THE ROLE OF THE PUBLIC PROSECUTOR'S OFFICE IN LATIN AMERICA'S CRIMINAL PROCEDURE REFORM: AN OVERVIEW

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The reforms to the criminal procedure system that have been undertaken in Latin America beginning in the 1980s produced very important changes in the structure of the traditional procedure system that the region had used and had a significant impact on the institutional configuration of the public prosecutor's office. To a large extent the changes made to this institution have been an indispensable part of the effort to bring it in step with the role and functions required by the accusatory criminal procedure model that most of the region's reforms have looked to introduce. The countries in the region that have not undertaken reforms have strengthened the role of the public prosecutor's office over the past two decades.[1] But despite the central role that it plays in the changes that the region's criminal justice systems have undergone, scant attention has been paid to new sphere that was created as a result of the transformations that have been produced in the institution.

The focus of this paper is the experience of countries that have made changes to the public prosecutor's office as part of procedure system reforms.[2] In these cases, the transformations have generally represented a very strong wager on the part of reformers in favor of that institution's capacity to generate important chances in the practices and work of the criminal justice system in order to ensure adequate configuration and adoption of the new accusatory procedure models. The public prosecutor's office has been the object of legal modifications designed to adjust its institutional architecture to new needs, and there have also been systematic efforts to strengthen its budget and the human and material resources made available to the institution. In spite of the fact that this reform process has not yet concluded, the results obtained thus far are not entirely promising. The public prosecutor's office is currently facing a series of very important problems associated with its ability to satisfy expectations related to the reform process. There is a need to pause and launch an intense debate regarding possible approaches to the work that should be done in this area.

In order to contribute to the debate on this topic, I will provide a brief overview of the current state of efforts to reform the public prosecutor's office in the region, paying special attention to the main problems that this institution is confronting in the context of reformed procedure systems. I should note that this paper does not provide an exhaustive study of the state of the reforms in every country in Latin America. As I noted earlier, it focuses on nations that have carried out these reforms alongside transformations in their procedure systems. Specifically, this paper is mainly based on the empirical evidence produced through the "Follow-up Study on Judicial Reform Processes," a study carried out by the Justice Studies Center of the America (JSCA) in a joint effort with local organizations in various countries in the region since 2001. I will consider the reports submitted for the province of Córdoba in Argentina and country reports for Costa Rica, Chile, Ecuador,

[1] Prime examples include Mexico and Panama.

[2] While this distinction does preclude a more systematic analysis of cases such as those of Mexico and Panama, several of the topics that I will address in this paper could be applied to those countries.

El Salvador, Guatemala, and Paraguay.[3] This data is complemented by studies and analyses of this topic culled from a variety of texts published in countries throughout the region.

1. General Context Preceding the Reforms:

As I mentioned in the introduction, the reforms that the public prosecutor's office have undergone in this region are related to the need to bring the institution in line with the needs of a procedure model that has undergone a radical change in terms of the role that prosecutors had played in the inquisitory system that had been used throughout Latin America.

This topic merits a more detailed discussion. The public prosecutor's office that we know today is mainly the product of the revolution in criminal procedure that the Europeans tried to implement in the 19th century through the installation of a system called the "inquisitory reformed" or "mixed" system.[4] If we look at its design and its operation in practice, we can conclude that the roles assigned to the public prosecutor's office in the context of reformed inquisitory or mixed systems were secondary and that the institution's role at the investigation stage was therefore minor. The public prosecutor's office had a bureaucratic role, and active investigation was by law the responsibility of examining judges and in practice the work of the police. Examining judges had a proactive role that allowed them to serve as the main players in the procedural process. In the best cases the prosecutor made minor contributions to judicial investigation by presenting evidence and requesting that the judge carry out investigative tasks, which he agree to or refuse to do at his discretion. However, the prosecutors' interventions during the trial were considered an essential aspect of transforming a more orthodox inquisitory system given that judges assumed that both parties would be present and would challenge one another. Prosecutors were expected to take on a key role in representing society, but the fact that the instruction stage consumed the trial and that, in practice in the reformed inquisitory system, the judges took on a key role in the production of evidence in the trial, the public prosecutor's office was relegated to a secondary role at this stage.[5] As a result, the public prosecutor's office had no real chance to participate in any real sense in the reformed inquisitory system because the system was not designed to leave room for any other approach to processing cases.

The lack of importance of the public prosecutor's office was even stronger in Latin America because the countries in this region maintained a procedural model that had more inquisitory components than the systems in Europe, which tended to install the mixed system (many of the systems in America did not even allow for an oral trial before they were reformed). This has made it so that while the role of the public prosecutor's office has been minor in the European countries in which an effort was made to move to a mixed system, the institution's role in Latin America, where more orthodox inquisitory structures were maintained, has generally been absolutely irrelevant. This explains some of the terms used to characterize the public prosecutor's office in the region, which range from "the fifth wheel" to "as silent as a grave" or "soldiers without guns or generals." Binder concludes that prior to the reforms that were undertaken in the region, "the public prosecutor's office was a rickety institution about which little known by those who hadn't studied it, that had no political profile of its own, no important history, and that generated mistrust in the community."[6]

[3] For general information on this project, see Cristián Riego, "Informe Comparativo: Proyecto de Seguimiento de las reformas Judiciales en América Latina," in Revista Sistemas Judiciales nº 3, Buenos Aires 2002, 12- 58, especially pages 12 - 17.

[4] For more on the historical background of this claim, see Julio Maier, *Derecho Procesal Penal II, Parte General Sujetos Procesales*, Editores del Puerto, Buenos Aires 2003, 294 - 310.

[5] This is not only in the practice. Even at the normative level the reformed inquisitory system places the judge in a central role in the production of evidence in the oral trial. A clear example is the ability to interrogate witnesses that are presented to judges during oral trials in several countries in Europe. This is the case in the German system, in which the judge, and not the attorneys, has the right to be the first to interrogate a witness. This means that the examination that the parties make afterwards is subordinate to that of the judge.

[6] Alberto Binder, *Funciones y Disfunciones del Ministerio Público Penal*, in EL MINISTERIO PÚBLICO PARA UNA NUEVA JUSTICIA PENAL, Corporación de Promoción Universitaria, Fundación Paz Ciudadana y Escuela de Derecho Universidad Diego Portales, Santiago 1994, 68. (Translated from the original Spanish.)

As a direct result of this irrelevance, some countries in the region eliminated the public prosecutor's office altogether. In Chile first instance court prosecutors were taken out of the system in 1927 because they were not considered to be "indispensable," as the framers of Decree 426 of 1927 put it. This decision was fairly rational if we follow the logic of the functioning of the system given that it allowed the State to save economic resources and limit superfluous procedures. A similar phenomenon was observed in Honduras.

Overall, the elimination of the public prosecutor's office was not the general rule for the region. On the contrary, most countries maintained the institution, but gave it a very low profile. We can therefore state that the existence of the public prosecutor's office did not cease to be a legal abstraction in a good number of countries in the region prior to the procedure reform. An extreme case is the merely formal existence of Guatemala's public prosecutor's office prior to the 1992 reform. In February 1991 the public prosecutor's office had only 24 prosecutors for the entire country, which had a population of more than 9 million. Observers reported at the time that "...when *fiscales* appeared in court, judges sometimes asked who they were and what they were doing there."[7] Similar opinions about the role of the institution prior to the reforms can be found in other countries in the region.

This low profile and the irrelevance of the tasks performed by the public prosecutor's office in the region also have an impact on the organizational aspects of the institution, which has been characterized by its weak structure. Linn Hammergren reports that:

> ...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.... 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.[8]

As we can see, the public prosecutor's office had very few and unimportant responsibilities prior to the reforms, which explains why it had a very weak organizational structure and received little support.

2. The New Situation Created by the Reforms:

The move away from strongly inquisitory procedure models toward more accusatory systems had a profound impact on the roles that the region's public prosecutor's offices play in criminal procedure and, as a result, on the institutional configuration of the institution. The new procedure model has introduced fundamental changes in the role of the public prosecutor's office, which have involved strengthening the institution by granting it new roles in addition to its traditional responsibility of exercising the public criminal action that has made the prosecutor the party that is responsible for criminal prosecution. This has meant that the public prosecutor's office has been given the responsibility of conducting preparatory investigations of crimes,[9] which led to the abolition of the investigating judge model and some of the discretionary faculties that judges had enjoyed in exercising public criminal action.

These new faculties have placed the public prosecutor's office in a role as one of the main protagonists of the new procedure model. The adversarial systems that countries have tried to install in the region had operated under the assumption that reasonable work loads could be maintained by having a strong and active public

[7] See Linn Hammergren, *The Politics of Justice and Justice Reform in Latin America*, Westview Press, 1998, 84.

[8] Linn Hammergrenn, *Institutional Strengthening and Justice Reform*, Center For Democracy and Government USAID, 1998, 36.

[9] In view of this function the system normally gives these responsibilities to the police so that they can carry out specific investigative tasks.

prosecutor's office responsible for investigating crimes, accusing those presumed to be responsible for them, and exercising important discretionary faculties.

This new role of the public prosecutor's office involved intervening in the institution in order to make a variety of changes to its institutional configuration, resources, and strategic objectives. It would have been ridiculous to think that the procedural change could lead to a real functional change in practice without introducing these changes. These three dimensions of the changes will be reviewed in the following section.

2.1.- The Public Prosecutor's Office's New Strategic Objectives:

In the new model the public prosecutor's office is not only called upon to fulfill certain very important procedural roles that allow the system to function, such as being responsible for the preliminary investigation and the exercise of the public criminal action, but is also expected to carry out a set of tasks oriented towards consolidating the proposed procedural model.

From a more general point of view, attempts to reform the public prosecutor's offices in the region expected the institution to be able to contribute to the consolidation of the new procedural systems in at least three specific areas. First, the reform was expected to make a decisive contribution to the abolition of the inquisitory model. Second, the public prosecutor's office was expected to constitute a force that would promote the most important work of the new system. Last, it was thought that the public prosecutor's office should assume a leadership role in promoting and protecting victims' interests. The following is a brief discussion of these three aspects.

One of the central objectives of the reform in Latin America has been to completely replace our archaic inquisitory systems with accusatory ones. This is not, however, a simple matter, as we can see by examining the European reform experience from the 19th century. As can also be observed in the current reform process, one of the main objectives of the strengthening of the public prosecutor's office in Europe was to abolish the inquisitory system.[10] However, the creation of the modern public prosecutor's office was not enough to achieve this objective because the inquisitory system survived in the form of the reformed inquisitory system, which entailed only minor surface changes. The survival of the inquisitory system can be explained to a certain extent by the lack of change effected in the criminal investigation stage, which is the heart of the system. Therefore, as Binder notes, one of the public prosecutor's office's fundamental contributions in the region for achieving the abolishment of the inquisitory approach is through the dismantlement of the current summary criminal structure or investigation stage.[11] For Binder, this should lead restore the central role of the oral trial and the system as a whole. In response to those who ask how this objective will be met, the scholar responds that it will involve deformalizing the investigation stage and freeing the judge of his current prosecutorial role. Both issues are key to the main change in the structure of the investigation and in terms of the roles that the different players have in that process.

Second, the logic of the new system is based on the idea that a strong institution will be in charge of conducting the investigation, formulating charges against the accused, and representing society at trial. Without a strong public prosecutor's office that has the training it will need to carry out these tasks, it is impossible to conceive of a new system that functions properly because the accuser's role is not properly carried out. What is more, the new model requires the public prosecutor's office to follow the rhythm of the system in order to make it function correctly. As a result, the public prosecutor's office takes on a role that is akin to that of the motor of the new system.

There are two areas of the functioning of the system that serve as good examples of how crucial the public prosecutor's office is in the new system. First, it plays an important role in

[10] See Claus Roxin, *Posición Jurídica y Tareas Futuras del Ministerio Público*, EN EL MINISTERIO PÚBLICO EN EL PROCESO PENAL, Ad-Hoc, Buenos Aires 1993, 40.
[11] Alberto Binder, op. cit., 80.

deformalizing the criminal investigation stage, which has proven one of the most deficient aspects of the inquisitory model. The system that was used prior to the reforms was characterized by a bureaucratic, ritualistic, and excessively formalized investigation stage. In contrast, the new model requires that the public prosecutor's office be capable of making the criminal investigation process more dynamic by endowing it with greater flexibility, using multidisciplinary teams, and coordinating police work more efficiently. In short, it is meant to serve as a point of contact between the police and dynamic judicial work. Second, the role of the public prosecutor's office is fundamental for the design of a policy for controlling workload that allows the institution and the criminal justice system to work within the parameters of optimum efficiency and quality. The public prosecutor's office possesses the ideal tools for establishing this type of policy and thereby overcoming the problems endemic to criminal justice in Latin America, including unreasonable workloads that affect the various players in the system. As a result, most reform processes handed important responsibilities over to prosecutors so that they could stop exercising criminal action and make use of various manifestations of the principle of opportunity, alternative sentences, and mechanisms designed to simplify procedures.

Third, the public prosecutor's office should also play a decisive role in the promotion and protection of the victims' rights in new procedure system. The victim, a player that was traditionally forgotten in inquisitory systems, has acquired a new importance. The reforms have led to the normative consecration of a set of rights that favor the victim, a good number of which should be promoted and protected by the public prosecutor's office. These include the right to access to information, as well as reparations, protection, and assistance.

2.2.- Reforms to the Normative Regulation of the Public Prosecutor's Office:

The first aspect that was indispensable for modifications that would enable the public prosecutor's office to carry out its new responsibilities was the constitutional dispositions or organic laws that contained the basic definitions of the institution. This has allowed several countries to make progress toward modifying the legal statutes that contain basic regulations on the public prosecutor's office.

Table 1 presents a basic summary of that which has occurred in the past few years in eleven countries in the region that have implemented criminal procedure reforms. It indicates the institutional location of the public prosecutor's office in each country and makes mention of the reformed legal sources in which the new institutionality of the public prosecutor's office has been regulated and the date of the implementation of the new criminal procedures.

Table 1[12]

Country	Institutional Location	Source of the PPO Reform	Date New Procedures were Implemented
Argentina	Autonomous, outside of the judicial branch	Constitutional Reform of 1994 and Organic Law of the PPO No. 24.946 of 1998	September 5, 1992 (Federal system)
Bolivia	Autonomous, outside of the judicial branch	Political Constitution and Organic Law of the PPO No. 1.469 of 1993	March 24, 2001
Colombia	Affiliated with the judicial branch but with functional autonomy	Constitution of 1991 and Organic Law of the PPO No. 2699 of 1991	1991
Costa Rica	Dependant of the judicial branch	Organic Law of the PPO No. 7.442 of 1994	January 1, 1998

[12] This table only contains information on some of the countries in the region that have recently reformed their criminal procedure legislation. The selection is based on the degree to which they can be seen as representative in the regional context of the reforms.

Chile	Autonomous, outside of the judicial branch	Constitutional Reform of 1997 (Law No. 19.519) and Organic Constitutional Law of the PPO No. 19.640 of 1999	December 16, 2000
Ecuador	Autonomous, outside of the judicial branch	Constitution of 1998 and Organic Law of the PPO No. 2000-19 of 2000	July 1, 2001
El Salvador	Autonomous, outside of the judicial branch	Constitution	April 20, 1999
Guatemala	Autonomous, outside of the judicial branch	Constitutional Reform by Legislative Agreement 18-93 of 1993 and Organic Law of the PPO No. 40-94 of 1994	June, 1994
Honduras	Autonomous, outside of the judicial branch	PPO Law No. 228-93 of 1993	February 20, 2002
Paraguay	Affiliated with the judicial branch but functionally autonomous	Constitution of Paraguay of 1992, Organic Law of the PPO No. 1562/00	July 9, 1999
Venezuela	Autonomous, outside of the judicial branch	Organic Law of the PPO No. 5262 of 1998.	July 1, 1999

I would like to make two brief observations about this table. The first is that one can clearly appreciate a parallel between the criminal procedure reforms undertaken in each of these countries and the reforms undertaken in the public prosecutor's offices. The second has to do with the institutional location of the public prosecutor's office, which has traditionally been one of the most intense debates in the specialized literature on this institution in the region.[13] As one can appreciate in the table, the public prosecutor's offices as an autonomous organization (be it outside of the judicial branch or dependant on the judicial branch but with functional autonomy) has dominated over alternatives such as its dependence on the executive branch or the judicial branch without functional autonomy (as is the case, for example, in Costa Rica). The topic has yet to be completely closed from the legal point of view, though this does not mean that there is still a lack of clarity on the choices that have been made even at the normative level, as we will see further on in the paper (see The Relationship between Autonomy and Accountability).

2.3. - Institutional Strengthening

Though legal reforms are inadequate on their own, they do represent a first step towards ensure that prosecutors fulfill the role assigned to them in the new criminal procedure model. We can therefore observe a corresponding process of institutional strengthening of the public prosecutor's offices, which has accompanied the reforms that are taking place around the region. As a result, prosecutors not only have access to the legal instruments that allow them to properly carry out their tasks in the new procedures, but also have the basic resources that they need in order to do so.

[13] See, for example: Alberto Bovino, *El Ministerio Público en el Proceso de Reforma de la Justicia Penal en América Latina*, in PROBLEMAS DE DERECHO PROCESAL CONTEMPORÁNEO, Editores del Puerto, Buenos Aires 1998, 29- 46; Alberto Bovino, *Ministerio Público y Poder Ejecutivo*, mimeograph given to the author; Juan Bustos, *La Configuración Orgánica e Institucional del Ministerio Público*, in EL MINISTERIO PÚBLICO PARA UNA NUEVA JUSTICIA PENAL, op. cit., 173- 180; Andrés D´Alessio, "The Function of the Prosecution in the Trasition to Democracy in Latin America," in TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY, Westview Press, 1993, 189 and following; Philip B. Heymann, *Should Latin American Prosecutors Be Independent of the Executive in Prosecuting Government Abuses*, in 26 U. Miami Inter-Am. L. Rev., 535-559; Elizabeth Iglesias, "Designing the Institucional and Legal Structure of Prosecutorial Power in the Transition to Democracy," in TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY, op. cit., 269 and following; Andrés Montes,"Algunas Consideraciones sobre la Reforma Constitucional que Crea al Ministerio Público," in PRIMER CONGRESO NACIONAL SOBRE LA REFORMA DEL PROCESO PENAL, Cuaderno de Análisis Jurídico nº 39, Escuela de Derecho Universidad Diego Portales, 1998, 135-154; Maximiliano Rusconi, "La Reforma Procesal Penal y la Llamada Ubicación Institucional del Ministerio Público," in EL MINISTERIO PÚBLICO EN EL NUEVO PROCESO PENAL, Ad-Hoc, Buenos Aires 1993, 59-79 ; and Enrique Soller, "La Separación de los Poderes en la República Argentina Después de la reforma Constitucional del año 1994 ¿Adiós a la Doctrina de Montesquieu?," paper presented at the VI Congreso Internacional del Instituto Iberoamericano de Derecho Constitucional, Bogotá, Colombia, April 1998.

Although it is still not possible to state that the strengthening process has concluded or that it has gone far enough to effectively allow prosecutors to undertake their new functions, significant advances can be observed in different areas of the legal system in numerous countries of the region.

One area where advances have taken place is in matters to do with budget regulation. In Ecuador, for example, the budget earmarked for the public prosecutor's office for 2001 was US$7.65 million, but when judicial reforms began to be implemented there in 2002 the figure increased by 158%, reaching an annual budget of US$12.14 million.[14]

El Salvador designated close to US$8 million to the public prosecutor's office budget in 1997, but that figure had more than doubled to US$19 million by 2000.[15] The case of Guatemala is similar: in 1995 the public prosecutor's office budget stood at US$11 million, but by 2001 the figure had risen to US$45 million.[16]

The situation is even more radical in Chile due to the inexistence of the public prosecutor's office prior to the judicial reform. Thus, in 1999 no budget was assigned to this entity, and in 2003 (when judicial reform was implemented in 12 of the country's 13 regions) the institution was allotted a budget of more than $44,000 million pesos (equivalent to US$74 million).[17]

To a great extent, budget increases have been aimed at improving the poor conditions associated with infrastructure and support systems for public prosecutors in the region. At the same time, an important effort has been made to increase the number of prosecutors who undertake tasks in said institutions, which represents a second area of institutional strengthening that is vital to adopting these bodies to new procedural roles. Table 2 shows the number of prosecutors per 100 thousand inhabitants in eight countries.

Table 2
Prosecutors per 100 thousand inhabitants.[18]

Country	No. of prosecutors per 100 thousand inhabitants
Colombia	8.6
Province of Córdoba (Argentina)	8.5
Costa Rica	6.5
Chile	4.3
Ecuador	2.7
El Salvador	9.9
Guatemala	4.5
Paraguay	3.2

It is difficult to compare these figures with data available in developed countries that have similar procedural systems due to the significant variations that exist in this area. Hence, whereas figures for the United States for 2001 indicate 12.3 prosecutors per 100 thousand inhabitants in cities where the population exceeds one million inhabitants, and 10.5 prosecutors in cities of between 500,000 and 999,999 inhabitants, a country like Japan falls at the other end of the spectrum, with only 1 prosecutor per 100 thousand inhabitants. Neither of these examples would seem to represent the general rule in the context of other developed countries with procedural systems similar to those being attempted in Latin America, where prosecutor rates fall somewhere between the figures mentioned above.

Another example is that of Canada, whose criminal procedure process is similar to that of the United States, but that has a prosecutor rate of 6.2 per 100 thousand

[14] See "La Evaluación de la Reforma Procesal Penal en el Ecuador (Evaluation of Criminal Procedure Reform in Ecuador)," Fondo Justicia y Sociedad Esquel Group Foundation-USAID, Quito 2003, pp. 51 and 52.

[15] See 'Segundo Informe Comparativo Seguimiento de los Procesos de Reforma Judicial en América Latina," in *Revista Sistemas Judiciales* No. 5, Buenos Aires 2003, p. 55.

[16] Idem p. 58.

[17] See Andrés Baytelman and Mauricio Duce, "Evaluación de la Reforma Procesal Penal: Estado de una Reforma en Marcha," Universidad Diego Portales Law School, Santiago 2003, p. 43. It is worth pointing out that as this involves a new institution, the budget for the public prosecutor's office in Chile not only includes operational costs, but also includes the initial investment associated with construction costs and the purchase of office equipment. The budget also includes costs related to implementing the reform in the Metropolitan Region (Santiago and its environs, which represents 40% of the country's population), which is scheduled for June 2005.

[18] Source: Second Comparative Report, op. cit. p. 38, with the exception of Colombia and Chile. In the case of Colombia the source is the 1995-1998 Justice Development Plan and the 1996 UN population survey. In Chile the source is Andrés Baytelman and Mauricio Duce, op. cit. p. 39.

inhabitants as calculated in 2000/2001.[19] This is similar to Germany's 6 prosecutors per 100 thousand inhabitants[20] as of the 31 of December 2002. It is important to note that German rules governing criminal procedures have also been an inspirational for many of Latin America's reform codes. Another country where criminal procedure legislation has been a source of inspiration for Latin American reform codes is Italy; according to available statistics, the country had 3.73 prosecutors per 100 thousand inhabitants in 1997.[21]

If we compare these rates to those observed in Latin America, we can conclude that many of our countries have figures which are either similar or superior to those in judicial systems belonging to more developed countries (for example, the cases of El Salvador, Colombia and the Province of Córdoba in Argentina). The exceptions are Ecuador and Paraguay, whose prosecutor rates are not very different from those of a country like Italy.

These comparisons weaken the validity of the often-heard complaint that the main problem affecting the work of prosecutors in Latin America is the lack of available resources because at least in the case of available human resources, the data indicates that countries in the region are either at the same level or have more resources than countries more developed countries.

3.- What has happened to Public Prosecutor's Office Reform in the New Criminal Procedure Systems? Analysis of the Main Problems Faced up to the Present

As we saw in the previous section, the region's public prosecutor's offices have undergone major legislative changes aimed at redefining their institutional make-up and the role that they play in order to make them fully compatible with the requirements of the new system. Moreover, an important number of countries have significantly increased budgets, numbers of prosecutors and the infrastructure of their respective public prosecutor's offices so as to consolidate changes introduced by the new system. At the same time, certain expectations have been created in relation to the strategic objectives that such institutions have been called on to fulfill. The goal of this section is to clarify the problems that public prosecutor's offices have been faced as they have gone through the process of institutional adaptation that will allow them to fulfill their new functions and strategic objectives.

Before analyzing specific aspects of changes taking place in the region's respective public prosecutor's offices, it is necessary to place such changes in the right context, as does the "Second Comparative Report on the Follow-up Study on Judicial Reform in Latin America," which deals with the problems facing the vigorous and highly dynamic process of criminal procedure reform.[22]

Without underestimating the aforementioned, another central characteristic of these reform processes is that they have presented more difficulties than expected when it comes to resolving certain problems that they were thought to be able to respond to more immediately. The same assessment can be made of the public prosecutor's offices.

In order to more effectively organize my reflections on this topic, I will separate the problems related to the work of the public prosecutor's offices in the region into two distinct types: problems associated with the institution's role and problems associated with the role of procedures.

3.1. - Problems with the Institutional Role of Public Prosecutor's Offices

This category includes problems related to institutional direction or the understanding of the institution's general role in the new system. In other words, it addresses problematic aspects

[19] See the Canadian Center for Justice Statistics, Criminal Prosecutions, Personnel and Expenditures 2000/01.

[20] Data provided via e-mail by Stefan Brings of the German Government Statistics Office 7 January 2004.

[21] This calculation has been carried out using "Italian Styles: Criminal Justice and the Rise of an Active Magistracy," in *Legal Culture in the Age of Globalization*, David Clark, Stanford University Press, Stanford-California, 2003, p. 247.

[22] See the Second Comparative Report, op. cit. pp. 36 and 37.

that are not linked to the specific tasks of prosecutors in criminal procedures. Empirical evidence gathered through the Follow-up Study on Judicial Reform in Latin America has led to the identification of four main problematic areas: an inability to identify and deal with problems; a lack of understanding of certain functions of the institution within the criminal justice system; a lack of leadership; and an almost complete absence of a culture of accountability.

a) Difficulties Related to Identifying Problems and Proposals for Innovative Solutions

The first major deficiency has to do with a certain institutional inability to identify the core problems and difficulties that prosecutors face when fulfilling their obligations within the new procedure systems. With the exception of some very specific cases, the region's public prosecutor's offices have not been able to engender the capacity that would allow them to produce detailed empirical information related to the true nature of work carried out by their prosecutors in their own institutions, and thus be able to follow up such work on a daily basis. In many cases, even the basic gathering of statistical information related to the institution's work load and flow of cases ends up being deficient. And even when statistical information does exist, it does not appear to have been strategically designed to obtain relevant information, but only to fulfill the "duty to provide statistics," which leads to the creation of bulky and generalized indicators that do not contribute to a better understanding of the institution's work.

In this context, it is no surprise that we also fail to observe a capacity for creating innovative responses to the problems that the institutions face. And if there are difficulties in identifying such problems, sophisticated and original tools for dealing with them are even less likely to emerge. As a result, there is no real understanding of existing problems and obstacles, and the answers tend to fall back on traditional solutions for new dilemmas.

To a great extent, the source of these problems lies in the persistence of an institutional style that emphasizes a theoretical and dogmatic approach to dilemmas rather than proposals for resolving concrete and specific problems, a defect that spans the entire legal community in Latin America. However, the fact that the public prosecutor's office in particular has been unable to alter this tendency in its internal working procedures represents a serious problem for the continuous improvement of institutional management.

A first step for achieving renovated public prosecutor's offices that are capable of responding to current problems consists of allocating part of their resources to the identification of problems (for example, by constantly monitoring their work) together with the production of trustworthy empirical information of the workings of the system. We will only be able to think about generating capacities aimed at offering innovative solutions for such problems after they have been properly identified. As we shall see, the lack of such a capacity becomes plainly visible in specific problems described below.

b) Understanding Responsibility: Other Functions of the Public Prosecutor's Office

Allowing prosecutors to assume a new role in criminal prosecution has not been easy in the region. In some countries, judges have not given prosecutors the space that they need in order to make important contributions. In others, conversely, it is the prosecutors who have not had enough drive to open an adequate space for themselves in the system (e.g. in their relationship with the local police). However, the role assigned to prosecutors by new procedures is gradually becoming consolidated. The same can not be said, however, with other responsibilities pertaining to public prosecutor's offices that go beyond strictly procedural concerns. The most significant of these is the contribution made by such institutions to the problem of public security facing most of the region's countries.

In effect, over the last decade public opinion has expressed growing concern regarding citizens' security in most of the region's countries. Citizens of most countries believe that the crime rate has shot up and that there has been no specific response on the part

of the criminal justice system. This has naturally led to a significant increase in citizens' demands for changes that will allow the justice system to investigate crimes and punish criminals more efficiently. These demands have acted as a catalyst for criminal procedure reforms and changes to public prosecutor's offices in the region.

This is not the time to discuss how much criminal procedure reform and public prosecutor's offices can effectively contribute via effective public security policies for crime prevention. In my opinion, within the limited framework of action pertaining to the criminal justice system and public prosecutor's offices, reform can play an important role in combating the lack of security and the rise in criminal behavior. This, however, is not a direct and immediate consequence of reform; rather, it presumes the development of various specific elements. One of the main requirements is that public prosecutor's offices accept specific actions in this area as part of its institutional objectives. Significant improvements can be made in the area of prevention if the public prosecutor's office improves coordination with state agencies in charge of prevention programs. This institution must also uses its procedural tools in a way that does not conflict with criminal policies focused on improving public security. Furthermore, proper attention given to victims, the principal sources of opinions within society regarding the work of the justice system, can represent a key strategy for improving levels of confidence in the system and diminishing the feeling of public insecurity. There are just a few examples of experiences in this area found in the international ambit.

The problem is that the public prosecutor's office has not shown much awareness about this issue in various countries in the region and has often been reluctant to assume any responsibility in the area of citizens' security. Prosecutors have argued that such responsibility does not form part of its functions or obligations. This has kept reforms to public prosecutor's offices from reaching their full potential and has constituted a central area of criticism of such institutions, weakened their position in the public eye, and led to uncertainty about the importance of reforming this entity.

The public prosecutor's office should abandon the rigid and traditional belief that it is a quasi-judicial institution whose only important role is procedural. This is a fundamental error from a technical point of view, as well as an erroneous strategy for institutional insertion from a policy perspective.

c) Lack of Institutional Leadership:

A third common problem is the lack of leadership at institutional level within the public prosecutor's office.[23] This does not necessarily imply that those who direct such institutions are weak, but is directed towards the traditional and prevailing belief that prosecutors enjoy important levels of autonomy. If we add to this the lack of standardization and follow up systems, we can see why many people in the upper levels of these bodies are unable to define the offices' institutional direction and focus on strategic aims that go beyond criteria that are specific to prosecutors. These individuals are more focused on the day-to-day fulfillment of their jobs than more "abstract" institutional objectives.

This explains why prosecutors in many countries enjoy a great deal of autonomy and are free to make decisions without incorporating a more strategic general outlook, at least at the operative level. This can often be explained by the lack of a comprehensive understanding of the institution's direction at the institutional level that establishes a clear line of action at operative level.

This leads to a situation in which no one demands that public prosecutor's offices fulfill objectives that go beyond strictly procedural matters such as issues regarding public security. This makes it difficult for the public prosecutor's offices to fulfill another important task that should be taken by all public entities in democratic systems: being publicly accountable and responsible for their performance, which I will examine forthwith.

[23] Regarding this area in particular please refer to Cristián Riego, op. cit., pp. 54 & 55.

d) Serious Limitations in Public Accountability:

The last problem that I would like to address is the public prosecutor's offices' general reluctance to make themselves publicly accountable for their performance. Once more we are dealing with a phenomenon that is not solely confined to this body, but that seems to extend to practically all public institutions in Latin America. However, given the present context and the fact that the problems of crime and delinquency represent a major concern for the general public and that public prosecutor's offices have been significantly strengthened, the lack of willingness to supply information and submit the institution's performance to public scrutiny is absolutely unacceptable.

The origin of this tendency is related to various complex factors, only three of which I will address here. First of all, I believe that prosecutors do not fully comprehend the concept that society is in fact a client to which the public prosecutor's office is accountable. Personnel in these institutions tend to see themselves as mere judicial operators, and not as agents who fulfill an important social function and must satisfy the community or "client's" expectations. The source of a significant part of this problem is the lack of leadership at institutional level. Second, criminal justice system institutions around the region are not in the habit of producing information on their performance. Secrecy has long been the operational standard backed up by the legal norms of the inquisitory system. This has led to a working culture that is reluctant to be observed, analyzed, or criticized. A third factor is linked to misunderstandings about the importance of institutional autonomy, which is inherent to many of the region's public prosecutor's offices, as can be appreciated in Table 1. In many cases such autonomy has not been viewed as representative of greater levels of control and responsibility, but as immunity or some sort of judicial statute that shields the institution from public control and criticism of its performance.

As such, it is not infrequent to find public prosecutor's offices that are basically not responsible to another institution. Such a lack of responsibility has hindered the task of making the work and performance of such bodies more dynamic in the face of such evident institutional inertia, creating problems for the fulfillment of basic procedural duties assigned to prosecutors by the new criminal justice systems.

3.2.- Problems with the Procedural Role:

This category includes specific problems that public prosecutor's offices confront when carrying out their basic functions, which have been assigned in virtue of the implementation of new procedure systems or should satisfy inquisitory criminal justice systems in the process of reform development and consolidation as a result of their reconfiguration. In other words, the public prosecutor's office must fulfill the strategic functions associated with the institution's new role of criminal prosecution in order to reinforce the new adversarial procedural model set up by the reform.

As identified in the previous section, empirical evidence gathered in the Follow-up Study on Judicial Reform in Latin America has let to the identification of four main problems of this type. The first concerns the limited impact that the work of public prosecutor's offices has had on invigorating the criminal justice investigative stage. The second refers to such institutions' limited capacity to control work load. The third problem is the fact that public prosecutor's offices have not become important agents in the promotion and protection of victims' rights. Last, there is a difficult relationship between these bodies and the police and the fulfillment of their investigative tasks. Each of these problem areas is examined in more detail below.

a) Limited Role in Invigorating the Criminal Investigation Stage[24]

As I discussed above, one of the greatest expectations about public prosecutor's office reform in the process of implementing accusatory judicial systems was the decisive role that the dismantling of antiquated criminal investigation structures, which were characterized by their extreme level of formality

[24] This issue is especially highlighted in the Second Comparative Report, op. cit, pp. 37 - 39.

and rigidity and the highly bureaucratic nature of their working methods, was to play. However, participant observation work carried out by prosecutors from various countries indicates that they tend to repeat the working methods of the inquisitory system.

The lack of innovation within public prosecutor's offices in terms of the way in which work is organized during the criminal investigation stage, which could have altered the dynamic established in the context of inquisitory systems, is reflected in various points. One of the most important has been the tendency to organize these bodies along practically the same lines as normal judicial structures, or as a carbon copy of other institutions. This has meant that the public prosecutor's offices have been organized almost in the shadow of the judicial organization model, which has lead to various problems. The main problem that interests me is that this reproduction of the judicial model has transcended the logic behind the organization of judicial work, which is not the most efficient way of carrying out a completely different function as is criminal prosecution.

One of the most typical examples of organizational problems and lack of innovation in the public prosecutor's offices is the cases assignment system. The prevailing system in most countries in the region is individual case assignment, which reproduces the rationale of jurisdictional systems. This means that once a case has been assigned, the prosecutor has the "jurisdiction" to hear the whole case (at least during the procedural stage in which that prosecutor is involved, as many systems hand "jurisdiction" over to the prosecution during different procedural stages due to the similarities between the organizations). This leads to the creation of significant periods of inactivity and does not contribute to the use of the economies of scale permitted by organizational forms of collective work. In this sense, it is possible to detect the almost total inexistence of group work. Each prosecutor works behind closed doors, without letting others "interfere" in the way he or she handles the case.

The specialization of functions as organizational working criteria is also absent with the exception of cases of specific specialization for the investigation and processing of specific types of crimes (especially drug related offenses). More sophisticated ways of organizing work, such as specialization in functions such as the evaluation and selection of cases and the formation of teams in high profile cases, do not exist.

Finally, we have observed significant advances in the professional development of public prosecutor administration and technical support services. Many public prosecutor's offices are still fundamentally the workplaces of "lawyers" and have failed to take advantage of the accumulated knowledge and experience of other disciplines, which could provide a fresh and innovative approach to the way in which prosecutors' work is organized. Approaches to organizing the work of teams charged with investigating or processing information more effectively is not an area in which attorneys have a great deal of experience as compared to administrators given the focus of most educational programs.

All these aspects translate into a strong tendency for prosecutors to replicate what investigating judges have been carrying out within the inquisitory system. That is to say, there is a tendency to follow homogeneous, formalistic, and bureaucratic guidelines for processing cases and to see the creation of the case file as the key objective. This does not only have an impact on the reproduction of inefficient methods to organize work, but also interferes with the principals of new systems, such as publicity, orality, and immediacy.

b) Limited Ability to Control Work Load

The most basic function that a criminal justice system should be in conditions to deal with is the ability to reasonably manage the cases that it hears, or at least to control the case flow it receives. In this sense, the main element that conditions the correct functioning of the criminal justice system is management and control of the cases received. If the system does not develop a

case flow control policy that allows it to control its workload, it will not be able to operate within minimum parameters of rationality and quality. In this sense, the work overload of criminal justice systems would seem to be the main source of their problems. For this reason, most criminal procedure reforms established a selection of criteria and institutions that allow public prosecutor's offices to develop a workload control policy, with the objective of dealing with the situation imposed by the unrestricted application of the principal of legality in the context of inquisitive systems. The powers that reform systems have sustained include faculties for the public prosecutor's office to dismiss cases at an early stage by using different criteria of prosecutorial discretion (non-serious offence, natural retribution, etc.), use of mechanisms for alternative dispute resolution (suspension of procedures by evidence and indemnification), and systems to simplify procedures aimed at saving unnecessary procedures and formalities (shortened proceedings, proceedings for crimes court in the act, among others).

As mentioned before, bestowing these powers on prosecutors has transformed the public prosecutor's office into the entrance key to the system. However, observation of the conduct of prosecutors in the use of these tools reveals that such instruments have been underused, particularly those mechanisms for early dismissal (prosecutorial discretion) and alternative resolutions. Table 3 summarizes the percentage of cases in which both instruments have been used in seven countries around the region.

Table 3[25]
Use of Mechanisms for Alternative Dispute Resolution and Discretionary Faculties by the Public Prosecutor's Office

Country	**% Use**
Province of Córdoba (Argentina)	1
Costa Rica	64
Chile	75
Ecuador	2
El Salvador	26
Guatemala	4
Paraguay	10

[25] Source: Second Comparative Report, op. cit. p. 39, with the exception of Chile where the public prosecutor's office's *Boletín Estadístico* (Statistics Newsletter) for 31 August 2003 was used.

With the exception of Chile and Costa Rica, the use of these instruments is extremely low. The impact of this has been that reformed systems have had to work with a large quantity of open cases in which prosecutors can not effectively carry out constructive activities of investigation. This has reinforced the bureaucratic treatment of cases and reproduced the same type of processing that was common to the inquisitory system, which has kept the new system from giving priority to work on more socially relevant crimes, along with those that the system has the effective possibility of investigating.

c) Limited Ability to Promote and Protect Victims' Rights

In fulfilling the basic expectations of reforms public prosecutor's offices have had to face problems related to their new functions regarding crime victims. In spite of having produced very significant changes in the design of legal standards that favor victims, it is still possible to state that such institutions have not become important players in the promotion and protection of victims' rights.

One observation that can be made regarding this issue is the lack of institutional commitment within public prosecutor's offices to set aside a space for the design and execution of policies that favor victims. With few exceptions –which also have problems of being implemented at national level- public prosecutor's offices have failed to set aside part of their institution for this area. This situation is also reflected in the lack of intervention programs designed to, for example, provide information about victims and protect them.

In relation to this lack of institutional support, various problems can be detected at operational level, where the link with victims is in the hands of prosecutors. First, prosecutors do not see victims as "clients" whose opinions should be taken into account when decisions are made regarding the prosecution strategy. Second, playing an active role in promoting victim's rights can frequently lead to conflicts with the logic behind criminal prosecution, which tends to be given more prominence when there are conflicts of interest in this area, leaving victims feeling that their interests are not being fully attended to. This is due not only to prosecutors' lack of awareness of victims' problems, but is also a function of the fact that such institutions generally use the results obtained by more traditional criminal prosecution to measure performance. Another typical example where dynamics of this kind are created are in those cases where prosecutors favor criminal prosecution rather than the early closing of cases using indemnification mechanisms on the victim's behalf, and placing public interest above the willingness of the victim.

In this context, one of the central problems that can be observed is a need to train prosecutors in order to make them more aware of victims' needs and a need to create institutional policies that make this issue a priority. This does not only entail abstract or purely discursive questions about the importance of victims, but also the design of real incentives, such as the performance evaluation associated with attaining the objective of satisfying the specific interests of victims during judicial procedures.

d) Public Prosecutor's Offices and the Police: Problems of Coordination and Definition of Roles

The relationship between the public prosecutor's offices and the police represents another conflictive aspect of the work carried out by public prosecutor's offices. Coordination between both institutions is a critical factor for the successful implementation of the new justice system and in order for prosecutors to be able to fulfill their basic responsibilities in the new procedures. However, significant deficiencies have been observed in the inter-institutional relationships in numerous countries, which lead to problems in consolidating dynamic aspects of new procedures. The underlying causes of this situation are varied and complex, but I would like to lay out some specific problems between the police and the public prosecutor's office that need to be taken into account in future considerations of this area. I would like to point out that this problem involves both the procedural function of the public prosecutor's

office and institutional factors, but I would like to reserve analysis in this section in order to emphasize the impact of this problem on the consolidation of the new procedural model in the region.

The police have not traditionally been an object of concern on the part of academics and legal reformists in Latin America.[26] What is more, the institution has not been widely recognized in society because those who are not involved with the police world find it hard to understand. This lack of knowledge goes a long way toward explaining why there is such a huge gap between the "police world" and the "civil world," which the numerous dictatorships that once plagued Latin America helped reinforce. As a result, criminal justice reform in the region has not incorporated significant and far-reaching reforms of the respective police forces, except in very specific cases.[27] What is more, in cases where the relationship between the police and the public prosecutor's office has been established by law in the new criminal procedural codes, it has been done so in fairly ambiguous terms, which creates serious problems for the task of coordination between both institutions. In this respect, one serious aspect concerns the implication of "managing direction" between the public prosecutor's office and the police in the area of preliminary investigation. The police have argued that this enters into conflict with their institutional chain of command, and that they are not under the command of the public prosecutor's office.[28] At the other extreme, many prosecutors believe that this directive gives them absolute power over the work of the police, without taking into account the experience of police investigators. Some even believe that they are authorized to substitute the police by assuming criminal investigation as their responsibility.

All these problems have led to misunderstandings and a lack of communication between both institutions. As a result, public prosecutor's office training programs do not incorporate the basic techniques, tools and strategies used by the police during criminal investigations, which would allow prosecutors to understand the methods that the police use and the problems that they encounter. Police training programs do not allow members of the force to establish constructive relationships with prosecutors, which make effective and coordinated relationships between these entities nearly impossible.

This problematic relationship between the public prosecutor's office and the police can also be understood as the result of tension created by the appearance of a new institutional actor on the scene who exercises part of the power that was once exclusive to the police under the old inquisitory system, and whose main objective is to control the work carried out by the police force. However, in spite of the formal rules establishing that investigative judges should exert significant control over the police when investigating crimes, in practice, police in the region have developed considerable spaces of autonomy thanks to the inquisitory system.

Given this complex scenario, public prosecutor's offices have lacked the sensibility to work more closely with the police and develop constructive relationships in order to further the work of criminal investigation. It is often the public prosecutor's offices themselves that do not have a clear idea of roles, functions, and correct division of the workload between prosecutors and police officials. The public prosecutor's office has to understand that as a

[26] Along these same lines please see, Alberto Binder, op. cit., p. 82; Maximiliano Rusconi, *Reformulación de los Sistemas de Justicia Penal en América Latina y Policía: Algunas Reflexiones*, in PENA Y ESTADO NO. 3, 1998, p. 189 & 190; and, Mauricio Duce and Felipe González, *Policía y Estado de Derecho: Problemas en torno a Su Función y Organización*, in PENA Y ESTADO NO. 3, 1998, pp. 51 to 53, among others. In this last it is suggested that one of the reasons for this lack of concern has been an excessively formal approach where the criminal process is understood as a set of proceedings and targets of a judicial nature, according to which only judicial procedures are considered by jurists as part of the study objective of criminal processes.

[27] One significant exception is represented by El Salvador, where a new police force has been set up. However, the creation of this new police body is the result of the implementation of peace agreements and not as a consequence of the new criminal justice system recently implemented in this country. As regards the country's new police force, see: Gustavo Palmieri, *Reflexiones y Perspectivas de la Reforma Policial en El Salvador*, in PENA Y ESTADO NO. 3, 1998, pp. 313-340.

[28] In relation to this point, see Linn Hammergren, THE POLITICS OF JUSTICE AND JUSTICE REFORM IN LATIN AMERICA, Westview Press, 1998, p. 275.

general rule, the police are responsible for carrying out investigations because of their professional expertise, jurisdiction, and resources. Prosecutors should also understand that the expertise pertaining to the police should be used to benefit criminal prosecution. However, they should also be able to demonstrate to the police that the results of investigations have little or no value unless the two bodies coordinate their efforts. In this sense, prosecutors play a key role in the new procedural model by acting as constructive links between the police and judicial institutions, or rather, enabling information obtained via police investigations to be successfully employed in a judicial case. The public prosecutor's office has a privileged position in designing new procedural models that will help bridge the gap between the judicial and police worlds. Experiences observed in various countries in the region indicate that public prosecutor's offices have not been strong enough to take on that responsibility or the clarity to properly understand that their main strengths in relation to the work of the police are concentrated in that specific function.

4.- Conclusions

This brief review of the problems being faced by public prosecutor's offices in the reform process may lead to somewhat disheartening conclusions, but it is important to take the strides that have been made into account as well. Prosecutors have had serious problems facing and satisfying part of the basic demands that criminal justice reform has placed on them and the changes experienced within their own institutions. But this does not suggest an absolute failure to meet their objectives. On the contrary, the country reports submitted for the Follow-Up Study on Judicial Reform in Latin America reveal the problems discussed in this paper, but also speak to a multiplicity of successful experiences in specific areas in which prosecutors have played active roles. There are various cases where successful working experiences have been developed between prosecutors and police, which have resulted in the creation of timely evaluation systems, specialized offices for victims, the introduction of modern administrative criteria, and many more elements of the system which would be difficult to properly detail in this present work.

In this context, Latin America's public prosecutor's offices enhance the success that has been enjoyed in areas that have seen the implementation of successful action programs. The first step is making important changes in the way work is directed. As previously noted, it will be impossible to solve the problems observed in the short term unless the systems are able to provide trustworthy empirical data on their performance and emphasis is placed on solutions to the specific problems that the institution is currently facing. But there is also a need to be clear on the most important roles that these institutions are asked to play in the context of an adversarial system and a reform process like the one that has led to the changes that have been implemented in the region over the last few years. Both of these challenges demand leadership and a capacity for innovation on the part of public prosecutor's offices, two attributes whose absences has thus far been quite conspicuous. This is the greatest challenge to be faced during the present stage of criminal justice reform in the region.