public administration linked with the direction of the economy.

D.- Negative Perception of the Judicial System and Failure of the Inquisitorial Procedure

An extended phenomenon in the region is the increasing negative public perception of the judicial system. Several sources show that there are various areas in which people express a strong disconformity with the judicial system in Latin America.[148]

The results of a survey oriented to measure the public trust in the justice system showed that the level of confidence in almost all countries of the region is lower than in more developed countries. The degree of trust in the region is in general lower than 30%

[144] EDMUNDO JARQUIN & FERNANDO CARRILLO, JUSTICE DELAYED, viii (1998).

[145] "We need effective judicial systems and legal order not only to guarantee respect for individual rights and freedoms, but also, and very significantly, to assure the success of reform to our economies." Nestor Humberto Martinez, *Rule of Law and Economic Efficiency*, in JUSTICE DELAYED, 3 (1998).

[146] *See* Carlos Peña, *supra* note 143, 2-3.

[147] For a description to the challenges of the judicial systems from the point of view of modernization of the state see Jorge Correa, *Modernization, Democratization and Judicial Systems*, in JUSTICE DELAYED, 101-105 (1998).

[148] *See* Robert Ayres, Crime and Violence as Development Issues in Latin America and the Caribbean, 21 (1998).

(Guatemala 15%, Ecuador 16%, Peru and Bolivia 21%, Venezuela and Mexico 22%, El Salvador 25%, Colombia 26%, and Chile 27%). The same survey showed that in developed countries the degree of trust is higher than 40% (Italy 43%, Unites States 51%, and France 55%) or even higher than 60% (Japan 68%, Germany 67%, and United Kingdom 66%).[149]

Two recent surveys conducted in Venezuela and in Chile show startling results that support this negative finding.

Between January and February 1998, the United Nations Development Programme (Hereinafter U.N.D.P) conducted a survey in Venezuela[150] which showed that 85% of the population has few or no trust in the administration of justice.[151] 75% of the people believe that the system does not work and requires a complete reform.[152]

In Chile a survey conducted between October and November 1997 by the Department of Sociology of the Catholic University of Santiago (Desuc) and the periodistic consortium COPESA, oriented to know the opinion of the public in different areas of national interest, showed that only 6.7% of the people surveyed trusted in the Chilean judicial system. 47.6% believed that the system worked badly and 39.5% very badly. With regard to the question about the three institutions that required urgent reform, the spontaneous answer of the people placed the judicial system in first place with 78.8% of the preferences, followed by public health with 71%, and public education with 63.9%.[153]

This negative perception is based on several shortcomings of the system.[154] The two most important from the point of view of the public are the limited access to justice[155] and the long duration of the proceedings.[156]

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[149]*See* Nestor Humberto Martinez, *supra* note 145, 6-7.

[150]*See* PROGRAMA DE NACIONES UNIDAS PARA EL DESARROLLO (P.N.U.D), JUSTICIA Y GOBERNABILIDAD. VENEZUELA: UNA REFORMA JUDICIAL EN MARCHA (1998).

[151]*Id.* at 147.

[152]*Id.* at 149.

[153]*See, Encuesta Desuc-Copesa Revela Pesima Evaluacion de la Justicia*, LA TERCERA (Santiago), December 5, 1997. Available at <http//www.tercera.cl/diario/1997/12/05/9.html>.

[154]Robert Ayres described them saying that "...most countries of the region have suffered from major inefficiencies, delays, and resultant high costs; a lack of transparency in the process, widespread corruption; a lack of predictability in the outcome of the cases; and, in some instances, political interference in judicial decisions by the executive branch." Robert Ayres, *supra* note 148, 21.

[155]One important cause of the exclusion of the people from the judicial system is the composition of the judicial work. In Chile, in the last twenty years, 75% of the judicial work in civil courts have been cases linked with credit. A recent study shows that 36% of the plaintiffs in civil cases in Chile are banks or financial institutions, 10% big stores, and 36% other kinds of businesses. Only 17% were individuals not associated with big companies. *See* Juan Enrique Vargas et al., Poder Judicial, Accion de los Privados y de las Agencias Publicas, (1999) (unpublished report on file with the author)(forthcoming).

This means that the limited capacity of the system is spent mostly in cases that belong to a small category

In addition, in the last decade the media has played an important role the dissemination of information about the system that has formed this negative perception. The problems of the administration of justice in the region are not new, but the social visibility of them has increased since they became an issue for the front page of newspapers or TV news.

The real problems of the system and the negative perception of the public have led to increased involvement by interested groups and individuals. On the one hand, this situation has produced the involvement of different relevant social sectors (e.g NGOs and Universities) that demand substantive changes. On the other hand, it has created incentives for political actors to adopt some measures (basically legal reform) to demonstrate their efficient reaction in the face of these social concerns. Hence, the crisis of the judicial sector has contributed to the reform of the criminal justice through the creation of some positive social and political conditions toward the reform.

In the area of criminal justice this negative perception has acquired a special dimension because it has been mixed with an increasing concern for the public safety.[157] An extended perception in the region is that the crime rate is increasing dramatically and that the criminal justice system is completely inadequate to deal with the situation.

The natural consequence of this perception has been increasing demands toward a reform of the criminal justice system oriented to improve the efficiency of the system, in other words, its capacity to prosecute and punish criminals.[158]

E.- Globalization and Convergence

There are several characteristics of the modern legal systems that show a general trend toward their convergence.[159] Merryman suggests that there are significant tendencies toward the divergence and the convergence between the legal systems of western societies (Common Law and Civil Law Systems) but the convergence is the more powerful one.[160]

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of "clients". Finally, the people excluded of the system, mostly poor people, subsidize the litigation of entrepreneurs and banks. *See* Carlos Peña, *supra* note 143, 10.

[156] *See* Nestor Humberto Martinez, *supra* note 145, 7-9.

[157] *Cf.* Jose Maria Rico & Luis Salas, La Administracion de Justicia en America Latina, 9 (manuscript in file with the author).

Surveys made in the last five years in Chile showed that one of the main concerns of the people was the public safety. *See* Hugo Fruling, *Carabineros y Consolidacion Democratica en Chile*, Pena y Estado No. 3, 93-95 (1998). I will analyze this aspect in more detail. *See infra* IV.2 B.

[158] *Cf.* Robert Ayres, *supra* note 148, 21.

[159] *See* Lawrence Friedman, *supra* note 85. (he limits his claims to the legal systems of "modern, industrial, advanced societies").

[160] John Henry Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 STAN. J. INT´L L. 357, 358-359 (1981).

In Latin America it is possible to identify various factors that are driving the legal systems of the region toward their convergence.

Political and economic integration through international agreements "...have served as a driving force and as a catalyst of internal legal change."[161] These include the North American Free Trade Agreement (NAFTA), the Common Market of the South (MERCOSUR), the Economic Community of the Caribbean (CARICOM), and several other bilateral agreements.

The increasing role of human rights in the region is also an important factor in this process of convergence of the legal systems of the region.[162]

A third factor that is possible to identify is a trend toward a procedural convergence. At this level, the work has been led by the Ibero-American Institute of Procedural Law (*Instituto Iberoamericano de Derecho Procesal*). In the 1980s, under the auspices of this institution, several experts drew up model codes for civil as well as criminal procedure.[163] As previously mentioned, the model code of criminal proceedings has been one of the main normative sources in the current reform efforts, but the civil one is also playing an important role in the modification of the civil procedure in the region.

In the particular area of criminal procedural law, another relevant factor in this process of convergence has been the increasing internationalization of certain types of crimes (e.g. drugs, white collar crimes) in the region. This phenomenon has generated incentives for the international cooperation in the criminal justice system and the design of common devices to deal with these crimes.[164]

In summary, the confluence of these elements and other factors has been a strong force for the reform of the criminal justice in the region.

F.- Role of the International Players

[161] *See* Hector Fix-Fierro & Sergio Lopez-Ayllon, *The Impact of Globalization on the Reform of the State and the Law in Latin America*, 19 HOUS. J. INT´L L. 785, 795 (1997).

[162] *Id*. at 797-799.

[163] *See* Juan Enrique Vargas, Lessons, *supra* note 7, 3.

[164] In the Second Summit of the Americas this was a point mentioned several times in the Plan of Action, for instance the following paragraph:

> Promote, in accordance with the legislation of each country, mutual legal and judicial assistance that is effective and responsive, particularly with respect to extraditions, requests for delivery of documents and other evidentiary materials, and other bilateral or multilateral exchanges in this field, such as witness protection arrangements.
>
> Summit, *supra* note 135.

There are several international players that have contributed to the reform of the criminal justice in Latin America. I will briefly discuss the role played by the most important of them.

First of all I will discuss the role played by the international banks. In this regard the most relevant institutions have been the World Bank and the Inter-American Development Bank (hereinafter IDB).

In my opinion the role played by these institutions has been overstated by several people that argue that the reform is a sort of imposition of the agenda of the banks.[165] I will demonstrate in the following paragraphs that this idea does not represent an accurate description of the real role played by these institutions.

Only in recent years have both banks included the reform of the administration of justice in Latin America as part of their policies in the region. When the reform became part of their agenda the initial involvement of both institutions focused on the reform of the civil justice and the governance of the Judiciary. The central idea that has guided these policies is that rule of law and development are embedded aspects that require a healthy judicial system.[166]

The reform of the criminal justice system was not an area of immediate concern. During this initial period the banks only implemented some specific programs not oriented toward a general transformation of the system.[167] The increasing intervention of both institutions in the area started only a couple of years ago[168], several years after the reform of the criminal justice became a widespread policy in the continent and even after the reform was implemented in many countries. Given these facts, it is hard to assert that the reform is the result of the agenda of the banks.

The intervention of the international banks has been important in several regards. First, the intervention of the banks has reinforced the political will for the reform, which has been a decisive contribution to the process. In addition, the intervention of the banks has been a decisive factor in incorporating in the alliance of reformers powerful sectors of Latin

[165]I call the supporters of this line of argumentation "conspiracy theorists". In my opinion this is a paranoic explanation of the reform. They see the reform as part of a master plan imposed by the developed countries (principally U.S.) oriented toward the protection of their economic interests in Latin America. Part of this argumentation reflects some level of truth; however, to explain the reform only as a product of this factor does not seem to be reasonable.

[166]*See* Malcolm Rowat, *supra* note 141, 19 and Ibrahim Shihata, *The World Bank*, in JUSTICE DELAYED, 117 (1998) (about the World Bank). *See also* FERNANDO CARRILLO, THE INTER-AMERICAN DEVELOPMENT BANK, in JUSTICE DELAYED, 149 (1998) (for the Inter- American Development Bank).

[167]Until very recently the policy of the World Bank did not include the reform of the criminal justice because it was not considered within the scope of action of the institution. *See* Malcolm Rowat, *supra* note 141, 19.

[168]For instance, the most important project of the World Bank in the region is the Venezuelan project of 1996 that includes funding to support the implementation of the criminal justice reform in that country.

American countries interested in the reform from the point of view of its contribution to the success of the new development strategy of the region.

In the near future the banks will play a significant role in the implementation of the reform, especially by supporting the economic cost of this stage of the process.

As we can see, the participation of the international banks has represented an important contribution to the reform process in the region but not in the sense pointed out by the groups that I called "conspiracy theorists".

A second group of institutions that have played a significant role in the reform process are the cooperation agencies. The countries that have the most relevant cooperation programs are Germany, Spain, and U.S.

German and Spanish cooperation programs are relatively new and are concentrated only in specific areas of the region. Spanish cooperation is concentrated in Central America[169] and the German programs are found in South American countries such as Chile and Venezuela. Generally speaking, the focus of these programs is the strengthening of the administration of justice through the design and implementation of training programs to judges, lawyers, and prosecutors. Also an important component of these programs is technical support in specific areas of the criminal justice system. For instance Spanish cooperation has helped in the creation of a new police force in El Salvador.

The late formulation of these programs and their limited geographical extent demonstrate that they did not constitute real impulses for the reform in the sense of being the original promoters of these processes. Rather, these programs have been helpful in the stages of implementation and adjustment of the legal reform already enacted in Latin American countries.

Like the banks, they have also been very important in reinforcing the political will toward the reform. The cooperation programs of these countries usually take the form of agreements between the governments and the donors that require manifestation of a strong commitment of the local authorities to the reform process.

A different situation is the American cooperation programs which have played a major role in the region during several decades. Since the late 1950s the American governmental cooperation has been led by the U.S. Agency for International Development (hereinafter USAID).[170] The initial programs of the USAID were focused on the improvement of the legal education and institutional strengthening. "However, they were

[169]For a general overview of the Spanish cooperation see Juan Antonio March Pujol, *Instituto de Cooperacion Iberoamericana*, in JUSTICE DELAYED, 133 (1998).

[170]*See* Michael Ross Fowler & Julie M. Bunk, *supra* note 84, 815. For a general description of the programs of the USAID in the justice reform in Latin America see Paul Vaky, *The U.S. Agency for International Development*, in JUSTICE DELAYED, 137 (1998).

most often conducted without an overall institutional strategy, and thus, their impact was limited."[171]

In contrast, the cooperation strategy implemented in this decade has been contextualized within an overall strategy for the reform of the judicial system in the region. "The overall aim of these programs is to assist the development of effective and equitable systems of justice, in order to protect the rights of the people and to strengthen democracy."[172]

The influence of these programs depends on the situation of each country. In some countries the level of intervention of the USAID has been very deep. Colombia and Bolivia are the most important examples in this regard. In the Colombian case, USAID had a six year $ 36 million program that supported the complete transformation of the criminal justice system in 1991. In the case of Bolivia, according to one observer, the level of intervention of the USAID has been so deep that it even involved the imposition of an agenda of reform as a pre-condition of the cooperation.[173]

The major involvement of the USAID in the reform process of these countries is a clear consequence of the U.S. drug policy in the continent.[174] It is necessary to remember that both countries are considered the most important producers and exporters of cocaine to U.S. in Latin America.

Despite the situation of these countries, this model of intervention has not been the general rule of the USAID programs. Rather, in most countries of the region the USAID programs have been very flexible and gave an important level of discretion to the local administrators to decide the specific direction of the programs according to the local needs.

The USAID cooperation program implemented in Chile is a good example of this model of cooperation. In 1992, USAID approved a four-year project of cooperation for $ 3.5 million to the Corporacion de Promocion Universitaria (hereinafter CPU). CPU is a Chilean NGO with vast experience in the judicial area that was linked with the political sector that formed the democratic government elected in 1990. The original goal of this project was to promote judicial training and improve the management of the courts in the new democratic scenario. However, during the execution of the project, CPU realized that an important opportunity to introduce significant changes in the judicial system was through the reorientation of the project toward the criminal procedural reform.

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[171] *See* Linn Hammergren, Institutional, *supra* note 109, 8.

[172] *See* Paul Vaky, *supra* note 170, 139.

[173] Interview with Juan Enrique Vargas, November 19, 1998.

[174] For an explanation of the role played by the DEA in enforcement of the U.S. drug policies in Latin America see ETHAN NEDELMAN, COPS ACROSS THE BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT, 251-312 (1993).

CPU redesigned the project with the approval of USAID and created an area of it oriented to supporting the criminal procedural reform. In the final evaluation of the project this was considered one of the most successful areas.[175] In addition, today it is broadly recognized in Chile that CPU was the key institution in the promotion and formulation of the reform of the criminal justice system in the first stage of this process.

The Chilean example shows various interesting aspects with regard to the cooperation of the USAID. First, in 1992 the reform of the criminal procedure was not a priority in the agenda of the USAID. Second, the introduction of this issue was a product of the local redefinition of the project rather than an imposition of the USAID. Finally, from the point of view of the donors, it shows an important level of flexibility in the management of the project and the configuration of its goals.

Despite the model of intervention followed in different countries, in general terms the role of USAID has been decisive in the reform of the criminal justice in the region. The Latin American and Caribbean Bureau of the USAID has committed over $ 200 million to justice projects in the last ten years.[176] In addition, it is plausible to argue that in some extent the current reform movement has been influenced by the effects that the first programs of USAID have had in the long run.

The third and final category of institutions that I will mention in this brief analysis are international bodies linked with the United Nations. Among them the most important have been MINUGA, ONUSAL, and the UNDP.[177] The first two worked only in Guatemala and El Salvador respectively. These institutions were created with the objective of participating in the process of pacification of both countries after several years of civil war. The reform of the criminal justice system was part of their agenda.

In the case of the UNDP, the Office for Latin America and the Caribbean has supported projects oriented to improve the defense of fundamental rights.[178] The work has focused on Central America. Recently the UNDP conducted a study in Venezuela that supported the reform of the criminal justice and proposed several orientations for the future work in that country.[179]

In summary, the role played by international institutions has been very important in reinforcing the political will toward the reform as well as in supporting part of the economic cost involved in this process. In addition, these institutions will play a significant role in the future stages of the reform process. However, it is difficult to argue that they have been the

[175]For a detailed explanation of this project see Juan Enrique Vargas, La Reforma, *supra* note 126, 82-88.

[176]*See* Paul Vaky, *supra* note 170, 139.

[177]For a General explanation of the programs of UNDP in the region, see Jorge Obando, *The United Nations Development Programme*, in JUSTICE DELAYED, 143 (1998).

[178]*Id.*

[179]*See supra* note 150.

catalyst of the change in Latin America or even leading institutions in the process of transformation of the criminal justice system in the region.

G.- The Role of a New Technical Elite of Reformers[180]

When I discussed the main characteristics of the reform movement I mentioned that one striking element of it was the links among reformers. A new elite of professionals (mostly lawyers but including people from other disciplines) have been a catalyst of the reform. I am not claiming that the reform is mainly a product of the work of this new elite. My point is that under certain circumstances an elite can play a decisive role in the formulation and implementation of a legal reform.[181]

In my opinion this is the case of the criminal justice reform in Latin America. In many countries of the region the reform was initially led by small group of people who were able to transform social and technical demands in a solid and coherent discourse toward the reform.[182] These elites also played a key role in the creation of a social and technical consensus with regard to the diagnosis of the current system and the reform proposals. Finally, these groups were able to involve public authorities in the reform efforts and generate a sort of international network among the countries of the region.[183]

During the first years of the movement, a group of Argentinean scholars were the main supporters of the reform. They worked in different countries of the region advocating for the reform and drafting legislative proposals.[184] They were joined by local groups that assumed the task of the reform at the national level.

These elites are mainly lawyers with academic experience in criminal law that share a critical point of view about the criminal justice in Latin America.[185] Even though most of the

[180]I will not analyze here the general role of the civil society in the reform process. For a discussion of the role of the civil society in the reform see Juan Enrique Vargas, La Reforma, *supra* note 126, especially 117-126.

[181]*Cf.* HERBERT JACOB, *supra* note 18, 312.

[182]For an extensive explanation of the members that conformed this elite of professional, their strategy, and their work in the Chilean reform see Juan Enrique Vargas, La Reforma, *supra* note 126, 80-117.

[183]The Latin American Review on Criminal Policy called *Pena y Estado* (Punish and State), is published by people that have been involved in the reform of the criminal procedure in several countries of the region. They are members of eleven academic groups and institutions from ten different countries. Most of the papers published in that review discuss different dimensions of the reform process in the region.

This group has also organized two seminars to discuss and exchange experiences about the reform process in the region. The first seminar was held in September, 1996, in Buenos Aires and the second in November, 1997, in Santiago.

[184]Together with Julio Maier the most influential person has been Alberto Binder. Binder is a lawyer and scholar from Argentina who was the secretary of the commission that drafted the Argentinean project of 1986. After that he has been involved with national groups in drafting the reform proposals of almost all countries in the region.

[185]In some cases, like Costa Rica and Uruguay, the people that lead the reform efforts are part of the judiciary.

people that belong to these groups are linked with some academic institutions, they represent a new line of thought regarding the traditional academia that work in procedural law in the region. Also these groups are more associated with the support of human rights rather than an economic approach to the reform of criminal justice system.

One of the successes of the reform is that after several years, the original small elite of people that had led the process grew in number. Today it is difficult to claim (at least in many countries) that a small elite is still conducting the process toward the reform. In many cases these elites still have power and are very much involved in the reform, but they are neither the only actors nor the most important.[186]

4.- Description of the Main Features of the New Model of Criminal Procedure

As mentioned previously, the core idea of the reform from the procedural standpoint is to replace the current inquisitorial procedure with a new model based on the principles of an accusatorial procedure.

Accusatorial procedure is the concept used in the European Continental tradition to refer to the "Adversary System". As one author pointed out, the contours of the adversary system are not clear.[187] On many occasions the notion of adversary system has been identified with the criminal procedure of the United States; however, the meaning as is used in the reform in Latin America and Europe is not synonymous to an Anglo-American type of criminal procedure.[188]

In the case of the Latin American reform, the meaning of accusatorial system refers more to the model developed in Continental Europe than United States or England.[189] In fact, as mentioned before, the proposed model in Latin America is mainly based on the Ibero-American Model Code of Criminal Procedure (based on the current German legislation) and also on legislation of European countries such as Italy and Spain. Only particular features of the Anglo-American type of criminal procedure have been adopted.[190]

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[186]Despite these facts one of the most important criticisms of the reform process has been the difficulties to expand its support among common citizens. *Cf.* LINN HAMMERGREN, THE POLITICS, *supra* note 1, 272.

[187]*See* Mirjan Damaska, *Adversary System*, in ENCYCLOPEDIA OF CRIME AND JUSTICE (VOL. 1), 24 (1983).

[188]For a description of the main differences between the new Italian accusatorial criminal procedure and the American adversarial model see Ennio Amodio & Eugenio Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 62 TEMP. L. REV. 1211 (1989).

[189]This claim is valid despite the fact that an important trend of the Continental European model since the French Revolution has been toward the convergence with an Anglo-American type of criminal procedure. *See* Jan Stepan, *Possible Lessons from Continental Criminal Procedure*, in THE ECONOMICS OF CRIME AND PUNISHMENT, 181, 182 (1973). *See also* Craig M. Bradley, *The Convergence of the Continental and the Common Law Model of Criminal Procedure*, 7 CRIM. L.F. 471 (1996).

[190]*See supra* note 24.

The main characteristics of this new model are the stipulation of an oral, public, and adversary trial as a central step of the procedure; the separation of functions and differentiation of roles between judges and prosecutors; and the recognition of the basic rights of due process in favor of the defendants.

In the following pages I will analyze with more details these and other features of the new criminal procedure of the region.

A.- New Actors

One of the striking characteristics of the current procedure in Latin America is a tendency to concentrate power in a single judge who performs judicial as well as prosecutorial functions. The new system will make a radical change of this aspect through the division of the current functions of judges among three principal actors.

First, the prosecutors will be responsible for the criminal investigation, coordinating with the police the practical proceedings of particular investigations. The new system also gives to prosecutors the power to decide when to prosecute and when to file charges against defendants. Finally, during the trial, prosecutors will have the responsibility of representing the society before the courts.

At the level of the judicial duties, the new system will divide the functions between judges that are in charge of the trial phase and judges that are in charge of the pre-trial phase.

During the pre-trial stage, a single professional judge, the so-called *Juez de Garantias* (judge of guarantees) or *Juez de Instruccion* (judge of instruction), will be in charge of the supervision of the investigation and the adoption of judicial decisions that are required in this stage of the procedure (e.g. the decision about pre-trial detention or the authorization for a search warrant). The difference from the current investigating magistrate is that these judges will not have any power to investigate, except under exceptional circumstances. The idea of the reform is to place the judges in an impartial position that will allow them to exercise a neutral supervision of the prosecution.

In the trial phase, the general rule in the region is that a trial court integrated by a panel of three professional judges will be in charge of this stage of the procedure. In this model of organization one judge plays the role of the presiding magistrate.

The general model in the region opted for a professional organization of the judiciary instead of the introduction of lay judges. The participation of lay people in the criminal justice has been part of the discussion of the reform in many countries; however, just few of them have introduced a model of mixed panels or lay juries.[191] Venezuela is probably the most paradigmatic case were lay people were introduced in the administration of criminal justice in the region.

[191]In Europe mixed panels are common in several countries like Germany, Italy, and Portugal. A recent trend in Europe is toward the introduction of a lay jury to some type of cases. *See* Stephen Thaman, *Spain Returns to Trial by Jury*, 24 HASTINGS INT´L & COMP. L. REV. 241 (1998). *See also* Stephen Thaman, *The Resurrection of Trial by Jury in Russia*, 31 STAN. J. INT´L L. 61 (1995).

The Venezuelan Organic Code of Criminal Procedure regulates three different trial courts according to the seriousness of the offenses.[192] For misdemeanours and minor crimes the trial court is composed of one professional judge.[193] In case of more serious crimes the trial court is a mixed panel composed of one professional judge, who is the presiding magistrate, and two lay people.[194] Finally, in the case of the most serious crimes, the trial court is composed of a lay jury of nine people and of one presiding professional judge.[195]

With regard to the public defense systems, the reform projects contemplate the strengthening, and in some countries the replacement, of the current systems with the objective to ensure that all the defendants will have a professional defense during the procedure if they need it.[196] There is not a common model of organization of the public defense in the region. For that reason I will not describe the features of these different organizations.[197]

The idea of the reformers is that the new distribution of roles among different actors will allow the construction of a process based on the activity of the parties instead of the activity of judges as is in the current inquisitorial system. This is a traditional feature associated with an accusatorial model of criminal procedure.[198]

B.- General Characteristics

The new procedure has two distinctive characteristics that represent significant changes with regard to the current system. They are the oral character of the procedure and the formal regulation of discretionary powers of the prosecution.

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[192] CODIGO ORGANICO PROCESAL PENAL (1998) ART. 102.

[193] *Id.* art. 60. According to this article these are cases in which the maximum penalty is not more than four years of imprisonment.

[194] *Id.* art. 61 and art. 158. The cases that this court hears are crimes which punishment is more than four years and less than sixteen years of imprisonment.

[195] *Id.* art. 62 and art. 164. This court hears cases which punishment is more than sixteen years of imprisonment.

[196] Traditionally the public defense has been one of the most deficient areas of the criminal justice system in the region. *See* ANA ISABEL GARITA VILCHES, LA DEFENSA PENAL PUBLICA EN AMERICA LATINA DESDE LA PESPECTIVA DEL DERECHO PROCESAL PENAL MODERNO: BOLIVIA, COLOMBIA, COSTA RICA, ECUADOR, GUATEMALA, PANAMA, (1991).

[197] The most traditional model of public defense system in the region is the model of the public defenders´ office. This model operates on the idea that public defenders are lawyers hired by the State who work as civil servants. One of the most prestigious examples of this model is the public defender office in Costa Rica. A new model that has been debated in some countries in the region is called a mixed model. This model shares the responsibility of public defense between public and private lawyers. On the one hand, lawyers that work for the State provide this service and, on the other, private lawyers assume this role and receive some public funds for that work. This model has been proposed, among other countries, in the Chilean reform.

[198] *See* Mirjan Damaska, *supra* note 187, 25.

The orality is the most symbolic trait of the new procedure[199] because it implies the elimination of one element that is a central part of the backbone of the inquisitorial system, its written character.

Orality means a very simple or even common sensical idea for people educated in a Common Law country, but represents a revolution in Latin America. Orality means that the judicial decisions of the procedure must be adopted by the judges after a hearing in which parties have to present their arguments and evidence face to face to the court, in an oral manner.

The oral character of the procedure does not mean that no written element of it will survive. In fact, the parties keep the possibility of presenting written motions and also most judicial decisions will have a written form. Thus, the new procedure will require also a sort of dossier or file. However, the central idea is that all the important decisions of the procedure must be adopted by the courts as a consequence of a previous hearing and not based on the reading of the files.

A second paradigmatic characteristic of the new procedure is the possibility to exercise discretion on it. The new model keeps the "legality principle"[200] as the general rule for the prosecution. However, almost all countries have introduced several rules that allow prosecutors or judges to dismiss cases during the pre-trial stage based on different kinds of considerations (e.g. insignificance of the crime, minor participation of the defendant in it, lack of public interest for the prosecution, etc.). These exceptions constituted the so-called opportunity principle.[201] This formal recognition of discretionary powers represents a new and even revolutionary feature in the criminal procedure in Latin America.

C.- Procedural Structure

The new system divides the criminal procedure into three stages. The pre-trial or investigative stage, usually called *Instruccion*, a preliminary stage, called *Preparacion del Juicio Oral or Etapa Intermedia*, and the trial stage, called *Juicio Oral*.

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[199] The Plan of Action of the Second Summit of the Americas is one of the multiple examples in which orality is highlighted as one of the most relevant elements of the new procedure. The document said:

"Strengthen, as appropriate, systems of criminal justice founded on the independence of the judiciary and the effectiveness of public prosecutors and defense counsels, recognizing the special importance of the introduction of oral proceedings in those countries that consider necessary to implement this reform."

Summit, *supra* note 135 (emphasis added).

[200] *See supra* II.4 B.

[201] For an explanation of the opportunity principle and its role in different models of criminal procedure see Fabricio Guariglia, *Facultades Discrecionales del Ministerio Publico e Investigacion Preparatoria: el Principio de Oportunidad*, in EL MINISTERIO PUBLICO EN EL PROCESO PENAL, 81 (1993).

From the point of view of the public opinion, the most striking change introduced by the reform is the regulation of the trials as a central step of the procedure. However, the transformation of the investigative phase is as significant as the regulation of the oral trials. The structure of the new investigative stage represents a complete change with regard to the current *Sumario*. Hence, in the new system there is an absolute change in the role played by judges, and also a new actor, the prosecutor, appears. Finally, the defendant has right to participate in almost all the proceedings of this stage.

The most distinctive characteristics of this new stage are that the evidence collected for the prosecution is not secret for the defendant and his lawyer (with some specific exceptions) and that most judicial decisions are adopted after hearings that require the presence of both parties instead of a written procedure. In addition, the evidence collected by the prosecutor does not constitute evidence and does not have any probative value unless it is presented at trial.

The way in which the new procedure could be initiated is similar to the current procedure. The main difference is that the information of the case should be put at the disposition of the prosecutor instead of judges to decide the further proceedings. Prosecutors have power to dismiss cases in a very preliminary stage of the investigation or to use a limited discretion to decide not to prosecute (opportunity principle). However, the general rule in the new system in the region is still the compulsory prosecution (legality principle).[202]

Once the investigation begins, the prosecutor is responsible for collecting all the evidence that could support charges against the defendant, with help of the police. Any activity of the prosecutor that could potentially affect constitutional rights of the people (especially the defendant) requires prior authorization from a judge. Hence, the autonomy of the prosecution is limited by judicial control over the legality of some proceedings of investigation.

The new procedure mandates a sort of preliminary charge made by the prosecutor in a judicial hearing. The purpose of this preliminary charge is to inform the defendant that he is an object of a criminal investigation and of the nature and cause that justify this investigation. This preliminary charge has some procedural effects but never implies a pre-judicial decision about the substance of the case or an automatic limitation of rights for the defendant. If the prosecutor wants to get the pre-trial detention or another restrictive measure against the defendant, he has to present a motion to the judge and justify in a hearing before him that this measure is based on different grounds than the sole initiation of the criminal prosecution.

During this phase of the procedure the defendant has possibilities to discuss with the prosecutor or the victim some limited pre-trial alternatives to suspend or to end the procedure without going to the trial.[203]

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[202]For an explanation about the discretionary powers of the prosecutors in this stage of the procedure in the Chilean reform see Maria Ines Horvitz, *Ministerio Publico y Selectividad*, Pena y Estado No. 2, 111 (1997).

[203]For an extensive analysis of the most important alternatives in the Chilean reform with additional information of other countries in the region see Mauricio Duce, *Las Salidas Alternativas y la Reforma Procesal Penal Chilena*,

Once the investigation ends, the prosecutor has to decide whether he will file charges against the defendant or ask for his release. If the prosecutor chooses the first option, then the second phase of the procedure starts.

One of the objectives of this second stage of the procedure, the preliminary phase, is to prepare the cases that will go to the trial. The main activity of this stage is a hearing that requires the presence of both parties and that is conducted by a single judge. In this hearing the parties have to explain their arguments and to determine what evidence they will present at the trial. In many countries the judge has the power to dismiss the charges of the prosecutor when they are not supported by the results of the pre-trial investigation. If the judge has allowed the charges filed by the prosecutor, his main role is to determine the facts that will be discussed by the parties in the trial and the evidence that they will present and discuss in that opportunity.

The second objective of this phase is to control the results of the prosecution activities during the first stage of the procedure.

The trial is the central part of the new procedure, even though it is expected that just a small percentage of the total number of cases will get to this stage.[204] The basic structure of the trial is an adversarial hearing. This means that the parties have the right to produce their own evidence and also to contradict the evidence presented by the counterpart. In addition, the parties have the right to present opening and closing arguments to the court. Despite these rights, judges keep power to interrogate witnesses after the direct and cross-examination made by the parties and in exceptional circumstances they even have the power to order the presentation of new evidence before the trial is closed.

Once the debate is closed, the court must deliberate in private. After the court reaches its decision, they have to announce their opinion in the same hearing in order to acquit or condemn the accused. The court usually has a time limit of several weeks after the trial hearing ends to write up a sentence in which they present more detailed justification of their decision.[205]

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in REFORMA DE LA JUSTICIA PENAL, 171 (1998).

[204]For instance in Chile it is expected that no more than 3% of all cases will be finished in a full oral trial. *See* Juan Enrique Vargas, La Reforma, *supra* note 126, 154.

[205] The written decision usually contains the following elements:

> (1) summarizes the charges and the evidence developed at trial, (2) explains any legal issues raised at trial and how they were resolved by the court, (3) indicates the factual and legal conclusions reached by the court and why the court reached those conclusions, and (4) if the defendant is found guilty, indicates the sentence that court has imposed and why it decided on that sentence.
>
> William Pizzi, *supra* note 13, 1334.

A trend in the new model of criminal procedure in the region is to limit the broad possibilities to invoke remedies against the sentence issued by the trial court before higher courts. The idea of the reformers is to give more weight to the decisions adopted by the trial courts and admit appeals only when there is prejudice against one party caused by a mistake in the application of procedural or substantive law. Thus, generally speaking, superior courts are limited to a revision of legal issues and not facts.