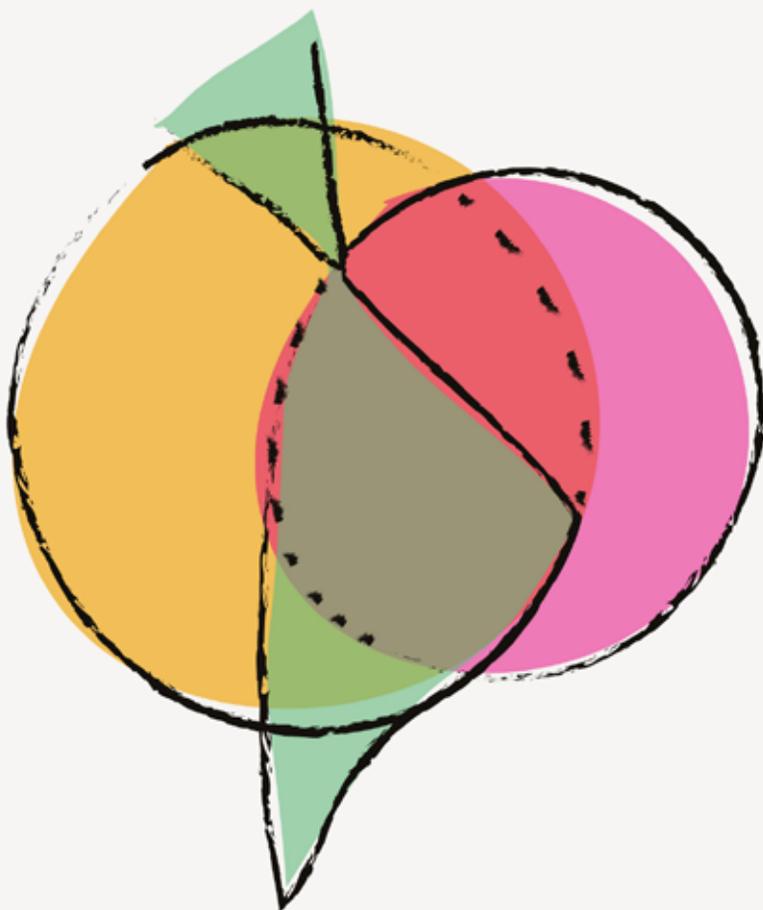


COMPARATIVE ANALYSIS OF CIVIL JUSTICE REFORMS IN LATIN AMERICA

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Introduction

The passage of Uruguay's General Procedure Code in 1989 –which had a major influence on the Model Code of Civil Procedure for Ibero-America– began a gradual civil justice reform process in Latin America. Peru (1993), Honduras (2009), and El Salvador (2010) would be the next countries to follow this path. Colombia's reform was introduced in 2012, and we then witnessed changes to civil justice in countries like Bolivia, Brazil, Ecuador, Costa Rica, and Nicaragua.

Ten years after the entry into force of the first code that would mark this process, we wanted to engage in a comparative analysis of the characteristics of these reforms in order to identify trends and determine whether this process reflects the discussions that have developed at the regional and international levels in the legal, political, and academic communities. This is an effort to observe the phenomenon as a whole and arrive at a regional comparative perspective that allows us to engage in discussions around a fundamental question: Is there a Latin American civil justice model?

That analysis resulted in the publication "Comparative Study of Civil Procedure Reforms in Latin America." This text contains the first section of the study. The full Spanish-language version is available online at: <https://biblioteca.cejamericas.org/handle/2015/5662>.

The main purpose of this text is to offer readers a comparative vision of the civil justice reforms that have been developed in our region since the Honduran Civil Procedure Code entered into force.

We thus provide a comparative description based on several aspects: the implementation and entry into force of each reform, procedural models, procedural structures and their respective hearings, evidentiary and litigation aspects, alternative dispute resolution (ADR) mechanisms, collective processes and avenues that can be used to challenge decisions. Each of these areas has its own axes or indicators of analysis, which have allowed us to generate comparative data that we believe is useful for exploring the regulatory deficiencies identified, outline a shared work agenda, and contribute constructive solutions for the review of these reforms and the promotion or discussion of those that are in process elsewhere in the region.

In order to carry out this work, we have used the regulatory texts of the eight Latin American countries that have reformed their civil justice systems during this period. These are the Civil Procedure Codes (CPCs) of Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Honduras, and Nicaragua. We chose these texts because these codes have been approved and implemented. We did not include provincial or federative entities' codes or ongoing regulatory projects.

I. The most recent civil justice reforms in Latin America

1. TIMELINE OF CIVIL JUSTICE REFORMS FROM THE PAST DECADE

The country that began this reform process was Honduras, which approved its new Civil Procedure Code on May 26, 2007, though it did not enter into force until it was published in the Official Gazette (Art. 932, CPC) 24 months later, on May 26, 2009.

El Salvador followed, passing its Civil and Commercial Procedure Code (Código Procesal Civil y Mercantil, or CPCM) on November 27, 2008.¹ Although there are various similarities between the codes (for example, their regulatory approach, scope, and direction), the latter only took 14 months to enter into force. However, given the limited timeframes established to take the actions required to guarantee the effective implementation of the new regulations, it was delayed until July 1, 2010.

Colombia's General Procedure Code (Código General del Proceso, CGP) was approved on July 12, 2012 (Law No. 1564), establishing two modes for its entry into force, one direct and one conditional (Art. 627). The direct mode involved a limited number of specific articles that would be in place once the code was passed. The rest would go into effect on October 1 of that year. That type of decision is interesting for introducing gradual changes to areas that can be important in the reform process and operation of the system, and that do not require significant changes of any kind (for example, budgetary, cultural, or forensic).

Conditioned entry into force, for its part, meant that the other articles of the code would go into effect gradually beginning on January 1, 2014 as the programmatic requirements were met.² However, the code had to be introduced fully and definitively in all of the country's judicial districts within three years. In other words, the deadline was January 1, 2017, regardless of whether or not the stipulations had been met.

The Superior Judiciary Council's Administrative Chamber issued an agreement on December 27, 2013 regulating the gradual implementation of the code. It established three stages for its entry into force in the 34 judicial districts. The first would begin on June 3, 2014 and had to be fully in place by January 2016. The process would start in smaller judicial districts and end with the larger ones.³

Bolivia passed its Civil Procedure Code on November 19, 2013 (Law No. 439), nearly 18 months after Colombia. The first temporary provision established that it would be operational beginning on August 6, 2014. That date was postponed twice. The first time it

¹ Legislative Decree No. 712, September 18, 2008.

² These include training courses for officials and employees, necessary physical and technological infrastructure, the number of judicial offices required and the other elements necessary for the hearing-based oral proceedings. The Superior Judiciary Council was responsible for identifying and overseeing those conditions.

³ See [http://www.sic.gov.co/sites/default/files/files/PSAA15-10392%20\(1\).pdf](http://www.sic.gov.co/sites/default/files/files/PSAA15-10392%20(1).pdf)

was due to the approval of the Code on Children and Adolescents (Law No. 548). Then, the Law Modifying Full Application (Law No. 719) delayed the introduction of both the Civil Procedure Code and the Code on Children and Adolescents, determining that they would be applied beginning on February 6, 2016. This actually occurred on the tenth of that month.

As was the case in Colombia, Bolivia's Civil Procedure Code determined that certain institutions had to be fully operational when it was published regardless of its general entry into force. This "early" entry into force covered the identification of the procedural domain, procedure communications system, procedural timeframe calculation system (including terms related to means of challenging rulings), the system for nullity of procedural acts, the appointments procedure and procedures for delays, recusals, and exemptions.

Brazil adopted its Civil Procedure Code through Regular Law No. 13.105 on March 16, 2015, though Article 1045 stated that it would enter into force one year after its official publication. As such, it formed part of current law beginning on March 16, 2016.

The General Organic Procedure Code (Código Orgánico General de Procesos, COGEP) introduced in Ecuador provided for a 12-month implementation period starting with its publication in the official gazette. This occurred on May 22, 2015 and the system was fully operational beginning on May 23, 2016.

Nicaragua approved its Civil Procedure Code via Law No. 902 on June 4, 2015. It would enter into force 12 months after its publication in the official gazette. The process was delayed for an additional six months so that all justice system stakeholders could be trained.⁴ It entered into force on April 10, 2017.

Table 1: Civil procedure codes in Latin America

Country	Type of Procedure Code	Date Passed	Deadline for implementation	Extension	Actual Entry into Force
Honduras	Civil	May 26, 2007	24 months	No	May 26, 2009
El Salvador	Civil and Commercial	Nov 27, 2008	January 1, 2010	Yes (6 months)	July 1, 2010
Colombia	General	July 12, 2012	36 months (limit)	No	June 3, 2014
Bolivia	Civil	Nov 19, 2013	August 6, 2014	Yes (two extensions)	Feb 10, 2016
Brazil	Civil	March 16, 2015	12 months	No	March 16, 2016
Ecuador	General	May 22, 2015	12 months	No	May 22, 2016
Nicaragua	Civil	June 4, 2015	12 months	Yes (6 months)	April 10, 2017
Costa Rica	Civil	April 8, 2016	30 months	No	Oct 8, 2018

Source: Developed by the authors.

⁴ See <https://www.elnuevodiario.com.ni/nacionales/400999-prorrogan-entrada-vigencia-codigo-procesal-civil/>

The last text adopted was that of Costa Rica. It was approved by the Legislative Assembly on December 1, 2015 and published in the official gazette on April 8, 2016. It entered into force on October 8, 2018. That deadline was set in a temporary provision as the deadline for guaranteeing its effective and adequate implementation.

The table below organizes all of the data provided above, listing the orders that set the deadlines for the entry into force or its immediate application, extensions, and the unfolding of the entry into force of the regulations.

2. BRIEF COMPARATIVE DESCRIPTION OF REFORM PROCESSES: COMPREHENSIVE REFORM OR COSMETIC CHANGES?

JSCA has argued in favor of and defended the importance of working on justice reforms from a public policy perspective. This has various implications. We would like to highlight two of them: (i) Regulatory changes are just one component of reform. Although the adoption of a new regulatory body appears to be an important development (in that it condenses the rules for the enforceability of rights), it is not the same as and does not go as far as a reform process. Believing that the approval of rules modifies behaviors or practices implies leaving aside the systemic, complex condition based on power involved in the justice service and its dynamics; (ii) The approach should be comprehensive given that reform processes involve a series of components that are indivisible and interdependent. These include the organization of power, judicial structure, training of human resources, availability of infrastructure and material elements or the regulatory model itself.

Starting from that premise, we are interested in identifying the position of each country as it has engaged in reform processes in order to (briefly) discuss the main actions or lines observed and to offer some general observations about them.⁵

Main actions taken in reform processes

Colombia's CGP included the introduction of a "CGP Implementation Plan of Action" to be overseen by a "Commission to Monitor the Execution of the CGP Implementation Plan of Action" (Arts. 618 and 619).

The plan was developed by the Superior Judiciary Council's Administrative Chamber in collaboration with the Ministry of Justice and Law. It was approved through Agreement No. PSAA13-9810 on January 11, 2013. The full plan is included in Annexes 1 and 26 of the Agreement. Its mission included the design of a special plan to relieve judicial congestion; a new management model, internal structure, and office operation; adjustments to the judicial map and the decentralization of services based on supply and de-

⁵ For a more exhaustive discussion of the positioning, approach, and regulations of each country, see the technical sheets created for this purpose, which are included in the second section of this study.

mand; and the use and adjustment of offices' physical and technological infrastructure as well as that of hearing rooms and service centers that ensure the safety and integrity of information and training.⁶

The program showed that the CGP's implementation had a certain public policy approach. However, in May 2014, the Superior Judiciary Council's Administrative Chamber ordered the suspension of the planned timeline due to a lack of budget allocations. At that point, it had only completed isolated actions.⁷ After the interruption, the work continued until its final implementation, which was not free of various technical and logistical critiques.⁸

Bolivia replicated Colombia's strategy and included in the CPC the duty to develop an implementation plan within three months of its passage. That term was updated through Law No. 719 due to the series of delays in its entry into force.⁹

The Magistrate's Council Plenary Chamber was responsible for preparing the plan in consultation with the highest ranking representatives of the various state agencies. The program was to have at least a series of elements that reflected a comprehensive approach. Its framework guidelines were similar to those established in Colombia.

Two specific actions derived from the plan were the introduction of the Judicial Computer System (Sistema Informático Judicial, SIREJ)¹⁰ and the "Reorganization and Assignment of Equivalences of Judiciary Courts and Tribunals" approved through Agreement No. 001/2016 of the Magistrate's Council Plenary Chamber.

In order to coordinate the application of the CPC, a Monitoring and Implementation Commission was created that was composed of representatives of the three branches of government. The main measures that it promoted include: (i) the creation of a customer service platform; (ii) the judicial mailbox; (iii) the litigant services office; and (iv) the creation of an app for cell phones to follow the course of a certain process.

In the case of Brazil, the CPC brought about radical changes in the concept, design, and approach of the procedural plan. The objectives and purposes that the regulatory regime installed and the measures that the implementation required were aligned with the 2015-2020 National Judiciary Strategy formulated by the National Justice Council and approved by Resolution No. 198/2014 dated July 11.¹¹ In contrast to the previous examples, Brazil did not include special or significant provisions around the implementation within the Code itself. The only relevant provision was the duty of the National Justice Council to periodically promote statistical research to evaluate the effectiveness of the regulations set out in the CPC (Art. 1069).

⁶ See <http://actosadministrativos.ramajudicial.gov.co/web/Gacetas/Consulta/Contenido/Default.aspx?ID=1710>.

⁷ Agreement No. PSAA14-10155 dated May 28, 2014, issued by the Superior Judiciary Council, suspended the timeline set out in the agreement reached on December 27, 2013. For further information: <http://www.elnuevo siglo.com.co/articulos/6-2014-paralizada-implementacion-de-c%C3%B3digo-general-del-proceso.html>.

⁸ Through Agreement No. PSAA15-10392 dated October 1, 2015, the Superior Judiciary Council ruled that the CGP would enter into force throughout the country in full on January 1, 2016. See <https://www.elnuevo siglo.com.co/articulos/4-2016-con-tropiezos-arranca-c%C3%B3digo-general-del-proceso>.

⁹ See Article 2.II of Law No. 719.

¹⁰ The SIREJ replaced the IANUS, the online consultation system that had been in place for over 20 years.

¹¹ See <http://www.cnj.jus.br/gestao-e-planejamento/estrategia-nacional-do-poder-judiciario-2015-2020>.

Costa Rica did not establish special provisions within its CPC with the exception of transitory clause VI, which authorized the Supreme Court to issue –ex officio or at the request of a party– the practical regulations necessary to apply the Code. Nor are there autonomous regulations aimed at addressing the reform process as a whole or any mention of the implementation of the new CPC in the *2013-2018 Judicial Branch Strategic Plan*.

However, it is important to note that: (i) the plan includes cross-cutting axes of the work of the Judicial Branch in terms of structure, organization and service (for example, quality public service, access to justice, gender, ethics, values and the environment) and (ii) the topics and strategic objectives that guide the institutional work for 2013-2018 include judicial delays, modernization (innovation) of judicial management, citizen participation, human resources management, communication, transparency and accountability, and institutional planning.

The Costa Rican Civil Jurisdiction Commission's website includes information on the civil justice reform. For example, it states that one of its fundamental pillars was the technological update that introduces modern systems for implementing processes and simple access for users along with expedited communication that is recorded as part of the procedural activity. Furthermore, the Judicial Academy's Training Modules include intensive courses on the CPC for judges and judicial technicians.

The documentation shows that Ecuador considered –though superficially– implementing the COGEP from a multidimensional perspective. The Judicial Council was charged with drafting and approving the plan to implement the new regulations so that: (i) they would be executed fully throughout the territory and (ii) they would adopt a wide range of measures for the application of the provisions that the plan contained. Special attention was to be paid to technology, training and implementing hearing rooms in judicial units that would facilitate the implementation of the new system.

To that end, the Judicial Branch Strategic Plan was created. This plan covered 2013-2019 and included five strategic objectives with no hierarchical order or priority. They were meant to promote access to justice and a modern institution in terms of its structure, processes, and procedures. The objectives are:

- (i) to ensure transparency and quality in the provision of justice services; (ii) to promote optimal access to justice; (iii) to encourage ongoing improvement and modernization of services; (iv) to institutionalize meritocracy in the justice system; and (v) to combat impunity, thus contributing to efforts to improve public safety.

The Restructuring Program, which was part of the Strategic Plan, sought to modernize and increase transparency within the justice administration system. It was organized and developed around six axes: human talent, management model, civil infrastructure, technology, inter-institutional coordination, and equitable financial management.

In regard to specific actions of the strategic plan, we note the construction of a building to be used for oral procedures in Quito, the construction of 938 hearing rooms, the improvement of electronic notifications, and updates of procedural flows. In addition, judges and employees were trained and the Judicial Council organized courses for attorneys to ensure that they would be prepared for the COGEP to go into effect.

Following the logic of the aforementioned countries, through with less depth and intensity, El Salvador also tried to carry out an implementation planning process. Decree No. 372 was issued to implement organic changes in order to guarantee the application of the CPCM. Judicial agencies and/or jurisdictions were created, converted and/or transformed, the distribution of judicial work was reorganized, and changes were made to complementary regulatory bodies.

The code itself established that the Supreme Court would adopt the measures necessary to allow the courts to have the material means required to hold judicial processes and for procedural communications (Art. 703). However, its entry into force had to be postponed because of budget cuts and limitations.¹²

For its part, the Honduran CPC provides for: (i) the creation of a National Inter-institutional Coordination Commission for the Civil Justice System, which was composed in a plural manner and had as its main goal the implementation of the new procedure system; (ii) the introduction of a Notifications Commission that would craft the communications formats and manuals; and (iii) the duty of the Judiciary to hire sufficient staff and procure enough materials to allow the civil justice system to function adequately within one year.

Like El Salvador, Honduras suspended and postponed the entry into force of the CPC (Decree No. 168-2009) because the conditions required to implement it were lacking. For example: (i) The agencies called to implement the new CPC did not have the necessary infrastructure and logistics; (ii) justice operators and service members had not received the proper training; and (iii) key management tools that had to be approved by the Supreme Court were missing, such as manuals, flow charts, forms, and regulations.

This information (and the absence of key related data) allows us to state that the implementation itself was not structured or executed with a comprehensive perspective and/or public policy approach. This is problematic because: (i) the change proposed with the Civil Procedure Code reform of 1906 was truly radical in terms of the conception and exercise of rights and administration of power¹³; (ii) there would seem to be a consensus about and awareness among the social stakeholders involved in the reform process regarding the need to organize a plan that was appropriate for the size of the change¹⁴; and (iii) the additional provisions mentioned had anticipated the complexity of the work, institutionalizing agencies for that purpose.

In regard to the development of training, we only found a few programs that are part of universities¹⁵ or cooperative entities¹⁶, but they are isolated and non-systemic. The fact

¹² See <http://elsalvador.abogadosnotarios.com/codigo-procesal-penal-civil-y-mercantil-entraran-en-vigencia-en-2010/>

¹³ "The intention to approve a new code was based on the existence of a very broad political-legal consensus led by the Supreme Court in close collaboration with Congress to modify the current civil trial system in Honduras and approve a new Code imbued with the principles that should govern a modern civil process." (Module 4 of the Program to Strengthen the Rule of Law in Honduras. Our translation). Instructional explanation of Honduras' new Civil Procedure Code. March 2007.

¹⁴ See the opinion on the Civil Procedure Code bill offered by the Ordinary Judicial Affairs Commission designated by the Presidency of the National Congress on May 30, 2006. It explains that "it will not be easy to quickly and effectively implement the rule that embodies the new Civil Procedure Code given its tremendously innovative and modern nature, which will come up against the weight of tradition, as has occurred in other systems and countries." (Our translation).

¹⁵ For example, as part of the content of a master's degree in Procedure Law, but not as a plan of action of the government or Judicial Branch.

¹⁶ Program to Strengthen the Rule of Law (...), op. cit.

that the application of the CPC had to be suspended for 15 months due to a lack of essential elements and conditions reveals the absence of structural planning.

Finally, Nicaragua focused on developing a comprehensive implementation process. While the Procedure Code did not have any provisions related to this area, the National Judicial Administration and Career Council created a series of commissions to work towards that end. These include the Technical Implementation Commission, Training and Monitoring Commission, Legal Infrastructure Commission¹⁷, Technical Support Operations Commission¹⁸ and the Commission to Coordinate and Monitor the CPC Approval Process¹⁹.

In the case of Nicaragua, one noteworthy development was the national training plan that established that each region of the country had to have three teachers responsible for training Judicial Branch employees on new processes. Courses were also offered for trainers, attorneys, and notaries. In fact, JSCA and the Judicial Branch held a course on expanding skills in oral litigation in civil processes in 2017. Prior to the entry into force of Law No. 902, videoconferences on the application of the CPC were held nationally; WhatsApp groups were created for judicial officials from each precinct in order to address procedural questions; hearings were monitored and evaluated in order to identify and plan changes to judicial training programs; and a website was created to provide users with brief, simple, informative posts about each process.

3. ANALYSIS OF REFORM PROCESSES

In general, it is worth noting that the majority of the countries that initiated justice reform processes have taken a public policy approach regardless of its merit.

The analysis of the measures adopted reveals that the seriousness and depth of the planning and measures adopted have been variable and that it would have been desirable in all cases to pay more attention and dedicate more institutional capacity to the assimilation and management of the changes. However, it is important that the perspective used has provided a multidimensional approach in contexts in which legal dogma, regulatory fetishism and the rendering invisible of practices had eclipsed or dominated the reforms' discourse and substance.

In that regard, it is also important to note that the codes introduced have set deadlines for their entry into force in order to ensure that there would be time to train stakeholders and take the institutional measures required for their implementation. Some also ordered the creation of plans or programs to implement the reform. In contrast to the

¹⁷ Responsible for crafting judicial forms, ordinance models, rulings and sentences and the administrative regulations necessary to apply the law.

¹⁸ Its mandate was to create the minimum favorable conditions in terms of physical infrastructure, the organization of judicial offices, technological teams, planning, updating judicial statistics and rational use of resources.

¹⁹ Specifically oriented towards offering training on the CPC for members of Congress, participating in discussions of the plenary of the National Assembly. And providing explanations and clarifications regarding the Code's regulatory contents.

other decisions that were developed by pro-reform processes in the context of their strategic plans, that decision allows the reform to be prioritized, introduced as part of a restructuring of the concept, organization, and provision of the service of justice, identified as a pressing matter and to avoid the reform to be diluted through macro objectives. It also allowed reformers to prevent the de facto inertia of the modified structure to resist or modify the process of change.

In certain cases, those programs were provided for in the procedure code that was adopted. This policy option is interesting because it summarizes the point that we have noted in several ways: the (re)resolution of conflicts (a central mission of the justice service) requires a set of devices that the legal rules that the Procedure Code adopts do not explain, provide, or exhaust. By carrying out the work in this way, these programmatic experiences once again bring to the forefront the duty of weighing the comprehensive and cross-cutting approach as a work methodology for structuring the Judicial Branch as a branch of government, organizing the work of justice, or thinking about relationships between the components and operators that interact in its administration and management. Furthermore, it presents the advantages of setting minimal budget lines and resources for the implementation of the reformist public policy; outlines the reform agenda measures in alignment with the ideas of the procedure code and its reason for being and conditions discretion in the adoption of said policies given their nature as budgets for the operation of the procedure system, the setting of timeframes for its implementation and/or oversight or monitoring bodies. It also grants any operator a base framework for requiring the allocation of resources and adoption of relevant measures, including general guidelines in a regulatory body which, due to its nature and entity, is more difficult to modify. Finally, it minimizes the risk that naturally political powers will defer, suspend, or disassemble the reform once the procedure code is adopted.

Another point that must be highlighted is that certain countries have decided to create commissions or committees charged with managing the reform process. The Bolivian case is exemplary because the design of the implementation plan was crafted by representatives of various state entities. This is extremely useful for the creation of bonds among key reform stakeholders, the efficient coordination of measures and the creation of a shared space and responsible party.

Some of the practices that emerged seemed to be innovative and useful given their disruptive and unorthodox condition in the context of a reform process. The aforementioned WhatsApp groups in Nicaragua for each district's officials are one example that was meant to address any procedural questions. These modes should be expanded so that they can be made more flexible and dynamic and improve direct dialogue and efficiency in the approach to and resolution of reform process problems.

As a counterpoint, we will list various points that can be criticized from the reform processes analyzed:

- (i) The lack of depth and scope of the public policy approach adopted in the majority of cases. At the same time, each of these aspects is penetrated by a series of formal and informal practices and interpretations that must also be evaluated when bringing about any change. This translates into the omission of certain aspects that are not respected, biases or lack of robustness of those that are

actually addressed (for example, statistical research to evaluate the efficacy of the Brazilian CPC rules provided for in Art. 1069) and/or in isolated and temporary actions (rather than holistic ones that are sustained over the amount of time required to manage the change). Proof of this is the generic provisions that authorize Superior Courts to “adopt all manner of measures to guarantee the effectiveness of the implementation,” but without guidelines with clear foundations or complementary plans (our translation).

- (ii) Lack of assessments of unmet legal needs that can be used to determine the demand for justice or to define the existing approach to individual or collective disputes. There also seems to be a lack of available base information or data on how this impacts the regulatory or operational decisions made.
- (iii) Operational and budgetary limits identified due to both lack of foresight during planning and the absence of priority allocations or cuts in the area (as occurred in El Salvador or Honduras).
- (iv) The targeted treatment of certain elements to the detriment of other equally valuable ones for the comprehensive approach. The focus was modernization, the introduction of oral procedures or internal training, but factors such as (dis)incentives, training of operations staff, officials, and attorneys, and the (re)structuring of Judicial Branch government were left out.
- (v) The marked absence or lack of foresight, planning and execution of monitoring, supervision, and reform process adjustment tasks.
- (vi) The lack of participation of other key system stakeholders and/or the public in the agencies created.
- (vii) The omission or lack of importance of the user in the reform process either as a participant, opinion agent or recipient of adequate information in order to assimilate the change.

II. Procedural models

1. PRELIMINARY CONSIDERATIONS

When analyzing procedural reforms in Latin America, one of the first questions that emerged and that we wish to address in this study is whether they addressed or were designed following certain previously established models or trends. Basically, and as a first approach, we wanted to determine whether the new civil justice was characterized as adversarial or inquisitorial or, to put it another way, if the new codes were approved considering adequate management of conflicts in society or in search of the truth that allows for the correct application of the law. What were the goals of the new procedural rules? What paradigms inspired them? Do they align with a model of the State? Are the principles that govern them aligned with it?

These are some of the questions that we pose in this chapter, which analyzes procedural regulations in order to determine whether a specific procedural model or structure was adopted.

To that end, we have followed one of the most common classifications for identifying the objective of a justice system. Mijran Damašca (1984) established two competing models: the idea of the judicial process as a dispute resolution system and the implementation of public policies through the application of the law. This classification is made with a theoretical vocation, and the author notes that “there are no systems that can be expected to fully replicate all of the characteristics of the pure model” (Damašca, 1984, p. 169, our translation).

Procedure as dispute resolution

The first procedure model reflects the principles and values of the reactive or *laissez-faire* State. In this model, the State prioritizes the management of interests by private entities, with the State playing a secondary role because it only intervenes when private entities are unable to manage their own affairs (Damašca (1984).

One of the main characteristics of this model would be the *displacement of regulation* (Damašca, 1984, p. 172). The author refers to the possibility that litigants may deviate from procedural regulations. In these cases, the failure to follow procedural norms would not justify a move by the State to remedy the deviation.

The role of the judge who processes the case would be tied to observing procedural rules beyond analyzing the merits of each of the parties. As Damašca (1984) puts it, “procedure law, which is prefabricated by the State and created ad hoc by litigants, acquires its own integrity and independence from substantive law” (p. 176, our translation). The judge should play a minimal role in managing the process, as he or she is not responsible for ensuring a rapid and fluid processing of the case. His or her focus should be the parties in accordance with the defense of their procedural interests.

One key point of this model is the *recognition of the parties' ability to autonomously* manage their litigation. The reactive State has many qualms about intervening in the way in which the parties manage their case, even if it goes against its own interests. This is observed and addressed very carefully given that it is possible to engage in corrective paternalism.

In regard to the oversight of the process by the parties, it is understood that they are responsible for undertaking judicial action and abandoning it when they deem such action to be advisable without any judicial official conditioning their decision. Similarly, the parties choose the facts that will serve as the basis of their allegations and for developing their legal theory of the case. The judge will support the parties to "identify legal matters and offer applicable legal theories and will decide the case within the legal limits set by the parties" (Damašca, 1984, 199, our translation). In procedures developed in accordance with this model, the parties are an important source of information and are subject to examination by their attorney or opposing counsel.

Another important characteristic of this theoretical paradigm is the existence of a *forced cooperation model* based on the exchange of information and documents between the parties. Discovery mechanisms are meant to favor litigation in good faith. In accordance with the values of the reactive State, it is meant to promote negotiation between the parties even after the proceedings have begun. Discovery allows the parties to analyze how strong their cases are in light of the information that each of them reveals.

Procedure as policy implementation

This second model of the judicial process is characterized by its relationship with what is called the activist or welfare State. In this type of State, which is concerned with implementing "a full program to materially and morally improve citizens," the State has the capacity to address "all spheres of social life" through the formulation of its policies (Damašca, 1984, p. 141, our translation).

While the dispute resolution model is based on the displacement of regulation, in this case *procedural rules appear within an instrumental logic for the application of substantive law*. This type of activist State is concerned that the justice system produces adequate results. As such, there is a possibility that the adjudicator will stray from procedural norms if he or she obtains a greater benefit in terms of the implementation of a substantive law policy.

A parallel can be drawn between the two procedure models because a *flexibility and/or submission of procedural forms is established in both cases*. The main difference is that while in the first model this comes from a broad recognition of the *autonomy of the parties' wills*, in the second it has to do with the *primacy of State interests in social life*.

One important element of distortion between the two models can be identified by analyzing the role of the parties in the proceedings and the implementation of the policies. The State confers a series of rights on the parties, and it has the power to enforce those rights even in cases in which the parties have not asked it to on their own. According

to the activist model, citizens “are not necessarily the best representatives of their own interests when they appear in light of State interests” (Damašca. 1984, our translation).

Following the logic of an activist State that seeks to implement policies through the judicial system, *the State itself should have the power to decide when a process begins*. Furthermore, if the parties had the authority to abandon processes initiated by the State, this could impact the work undertaken. The control of the beginning and end of the process may only be acceptable “if there is a substantial congruence of the private and official motivation to implement policies” (Damašca. 1984. p. 167, our translation). This State monopoly over action does not mean that private parties are completely excluded. They have the right to be heard and to present evidence and arguments throughout the proceedings and to inform officials when events that could serve as the basis for judicial action have occurred.

One of the main characteristics of the justice model as the implementation of policies *is that a high standard must be guaranteed in the process of determining the facts*. Given the importance of the search for the truth in the operation of the judicial system, the responsibility for that task falls to the adjudicator to the detriment of the parties, who will play an auxiliary role throughout the process.

In regard to management of the proceedings, judges have the power and duty to get involved in the case by expanding the arguments or evidentiary means. This is the case because they are expected to reach an appropriate decision regarding the legal dispute. Furthermore, when the adjudicator hears two different fact-based hypotheses, they do not only analyze which is argued better. They must also “follow a second order State policy to seek out the best solution under uncertain conditions.” This may lead them to decide against the party that presents a stronger argument if there is a possibility that the negative consequences of an error will be reduced (Damašca, 1984. p. 292, our translation).

In the pages that follow, based on the elements that can be extracted from the theoretical models that we have briefly summarized, we will analyze –with the limitations of a study of this nature– whether the procedural reforms of the region have implicitly or explicitly opted for one of these two main objectives.

2. OBJECTIVES OF THE PROCEEDINGS, REGULATED PRINCIPLES, AND THE ROLE OF THE JUDGE

We have grouped the characteristics described in the previous section into three main areas: objectives of the proceedings, regulated principles, and the role of the judge.

Objectives of the proceedings

First, we analyze the objectives of the procedure reforms under study. Specifically, we examine whether they seek to contribute to social peace through adequate conflict

management, whether they seek to correctly apply substantive law and with it properly implement public policies, or if they have stated that they have met or seek to meet another specific objective.

A first shared element of all regulations is that none of the procedure codes introduced has explicitly identified the objectives of the civil justice system or judicial proceedings. However, in the principles –which are analyzed in greater depth in the next section–, we can find certain indirect references. Specifically, these can be found in principles of instrumentality of forms, interpretation of procedural law, judicial protection or in transparency.

For example, in the case of Bolivia, the judicial authority is to consider the fact that the purpose of the processes is the *effective protection of the rights recognized by substantive law* (Art. 6, CPC). Transparency is consecrated as a means for ensuring that “the jurisdiction meets its goal of protecting rights and interests that deserve legal protection” (Art. 1.12, our translation).

In Brazil, the code expressly recognizes that by applying the legal framework, the judge will address the social goals and requirements of the common good, protecting and promoting the dignity of human beings and demonstrating proportionality, reasonableness, legality, publicity, and efficiency (Art. 8). It also states that it is the duty of the State to promote consensual solutions to conflicts whenever possible (Art. 3). We can thus affirm that the Brazilian process as evoked in its CPC has as its purposes: (i) encouraging the parties to use ADR mechanisms; (ii) building a cooperative space with broad powers at the disposal of the parties and a judge who plays and active role in case management (Zanetti Jr.); and (iii) guaranteeing the effective fulfillment of the right to reasonable timeframes.

Colombia’s CGP takes a similar approach, adding that “questions that emerge in its interpretation must be clarified through the application of *constitutional principles and general principles of procedural law*, guaranteeing due process, the right to defense, the equality of the parties and the other fundamental constitutional rights at all times (Arts. 11 and 12, CGP. (Our translation).

The texts of the remaining countries contain similar terms. For example, Ecuador’s refers to the objectives of the process in the history of the code, which mentions that it regulates processes, “that is, the series of actions focused on the application of law in a specific case.” (Our translation). Based on this, one can conclude that the purposes of the process in Ecuador include the application of substantive law.

The same is true in Costa Rica (Art. 2.2 CPC), Honduras (Arts. 1 and 7 CPC), El Salvador and Nicaragua. In the latter two cases, it is established that the interpretation should not only seek the *protection and efficacy* of individuals’ rights, but also “the achievement of the ends consecrated in the Constitution” (Art. 18 CPCM, El Salvador) and “international human rights instruments, as it is the duty of all judicial officials to ensure respect for fundamental rights” (Art. 1 CPC, Nicaragua). (Our translation).

Table 2: Explicit or implicit goals of the proceedings

Country	Dispute resolution	Effectiveness of substantive law
Bolivia	NO	YES
Brazil	YES	YES
Colombia	NO	YES
Costa Rica	NO	YES
Ecuador	NO	YES
El Salvador	NO	YES
Honduras	NO	YES
Nicaragua	NO	YES

Source: Developed by the authors.

Regulated principles

This table presents the principles expressly included in reformed procedure codes. That explains why, for example, despite the fact that those certain principles may be normatively rebuilt in certain codes, they are not listed as such. For example, the double instance is provided as an express principle in Honduras (CPC) and Colombia (CP). However, all of the codes provide for an appeals system that involves at least two ordinary instances.

Table 3: Principles regulated in the codes

Regulated principles	Ecuador	Brazil	El Salvador	Honduras	Costa Rica	Colombia	Bolivia	Nicaragua
Constitutional supremacy	Yes	Yes	Yes	-	-	-	-	Yes
Use of oral procedures	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Compliance	-	-	Yes	Yes	-	Yes	Yes	Yes
Dispositive	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Unofficial drive and direction	-	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Immediacy	Yes	-	Yes	Yes	Yes	Yes	Yes	Yes
Concentration	-	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Public processes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Remediation	-	-	-	Yes	-	-	Yes	Yes
Free services	-	-	Yes	-	-	Yes	Yes	-
Promptness	-	-	-	-	-	-	Yes	Yes
Interculturality	-	-	-	-	-	-	Yes	-
Transparency	Yes	-	-	-	-	-	Yes	-
Procedural equality	-	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Contingency	-	-	-	-	-	-	Yes	-
Contradictory processes	-	Yes	Yes	Yes	-	Yes	Yes	Yes

Regulated principles	Ecuador	Brazil	El Salvador	Honduras	Costa Rica	Colombia	Bolivia	Nicaragua
Veracity	-	-	Yes	Yes	-	-	Yes	-
Loyalty, good faith, and probity	-	Yes	Yes	Yes	Yes	Yes	-	Yes
Concordant interpretation	-	Yes	-	-	-	-	-	Yes
Procedural economy	-	-	-	Yes	-	Yes	-	-
Abuse of rights	-	Yes	-	-	-	-	-	-
Reasonable timeframe	-	Yes	-	-	-	Yes	-	-
ADR mechanisms	-	Yes	-	-	-	-	-	-
Procedural cooperation	-	Yes	Yes	-	-	Yes	-	-
Ne ultra petita	-	Yes	-	-	-	Yes	-	-
Instrumentality of forms	-	Yes	-	-	Yes	-	-	-
Reasonable foundation	-	Yes	-	-	-	Yes	-	-
Evidentiary acquisition	-	Yes	Yes	Yes	-	-	-	Yes
Access to justice	-	-	Yes	Yes	-	Yes	-	Yes
Double instance	-	-	-	Yes	-	Yes	-	-
Preclusion	-	-	-	Yes	Yes	Yes	-	-
Privacy	Yes	-	-	-	-	-	-	-
Due process	-	-	-	Yes	-	Yes	Yes	Yes

Source: Developed by the authors.

An initial point that we highlight as a common note is that *only three principles have been regulated by all of the codes*: the use of oral procedures, the dispositive principle, and the use of public proceedings. Preliminarily, and only from that perspective, this suggests as a common matrix: (i) the fact that the proceedings begin at the request of the parties, and that they have the power to avail themselves of their rights during them and (ii) that what we should find in the rest of the regulations is that there was a desire to install at least a public and oral hearing as a shared pattern.

Immediacy is very closely linked to the use of oral procedures and is another principle that seems to be regulated categorically in nearly all of the codes (except for Brazil's). It is conceived as the means that allows the judicial authority to have personal and direct contact with the parties, the evidence and the facts argued in the process.²⁰ The principles of concentration, *sua sponte* drive and direction, and procedural equality are received in a similar manner. The three are expressly regulated by all of the codes except for that of Ecuador.

After these, we can identify a fundamental principle that tends to reinforce the use of oral procedures (as a methodology), the principle of contradiction, which is regulated by all of the codes except for those of Ecuador and Costa Rica. The principle of legality

²⁰ Arts. 2, 11, 139 and following. Bolivian CPC.

has similar regulatory reception, which is regulated in all of the codes except for those of Ecuador and Brazil, and whose presence will be fundamental for the analysis presented in Chapter 3 of this publication, which will address regulated procedural structures.

We can reach an initial conclusion regarding these principles, which have been consecrated in at least six of the eight codes analyzed. This refers to the fact that, preliminarily –and only from the perspective of guiding principles–, all of the codes have established a procedural model whose main axis should be the oral, public, and contradictory hearing in which the dispositive principle governs in a cross-cutting manner. As such, this can be considered a *matrix of shared analysis that flows from the regulations themselves*.

We argue this because, first, *all of the countries regulated the use of oral procedures*. As we will see in greater detail later on, this is related to the existence of a trial that consists of an oral hearing in which due process becomes operational through the contradictory process and information filtering and quality control is performed. This is reinforced by the existence of the principle of immediacy, which is regulated in all of the regulations except for those of Brazil, though that country does expressly regulate the principle of contradiction.

There is also a general trend in the countries analyzed to observe the principle of immediacy and *sua sponte* procedural drive and direction. The procedures must also guarantee procedural equality and the principle of legality with similar intensity.

Other important principles to observe are, for example, due process, access to justice and the principle of constitutional supremacy, which are expressly regulated in only four codes.

Finally, we will note a few specific aspects of this area.

In regard to publicity, and while all of the codes have expressly regulated it, we note the Bolivian regulation that is not limited to ensuring that the process is not secret and the information public for everyone. Instead, it requires the court to engage in a positive action: the dissemination of procedural activity. In other words, it is not enough to carry out a process with open doors. It must be actively disseminated.²¹ The same is true for El Salvador.

Brazil is unique in that it conceives of the process as a community of work. This means that cooperation is a model and principle. All of the participants in the proceedings have the duty to cooperate with others to reach a just and effective decision within a reasonable timeframe.²²

Colombia also approaches the process in terms of cooperation, establishing that the parties have a duty to cooperate with the judge for the presentation of evidence and during the proceedings. They also have the duty to take steps to preserve the evidence in their possession and the information contained in data messages that are related to

²¹ Arts. 100 and following, CPC.

²² Arts. 6, 139, 378, 774 and following, Brazilian CPC.

the proceedings and present them when the judge requests that they do so. The CGP also states that the judge must always describe the parties' procedural conduct and, if necessary, infer evidence from it.²³

The principle of interculturality that has been regulated only in the Bolivian CPC deserves special mention. The CPC establishes the judicial authority's duty to consider that the exercise of individual and collective rights in the proceedings should allow for coexistence of cultural, institutional, regulatory, and linguistic diversity (Arts. 1.11 and following, CPC).

The role of the judge

Finally, the elements described in the first part of this chapter and our observations of the judge's role in the proceedings allow us to ascertain the role given to the parties and analyze the characteristics that will allow us to determine whether the reforms have adopted a specific procedure model.

In Bolivia, judges play an active role in the management of the proceedings and in ascertaining the truth. In accordance with the principle of interculturality promoted in this code, we note the duty of judges to ensure the coexistence of diversity and that steps are taken to consider the world view of the individuals who participate in the proceedings, ensuring that their traditions and customs are respected and that there is adequate understanding of the reality in which they carry out their work.

In regard to the management of the proceedings and search for the truth, a very similar regulation has been introduced in Costa Rica with the fundamental difference that the task of ascertaining the truth is consecrated as a power of the court rather than a duty.

In Brazil and Colombia, specific sections are focused on the judge's powers, duties, and responsibilities. In both cases, they are expressly charged with managing the proceedings.

In Brazil, the judicial official is responsible for ensuring that the parties are treated equally and the reasonable duration of the process; preventing and/or repressing any act that goes against the dignity of justice; determining which measures ensure the fulfillment of the judicial order; promoting settlements at any point in the process; expanding procedural timeframes and changing the order of the submission of evidence to meet the needs of the dispute; remedying the process, etc. In Colombia, judges must ensure the swift resolution of the process, preside over hearings, and achieve the highest level of procedural economy; remedy, sanction or denounce acts that go against the dignity of justice, loyalty, probity, and good faith; use the powers granted by the code in the area of ex officio evidence; take steps to remedy lacks in the proceedings and fix them; and oversee the legality of the procedural actions once each stage of the process is complete.

²³ Arts. 78.8, 12, 14, 229.1, 233, 280 and following, Colombian CGP.

Brazil highlights the duty of judges to manage both the process and the dispute as such. Based on this, judges also play a key role in conciliation, establishing work schedules for the case and turning repeated individual claims into collective processes.

In Ecuador, the judge is also charged with managing the proceedings. The COGEP expands on this role, identifying the implications that it has for the management of hearings, an express and exclusive duty of the judicial official, who is allowed to interrupt the parties to request clarification, steer the debate and use other corrective actions. Furthermore, their authority to indicate which matters are to be discussed, moderate said discussion and prevent irrelevant discussions is expressly established.

Similar regulations have been introduced in El Salvador, Honduras, and Nicaragua, but with some changes. For example, in El Salvador the regulation expressly states that the process must be driven by the court. In Honduras, it states that case management involves the duty to control the appearance of all procedural budgets *ex officio* and to drive the proceedings *ex officio*, but this must be completed without undermining the dispositive principle and the contribution of the parties. Nicaragua also regulates the duty to direct and oversee the proceedings and hearings, and expressly states that this is a formal duty.

As such, we have seen that in general, all of the codes have established that the management of the process is in the hands of the court in a more or less similar manner, and that judges have a series of duties and powers that must be exercised throughout the course of the proceedings.

The judge's role is not limited to analyzing actions related to the development of the proceedings. It also includes substantial aspects, such as the duty to present evidence *ex officio*.

In this regard, three main trends were identified. The first is that judges were given the power to present evidence *ex officio* separate from the parties' probative initiative. Bolivia offers an example of this. Its code expressly regulates a principle of material truth, which is defined stating that the judicial official must fully verify the facts that motivate their decisions. To that end, they must take the evidentiary measures necessary in accordance with the law *even when they have not been proposed by the parties* (Art. 1 No. 16). Furthermore, Article 136 refers to the burden of proof, and the first part of the text establishes that the burden of proof that the Code imposes shall not impede the evidentiary initiative of the judicial authority.

As such, we see that in Bolivia the court may not only submit evidence *ex officio* regardless of what the parties have proposed, but that it has the duty to do so.

The case of Colombia is fairly similar. Though Article 169 seems to authorize the judicial official to submit evidence *ex officio*, Article 42.4 expressly states that it has the duty to do so in order to verify the facts argued by the parties.

As part of this group, but with powers that are a bit more moderate than those found in Bolivia in that the regulation is optional and not mandatory, we have Costa Rica. Its Article 41.3 states that the court may ask the parties to include evidence that they

have not offered and may even order them to do so *ex officio*. Brazil has a similar regulation.

A second group, which includes Ecuador, El Salvador, and Honduras, is comprised of codes that have consecrated what we have called moderate *ex officio* evidentiary powers, as they recognize the action of the parties as a limitation and that they bear the principal of production of evidence.

For example, Article 299 of the Honduran Code states that evidence is only produced at the request of a party but that under exceptional circumstances, the court may agree that certain tests be conducted *ex officio* along with those proposed by the parties when it believes that the means contributed by them are insufficient. The Code states that this will “never mean that the judge has evidentiary initiative, replacing the duties and burdens of the parties in this regard” (our translation). The texts of the codes introduced in Ecuador and El Salvador suggest more directly what we generally refer to as measures to better rule.

Finally, Nicaragua is the only country with a code that expressly and clearly forbids evidentiary initiative by a judge. Article 13 regulates the principle of production by the parties and expressly states that the judicial official is prohibited from contributing facts or means of evidence to the proceedings. Similarly, Article 231 establishes that evidence may only be produced at the request of the party.

It is important to clarify that a systematic and full reading of the code would suggest that this prohibition is not absolute and that exceptions are allowed. Article 231 adds and indicates that the aforementioned principle of production of evidence at the request of the party exists “notwithstanding the terms set out in proceedings in which public rights or interests are protected” (our translation). This rule references special conditions in the ordinary process that are regulated in Articles 471 and following of the Code and include the process of “Protection of Fundamental Rights,” “the Public Nature of the Proceedings” and “Collective Claims.” In this regard, Article 494 refers to evidence and the burden of proof in this type of proceedings and states that “if the party that bears the burden of proof does not contribute the information and knowledge required to make a ruling, the judicial official may bridge the gap by requesting expert evidence from public entities related to the matter under discussion and obtaining evidentiary elements necessary to issue a judgment on the merits.” (Our translation).

As such, we observe that, although in general terms, judges in Nicaragua do not have the opportunity to produce evidence *ex officio*, but that exceptions are allowed in cases in which fundamental rights or public interests are protected. In such cases, evidentiary lacks may be remedied, and the parties’ initiative may thus be complemented.

The table below summarizes the information provided in this section.

Table 4: Type of powers for producing evidence ex officio

Type of evidentiary power	Description	Country	Broad ex officio evidence subject to be challenged by the parties	Duty of procedural management
Broad ex officio powers	Judges have the power or duty to produce evidence ex officio separate from the evidence that has been provided by the parties	Bolivia	NO	YES
		Brazil	Yes, Art 10	YES
		Colombia	Yes, Art 170	YES
		Costa Rica	NO	YES
Moderate ex officio powers	The judge may produce evidence but must follow the limit of action of the evidence proposed or contributed by the parties	Ecuador	N/A	YES
		El Salvador	N/A	YES
		Honduras	N/A	YES
No ex officio powers (In general, ordinary proceedings)	Judges may not produce evidence under any circumstances. Only the parties may initiate the production of evidence.	Nicaragua	N/A	YES

Source: Developed by the authors.

3. SOME PRELIMINARY CONCLUSIONS: HAVE PROCEDURAL REFORMS OPTED FOR A SPECIFIC PROCEDURAL MODEL?

We have analyzed three fundamental aspects of the codes: the objectives of the proceedings, their principles and the judge's role in the proceedings. Based on this, is it possible to clearly identify a procedural model?

Following Damaška's classification, we understand that the procedural model of a liberal state must have as its purpose dispute resolution and must have an essentially available and flexible procedural rule that establishes the role of a mainly passive judicial authority and clear autonomy of the parties. Furthermore, it would contemplate a fairly intense principle or notion of forced cooperation through the regulation of mechanisms such as discovery or consideration of ADR.

On the other hand, in the case of the welfare state, the procedural model would not only have to encourage the implementation of public policies through the correct application of substantive law, but the procedural rules themselves would have to be understood as instrumental for this. As such, the flexibility that can be identified in the proceedings is not motivated so that the parties can act but is applied on the basis of state interest. Furthermore, a dispositive principle is not observed, as the role of the judge should be very much accentuated in order to carry out the search for the truth.

Noting these elements, albeit succinctly and with the caveat that it is highly unlikely that there will be a model that fits with the theory described, allows us to conclude that, from this perspective, the codes have not adhered to a procedural model. On the contrary, the analysis suggests that an accumulative logic of the models or paradigms summarized has prevailed.

If we stay with the objectives of the proceedings identified, we arrive at the incorrect conclusion that Latin America's new civil justice has sought to introduce a justice model that aligns with the welfare state, as all of the codes analyzed align with the goal of this model: the application of substantive law.

However, one key indicator of this model is the failure to observe the dispositive principle. However, we observe the opposite in all of the cases because the codes expressly regulated that principle.

At the same time, and now in a manner more aligned with the welfare model, we observe that all of the codes have expressly, though using different formulate, established that the judicial official should manage the proceedings. However, we can state that that role is formal and not substantial in half of the codes, because only four of them allow the judge to produce evidence *ex officio*. Furthermore, in the case of the latter, only three state that this is a duty, and two state that the parties may challenge that power or duty.

Another element that reflects this intense integration of the models is seen, for example, in Brazil, the only country that has an express principle of alternative dispute resolution, which has a clear principle of forced cooperation and that, as we will see in greater detail below, presents a great deal of flexibility in its procedural norm and greater autonomy of the parties –all elements that are reflective of a liberal model–, but that also has an active judicial official that manages the process and may produce evidence *ex officio*.

These observations allow us to argue that none of the models traditionally studied have been consecrated in these codes, not even in regard to a general trend. This makes it even more important to explore the procedural design adopted to achieve the goals summarized, to analyze how much the principles have resonated, how coherent and reasonable the procedural structures are and what the roles of the parties and judges in each instance actually look like. In other words, we need to determine how this declaration of objectives and principles that we have analyzed has been addressed or resolved through regulations. We will engage in this process in the sections that follow.

III. Procedural structures and regulated hearings

1. FLEXIBILITY OF THE PROCEEDINGS: THE PRINCIPLE OF THE LEGALITY AND INTERRUPTION OF THE RULES

There is a consensus in the doctrine in regard to the major problems that “desperately” written civil procedures have presented. These include excessive slowness produced in part by the existence of extremely ritualistic practices that turn the formal requirements of the proceedings into an essential aspect (Pereira, Villadiego & Chayer, 2011). These practices are linked to the well-known “principle of formal legality,” according to which the legislator sets out the rights and solemnities of procedural actions, and which Calamandrei supported when he stated that procedural actions could not be taken in the mode and order in which the interested parties deemed appropriate for a specific case but had to be conducted in the mode and order established in the procedure law once and for all (Gozaini, 2009).

However, the trends of the reforms in our region began to leave excessive formality behind, seeking to streamline processes and place procedural forms at the service of substantive law (Pereira, Villadiego & Chayer, 2011). As such, the idea of a static process established by law that is apparently adequate for all cases began to give way to the concept of a flexible or ductile process (Priori Posada, 2015).

While these reform-oriented trends in our region did not adopt a principle of freedom of forms as Cernelutti understood it –he believed that the parties could agree to the procedural rules that they wished to include given that they are in the best position to protect their rights and those of justice (Gozaini, 2009)–, we can say that the law began to relinquish certain spaces. One expression of this is, for example, that the role of the judge has ceased to be so strongly restricted by the principle of legality. Judges have taken on a more active role in the management and development of the proceedings. Furthermore, some case management techniques that contribute to that objective have been recognized in practice, although not explicitly (Berizonce, 2012).

Based on all of the above and as we mentioned in the second section of this publication, JSCA believes that Latin America’s new civil justice should abandon the interpretation of the principle of legality of forms that is in place and move towards a flexible judicial process. In that sense, one of the aspects that we were interested in analyzing is the flexibility of the codes’ procedural structures. In other words, we wanted to look at whether the rules that regulate the main processes of knowledge of each code can be adapted based on certain requests and/or in certain cases or if, on the contrary, procedural regulations continue to be rigid.

To that end, one of the first elements to explore is whether the codes analyzed establish a *principle of procedural flexibility* as such or if, on the contrary, there continues to exist a *principle of procedural legality* and/or a similar expression, such as the *interruption of the procedure norm*, which, as we have mentioned, in its fullest expression led to proceedings being carried out with extreme rigidity based on unlimited respect for procedural forms.

A second element that should be observed, and that tends to be very closely linked to the previous one, is whether the procedural norm is understood as a means or instrument that can be used to make effective substantive rules and/or adequately manage disputes in society, based on the purpose that it is given. This is what is called the instrumentality of the norm.

Below we present a table that shows whether the codes under study have explicitly regulated the principle of procedural flexibility and/or if, without considering said explicit principle, the procedural norm is presented as instrumental in the achievement of other objectives and can thus present a certain degree of flexibility.

Table 5: Reception of the principle of procedural flexibility or instrumentality of the norm

Country	Explicit principle of procedural flexibility	Instrumentality of the procedural norm	Definition or description
Bolivia	NO	NO	N/A
Brazil	NO	YES	Does not regulate a principle as such, but a careful reading of the code suggests that a principle of a certain amount of procedural flexibility governs by establishing the instrumentality of the norm. The CPC establishes that procedural acts do not depend on a specific form except when the law expressly requires it, and they are considered valid when they meet their essential purpose when they are conducted in another manner. If the judge verifies the existence of irregularities, he or she will order that they be corrected. Allows for procedural agreements between the parties and introduces case management modalities (Arts. 188, 277, 283, 352 and following).
Colombia	NO	NO	N/A
Costa Rica	NO	YES	Art. 2.2: "Instrumentality. The fact that the purpose of the procedural norm is to apply substantive norms should be considered when it is applied." (Our translation).
Ecuador	NO	NO	N/A
El Salvador	NO	NO	N/A
Honduras	NO	NO	N/A
Nicaragua	NO	NO	N/A

Source: Developed by the authors.

As we can see, none of the codes studied have explicitly regulated a principle of procedural flexibility as such. However, Brazil and Costa Rica conceive of the procedural norm

as instrumental for the substantive norm. In the case of Costa Rica, this is observed in an explicit principle of instrumentality of the procedural norm, and in the case of Brazil we observe it in the reading of various articles. The table below, which complements the analysis, shows that Brazil is the only country in which we can say that there is a trend towards procedural flexibility and a coherent notion of instrumentality of the procedural norm given that it reaches the level of introducing case management²⁴ modes and allowing for broad procedural agreements to be reached among the parties.²⁵

Below we will see that although Costa Rica regulates the principle of instrumentality of the norm, we cannot conclude that the country has a flexible judicial process given that the code regulates the mandatory nature of the procedural norm.

In the table below, we show countries that consecrate and regulate the principle of reality and/or mandatory nature of the procedural norm in what should be the opposite trend or model of those in the previous table.

Table 6: Reception principle of legality or mandatory procedural norm

Country	Principle of legality	Imperative or mandatory procedural norm	Definition or description
Bolivia	YES	YES	Art. 1: "Legality. The judicial authority should act in accordance with the terms of the law in the proceedings." (Our translation). Art. 5: "(PROCEDURAL NORMS) Procedural norms are matters of public order and, as such, must be followed by judicial officials, the parties and potential third parties. Norms which, though procedural, are optional because they refer to parties' private interests are excluded." (Our translation).
Brazil	NO	NO	N/A
Colombia	YES	YES	Art. 7: "Legality. Judges are subject to the rule of law in their ordinances. They must also consider equity, custom, case law and doctrine." (Our translation).

²⁴ The judge and the parties may jointly set a schedule for procedural acts when appropriate. The calendar is binding for the parties and the judge, and the deadlines set may only be modified in exceptional, duly justified cases. The formality of the parties for the practice of the procedural act or hearing for which dates have been set in the calendar is waived (Art. 191, CPC).

²⁵ If the proceedings involve rights that allow for settlement, fully capable parties may stipulate to changes in the procedure in order to adjust it to the specific characteristics of the case and agree on their burdens, powers, authority, and procedural duties before or during the proceedings. The judge may, ex officio or at the request of a party, oversee the validity of the conventions, refusing to apply them only in cases of nullity or abusive inclusion in a contract of adherence or if one of the parties is in a clear situation of vulnerability (Art. 190, CPC).

Country	Principle of legality	Imperative or mandatory procedural norm	Definition or description
Colombia	YES	YES	Art. 13: "Observance of procedural norms. Procedural norms are matters of public order and, as such, are mandatory. They may not be repealed, modified, or replaced by officials or private parties without express legal authorization. The stipulations of the parties that establish the exhaustion of requirements of procedure to access any justice operator are not mandatory. Access to justice without exhausting said conventional requirements shall not constitute a lack of compliance with legal business in which they have been established, nor shall it prevent the justice operator from processing the corresponding complaint. The stipulations of the parties that go against the terms set out in this article shall be taken as not written."
Costa Rica	NO	YES	Art. 3.5: "Mandatory nature of procedural norms. The parties may not reach an agreement, even with the authorization of the court, to dispose or renounce procedural norms in advance except through alternative dispute resolution, submission of admissible competency, extrajudicial orders or legal acts expressly provided for in the legal code." (Our translation).
Ecuador	NO	NO	N/A
El Salvador	YES	YES	Art. 3: "Principle of legality. All proceedings must come before a competent judge in accordance with the provisions of this code, which may not be changed by any procedural subject. The formalities set out are mandatory. When the form of the procedural acts is not expressly determined by law, the one that is mandatory or suitable for the purpose sought shall be adopted." (Our translation).

Country	Principle of legality	Imperative or mandatory procedural norm	Definition or description
Honduras	YES	YES	Art. 7: "Procedural legality and forms. 1. The civil proceedings shall be developed in accordance with the provisions of this Code under the Constitution of the Republic. The formalities set out in it are mandatory. 2. The norms contained in this Code are mandatory for the jurisdictional agency, the parties and third parties that intervene in the proceedings unless the law exceptionally offers another opportunity for action. The jurisdictional agency shall adjust the requirement of the norms to the achievement of the purposes of the process, respecting legally established guarantees (...)." (Our translation).
Nicaragua	YES	NO	Art. 2: "Scope of the law. In civil proceedings, judicial officials and those who turn to them and intervene must act in accordance with the terms of this Code." (Our translation).

Source: Developed by the authors.

The contents of this table clearly show certain trends. First, we see a procedural trend that is only integrated by Brazil, and that represents a move away from the principle of legality of forms that moves towards a flexible judicial process.

Brazil's Civil Procedure Code does not regulate the principle of legality or consider the fact that the procedural norm is mandatory, which aligns with the contents of the norms described in the first table. Furthermore, Brazil conceives of the proceedings as a community of work in which the judicial official should apply the legal framework considering the social goals and requirements of the common good, protecting and promoting human dignity.²⁶ Furthermore, all of the participants in the process have the duty to cooperate with others to reach a just and effective decision within a reasonable timeframe.²⁷ This means that cooperation is a model and principle. No procedural act depends on a set form, except when the law expressly requires this, and those that are completed in a different way are considered to be valid as long as they serve their essential purpose.²⁸

²⁶ Arts. 8 and following, Brazilian CPC. MITIDIERO, Daniel, A Colaboração como Modelo e como Princípio no Processo Civil.

²⁷ Arts. 6, 139, 378, 774 and following, CPC.

²⁸ Arts. 188, 277, 283, 352 and following, CPC.

Second, all of these countries seem to follow the principle of legality of forms fairly clearly and explicitly, affirming that the legislator sets the rites to be followed and makes them mandatory.

In any case, it is worth clarifying one aspect of these matters. The codes that follow this trend do not ignore or cease to regulate all of the other possible characteristics or indicators in their regulations that could lead us to describe them as a code that tends towards procedural flexibility. For example, several of the countries that we have grouped into this category regulate greater oversight powers for judges or recognize that the objective of the proceedings is the effectiveness of substantive law. However, we categorize them within this group because, in what may be a regulatory conflict, the interpretation of their norms, especially in light of their principles, leads us to conclude that there is no room for a flexible judicial process either because the oversight powers of judges are clearly determined by law or because, although the objective of the proceedings is the realization of substantive law, the procedural norms are completely obligatory and the law continues to dominate the forms and rites of the process.

Brazil, Colombia, El Salvador, and Honduras, the countries that regulate both the principle of the legality of forms and the mandatory nature of procedural norm expressly, are included in this group.

One example of how this type of code falls into the legality of forms, though distancing itself from extreme ritualism, is Bolivia's CPC. This code defines the principle of legality as the judicial official's duty to act in accordance with the law. It also defines judicial management as the court's power to channel the procedural actions effectively and efficiently. It states that the purpose of the process is the effectiveness of the rights recognized by substantive law. However, it stipulates that procedural norms are matters of public order and, as such, must be followed by judicial officials, the parties and potential third parties.²⁹ In order to move towards a versatile or flexible judicial process, one must abandon the idea of a mandatory procedural legality.

Something similar occurs in Colombia. The code establishes that when interpreting procedural law, the judge must consider the fact that the object of the proceedings is the effectiveness of rights. However, it states that the process must be conducted in the legally established manner and that procedural norms are a matter of public policy.

As the previous table shows, Honduras and El Salvador have similar provisions. It states that civil proceedings must be conducted in accordance with their provisions, which are considered obligatory. However, they also state that the court will adjust the level of compliance with the norms to the achievement of the purposes of the process, respecting legally established guarantees. In regard to the idea that this trend does not imply that codes are not making progress towards leaving procedural ritualism behind, we see, for example, that El Salvador's code expressly establishes that the judicial official "must avoid ritualism and interpretations that subordinate the effectiveness of law to merely formal aspects."³⁰ (Our translation).

²⁹ Arts. 1, 5, 6, 24 and following, Bolivian CPC.

³⁰ Art. 18.

Finally, we identified a third group which, like the previous one, does not present a trend towards flexible judicial process, but that we categorize separately because *it does not explicitly and jointly regulate the two principles* that we defined as basic indicators, which are *procedural legality and the mandatory nature of the norm*. We are referring to Costa Rica, Ecuador, and Nicaragua.

First, we note especially the case of Costa Rica because it is one of the countries that explicitly establishes the instrumentality of forms. At the same time, it prescribes the mandatory nature of procedural norms. This means that the parties may not, by mutual agreement or even with the court's authorization, dispose of or renounce procedural norms in advance except for legal acts expressly provided for in the legal framework (Art. 3.5 and following).

The case of Ecuador is noteworthy because, as we saw in the table, it does not establish any of the principles observed explicitly and does not seem to present a trend towards flexible judicial proceedings. In any case, in the explanatory memorandum, the legislation states that "proceedings with basic structures that are flexible, adaptable and rational shall be created" (our translation), which does not seem to have clearly materialize in its framework. Finally, Nicaragua regulates the principle of legality but does not establish that these are of public order.

As this summary demonstrates, seven of the eight codes analyzed continue to be rooted in the principle of legality of forms and/or expressions connected to it. In other words, they subject the dispute and its management to a bureaucratic and, above all else, unthinking mechanism.

This prevents or makes it difficult for the judge and the parties to enter into dialogue and connect in a dynamic manner with the (construction of the) procedural norm in order to achieve their main objective: effectively organizing the discussion and solution to the dispute.

On the other hand, we also see that the principle of adjustment of the forms has been incorporated and that there is a desire to provide an instrumental condition for the proceedings along with greater judicial prominence. These trends are considered positive, but they are not sufficient. How should the judicial official act in response to said prerogatives when there is also a rule that provides that all procedural rules are of public order? What guidelines do procedure codes offer for balancing or working with both ideas? How are subjects linked and related to each other in the creation of legality? What is the place of the parties in that realm? These are some of the questions that emerge from and are presented after this initial analysis.

2. ADJUDICATION PROCESSES

Twentieth century Latin American civil justice adopted the procedural system that was introduced in continental Europe in the 19th century. This means that the proceedings were written, slow, formal, and bureaucratic. They were characterized by the procedural

momentum of the party, excessive delegation of functions and a lack of immediacy, among other things. Another problem with this system was the multiplication of procedural structures for resolving civil disputes. This was associated with the “erroneous but firmly-rooted belief that still exists in some countries that each substantial specialty needs its own adjective or procedural structure” (Pereira, Villadiego & Chayer, 2011, p. 20, our translation).

Towards the first decade of the second millennium, civil justice was influenced by enormous efforts to “model” the civil procedure. This originated in our region and as is well known, was promoted by the Ibero-American Procedure Law Institute through the 1988 Model Code. The many transformations that this code proposed –and which were almost entirely adopted by Uruguay’s code in 1989 and partially by that of Peru in 1993– include the adoption of oral hearings that expressly included a preliminary hearing with various objectives (Berizonce, 2012).

From that point forward, it could be said that the trend of the characteristics that a modern civil procedure had to have were solidified. In addition to being influenced by the aforementioned Model Code, they had the influence of the civil justice reform introduced in England and Wales in 1999 and the Spanish Trial Law reform of 2000. These three reforms consolidated the idea of incorporating the use of oral procedures and immediacy in the fundamental stages of the process, but leaving some written elements, such as the filing of electronic complaints in the English case or proposal acts in the other two reforms (Pereira, Villadiego & Chayer, 2011).

Furthermore, we will see that in the main process of knowledge, which is generally called the “ordinary proceedings,” the countries have adopted the same design: mixed proceedings structured in a double hearing. This structure also had a clear influence on the aforementioned reforms, and especially on the Ibero-American Model Civil Procedure Code, which was in turn the basis for the most direct Latin American development: Uruguay’s General Procedure Code, which was approved in 1989 and was the first in the entire region to be reformed. Ríos (2017, p. 92) describes this as well, noting that the closest strong inspiration to this structure is found in the Ibero-American Model Civil Procedure Code, which “was reflected in the Uruguayan General Procedure Code and then influenced most if not all of the other reformed procedural frameworks.” (Our translation).

In view of this, a second major aspect that we wanted to analyze were the procedural structures of the codes analyzed, and especially the structure of the main adjudication process.

As we noted above, an initial point that we can identify is that, in general, all of the reformed codes have adopted a hearing process in which the proposal acts tend to be written.

Another common note is the establishment of a dual or single hearing system based on the level of complexity of the case. In ordinary proceedings, there is a preliminary hearing and a trial hearing (the names of which vary from country to country). In abbreviated or summary proceedings, there is a single multipurpose hearing. The only exception to this structure is found in Brazil, which designed a single adjudication process with two

hearings, but without a preliminary hearing as these tend to be understood and which the other countries have established.

The table below provides a summary of this and describes the adjudication processes of each country, offering a brief description of them and the hearings that have been established for each of them.

Table 7: Adjudication processes and their respective hearings

Country	Regulated adjudication processes	Description	Regulated hearings
Bolivia	Ordinary Proceedings Art. 363 and following	Applicable in all cases in which the law does not offer any special instructions. It is applied in a supplementary manner.	<ul style="list-style-type: none"> • Preliminary hearing • Complementary hearing
	Extraordinary proceedings Art. 369 and following	A single hearing is held to present and rule on the matter. Counterclaims are not permitted. Applies in disputes such as those involving possession, new construction that may have a negative impact, eviction, etc.	Single multipurpose hearing
Brazil	Adjudication process Art. 318 and following	Applicable to all common cases (unless a contradictory provision is set out in the CPC or law) and, subsidiarily, special and execution cases.	<ul style="list-style-type: none"> • Conciliation-mediation hearing • Pretrial and trial hearing
Colombia	Verbal Process Art. 363 and following	Any contentious matter that is not subject to a special process. Original and/or supplementary proceedings.	<ul style="list-style-type: none"> • Initial hearing • Pretrial and trial hearing
	Verbal summary proceedings Art. 390 and following	Abbreviated, simplified and in a single instance. Small claims matters and those expressly set by law are processed, such as disputes over horizontal property, among others.	Single multipurpose hearing
Costa Rica	Regular proceeding Art. 101 and following	Supplementary in nature, applied to all claims that do not have a procedure expressly stated for their processing.	<ul style="list-style-type: none"> • Preliminary hearing • Complementary hearing
	Summary proceeding Art. 103 and following	Applies to certain matters that are mainly related to assets, which are outlined in the fourteen paragraphs included in Article 103. Special summary proceedings that set specific rules for processing.	Single multipurpose hearing
Ecuador	Regular proceeding Art. 289 and following	Applicable to all cases that do not have a special process for their hearing	<ul style="list-style-type: none"> • Preliminary hearing • Trial hearing
	Summary proceeding Art. 332 and following	Applicable for the discussion of certain personal rights and small financial debts that cannot be enforced by other means.	Single multipurpose hearing

Country	Regulated adjudication processes	Description	Regulated hearings
El Salvador	Common proceeding Arts. 240, 276 and following	Applicable to claims in certain areas (such as unfair competition or industrial property) as long as the object of discussion is not exclusively a matter of quantity. Also applies to cases whose amount exceeds 25,000 colones or the equivalent in dollars and those in which the size of the claim cannot be determined.	<ul style="list-style-type: none"> • Preparatory hearing • Evidentiary hearing
	Abbreviated proceeding Arts. 241, 418 and following	For cases that do not exceed 25,000 colones and certain patterns such as claims for liquidation of damages and losses.	Single multipurpose hearing
Honduras	Regular proceeding Arts. 399, 424 and following	Applies to claims that involve specific matters defined by law regardless of the amount involved, such as the protection of fundamental rights and collective claims, among others. Regardless of the matter in question, it also applies to claims involving more than 1,000 lempiras ³¹ and those in which an amount cannot be determined.	<ul style="list-style-type: none"> • Preparatory hearing • Evidentiary hearing
	Abbreviated proceeding Arts. 400, 583 and following	Applies to specific matters set out in the law, such as payment on consignment or possessory claims, among others, and all cases in which the amount does not exceed 100,000 lempiras.	Single multipurpose hearing
Nicaragua	Regular proceeding Arts. 391, 420 and following	Applies to claims involving an undetermined amount and those to which the summary proceedings do not apply based on the amount set by the Supreme Court and all matters which, regardless of the amount involved, address the matters regulated in Article 391 (such as protection of fundamental rights or collective claims, among others).	<ul style="list-style-type: none"> • Initial hearing • Evidentiary hearing
	Summary proceeding Arts. 392, 502 and following	Applies to claims which, based on the amount set by the Supreme Court, are not included in the sphere of ordinary proceedings and for matters which, regardless of the amount involved, are regulated in Article 392 (such as possessory claims or division of an inheritance).	Single multipurpose hearing

Source: Developed by the authors.

³¹ The amount was set by Decree No. 21-2015 dated March 17 and published in Official Gazette No. 33.882 on November 13, 2015. The reform is questioned, and it is argued that the legislator did not modify the rule that attributes objective competency (Article 29.2 of the CPC).

Below we offer a brief review of the characteristics of these processes and how the respective hearings are regulated.

a. Ordinary proceedings

The most common procedural structure involves the use of ordinary hearing-based proceedings, and it is also the most complex. This approach involves two hearings, and it is applied in a supplementary manner. In the majority of countries, the term does not vary, except in Colombia, which calls it the “Verbal Process”; El Salvador, where it is the “Common Process”; and Brazil, which, as we noted in the first part of this chapter, calls it the “Adjudication Process” and not the ordinary process. Brazil is also the only country that only considers this procedural framework and does not regulate a second summary one.

As noted, all of the countries have a procedural adjudication framework which, in regard to the declarative first instance part, can be described as structured in three stages: 1) initial acts (claim and response); 2) preliminary hearing; and 3) trial hearing. In general, this framework follows a similar logic and has similar goals in the majority of the countries. Below we briefly analyze each one of the stages.

1. Initial or introductory acts

As we have noted, there is a consensus that the modern civil process should maintain certain written acts. We have seen this in the three reform proposals that influenced Latin American reform processes, the Model Code, the reform introduced in England and Wales and the Spanish Trial Law. The three maintained some or all of the written introductory acts.

The table below illustrates whether this trend –which led us to describe the new civil procedure as a “mixed process” and not a purely oral one– has completely or partially been accepted by the regulations under study.

Table 8: Regulation of introductory acts

Country	Written complaint	Written response
Bolivia	Yes, Art. 110.	Yes, Art. 125.
Brazil	Yes, Art. 319.	Yes, Art. 335.
Colombia	Yes, Art. 82.	Yes, Art. 96.
Costa Rica	Yes, Art. 35.1.	Yes, Art. 37.1.
Ecuador	Yes, Art. 142.	Yes, Art. 151.
El Salvador	Yes, Art. 276.	Yes, Art. 284.
Honduras	Yes, Art. 424.	Yes, Art. 433.
Nicaragua	Yes, Art. 420.	Yes, Art. 427.

Source: Developed by the authors.

We can see that all of the codes analyzed have followed the aforementioned trend and that both the claim and the response must be completed in writing and meet certain formal requirements that vary according to each law. From this perspective, this first stage in the regular proceedings is fairly similar in all countries, varying only in terms of timeframes or formal elements.

The exception is once again Brazil. Despite the fact that the claim –which is called the “initial request”– and response are written, the latter presents an important variation. In contrast to other codes, the response is not presented directly after the claim under Brazil’s Code. Instead, this occurs after the mediation or conciliation hearing or after the respective request that it be canceled.³²

This implies that the stages that we have identified as part of the procedural framework of the regular proceeding vary to a certain extent in this country given that, by its very nature, the procedural act would come after the claim is the scheduling of the mediation and conciliation hearing³³ and not the transfer of the case so that the respondent can answer the claim.

2. *Preliminary hearing*

Once the discussion period or initial acts are complete, the preliminary hearing is held. This is the first hearing in oral proceedings. It was strongly influenced by the Uruguayan code and comes before the trial hearing (the main hearing in which evidence is presented). It is also called an initial, preparatory, or organizational hearing.

The purpose of the hearing is to address all of the matters necessary to hold an adequate trial (Ríos, 2017). According to Lorenzo (2017), during this hearing, the judicial official must: i) determine whether the case will go to trial, which involves determining whether there are disputed facts and what they are, with their respective legal and evidentiary support; ii) if the case should go to trial, establish the type of trial that should be held; and iii) establish the evidence that will be allowed to be presented at trial. Ríos (2017) states that the first two objectives would correspond to what he calls setting the objectives of the process and evidence. In addition to those objectives, the regulations tend to indicate that the preliminary hearing should include an attempt at conciliation between the parties.

We can state that, in general, the preliminary hearing is meant to include conciliation, organize the proceedings, receive evidence regarding previous events, set the object of the discussion and determine the admissibility or exclusion of evidence.

The table below summarizes the aforementioned aspects and lists the name that each code has for this hearing, its objectives, and the respective regulations.

³² Art. 335.

³³ Art. 334. “If the initial request meets the essential requirements and the request is not inadmissible at the outset, the judge will schedule the conciliation or mediation hearing at least 30 (thirty) days in advance. The respondent must be notified at least 20 (twenty) days in advance. (...)” (Our translation).

Table 9: Regulation of the preliminary hearing

Country	Name used to refer to the preliminary hearing	Objectives	Regulation
Bolivia	Preliminary hearing	To ratify the requests; attempt at conciliation; receive evidence regarding exceptions; organize the proceedings; set the object of the proceedings; identify, organize, and process the admissible evidence; receive evidence that was processed during that hearing; or organize a complementary hearing regarding the evidence that was not produced prior to its conclusion.	Article 366
Brazil	Mediation or conciliation hearing *It is not a preliminary hearing.	Its purpose is to allow the parties to reach an agreement and it must follow the rules set out in the CPC. When necessary and when there are opportunities for settlement, more than one session may be held. *The resolution of pending procedural matters, setting of disputed facts and admissibility of evidence is handled in writing by the judge through the 'procedural organization' resolution'. (Our translation). (Art. 357).	Article 334
Colombia	Initial hearing	Present the evidence strictly necessary to resolve the prior exceptions; attempt conciliation; organize the proceedings; verify the inclusion of the dispute; allow the evidence necessary to elucidate the dispute; and decree and process other evidence if possible, as long as the parties are present.	Article 372
Costa Rica	Preliminary hearing	Report the purpose of the process and structure of the hearing; encourage conciliation; ratify, clarify, adjust, and organize the parties' positions when the court deems such action appropriate; organize the proceedings; determine the amount of the proceedings and set the subject of the debate; analyze and state which evidence is admissible; and, where they exist, resolve any protective measures that may be pending.	Article 102.3
Ecuador	Preliminary hearing	Rule on previous events; organize the proceedings and identify the object of the dispute; present each party's position; mandatory attempt at conciliation; announce the evidence and the respective requests, objections and arguments made by the other party; discuss and rule on the admissibility of evidence; evidentiary agreements.	Article 292 and following

Country	Name used to refer to the preliminary hearing	Objectives	Regulation
El Salvador	Preparatory hearing:	Attempt conciliation between the parties in order to avoid unnecessary continuation of the proceedings; allow for the procedural defects that the initial arguments may contain to be organized; precisely identify the goal and issue of evidence; and propose and allow evidence that the parties intend to use in the evidentiary hearing.	Article 290 and following
Honduras	Preliminary hearing	Attempt conciliation between the parties in order to avoid unnecessary continuation of the proceedings; organize the procedural defects listed in the response to the claim or counterclaim; precisely identify the goal and opposition and the terms of their discussion; and propose and allow evidence that the parties intend to use in the evidentiary hearing.	Article 444 and following
Nicaragua	Initial hearing	Urge the parties to reach an agreement; allow for the organization of the procedural defects reported; precisely identify the goal and opposition as well as the terms of their discussion; ratify the list of proposed forms of evidence; allow the evidence that the parties try to use in the evidentiary hearing; and set the date and time of said hearing.	Article 441

Source: Developed by the authors.

The first thing that we can conclude from this analysis is that, while all of the countries regulate an initial hearing after the request process is complete, Brazil is the only country that does not regulate a preliminary hearing as such, strictly speaking. The country regulates a “Mediation or conciliation hearing” which, as we will see below, does not only have a different name, but involves substantially different objectives and dynamics.

One could say that, in this regard, Brazil shares only one of the many objectives that tend to be identified as part of the preliminary hearing. We are referring to attempts to encourage the parties to settle. Article 334 of the Brazilian code states that, as its name indicates, the main purpose of this initial hearing is the reach an agreement between the parties through conciliation or mediation. The goal is not to organize the proceedings, establish their purpose or admit evidence.

This is to be expected because the structure of the Brazilian process focuses on settlement methods by establishing that the response to the complaint comes after this first hearing and/or once attempts to reach a settlement have failed. Furthermore, the code gives the parties the burden of modifying this approach. Number 5 of the aforementioned article states that the complainant must indicate in the initial request that there is

no interest in reaching a settlement, and the respondent must do so through a petition submitted ten days prior to the respective hearing.

If we look at the rest of the regulations, we can conclude that the other countries have this goal as part of the activities to be conducted during the preliminary hearing, given that they indicate that the judicial official must try to engage in conciliation, and they include rules that state that this does not involve prejudging or a cause for recusal. For example, Ecuador's COGEP states that "the forms of hearing management, including the proposal of settlements between the parties and orders to carry out the activities that form part of the same, in no case shall represent prejudgment. As such, the judge may not be accused of prevarication, recused or subject to any complaints." (Art. 294.8, our translation).

A careful reading of Nicaragua's code reveals a subtle variation. Nicaraguan judicial officials may not engage in conciliation efforts as such and may only "encourage" the parties to reach an agreement, which means sending the case for extra-procedural conciliation or mediation.

Second, with the exception of Brazil and Colombia, the majority of the codes establish that the parties must *clarify or ratify their intentions during this first hearing*. Whether through formulae such as "precisely setting the intention and opposition" or "ratifying pleadings," the majority include this activity. While this activity tends to be considered part of this hearing based on the doctrine, its regulation may lead to unnecessary repetitions of the matters presented during the respective pleadings. Furthermore, these clarifications or ratifications should never involve a comprehensive reading of the complaint or opening argument. In view of this, we believe that Ecuador's regulations in this regard is worth highlighting, as indicating that the parties should present "their rationales" provides the foundation necessary for them to make opening arguments starting from a correct understanding of this as a basic tool of litigation and contradictory procedures, and as such they do not engage in useless repetitions of the information presented in the complaint and response.

As such, and again with the exception of Brazil, we see that all of the codes hold that the preliminary hearing must include the activities necessary for the proceedings to be properly developed and for a successful trial. Specifically, the codes state that this procedural instance should *organize the proceedings* and determine –and potentially provide room to litigate– *the formal defects* that may affect the resolution of the dispute. This may include, for example, preliminary defense or procedural voiding factors. In addition, the *purpose of the discussion* must be precisely established. The understanding of this may include the difference between the object of the proceedings and the determination of substantial, contested and allowed facts, but which for these purposes we consider part of a single activity. Finally, it includes *determining which evidence is admissible* based on the various criteria that will be examined later in the text.

In some regulations, the procedural structure presents special changes based on the opportunity to exhaust the debate during the preliminary hearing. For example, Bolivia allows all evidence that can be processed during that hearing to be presented. A complementary hearing will only be held if there is evidence that cannot be presented during the preliminary hearing (Art. 366, CPC). This is why it is described as complementary.

The same occurs in the case of Colombia. When it is possible and appropriate to present evidence during the initial hearing, the judge may, ex officio or at the request of a party, specify the evidence in the order that sets the date and time for the hearing in order to satisfy the purpose of the investigation hearing and trial. The sentence will be read during that sole hearing (Art. 372). This rule offers an interesting summary of the managerial role of the judge, the cooperative work of the parties, and focus on simplifying the proceedings and the search for effective solutions. The Honduran CPC provides for similar actions, allowing the decision to be made during the preliminary hearing if all of the evidence can be presented at that point, including, for example, examinations (Arts. 464, 474 and 475).

In the Brazilian case –which, as we have noted, does not have a preliminary hearing–, the procedural organization activities, setting of the subject of debate and provision of admissible evidence are conducted in writing by the judge through a resolution on the “*organization of the process*” (Art. 357).

However, as an exception –when the case presents a certain level of complexity in the facts or law– the judicial official must hold a hearing so that the organizational work may be completed with the parties. The aforementioned tasks are conducted during that hearing, and the judge invites the parties to present or outline their arguments. They also work on a case management calendar, especially in regard to the production of evidence.

Finally, it is important to note that the preliminary hearing –and trial, where applicable– must be used to resolve any other detail linked to the proceedings in general or a specific development that emerges during them. These may include lifting precautionary measures, which is expressly regulated in Costa Rica.

As such, active, ongoing, and adequate case management is essential for adopting the measures and taking the actions necessary to ensure that the hearings can be utilized as effectively as possible, attended by all of the stakeholders, and used to discuss and rule on all of the elements of the trial. Joint, coordinated, and cooperative work by the judicial official, judicial office, attorneys and third parties will be key.

3. *Trial hearing*

The trial hearing is, by definition, the stage during which evidence is presented, and it must be established as the central axis of a case. Lorenzo (2017, p. 39) defines it as “the central moment in a contested process, as the parties must produce the evidence that will allow them to establish their position during the trial hearing, and the judge will rule based on the evidence produced”. (Our translation). It is necessary to note that the trial or trial hearing are synonymous with the *oral, public and contradictory hearing*, and that the purpose of this is to allow “the parties to present their version of the facts through their arguments and evidence before an impartial court that observes the litigants’ activities in a concentrated and direct manner and, based on the information presented and solely on that, must form their judgment or belief” (Duce, Marin & Riego, 2008, p. 47, our translation).

It is fundamental that this hearing be effectively oral, public, and concentrated, and governed by the principles of immediacy and contradiction. These lines are not only

associated with the fulfillment of the guarantee of due process, but also allow the trial to produce high quality information as well as better development of litigation and, with it, also facilitates the judges' final ruling (Duce, Marín & Riego, 2008; Pereira, Villadiego & Chayer, 2011; Lorenzo, 2017).

Adequate regulation of the trial hearing is a fundamental element of analysis within a reform. As such, below we will focus on certain aspects that the trial hearing presents in each of the procedural regulations studied.

We first present a table that lists the name of this hearing in each code as well as its objectives and the respective regulations.

Table 10: Trial Hearing Regulation

Country	Name used to refer to the trial hearing	Objectives	Regulation
Bolivia	Complementary hearing	The main purpose is the presentation of evidence. This hearing also gives the judicial official an opportunity to hear each party in turn and then issue a ruling.	Article 368
Brazil	Investigation and trial hearing	Attempts at conciliation will be made (even when similar measures such as mediation or arbitration have been attempted), evidence will be submitted, and a sentence will be issued where applicable.	Article 358 and following
Colombia	Investigation and trial hearing	Presentation of evidence on the facts in dispute and for which confession is not applicable, presentation of arguments by the parties and issuing of the oral sentence.	Article 373
Costa Rica	Complementary hearing	The purpose is to present the evidence, for the parties to offer their conclusions and for the judge to deliberate and rule.	Article 102.5
Ecuador	Trial hearing	The hearing begins with opening arguments presented by each of the parties, in which they must determine the order in which their evidence will be presented based on their strategies. The judicial official will then order their presentation. The hearing concludes with the closing arguments.	Article 297 and following
El Salvador	Evidentiary hearing	The purpose of the hearing is to allow for the oral and public presentation of the evidence that has been allowed. During this same hearing, and prior to its conclusion, the parties are given an opportunity to present closing arguments.	Article 402 and following
Honduras	Evidentiary hearing	The main purpose is to allow for the oral and public presentation of all sources and evidentiary means that have been allowed. The parties are also given the opportunity to offer closing arguments.	Article 466 and following

Country	Name used to refer to the trial hearing	Objectives	Regulation
Nicaragua	Evidentiary hearing	The purpose of the hearing is to present evidence. Prior to the conclusion of the hearing, the parties present their closing arguments in order to link the facts argued with the evidence presented.	Article 460 and following

Source: Developed by the authors.

Although there are similarities in terms of the structure and objectives of this hearing set out in the various codes, one major difference between them is the name used for this hearing.

Only Ecuador refers to this hearing as a trial hearing. El Salvador, Honduras, and Nicaragua call it an evidentiary hearing, referring to its main objective. For their part, Bolivia and Costa Rica call it a complementary hearing, and Brazil and Colombia call it an Investigatory and Trial Hearing.

It has been stated that, if the goal is to reflect the true meaning of Articles 8.1 of the American Convention and 14.1 of the Agreement and, as such, establish oral, public, and contentious hearings as the main guarantee of due process, it must be identified as the main axis of any proceedings (Duce, Marín & Riego, 2008; Pereira, Villadiego & Chayer, 2011; Binder, 2012). We therefore believe that the *appropriate name is trial hearing*, as this is the term that best reflects its nature as the moment in which the judge reaches a conclusion on the facts based on the evidence (Marin, 2018). While this may seem to be a minor issue, we believe that it is important to mention it because, for example, the idea of complementarity that Bolivia and Costa Rica link to this hearing moves away from this idea that this hearing should be central to the process. For its part, the idea of investigation and trial also fails to reflect the adversarial and contentious nature that is expected to be part of it.

Of course, the existence or name of the trial hearing is not sufficient to determine whether or not it will serve as the central and effective guarantee of due process or, as we will analyze later on, if it serves as a tool for generating high quality information. In order to reach that objective, the conditions that effectively ensure the reasonable exercise of individuals' rights must be analyzed (Duce, Marín & Riego, 2008), and we can do this by reviewing the objectives and respective characteristics that the regulations have established for this hearing and, of course, analyzing the rules on the regulation of the evidence that will be produced during this stage.

Given that the rules of evidence will be analyzed separately in a section focused exclusively on this topic, we will briefly review the other set of conditions that characterize and provide content for this hearing. We will analyze the objectives and other characteristics that the codes have established for the trial together.

The codes are fairly similar in this area, at least in terms of the regulations that they contain. In general, we can say that they address three major objectives: 1) to produce

or present the evidence allowed; 2) to listen to the parties' rationale or arguments; and 3) to issue a ruling.

In regard to the first goal, we see that all of the countries have established that one of the main activities to be developed during this hearing is the *production of evidence*. From here, the first thing that should be mentioned is that this objective is basic if the goal is to establish an oral procedure.

We remind the reader of two important points in this regard. First, all of the codes studied expressly establish the principle of the use of oral procedures. Second, while the use of oral procedures involves using the spoken word rather than the written word, this is basically "a method of production of information and its communication among the parties, on the one hand, and between the parties and the court, on the other" (Duce, Marín & Riego, 2008, p. 36, our translation). The information referred to in this definition is the information provided through the evidence. As such, one basic requirement for being able to speak of an oral procedural system is that evidence must be produced during an *oral, public, and contentious hearing*. Based on this initial approach, we can say that all of the countries effectively do so. All in all, it will be the analysis of the rules of evidence that will allow us to determine whether the principle of oral procedures and presentation of evidence at trial are more than a system formally designed as oral.

The difference that the regulations present in regard to this point is related to the role of the judicial official and the parties during the hearing based on many other factors related to the philosophy and model of justice that the regulations reflect. In this regard, we refer to the considerations offered in the chapter on evidentiary aspects.

Second, we see that, in broad terms, all of the codes provide for trial hearings in which *the parties present their positions or offer oral arguments*. In general, specific timeframes are established that can be expanded for complex cases.

In this regard, we note that closing arguments are provided for in all of the regulations, but *not opening arguments*. This reflects the fact that the use of oral procedures as a methodology for producing information has not been comprehensively captured by the reform processes. As the doctrine reflects, opening arguments³⁴ are a basic tool that allow litigation to be carried out adequately and that the principle of the use of oral procedures materializes through this. To put it differently, the restriction on the opening argument also restricts the principle of the use of oral procedures, as it removes a litigation tool that is essential to the production of high quality information.

In this sense, the only country that expressly mentions opening arguments is Ecuador. However, by not prohibiting them, they may implement them as a best practice in support of the principle of oral procedures that governs the regulations.

Finally, the majority of the regulations state that this hearing is the correct time to *issue a ruling*. In general, the majority establish that the ruling must be read during the hearing

³⁴ See, among others: Lorenzo, L. (2017), *Manual de Litigación Civil*; Marín, F. (2018), *Manual de Litigación de Audiencias Orales en la Nueva Justicia Civil de Costa Rica*; Baytelman, A. & Duce, M. (2004), *Litigación Penal, Juicio Oral y Prueba*.

and, exceptionally, that it may be deferred. The exception is based on the complexity of the case. As such, we have identified two variants. The first involves issuing the ruling (operative part) and deferring the substantiation for a later date (as in Bolivia). The second allows for the ruling to be issued outside of the hearing in writing and within ten (in Honduras, for example) to 30 days.

In Colombia, for example, the sentence must be issued orally. However, if necessary, a recess of up to two hours may be declared for the ruling. When it cannot be read orally, the judicial official must provide justification or inform the Superior Council. In that case, the reasoning for the ruling must be presented along with a brief justification, and the decision must be issued in writing within ten days (Art. 373, CGP). Ecuador also establishes that the judicial official may suspend the hearing until he or she arrives at a decision once the parties have spoken and must reopen the hearing that same day in order to present the ruling orally (Art. 295, COGEP). In Brazil, the regulation states that the judge shall issue a ruling during a hearing or within 30 days once the arguments have been presented, including closing remarks (Art. 366, our translation), without requiring an expression of the enabling provision. However, we believe that, as an exception to the rule and considering the right-guarantee to adequate justification of decisions, the judicial official should provide reasons justifying any delay.

One problematic aspect related to this point is sentence reading hearings, which exist in some systems and can be described as hearings limited to procedures. For example, when the judge defers justification for his or her decision, a sentence reading hearing is scheduled (Arts. 216 and following, CPC). The fact that the purpose of the hearing is to read the sentence does not serve to clarify matters linked to the ruling or its scope, and it is set for a later time (with all that this entails in terms of time for the parties), making it unreasonable and pointless. The experience of Uruguay's General Procedure Code, which contains a similar provision, confirms the statement.³⁵

In regard to the objectives of this hearing, the duty of the judge to attempt or reattempt conciliation can be considered. In some cases, it is expressly included (for example, in Brazil³⁶). In others, it may be built on the general duties of the judicial official.

Finally, while the majority of the Codes stipulate principles of unity of action and continuity of the hearing, some legislations allow for evidentiary hearings to be split up or for more than one to be held. Honduras' CPC (Art. 465) is one example. This goes against the requirement of guaranteeing concentration, procedural economy, and the use of adversarial procedures. The fragmentation of evidentiary production does not only generate more expenses. It weakens the challenges to information reported through evidentiary sources and thus undermines the strength of the immediacy.

b. Summary proceedings

As we mentioned at the outset of the second section on regulated proceedings and

³⁵ Regarding the procedural hearing and Uruguay's experience, see: Espinosa Olguín, L. & Martínez Layuno, J.J. (2017), *Reporte sobre la gestión judicial y oralidad en la justicia civil uruguaya*.

³⁶ Arts. 358, 359, 361 and following, CPC.

their respective hearings, the reformed procedural systems that we are studying identify at least two adjudication proceeding structures. The first is the regular proceedings that we analyzed in detail in the previous section, and the second involves “summary or extraordinary proceedings,” whose characteristics we will briefly examine below.

In general, it is understood that these proceedings, which tend to be used in cases that require an urgent solution that include certain matters or affect especially protected rights, should also be predominantly mixed and adversarial and guarantee due process with lower standards than ordinary proceedings. These summary and simplified proceedings must include a trial that guarantees the use of oral procedures, immediacy, concentration, economy, disposition, and public procedures (Pereira, Villadiego & Chayer, 2011, p. 94, our translation).

Like ordinary proceedings, summary proceedings tend to have the same procedural stages that are established for the ordinary process, with the difference that they present more flexible standards for processing and allow for greater concentration in some or all of their stages.

The table below describes the type of cases to which summary proceedings apply in the most recent codes passed in Latin America with the exception of Brazil because, as we stated at the beginning of this section, its code recognizes a single procedural structure.

Table 11: Regulation of summary or extraordinary proceedings

Country	Subject	Amount involved
Bolivia	<ul style="list-style-type: none"> • Disputes involving orders to preserve and recover possession as well as those involving prejudicial new construction, anticipated damages, or eviction regardless of prior conciliation or the adoption of preparatory and precautionary measures 	Not listed
Brazil	N/A	N/A
Colombia	<ul style="list-style-type: none"> • Horizontal property • Maintenance and child support • Legal custody, some disputes between spouses, minors traveling abroad and the restoration of the rights of children and adolescents • Certain articles from the Commercial Code • Copyrights • Securities titles • Matters which, under special provisions, must be resolved by a judge with knowledge of the case, or briefly and summarily or based on his or her sound judgment, or as an arbitrator • De facto occupation of rural properties • Matters listed in special laws 	Small claims contentious matters

Country	Subject	Amount involved
Costa Rica	<ul style="list-style-type: none"> • Eviction and recovery of liquid and enforceable monetary obligations when the matter does not fall under a monitoring process • Lease contract • Injunctions, suspension of new construction, demolition, jactitation • Provisional possession of goods except for money • Delivery or return of assets • Co-ownership, horizontal property, or shared domain • Provision, modification, or extinction of guarantees • Authorization to enter someone else's property • Recovery of credits guaranteed under the right of retention of movable goods • Reestablishment of the right passage based on a preexisting title • Those identified in special laws 	Not listed
Ecuador	<ul style="list-style-type: none"> • Those ordered by law • Possession and special actions, new construction, easements, boundary demarcation, violent dispossession, and judicial dispossession • Payment of maintenance • Contentious divorce • Lack of competency and declaration of interdiction and protection • Professional honoraria • Cases opposing voluntary procedures • Wrongful dismissal of pregnant or breastfeeding women and union leaders • Failure to agree upon a price to be paid for expropriation 	Not listed
El Salvador	<ul style="list-style-type: none"> • Liquidation of damages and losses • Opposition to judicial repossession of securities titles • Judicial dissolution and liquidation of a company • Nullity of companies 	Amounts not exceeding 25,000 colones or the equivalent in US dollars
Honduras	<ul style="list-style-type: none"> • Disputes between co-owners, payment on consignment, easement rights • Rental or tenancy • Claims of possession • Registry qualification • Correction of imprecise and prejudicial facts or information • Financial rentals and forward sale of movable goods • Horizontal property • Acquisitive prescription, demarcation, and signposting • Claims derived from transit accidents 	Amounts not exceeding 100,000 lempiras

Country	Subject	Amount involved
Nicaragua	<ul style="list-style-type: none"> • Settlers' rights • Easements • Leases • Claims of possession • Rejection of express or presumed registry entry • Correction of imprecise and prejudicial facts or information • Horizontal property • Acquisitive prescription • Division of inheritance • Claims derived from transit accidents 	Claims that do not fall within the scope of the ordinary proceedings based on the amount set by the Supreme Court

Source: Developed by the authors.

As we can see, an initial aspect that is noted in all of the regulations is that the matters for which summary proceedings are used are fairly similar and include disputes related mainly to various types of possessive action such as rental, while others are related to certain types of ownership (such as horizontal property) or specific disputes. Disputes involving assets dominate. All in all, we can observe two major trends related to the regulation of the summary proceedings from two perspectives.

From the first, which is related to the type of cases that are processed using this approach, we see a very marked group that is comprised of Colombia and Ecuador, the only countries that include the matters common to all of the countries as well as disputes over rights that are not strictly related to assets, such as those involving family law and, in Ecuador, labor law. This is due to the fact that these are the only two countries that have established a General Procedure Code.

The other countries tend to regulate the summary proceedings only for matters involving property, though it is noteworthy that Honduras and Nicaragua have similar legislation, which also includes the common matters we have mentioned as well as conflicts between partners, registry disputes and, most notably, matters related to traffic accidents.

In regard to the amount involved in the dispute as a criterion for applying summary proceedings, one group regulates this and the other does not. The first includes Colombia, El Salvador, Honduras, and Nicaragua. For their part, Bolivia, Costa Rica and Ecuador have not regulated the amount of the claim as a criterion for determining which matters should be subject to summary proceedings and which should not. They base this solely on the type of matter.

Description of summary proceedings and the single multipurpose hearing

As we have stated, summary proceedings tend to have a procedural structure that is similar to the ordinary proceedings, but they include other processes, acts and/or procedural stages that can be simplified and/or concentrated.

The first stage of the summary proceedings continues to be period of pleadings or discussion. The nature of this stage varies by country and with regard to the main ordinary

proceedings. For example, during this stage in Bolivia, counterclaims are not allowed. In Colombia, the claim and response can be submitted verbally before the clerk. In Honduras, standard claim forms can be used, and Ecuador does not allow the claim to be modified.

Although we could analyze many other elements (such as whether or not the decisions made in this instance can be appealed), the main focus on our analysis of this process is that ordinary proceeding actions take place during two hearings. In summary proceedings, a single multipurpose hearing is used. This is the common element of all of the regulations and is the essential characteristic of these proceedings.

We define the multipurpose hearing as the main development in a concentrated adjudication process. Its principal objectives are to try to have the parties reach a settlement, for the parties to orally present their perspectives, to organize the proceedings if applicable, set the object of the debate, debate the admissibility and exclusion of evidence and, during this same hearing, produce and litigate the evidentiary material that is admissible.

While this hearing is fairly similar to what we call small claims hearings, there are two major differences. First, and in general, the multipurpose hearing requires the presence of attorneys and does not have the same level of procedural informality and simplicity as a small claims hearing. This is because it is a formal hearing that has as its main purpose the adjudication of a law by a third party. Second, and most importantly, the law that tends to surround each of these hearings is completely different and impacts the way in which the dispute is handled. During a multipurpose hearing, a judge –within a traditional court law that is common to the rest of the judicial proceedings– hears the case. In small claims hearings, a very specialized law is presented that is focused on the management and settlement of the dispute. In fact, the case is often presented before a non-professional judge.

All in all, we believe that a multipurpose hearing can (and should) be similar to a small claims hearing given that the characteristics that summary proceedings generally present in the region have the potential to be similar to a small claims hearing if the elements of procedural simplification are emphasized and there is a focus on adequate management and, ideally, the settlement of the dispute.

The table below shows how each country regulates this hearing and its goals.

Table 12: Regulation of the single multipurpose hearing

Country	Description and objectives of the hearing	Regulation
Bolivia	A single hearing is scheduled in order to promote intraprocedural conciliation ex officio, set the terms of the debate, process the evidence and rule without the need for arguments.	Article 370
Brazil	N/A	N/A

Country	Description and objectives of the hearing	Regulation
Colombia	The activities described in Articles 372 (initial hearing) and 373 (investigation and trial hearing) are developed in a single hearing as applicable. The order that the judge uses to schedule the hearing lists the evidence requested by the parties and those considered ex officio.	Article 392
Costa Rica	The court identifies the evidence prior to the hearing, which includes the following activities as applicable: informing the parties of the objectives of the proceedings and the order in which matters will be heard; conciliation; clarification of the proposals of the parties; response, offering and presentation of counter-evidence; receipt, admission and presentation of evidence and ruling on defective procedural activity, exceptions and organization; determination of the amount involved in the proceedings; setting the object of the debate; admission and presentation of evidence; ruling on protective measures when applicable; conclusions of the parties; delivery of the sentence.	Article 103.3
Ecuador	A single hearing is held in two phases. The first focuses on organization, setting the points to be debated and conciliation. The second focuses on evidence and arguments. This hearing is held within 30 days of the response to the claim.	Article 333
El Salvador	The judge encourages the parties to reach a settlement. If there is no compromise through conciliation, the hearing is held and the complainant is given the opportunity to ratify, expand or reduce the claim. The respondent addresses formal and then substantive defects. The respondent may then formulate a counterclaim. The complainant will respond to the procedural defects argued and the counterclaim. The parties will speak as many times as the judge deems appropriate. The parties will then propose the evidence that they intend to introduce, and the judge will admit the useful and relevant evidence. Once the evidence has been presented the parties will formulate their closing arguments orally. The judge may issue a ruling once the hearing has ended, if applicable. If not, the ruling must be announced verbally.	Article 426 and following
Honduras	The hearing will begin with an attempt at conciliation. If not, agreement is reached, the complainant ratifies the complaint. The respondent responds, first regarding formal matters and then substantive ones. If applicable, they will then present their counterclaim. The complainant may answer the responses and counterclaim. The hearing then shifts to the proposal, admission, and presentation of evidence. Once the evidence has been presented, the parties or their attorneys, if applicable, shall offer oral closing arguments. The court will issue a sentence within five (5) days of the end of the hearing.	Article 591 and following
Nicaragua	The purposes of the hearing in the summary proceedings are those listed for the initial hearing and the evidentiary hearing in the ordinary proceedings. Once the evidence has been presented, the parties who aid or representation shall orally present their closing arguments in the manner provided for in the Code.	Article 506.

Source: Developed by the authors.

3. CONCLUSIONS REGARDING THE DESIGN OF PROCEDURAL STRUCTURES AND THE RESPECTIVE HEARINGS

We have identified trends and topics of interest through our analysis of the procedural structures and their respective hearings. These will allow us to reflect on the degree and quality of the use of oral procedures in these reform processes.

First, and in regard to the *principle of procedural flexibility*, the analysis allows us to conclude that, in general, the reform process that Latin America has experienced continues to be *rooted in a rigid and legalistic concept of law* that has its expression in the consecration of principles such as the legality of procedural forms or the consecration of the procedural regulation as unavailable. The countries that present the highest levels of procedural rigidity in their regulations are Bolivia, Colombia, El Salvador, Honduras and, to a lesser extent, Costa Rica.

We believe that, in this sense and under a correct and evolving understanding of the principle of procedural legality³⁷, the regulation that truly closes the door on the ductile process is the mandatory nature of the procedural norm, as a principle like this one makes it nearly impossible to adapt or modify norms in order to advance other principles, rights or values that justice should include. A systematic and harmonious interpretation of the regulations can align a principle of procedural legality with a principle of flexibility. In fact, Garcia Odgers (2018) also sees it this way, referring to the conditions that a tool like case management requires to be effective. The author states that this depends on a regulation that contains an adequate balance between the existence of rules (standardization) and their flexibility, which is important for greater judicial discretion.

On the other hand, we see that the only country that leads what we could call a new procedural trend that is directed at a flexible judicial process is Brazil. As we noted in the respective section, this country has a framework that is coherent with the principle of the instrumentality of forms, and also has certain modes of case management. While this country does not have an express principle of procedural flexibility, its regulations do constitute an expression of it.

In regard to the *procedural structures* regulated, all of the countries analyzed except for Brazil regulate two major notice proceedings or declarative proceedings that share various similarities. We are referring to the ordinary and summary proceedings. For these countries, the ordinary proceedings are the main and supplementary mechanisms and consist of two hearings: the preliminary hearing and the trial hearing. For their part, the summary proceedings are characterized by a concentrated process that we identify as a single multipurpose hearing.

In regard to the characteristics of these procedural structures, we can say that all of the regulations incorporate an *oral hearing process* without exception as the form of discussion. Strictly speaking, it would qualify as mixed given that the pleadings and appeals are

³⁷ For an interpretation of the principle of legality of forms that moves away from ritualism and extreme procedural rigidity, see Gozáni (2012).

written. From this perspective, we can conclude that all of the reforms sought to establish, at least in terms of the regulations, an oral civil justice system. In fact, this is so much the case that, as we saw in chapter two of this section, the principle of the use of oral procedures is one of the few principles of all of those identified that is expressly regulated in all of the codes (along with the principles of dispositive and public procedures).

The analysis developed of the procedural structures and their respective hearings does not necessarily reach the conclusion that the aforementioned principle of the use of oral procedures has been adequately received in all of the reforms. However, we can arrive at a more complete conclusion after analyzing the rules of evidence. Below we offer some reflections on this from the perspective of the regulatory design of the proceedings and hearings.

As a starting point, we believe that in most cases, the guidelines regarding the use of oral procedures have not been as clear as we would want them to be.

On the one hand, the trial hearing does not seem to have the centrality that it deserves in the current regulations.³⁸ Proof of this is the fact that it is referred to as complementary, investigative, or trial hearing, the fact that it does not have a unique form or lacks aspects that are related to the trial (such as opening arguments) and the type of exchange allowed, which may go against the goal of obtaining quality information. For example, the rules stipulate that the judge is the party who –without any prior exchange between the parties– initiates the examination of a witness (which we will examine in greater detail in the next chapter).

We thus believe that it would be advisable to incorporate these matters as best practices (for example, the presentation of case theories during the opening phase) or to reinterpret the design of the debate (for example, allowing the parties to begin the examination, allow them to engage in cross examination and to ask questions at the end) in order to guarantee and strengthen the trial as a space for debate, improving litigation and decision-making processes.

Finally, in regard to the cross-cutting characteristics of the codes under study, we can say that all of the regulations establish the duty of personal appearance, do not allow a proxy to replace the party, and provide for sanctions in cases of non-compliance. (For example, these may include loss of the action, presumptions or, as in Brazil, the additional possibility of fines). The regulations also allow for a limited number of deferments³⁹ and/or the duty of priority in rescheduling. This is fundamental for ensuring that hearings are held on a timely basis and for improving the level of personalization of the dispute, arguments, and procurement of quality information.

For example, Bolivia's code states that the parties must attend the preliminary hearing unless they have a bona fide reason to send a representative or if the party is a group of individuals or the party lacks legal capacity. If the complainant or counter-claimant

³⁸ Ecuador's COGEP states in Article 297 that the trial hearing must have clearly differentiated moments.

³⁹ For example, in Honduras, the hearing may only be postponed once if it is proven that such a delay is required due to reasons of force majeure (Arts. 445 and following, CPC).

fails to attend, the respective action will be dismissed. If the respondent fails to appear, the court may immediately issue a sentence (Art. 365). In Colombia, when none of the parties attend the hearing, it cannot be held. If the term ends without the absence being justified, the judge may issue an order declaring the proceedings terminated (Art. 372.4, CGP).

One objectionable exception –though one that is mitigated by the requirement of legal capacity– is the Honduran rule that if the parties send a representative due to a well-founded reason, he or she may have sufficient authority to engage in conciliation, withdraw the case, agree to the outcome, or settle the matter. Otherwise, the party will be understood to have failed to appear (Arts. 444, 445, 446 and following).

IV. Aspects related to evidence and litigation

There are various reasons that justice systems have sought to introduce a hearings-based system. These include a technical consideration of *improving the quality* of information that the court uses to reach its decision.

There is an understanding that modern civil procedure must be structured such that it allows for the information produced at trial to be monitored and filtered efficiently and effectively and that the judge will use that information as the primary materials to issue their ruling. In order to achieve this goal of filtering the information, there must be *adequate regulation of the rules of evidence*. These rules govern the submission and admissibility of evidence, the timing and manner of its presentation, the methodology that both the parties and the court will use to review and monitor it and the way in which judges assess its evidentiary content (Duce, Marín & Riego, 2008).

The importance of the study of these aspects for assessing whether the regulatory design of oral trials has the merit of allowing them to constitute efficient tools for controlling information is key. Duce, Marín and Riego (2008, p. 47) explain this importance eloquently: "...We understand that by providing advanced rules of evidence in each of these components (the four areas that we will analyze), we will have the basic assumption necessary to obtain an efficient oral trial in the control of the quality of information entered and, as such, to obtain well-founded rulings based on more trustworthy information that makes those rulings more reliable". (Our translation).

Furthermore, the authors understand –and we share that position– that an initial approach to what would be the rules of evidence argued for implies the establishment of clear mechanisms that allow the parties to "show, analyze and assess the information submitted at trial with greater specificity" (our translation). At the same time, this means that the rules of evidence should provide effective tools so that judges are capable of actually "identifying good and poor quality information when it is presented at trial." The work of filtering or "cleaning" the information should be a central criterion when regulating (and assessing) the rules regarding the production of evidence. This criterion must be based on a first central idea:

"...The best way to filter information consists of allowing all of the versions that contain information, regardless of the format that it is expressed in, to be subject to vigorous questioning (quality control) and for that vigorous questioning to be partly managed by the party that is negatively impacted by that information. The latter is justified by the fact that the counterpart is in the best position to know and prepare their case in detail in addition to having a greater interest in showing the deficiencies in the other party's version to the court" (Duce, Marín & Riego, 2008, p. 50).

Given all of the above, in this chapter we have focused on the study of these evidentiary rules, paying special attention to those that directly impact litigation and using the analytical perspective mentioned in the previous paragraph. The goal of this analysis is

to elucidate, at least preliminarily, whether the regulatory framework allows for strategic and effective litigation to be conducted that also serves as a tool for engaging in the efficient filtering of the information presented at trial.

To this end, and following the systematization proposal of the evidentiary discussion that González Postigo (2018) presents, below we systematize the analysis of evidentiary and litigation aspects in four main areas. First, we will study everything covered by discovery, which refers to the rules that regulate the mode and order in which information in general and evidence in particular can be exchanged or offered at trial. This level of analysis also includes the study of the burden of proof.

Next, we will study rules on the admissibility and exclusion of evidence, which includes the analysis of the filters that the rules establish for determining which evidence may be produced by the parties at trial. We will then analyze the regulations that refer to the presentation and control of evidence in the oral trial hearing, which leads us to the study of regulated evidentiary means and, very especially, to their characterization from the perspective of the quality of information. Finally, this section provides information on the rules that govern the assessment of evidence.

1. DISCOVERY AND BURDEN OF PROOF

a. Evidentiary discovery

In general terms, when we discuss evidentiary discovery in the strict sense, we refer to the rules that regulate the moment at which the means of evidence and information that provides the basis for each party to advance their argument must be made known to the other party. From the perspective that we have been using in this analysis, this discovery is one of the fundamental conditions required for the trial hearing to be effectively contradictory and, as such, for the court to be able to filter information through it (Duce, Marín & Riego, 2008). In other words, we can say that it is an early exchange of information.

This early exchange of information may manifest itself in various ways and degrees. The US⁴⁰ courts have done the most to develop discovery in Anglo Saxon law, and it is there that it presents the highest level of evolution and has even served as a guideline for the British system (Peña Mardones, 2017). This procedural tool has four main functions: (i) to allow for equal access to information; (ii) to facilitate agreements; (iii) to avoid 'ambush trials,' which refer to trials in which one party cannot respond or react to information that takes it by surprise at trial; and (iv) to allow judges to clarify the facts (Andrews, 2013).

Under this model, the parties generally present their evidence in private meetings before an officer of the court (who acts as a receiver or actuary) who has been hired for

⁴⁰ According to the US Federal Rules of Civil Procedure, the purpose of discovery is to outline the key points or axes of the trial, investigate and determine the sources of evidence in the counterpart's possession and produce evidence that could be admissible at trial and not only that which cannot be obtained later (Sucunza & Verbic, 2015, p. 20).

that purpose, and the judge only intervenes to address questions or challenges posed by the parties for clarification (Vial, 2006). For example, in Canada's civil justice system, the discovery session is carried out in a neutral space and with the presence of a court clerk or reporter who is responsible for taking notes and recording all of the proceedings. Both parties appear at the session and examine and cross-examine each other (González Postigo, 2018, p. 17, our translation). These discovery hearings are different from a trial hearing because although the evidence produced during a discovery session can serve as the basis for a judicial ruling, the information cannot be used at trial, but must be repeated, this time in the presence of judges (Vial, 2006).

For its part, continental law has begun to develop and identify procedural mechanisms which, while they have a different origin and cultural basis than the traditional discovery process, also entail early presentation of information and evidence. Countries like Germany and Italy have identified what Berizonce (2016) calls mechanisms of preliminary evidentiary examination that allow for an early decision to be issued in the disputes. For example, Germany regulates the production of some expert evidence at this stage when this process can be used to avoid a trial. In Italy, the options for producing evidence early are expanded so that the parties can effectively negotiate the terms of an agreement.

As such, either as a variant of Anglo Saxon discovery or a mechanism of early production of evidence, it can be said that early discovery of evidence allows for the assessment of the advantages and disadvantages of negotiating and reaching an agreement in a case, discourages cases without sufficient merits from reaching trial and allows the parties to adequately prepare for an oral, public, and adversarial hearing and to effectively control the information.

From this perspective, in this section we analyze whether some of the codes have regulated a mode of early exchange of evidence and information that allows the proposed objectives to be achieved. To that end, we will first analyze whether one of the codes studied has consecrated a type of discovery or preliminary evidentiary examination, which we prefer to call proactive early evidence.⁴¹

In this sense, the first matter that is clear is that none of the reforms that we have analyzed regulate any mechanism close to the Anglo Saxon system's discovery. Understood as such, evidentiary discovery has not become commonplace in practice or in law in Latin American civil justice systems (González Postigo, 2018).

Nevertheless, we can identify codes in the region that systematically allow for and organize mechanisms for the exchange or procurement of evidence prior to the proceedings. We are referring to Brazil and Colombia.

Brazil's CPC provides the opportunity to present evidence early with proactive effects (to evaluate the strengths and weaknesses of one's case and that of the opposition in order to reach a settlement or project the possibilities in a possible trial). In regard to the

⁴¹ As Sucunza & Verbic (2015, p. 9) put it: "Proactive early evidence can make it possible to reach a settlement using any alternative dispute resolution mechanism through the information that it reports to the interested parties on any aspect of the dispute and can facilitate prior knowledge of the facts in order to justify or prevent the filing of a legal complaint." (Our translation).

topic that is of interest to us, Art. 381 establishes that early production of evidence will be allowed in cases in which: (i) the evidence to be produced may facilitate a settlement or another adequate means of resolving the dispute and (ii) prior knowledge of the facts may justify or avoid the preparation of the action. The judge will subpoena the parties interested in the production of evidence unless it is not contentious. No ruling is made on whether or not the fact occurred or the respective legal consequences. Any means of evidence may be submitted (Art. 382).

Colombia has its own version of this, which is called the extra-procedural evidence system (183 and following, COGEP). This procedural tool allows any individual who has a legal dispute to obtain information prior to the proceedings in order to better evaluate the facts, position, interests, strategy, resolution mechanism or create the dispute. Examinations of any party or other type of evidence may be introduced, though the counterpart must be included in the process in order to oversee its production. If this is not done, the proceedings must be repeated at trial (Arts. 188, 222 and following).

The rest of the countries lack such a system and only regulate the possibility of presenting early conservative evidence. In other words, evidence may only be produced in advance when steps must be taken to preserve it and as long as the interested party “presents and certifies a well-founded fear that it will be lost, altered or difficult to prove later” (Sucunza & Verbic, 2015, p. 6, our translation).

We emphasize that reforms must guarantee the early and broad exchange of evidence and information so that the parties to the dispute may determine whether they have a case that can go to trial based on their knowledge of the facts; prepare their defense and determine their litigation strategy; assess its strengths; and/or move towards the settlement of the dispute through an agreement or other mechanism.

Various models may be used, and these depend on a series of cultural and institutional factors. However, what cannot be ignored is the requirement to build mechanisms and (dis)incentives for achieving timely exchanged or forced procurement of evidence.

That said, recognizing and assuming that, in general, Latin American justice has not provided discovery mechanisms and that in Brazil and Colombia there are proactive evidence hypotheses, below we examine whether the other countries at least have adequate incentives so that the parties can access some sort of information in the early stages of the dispute. From this perspective, we are interested in observing whether the pleadings or other procedural tools, in the absence of evidentiary discovery itself, can provide a reasonable amount of information in order to evaluate opportunities for reaching an agreement or preparing for and engaging in effective cross-examination of the evidence.

In this regard, we observe that all of the regulations analyzed require at least that all means of evidence be listed in the respective written pleadings. This involves a formal announcement of the evidence which, as such, does not provide information that would allow the parties to move towards the aforementioned goals.

The variations that the codes present are related to aspects such as whether the documents and respective expert reports should only accompany said documents or if they

are admissible later; whether they should outline the facts with the evidence that will be used to certify them and whether witnesses should indicate what they will testify about in addition to being identified by name.

From this perspective, we could say that there is a first group of countries that only require a formal announcement of the means of evidence that the parties will use. They systems used in these countries do not provide any information that allows the parties to prepare to respond to the evidence and, as such, do not make the principle of contradiction operational. A regulation like this does not allow for early assessment of the case in regard to likelihood of reaching a settlement and would not provide the information required –or do it early enough– in order for the objective of debating the admissibility and exclusion of evidence can be an activity that is conducted fully and efficiently during the respective preliminary hearing.

The countries that could be included in this group are El Salvador and Honduras, in which a generic statement or formal list of the evidentiary means is sufficient to meet with the regulatory requirement.

The second group of countries includes those that provide more information in their requirements, as is the case in Costa Rica. While its CPC does not require that all of the evidence be associated with concrete facts, it does state that this is true for testimonial and expert evidence. The Code states that: (i) if testimonial evidence is proposed, the facts regarding which testimony will be offered must be listed and (ii) if there are experts, the specific topics that they will cover, and the expert's specialty must be identified.

This second group includes Ecuador, which not only requires that the facts regarding which the witnesses will speak be identified but also requires that the objects of processes such as judicial inspection or an expert report be specified. Bolivia's CPC is similar in that it states that any evidence that does not consist of documents must be identified, with the parties stating both the means of evidence that they plan to produce and the facts that they will demonstrate with it. Nicaragua's CPC states the same (Art. 241).

While it cannot be said that the second group provides a reasonable amount of information for establishing the conflict or adequately preparing the dispute, it does expand upon and extend the level of information that must be provided.

Finally, and as the arguments presented thus far indicate, none of the codes studied contain sufficient requirements or incentives to ensure that when the complaint and response are presented, the amount and quality of information necessary to meet the objectives set out in this section are met. Brazil and Colombia provide the opportunity to meet that goal through early evidence, but this procedural tool is optional for the parties and thus does not serve as a general incentive or requirement.

The table below summarizes the contents of this section, grouping the countries into each of the trends identified. We reiterate that one of the trends that could be identified corresponds to a variant of Anglo Saxon discovery, but this is not included in the table because it is not observed.

Table 13: Regulatory trends regarding the early exchange of information

General trend	Description	Country
Formal announcement of the evidence	The regulation does not require that relevant information be provided in the pleadings and is limited to the formal announcement or listing of the evidentiary means.	El Salvador Honduras
Expanded announcement of the evidence	The standard evolves a bit beyond the formality of identification and requires that the evidence at least be linked to the fact that it is meant to prove or part of the information that it provides must be listed.	Bolivia Costa Rica Ecuador Nicaragua
Proactive early evidence	Evidence may be produced prior to the pleading stage in an effort to reach a settlement and/or avoid a trial.	Brazil Colombia

Source: Developed by the authors.

Though we have identified these general trends, it is important to mention that these do not apply to documentary evidence given that all of the Codes tend to require –in a more or less rigid manner– that documents be submitted when the case is filed. In other words, documentary evidence is not only formally announced, but is effectively presented during the pleadings. When the respective document is in the power of the defendant or a third party, it is sufficient to state that when submitting the documents and request that they be produced at trial. In general, the systems provide for presumptions against the defendant that does not accompany the document and various sanctions for individuals who fail to provide the information. We note that a distinctive aspect in this regard in the Ecuadorean CGP is that it makes the regulation flexibly by stating that the respondent may present all of the documents or reports whose interest or clear relevance have emerged based on the response to the claim during the preparatory hearing.

There is clearly a problematic trend of limited space and consideration for discovery in the reform processes of the region. As we have noted, this is a problem because the exchange of information prior to the organization of any mechanism of resolution is key for analyzing the dispute and its merits, making it possible to move forward with the process, identifying a strategy and/or potentially improving the litigation and processing of the case. While Brazil and Colombia stand out because they regulate proactive early evidence, this is always optional, and as a result does not form part of the essence of the system. As such, we believe that it should be mandatory so that it can serve its purpose at the general level.

b. Burden of proof

Preliminary considerations

The concept of the burden of proof tends to be a problematic aspect of evidentiary law.

As such, prior to describing the regional situation of the codes analyzed, it is important to clarify the concept.

Proving is not a duty or obligation, but a burden. In other words, it is an imperative of self-interest. In those terms, the evidentiary incentive rests on a simple fact: proving is the only way to show that I am right and thus to secure a favorable ruling.

The burden of proof must be viewed from a double perspective. It is a rule of trial for judges (objective perspective) and a rule of conduct for the parties (subjective aspect).

The objective burden of proof is a rule of trial directed at the judicial official. Who should the judicial official rule against if he or she is not convinced of either position? Who is to be found in the right if the facts of the case have not been proven? We note that the judicial official has the duty to make a decision regarding the dispute even if it is not clear or the judge has questions (prohibition against *non liquet*).

The answer to these questions is the objective burden of proof, which is a trial rule that allows the judge to make a decision in cases of doubt or lack of evidence. As Taruffo puts it, "the function of the principle of the burden of proof is to allow the court to resolve the case when the main facts have not been proven." (Taruffo, 2008, p. 146, our translation).

The subjective aspect of the burden of proof is directed at the parties and is meant to regulate their conduct even though the evidence is "acquired for the process" and can be assessed independently from the person who contributed it. The purpose is to determine which one has the "imperative of self-interest" to contribute the evidentiary material regarding the various facts that are the object of the trial. The failure to meet the burden will allow the judicial official to apply the objective burden of proof: the party that fails to prove the statements of fact of their theory of the case will lose the trial.

From the perspective of English law, Zuckerman (2013, p. 1015 and following) explains this very eloquently and in a sense that is very similar to what has been developed in continental law.

In his book *On Civil Procedure. Principle of Practice*, he addresses the topic of the burden of proof as a norm that must respond to three essential questions: which party will lose the trial if the court is not convinced of the facts in question (the burden of persuasion), which party should contribute the evidence to support the facts in question (the burden of adducing evidence), and which level of evidence is required to consider the facts in question to be certain (the standard of proof). In our tradition, the latter aspect, which is known as the standard of proof, is generally treated as a separate issue even though it is intimately related to the burden of proof.

What Zuckerman defines as the burden of persuasion is what we call the objective burden of proof, and it is directed at the judicial official. The problem can be phrased differently than we did at the outset. Instead of asking who the court should rule in favor in case of evidentiary insufficiency, we can ask which of the parties should assume the cost of the fact that the facts of the case are not proven in the end. In Zuckerman's words, the party that has the burden of persuasion (the objective burden of proof) is

the one that should assume the risk of error or failing to convince the court because it would have to rule against that party if the facts of the case are not proven one way or another.

Dynamic burden: Regional trends

Various criteria can be used to determine who should assume the risk of evidentiary insufficiency or failing to convince the court. The first thing that we should consider is that the objective and subjective burden of proof (or burden of persuasion and burden of providing evidence) generally fall to the same party. Here the losing party who fails to convince the court will be the one that had the burden of producing the evidence (Zuckerman, 2013, p. 1016).

However, the burden –in its objective dimension– should also be understood as an originally autonomous procedural burden. In other words, it is a concept that is built around the problem of distribution and assumption of risk. As such, the criteria for placing risk on the head of one party or the other has evolved over time. This is due to several different reasons. The distribution of risk criteria is where the dynamic burden of evidence takes on special importance.

The reforms undertaken in the region over the past ten years have adopted various criteria. As we will see, all of them preserve as a general guideline the traditional criterion of *onus probandi* (the party that argues proves), but only some receive dynamic burdens or rules of modulation of the general criterion.

The first model expressly consecrates the dynamic burden of proof. In other words, the Procedure Code gives the judicial official the express power to distribute the burden of proof in a manner that differs from the traditional approach considering various circumstances or situations that each regulation specifies. All of them include the criterion of proximity or the easy of obtaining evidentiary material. For purely methodological purposes, we will call this trend the pure dynamic burden of proof. The codes that regulate this type of evidentiary burden are those of Brazil (Article 383, CPC)⁴² and Colombia (Article 167, CGP).⁴³

In the second model, while the rule does not expressly grant the judge the authority or duty to invert the burden of evidence in each case, its interpretation allows one to conclude that the legislator's intention was to establish it.

⁴² The first part establishes the general rule of the burden of proof. It then expressly grants the judge the authority to invert the burden of proof in the following situations: 1) in the cases provided for by law; 2) those in which, due to their specific characteristics, it is impossible or excessively difficult to comply with the traditional rules of the burden of proof; and 3) cases in which it is easier to obtain the evidence. In any case, the decision must be well-founded and may not make it impossible or excessively difficult to meet the burden assigned.

⁴³ The dynamic burden of proof involves presenting evidence *ex officio* or at the request of a party (though it does not determine the specific point at which this must be done), and the party that is in a "more favorable situation" must contribute evidence or elucidate the facts. In order to define that situation, the CGP establishes five illustrative criteria, leaving the formula open to any analogous or similar approach. Those criteria are: "1) proximity of the evidentiary material; 2) having the object of evidence in its possession; 3) special technical circumstances; 4) having directly participated in the facts that gave rise to the litigation; and 5) the counterpart being in a state of defenselessness or disability."

This is the case because, as the technical sheets for each country show, the codes expressly state that –in order to apply the rules of the burden of proof– the judicial official must consider the availability and evidentiary ease that corresponds to each of the parties based on the nature of the matter under discussion. The use of the same evidentiary distribution criteria and the duty to interpret the rule in a useful and comprehensive manner allow us to affirm their consecration.

We have identified this trend as the diffuse dynamic burden of proof. The countries that have regulations of this kind are Costa Rica (Article 41.1, CPC), Honduras (Article 238, CPC), and Nicaragua (Article 240, CPC).

Finally, countries like Bolivia, Ecuador, and El Salvador limit the distribution of the burden of proof to the terms set out in the law. None of them allow the judicial official to distribute the burden of proof in specific cases. In other words, these three countries only regulate the traditional burden of proof.

This is notwithstanding the legal presumptions introduced by the legislator in all of the systems through which the burden of proof that corresponds to one party is eliminated and the other is given the burden to prove the opposite of the presumed fact. Beyond the subtleties that they raise, what is certain is that the parties know them in advance and can organize their strategies, weighing their impact.

The table below summarizes the trends identified, offering a brief definition and a list of the countries that adopted each of the three models.

Table 14: Models of evidentiary burden

Model	Definition	Country
Pure dynamic burden	The law expressly gives the judicial official the authority or duty to distribute the burden of evidence in a manner other than the traditional one. It is generally linked to criteria such as evidentiary availability and convenience.	Brazil Colombia
Diffuse dynamic burden	The judicial official does not have the express authority or duty to invert the burden of proof. However, the interpretation of the rule allows one to conclude that the legislator intended to consecrate the dynamic burden of proof based on criteria of evidentiary availability and convenience.	Costa Rica Honduras Nicaragua
Traditional burden of proof.	The judicial official lacks the authority to modify the legal criteria of the distribution of the burden of proof. In other words, there would be no “dynamism” of the evidentiary burden because it would be defined in all cases by law.	El Salvador Bolivia Ecuador

Source: Developed by the authors.

As we have stated, general aspects of the procedural frameworks that approve the dynamic burden regulate it. However, there is a series of questions linked to its scope, administration and application that should be specified. For example, when does the judicial official form the belief that this specific case requires a distribution of the evidentiary burden that is different than that which is consecrated in the law? When will he or she inform the parties of this? What information is used to reach that conclusion and make this decision? How can we be sure that it is quality information? What can the parties do?

Some of these questions can be answered through systemic remission, appealing to the structural principles of the process and related rules. For example, discussions about evidentiary convenience can be addressed by analyzing the admissibility of the evidence in the preliminary hearing, reinforcing the contradictory principle and the opportunity to offer counter-evidence where applicable. Other questions will be clarified through case law, such as the scope of the notion of evidentiary availability and convenience. However, in both cases, it would be ideal for the legislator to provide clearer rules around the systemic integration of a non-pacific institution, the clarification of the authority of all of the participating subjects and the optimization of their performance.

2. EVIDENTIARY ADMISSIBILITY AND EXCLUSION

When we talk about evidentiary admissibility and exclusion, we are referring to the set of rules for excluding evidence that form part of a system or, to put it differently, to the study of the filters that determine which evidence will be allowed to be presented and contribute to the process.

There are two traditions in this area. The first is the classic rationalist tradition of evidence. Jeremy Bentham, an author who is completely against the existence of binding legal rules of evidence, has been the greatest proponent of this approach (Ferrer, 2010). This approach holds that the principle of free proof should govern, which holds that “except for where there are specific rules, evidence is free in the sense that all new relevant elements can be used based on the canons of common sense and rationality in order to prove the facts.” (Taruffo, 2011, p. 357, our translation). For those who hold this view, the purpose of evidence in the judicial process is to determine the truth and, in this sense, judges will be in a better position to reach that goal to the extent that they have more information and evidence (González Postigo, 2018).

This approach “coexists with a limited current that supports the use of very specific filters of admissibility to prevent low quality evidence from being admitted.” (González Postigo, 2018, p. 18, our translation). This approach comes from Anglo-Saxon law and consists of the rules of evidence, or the law of evidence, which is comprised of rules “that seek to exclude evidence which, otherwise (that is, based solely on common sense) would be admissible” (Taruffo, 2011, p. 358, our translation).

Adequate regulation of these rules or filters of admissibility is fundamental for the functioning of a hearings-based system and especially for the trial hearing to serve its

purpose. However, one shared challenge in this area has been identified as providing conceptual and practical clarity for the contents of these rules of exclusion, as they tend to establish very generic filters of admissibility that do not allow for true control of merit regarding the evidence presented by the parties and that they intend to introduce at oral trial (González Postigo, 2018).

As such, from the perspective of this analysis, in this section we review how the codes analyzed seek to determine which evidence should be allowed at trial and the criteria for their exclusion.

It is important to offer a few clarifications first. When analyzing the criteria of admissibility and evidentiary exclusion of the codes that have been regulated, it is important to keep in mind that the facts that will be the object of the evidence and evidentiary means that will be allowed to accredit them tend to be defined. The legislation occasionally confuses the two. As such, the regulations must be read in detail and with this clarification in mind in order to adequately arrive at the respective criteria and requirements, which are logically closely linked.

In view of this, below we briefly review the minimum and shared criteria that define the type of fact that should be the object of the evidence, and they are those that:

- (i) Are relevant in that they would form part of the factual approach which, if verified, would make the respective regulation applicable. In other words, they are related to the suppositions of fact covered in the law invoked.
- (ii) They are disputed. As such, all of the facts that have not been rejected or that were recognized by the counterpart should not be the object of evidence. It is true that in the majority of cases, we should produce documentary evidence and offer the remainder with our claim document such that, beyond the knowledge gleaned from prior negotiations or what we can learn from the set of options or strategies used by the respondent, we will not know which facts are in dispute for sure and within the proceedings. In that sense, we should increase the steps taken to protect all of the elements of evidence that we have and the means that we will use to produce them in regard to the facts that we must prove. If they are not rejected or are recognized, we must leave aside that evidence as unnecessary.
- (iii) They must be relevant. In other words, it is not enough for a fact to be in dispute. It must also be relevant to the resolution of the conflict. As such, we must verify that the facts are relevant in regard to how the dispute has been set up in order to support or dismiss the evidence.

In regard to the requirements of admissibility or exclusion of evidentiary sources and means, the issue is more complex given that there are differences in terminology and discrepancies in the interpretation of their meaning and scope. This is where concepts such as permissibility, legality, relevance, propriety, relevance, or need come into play.

The table below provides a brief overview of how the codes analyzed address these criteria.

Table 15: Criteria of evidentiary admissibility

Country	Criteria regulated
Bolivia	<ul style="list-style-type: none"> • Propriety • Legality • Relevance
Brazil	<ul style="list-style-type: none"> • Permissibility • Morality • Utility (do not appear as merely designed to delay)
Colombia	<ul style="list-style-type: none"> • Propriety (is not notoriously inappropriate) • Permissibility • Utility (are not manifestly useless) • Necessity (are not manifestly superfluous) • Relevance (is not notoriously irrelevant)
Costa Rica	<ul style="list-style-type: none"> • Propriety • Legality • Necessity (not excessive) • Relevance
Ecuador	<ul style="list-style-type: none"> • Propriety • Permissibility (not applicable when obtained with a violation of the Constitution or law) • Utility • Relevance
El Salvador	<ul style="list-style-type: none"> • Permissibility • Utility • Relevance
Honduras	<ul style="list-style-type: none"> • Permissibility • (Inadmissible when it has been obtained by violating fundamental rights or going against applicable legal provisions) • Origin • Relevance • Utility
Nicaragua	<ul style="list-style-type: none"> • Permissibility • Utility • Necessity

Source: Developed by the authors.

As we see above, the notion of admissibility refers first to the idea of substantive or formal legality of evidence, a requirement that is included using one name or another (permissibility or legality) in the regulations studied. In this regard, it is worth recalling that legality refers to not prohibiting evidence, and permissibility refers to evidence “whose evidentiary source is contaminated by the violation of a fundamental right or evidence that has been applied with an identical violation of a fundamental right.” (Picó, 2005, our translation).

As such, evidence (source and means) is admissible when its use is not prohibited by law, it has not been obtained in a manner that violates fundamental rights or guarantees, and it is offered with the timeliness and in the manner and form that the system allows. For example, illicit evidence or any evidence that is excluded by law in substantive and procedural rules is inadmissible.

Honduras' CPC merits special mention here, given that it expressly states that any evidence that directly violates procedural guarantees established in international human rights agreements that have been signed and ratified is prohibited.

The second filter that we should consider in the analysis of evidentiary admissibility is whether the evidence is materially and logically relevant. Relevance is mentioned in six of the eight codes, though none defines its meaning or scope. According to the Real Academia Española Law dictionary, 'relevant' is an adjective that describes a noun as "related to the suit". (Our translation). In this case, we are referring to material relevance.

Experts tend to analyze a second aspect of relevance that we believe will have special practical relevance for the purposes of litigation. Marin (2018) refers to this as logical relevance, stating that it exists when there is "evidence that tends to make more or less likely the existence of the alleged fact". (Marin, 2018, p. 181, our translation).

When admitting evidence, it is important to consider its logical and material relevance and, according to Marin, to determine whether it is logically and materially relevant, we must ask "whether the fact for which it is offered is relevant. In other words, if the fact is to be believed, it tends to meet one of the elements of the legal theory invoked". (Marin, 2018, p. 182, our translation).

Also tied to the idea of relevance is the notion of evidentiary appropriateness, which is present in four of the eight regulations. Evidence is appropriate when it aligns with the facts in dispute in the proceedings such that it can be used to clarify them.

Another common criterion is for the evidence that is presented to be necessary or, to put it another way, not excessive or overabundant. We believe that the meaning of this type of rule is found in the requirement of making rational use of resources. As such, evidence should be admitted to the extent that it is necessary to prove a certain fact.

The need or utility of the evidence should be evaluated on a case by case basis. It is important to consider that the numerical criterion works sometimes and is completely relevant in other cases. For example, if a large amount of evidence is introduced to prove different facts, it would not be overabundant. Or, if a great deal of evidence is offered to prove a same fact, but each piece of evidence contributes a different element to make its occurrence more likely, this would not be a case of overabundance either. It is also important to keep in mind that in some cases one must use the evidence listed and may present evidence to prove a related fact, which would not be considered excessive either (Marin, 2018, p. 184.) In this regard, the various codes establish that pieces of evidence may not be presented unless they address the facts that the parties have articulated in their respective documents, and that it will not be admitted if it is clearly irrelevant, superfluous, or merely meant to cause delays. In view of this, it is best to offer all of the evidence that we believe to be necessary and relevant to defend our position even if we have doubts about its admissibility, relevance, or appropriateness. This is because one can always decide not to present the evidence prior to moving forward with that process without facing procedural consequences. The only "unfavorable" aspect of this approach may be having given the judge information about a source of evidence that they believe should be presented and that does not actually favor our case the way we thought it did.

Finally, it is worth mentioning an element that we will expand on in regard to the purpose of testimonial evidence. We will just mention it briefly in this section because it has a specific connection to the admissibility of testimonial evidence and the persistence of a legal evidence system. We are referring to the existence of what are called disqualifications. As we explain in greater detail in the section on testimonial evidence, the persistence of testimonial disqualifications is wholly inconsistent with a free evidence or reasonableness approach and goes against the goal of generating quality information at trial. However, we note that, unfortunately, the majority of the countries present this trace of legal evidence and continue to regulate the disqualification system.

Below we present a brief table that summarizes the countries that use disqualifications and those that do not, which will be developed in greater detail in the respective section.

Table 16: Admissibility of testimonial evidence (disqualifications)

Countries that regulate disqualifications	Countries that do NOT regulate disqualifications
Bolivia Brazil Colombia Honduras Nicaragua	Costa Rica Ecuador El Salvador

Source: Developed by the authors.

3. PRODUCTION AND CONTROL OF EVIDENCE

The third area of analysis of evidentiary activity involves all matters related to the production or presentation of evidence and control over that process during the oral trial hearing. There are various aspects that can and should be analyzed in this regard, especially given that, as we have mentioned elsewhere, all of the codes have accepted the principle of the use of oral procedures. As such, in order to analyze how operational this principle is, or how it is being understood, it is essential to analyze the rules related to the production and control of evidence.

First, we briefly and comparatively identify the means of evidence that have been regulated and whether they represent an exhaustive list. Next, and as the focus on this section, we describe –without seeking to provide an exhaustive discussion and from a perspective focused on how well the use of oral procedures works– the main forms of evidence: testimony from the parties, documents, testimonial evidence, and expert evidence.

a. Regulated forms of evidence

All of the regulations cover similar forms of evidence, though they use different terms to refer to them. These are testimonial, expert, documentary and informative evidence,

judicial recognition or inspection and confession or statements from the parties. Several codes also include prima facie evidence and legal presumptions in the same section, although they are not forms of evidence.

The regulatory differences that we have observed have to do with the way that the various types are broken down and the way certain technological developments are received. For example, Brazil regulates documentation as well as the presentation of documents or artifacts, notarized documents, and electronic documents; Costa Rica accepts expert statements and scientific and technological forms of evidence independently; and Honduras, Nicaragua and El Salvador accept technical forms of storage and reproduction.

One noteworthy point in the regulation of forms of evidence is that all of the codes have a broad criterion in order to allow for greater access to sources. All of them allow for freedom in the types of evidence used, though with the aforementioned limitation that they not impact public morals or order, the freedom of litigants or third parties and that they not be prohibited for the case.⁴⁴ In other words, just as procedural frameworks regulate a series of forms of evidence that are “traditional or known,” they also allow for the use of any other type that may appear through scientific or technical advances.

There are two generally accepted rules that tie forms of evidence to admissibility: (i) the burden of producing evidence using the forms expressly provided for in the law and/or those that the judge allows at the request of a party or ex officio. In cases in which an “innovated, unanticipated or represented” form of evidence is contributed through the set of forms that procedural regulations cover, they will be processed by applying by analogy the provisions that are similar or, in their absence, in the manner established by the judicial official; and (ii) the impossibility of exchanging, replacing, or expanding a form of evidence with another that is applicable under the law, source or nature of the facts.

From this perspective, we can state that all of the codes have explicitly or implicitly moved away from the legal evidence system that established –generally and abstractly– which forms of evidence could be used and have replaced it with the principle of freedom of forms of evidence. This element undoubtedly encourages oral trial being established as a central element of the guarantee of due process and as an effective means of controlling information.

All in all, we believe that the principle of free means of evidence in some cases, such as that of Nicaragua, should be established explicitly and expressly and not regulated as a conditioned authority at the request of a party. To put it differently, we believe that in general, the rule should be that any means of evidence that is relevant should, in principle, be admitted in order to prove the facts of a case.

The table below summarizes this information

⁴⁴ For example, statements obtained through torture cannot be used as evidence unless they are used against the person accused of using torture as proof that the statement has been formulated (Arts. 15 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and 10 of the Inter-American Convention to Prevent and Punish Torture).

Table 17: Regulation of forms of evidence

Country	Regulated forms of evidence	Exhaustive list of admissible evidence
Bolivia	1. Documentary evidence; 2. Confession; 3. Witness statements; 4. Investigation and reconstruction of the events; 5. Evidence contained in reports; 6. Assumptions	NO
Brazil	1. Notarized document; 2. Statement from one of the parties; 3. Confession; 4. Presentations of documents; 5. Documents; 6. Electronic documents; 7. Expert testimony; 8. Testimony; 9. Judicial inspection	NO
Colombia	1. Statement from one of the parties; 2. Confession; 3. Sworn statement; 4. Third-party testimony; 5. Expert report; 6. Documents; 7. Reports; 8. Judicial inspection; 9. Physical items	NO
Costa Rica	1. Statement from one of the parties; 2. Statement from witnesses; 3. Expert report; 4. Documents and reports; 5. Judicial examination; 6. Scientific and technological evidence	NO
Ecuador	1. Testimonial evidence; 2. Documentary evidence; 3. Expert evidence; 4. Judicial inspection	NO
El Salvador	1. Documents; 2. Statement from one of the parties; 3. Questioning of witnesses; 4. Expert evidence; 5. Judicial inspection; 6. Sound, voice and image recordings and stored data	NO
Honduras	1. Questioning of the parties; 2. Testimony; 3. Expert evidence; 4. Documents; 5. Judicial inspection; 6. Technical means of storage and reproduction.	NO
Nicaragua	1. Questioning of the parties; 2. Documents; 3. Technical forms of evidence; 4. Testimony; 5. Expert evidence; 6. Judicial inspection; 7. Physical evidence	NO Although the law seems to establish this, new evidence may be added at the request of the party and in accordance with the regulated evidence.

Source: Developed by the authors.

b. Analysis and description of the main forms of evidence from the perspective of the quality of information

1. Statement from one of the parties

As Carbajal (2018) states, based on Art. 8.1 of the IACHR, reformed civil procedures in Latin America present a paradox: they emerged from the procedure reform movement that supports hearings-based trials but do not include procedural regulations that ad-

equately allow for the “right to be heard” to be exercised in civil proceedings. By contrast, they tend to hold the party’s statement as evidence and its production is conditioned by the offering of the counterpart. As such, they omit considering and regulating the statement of the party based on its own decision and initiative, which becomes important in the context of oral procedures due to the impact that it can have on the judge’s processing of the evidence.

The main question that should guide the reading of this form of evidence is thus if it is understood as a statement of the party as such (that is, that the testimony of the party is assessed as evidence independent of whether that statement favors or works against them) or if it continues to be the traditional confession or absolution of positions that the codes from the last century contain (which consider only facts that work against the declaring party to be evidence).

The table below presents information on the countries that can be described as allowing voluntary statements by the parties based on a systemic and comprehensive interpretation of their code and in keeping with the principles that inspire and sustain oral proceedings.

Table 18: Regulation of statements by the parties

Yes, allows parties to make voluntary statements (Expressly or based on interpretation of the regulations)		Only allows for forced statements by the parties
Costa Rica	The CPC regulates confessional evidence. However, in the general rules of the CPC and those focused on evidence, the statement of the party is not prohibited. Starting from this premise and without disqualifications, an interpretation of the code would lead one to conclude that this form of evidence should be allowed.	Bolivia Brazil Colombia Honduras Nicaragua
Ecuador	Based on Art. 174, a witness is defined as a party.	
El Salvador	Art. 344 expressly states that “each party may request a personal statement on the facts that are the object of the evidence.”	

Source: Developed by the authors.

Beyond this initial differentiation, it is important to note that countries that preserve “confessional evidence” have also changed their regulations in ways that would allow us to claim that they have changed their traditional approach.

For example, the law in Nicaragua does not determine how the conduct of a party who has been subpoenaed should be assessed. Testimony from the party that consists of silence or evasive answers does not have the effect of suggesting that the person is confessing to certain facts.

Colombia has introduced changes related to distinguishing between confession and a statement by the party. The former tends to be associated with the recognition of personal facts or those of which they have knowledge that have adverse consequences if they are confessed and regarding which the law does not require another type of evidence. Confessing requires capacity and power of disposition as an express, conscious, and free act. For its part, the statement by the party constitutes a summons –ex officio or from the opposing party– to testify regarding facts related to the proceedings in which certain facts are assumed if the person fails to appear or provides reluctant or evasive responses.

This distinction is also made in Brazil. As the technical sheet shows, if the party fails to answer a question or is evasive without a reasonable motive, the other circumstances and elements of evidence must be considered, and it will be stated whether or not the witness refused to testify when the sentence is read.

2. *Testimonial evidence*

Definition of testimonial evidence and regulation of disqualifications

One initial aspect that was observed in the codes is how testimonial evidence is conceived or understood and, closely tied to this, whether it is regulated in a system of disqualifications.

We will see that, in general, there is a more or less uniform trend regarding how testimonial evidence is conceived of or defined. In that sense, it tends to be said that any physical person with knowledge of the facts in dispute can be a witness based on having personally seen them. The only exception to this is in El Salvador. There the regulations state that the parties may propose a person who has knowledge of the facts as a witness, the rule clearly states that it may not be any person because the party may not be included in the list of witnesses. As such, it states that a witness is “any person who is not a party to the case that may have knowledge of the facts”. (Our translation). This definition is coherent and makes sense given that, as we saw in the previous section, this code allows for parties to testify voluntarily as a means of evidence. As such, the decision not to consider the party a witness has no negative impact because they may testify.

Beyond the definitions, the main problem that various codes present in regard to testimonial evidence is that that broad idea of witness-testimony is seriously restricted by the disqualification system that many regulations continue to include.⁴⁵ In other words, the evidence (source and type) is conditioned by a legal provision that has nothing to do with the capacity of perception of the witness or the information that they may

⁴⁵ See, for example, Arts. 294, 295, 298, 303, 312, 314 and following, Honduran CPC.

contribute to the process but is instead tied to a judgment and legal concept based on a personal condition. Rather than discussing witness credibility and the reason for their statements, strengthening the adversarial nature of the proceedings, personal, general, and abstract disqualifications are maintained.

The table below summarizes this information.

Table 19: Regulation of the concept and disqualifications of testimonial evidence

Country	How testimonial evidence is defined	Does it provide for disqualifications?
Bolivia	"Any person over the age of 17 may be proposed as a witness and shall have the duty to appear and testify except for in the cases established by law." (Art. 168)	YES Art. 169 (disqualifications) "Relative disqualification applies against a relative/dependent/someone who has direct or indirect interest/ students and teachers/ anyone with pending litigation/ close friend or sworn enemy/ debtors or creditors.
Brazil	"Testimonial evidence is always admissible unless the law establishes terms to the contrary." (Art. 442) "All persons may testify as witnesses except (...)" (Art. 447).	YES Art. 447. All persons may testify as witnesses except for those who lack legal capacity (injunction; under the age of 16; blind or deaf when knowledge of the fact depends on the senses that are lacking); barred (spouse, partner or similar; the party; those who represent the party); and suspect individuals (enemy or close friend; individual who has an interest in the matter).
Colombia	"All persons have the duty to present their testimony when asked to do so except for in the cases specified by law" (Art. 208).	YES Art. 211: Any of the parties may disqualify the testimony of individuals whose circumstances impact their credibility or impartiality based on their relationship, dependence, feelings, or interest in relation to the parties or their representatives, personal background, or other causes.
Costa Rica	"Any individual with knowledge of the facts in dispute who is over the age of 12 and has legal capacity may serve as a witness." (Art. 43)	NO
Ecuador	"A statement made by one of the parties or a third party." (Art. 174)	NO
El Salvador	"The parties may, as a form of evidence, present a statement during the proceedings made by individuals who are not parties to the case but may have knowledge of the facts in dispute that are the object of the evidence." (Art. 354)	NO

Country	How testimonial evidence is defined	Does it provide for disqualifications?
Honduras	"Any individual who has information on the facts in dispute that are the subject of the proceedings may testify as a witness. Any person may be a witness unless they are permanently deprived of reason or the use of their senses (...)" (Art. 294)	YES Art. 299: The court will ask (...) if the person has been or is the spouse, relative by blood or affinity, and the degree to which they are/have been a dependent or have a direct or indirect interest or are a friend or enemy.
Nicaragua	"Any person has the duty to testify as a witness when they have information about the facts in dispute that are the subject of the proceedings as long as they do not have an excuse and are not subject to a prohibition in this regard."	YES Art. 295: The judicial official will ask (...) if they are or have been a spouse or are in a stable union, are or have been a dependent of the party, have a direct or indirect interest or are a friend or enemy of the party.

Source: Developed by the authors. Our translation.

For example, we can see how the aforementioned problem is addressed in Bolivia. First, the fact that the code conceives of witnesses as individuals over the age of 16, and not only as third parties not involved in the proceedings, as was stated in Colonial period codes, emerges as what could have been a modern trend (Art. 168).

However, that legal virtue is obscured by Article 169, which regulates witness disqualifications, classifying them as absolute⁴⁶ and relative.⁴⁷ Based on a reading of this regulation, and having conducted a systematic interpretation of both of the articles cited above, the definition of witness would remain aligned with the old concepts in the sense that it would be understood that only someone completely removed from the trial and the parties could testify as a witness given the idea (or prejudice) that this would protect *the truth*. To put it another way, a witness would continue to be a third party with no interest in the dispute.

Brazil presents a very similar trend which, without referring to absolute or relative incapacities or impediments, rephrases these circumstances and indicates that anyone may testify except for those who would fall into the category of without legal capacity, prohibited from testifying or suspect, which the disqualifications system of a weighted legal system maintains.

The only countries that we could say have moved away from this system, at least at the regulatory level, are Costa Rica, Ecuador, and El Salvador.

We note as an example El Salvador's CPCM, which does not regulate witness disqualifications or ineligibility and, on the contrary, establishes that a witness' credibility will depend

⁴⁶ Among other things, it mentions individuals who suffer from serious mental or psychological issues; individuals in a state of drunkenness or under the effects of drugs or hallucinogens; and individuals who have been convicted of giving false testimony.

⁴⁷ Art. 169 II includes the dependent of the party for whom testimony would be given; direct, collateral or even adoptive relatives; the intimate friend or enemy of the party that presents the witness; or individuals who are debtors or creditors.

on the circumstances or facts that determine the veracity of their statements. This regulation is noteworthy in that it states that “the party that is harmed by the declaration of a witness may allege lack of credibility through any pertinent means of evidence based on the behavior of the witness while they testify or the way in which they do so; the nature or character of the testimony; and the degree to which the witness is able to perceive, remember or communicate the facts to which they are testifying”. (Our translation). The same article states that that allegation could also be based on the existence of any prejudice, interest or other motive of partiality that could affect the testimony or that witness’ previous statements. The latter basis must be interpreted in a restrictive, reasonable, and proportional manner in order to avoid restoring disqualifications through interpretation.

The most decisive aspect in terms of the efficacy of the use of oral procedures is not the understanding of testimonial evidence, but the existence of these traces of legal evidence that are absolutely inconsistent with systems of discretionary conclusion of fact or logical evaluation. Furthermore, this disqualification system has not only been removed from many procedure codes, but also, as Cappelletti (2006) explains, has been questioned for some time by individuals like Voltaire, who said in 1785 that “All men, regardless of who they are, can be allowed to testify. Idiocy, kinship, domesticity, infamy itself do not prevent him from having seen and heard well. It is the judges who are responsible for weighing the value of the testimony”. (Voltaire, 1785, p. 337, cited in Cappelletti, 2006, p. 111, our translation).

Examination, cross-examination, and suggestive questions

In general, and in accordance with the procedural approach adopted, statements must necessarily be given during a trial hearing (or multipurpose hearing) before the judge who is hearing the case. Exceptions are allowed if there is an opportunity to give testimonial evidence in advance (for example, Art. 198 of Ecuador’s COGEP provides for this) or testimony presented in writing (Art. 448 of Brazil’s CPC).

Another point that is addressed unequally is the organization of the examination of the witness, the discussion of their credibility and the grounds for their statements. As such, we observe that:

- (i) The figure of the judge continues to be central given that when they do not initiate the examination, they have broad powers to formulate questions for witnesses. In other words, they do not merely oversee the discussion or rule on objections. They have the authority to actively participate in the production of evidence.
- (ii) The discussion of witness credibility and their capacity to perceive or connect to the acquisition of the information do not play a notable role. We believe that there are several reasons for this. These include the continuation of a legalistic concept of the source and means of evidence, a simplistic vision of the activity, or the continued use of a disqualification system.
- (iii) While all of the regulations require the witness to provide reasons for their statements (which involves explaining what they are saying, how and why)⁴⁸,

⁴⁸ See, for example, Art. 221 of Colombia’s CGP. Costa Rica’s CPC notes that the witness must justify the circumstances of time, place, and mode in which the events occurred and how he or she came to have knowledge of them (Art. 43.4).

the method used to evaluate their statements directly impacts the opportunity to obtain and oversee the testimony and thus the quality of the information provided.

In that way, it is not irrelevant that the parties themselves examine and cross-examine, or that the judge asks questions. In general, the regulations do not seem to be designed for a trial hearing in which the litigation is high intensity, and the parties play a leading role in defending their interests through the adversarial proceedings.

The objections made reveal the problematic nature of regulations for realizing the key objective of the process as mechanisms of discussion: procuring quality information. The judge's role in the examination as a disincentive for generating robust adversarial proceedings and focusing on impartial assimilation of the information provided by the witness; disqualifications in the abstract or the lack of perception of the controversial and complex nature of testimony as a source of evidence conspire against the possibility of generating adequate, reliable, and relevant information for making an appropriate decision regarding the dispute.

For example, in Bolivia examination begins when the judicial official asks the witness to provide basic information and whether there is a reason for disqualification. The witness must immediately present the facts that they personally have access to in regard to the object of the dispute, justifying their statements and explaining the circumstances in which each event took place. The parties may examine the witness through their attorneys (Arts. 176 and following). As one can see, the court initiates and manages the examination. The court may reject questions that are impertinent or aggravating to the witness and may ask questions at any time and terminate the questioning (Arts. 176.3 and following).

Brazil's CPC stipulates that the questions put to the witness must be posed directly by the parties but allows the judge to ask questions prior or after that process is complete.⁴⁹

In Colombia's CGP, testimonial statements as such are begun by the judge, who examines the person in order to obtain a "spontaneous, precise and complete testimony". (Our translation). The parties may only examine the witness once the judge is finished.⁵⁰

By contrast, Honduras' CPC presents a regulation organized around the adversarial proceeding and with a residual role for the judge as the methodology for obtaining quality information. In that sense, it states that the declaration should be oral and adversarial, from and by the parties. The court ensures that the questions allow the witness to narrate the events in a linear, coherent, and logical manner without interruptions from the parties except for when there is a question, the witness contradicts themselves or they avoid providing all or part of the answer. In such cases, the judicial agency may examine the witness.⁵¹

⁴⁹ Arts. 456, 459 and 461, CPC.

⁵⁰ Arts. 212, 219, 221 and following, CGP.

⁵¹ Arts. 298, 300, 301, 304, 307, 308 and following, CPC.

One could criticize this approach in that only up to five witnesses may be called for each fact in dispute, and when three have answered, the judge may dismiss the remaining two. Furthermore, there are no adjustments that would make these rules reasonably flexible. Both aspects merit objections from the perspective of the right to evidence and the procurement of quality information.⁵² Nicaragua's CPC is similar, though it does do a better job of addressing these aspects (Arts. 292 and following).

Costa Rica's CPC differentiates based on whether the witness is an adult or a minor. Minors are examined by the court. Parties examine adult witnesses, though the court may intervene (Art. 43.4). We note that this intervention is optional and not mandatory. As such, it is up to the judge to determine when, to what extent and why to intervene.

There is a certain level of uniformity in regard to the form of the examination. In general, all of the regulations state that the plaintiff's witnesses testify first, and then those of the respondent except for when there is a request or provision to change the order. Furthermore, witnesses may not listen to each other's testimony and the questions that the parties ask (i) must be oral; (ii) may not refer to more than one fact; (iii) must be clear and concrete; (iv) may not include harassment or be offensive; and (v) must be answered personally without advice or reading notes unless the court authorizes the witness to do so based on the type of question asked.

From the perspective of litigation and quality of information, we note that El Salvador's CPCM explicitly allows for suggestive questions in the opposing party's examination, and states that the judicial official may only ask clarifying questions with the limits imposed by impartiality. Furthermore, it allows the parties to object to those questions and ask the witness about them (Arts. 366, 367, 369 and following).

Ecuador's COGEP contains a similar regulation, stating that the court may only ask questions for clarification when it is necessary (Arts. 174 and following).

In an effort to organize the elements of analysis that are most important in regard to how adversarial the proceedings may be as seen in this section, we present two tables that group together the regulatory trends identified in regard to the regulation of suggestive questions—a tool that constitutes the highest expression of this principle—followed by a table that summarizes who begins examining witnesses.

⁵² Arts. 296 and following, CPC.

Table 20: Regulations on suggestive questions during cross-examination

Type of regulation	Country	Regulation
Prohibited expressly and/ or in general terms (does not distinguish between only examination or also cross-examination)	Brazil	(Prohibited in general) The judge shall not allow questions that may induce the answer, are not related to matters of fact that are the subject of the evidentiary activity or that involve repeating the answer to another question that has already been asked (Art. 459).
	Colombia	(Prohibited in general) The judge shall reject irrelevant questions, impertinent statements, and superfluous exchanges. The judge also shall reject questions that seek to provoke concepts of the witness that are not necessary to clarify their opinions. The parties may object to questions for the same reasons for exclusion referred to in the previous paragraph and when they are suggestive. Questions that insinuate the answer should be rejected, though once the examination is complete, the judge may reformulate the question, eliminating the insinuation, if they deem such action necessary (Art. 220).
Prohibited expressly and/ or in general terms (does not only distinguish between examination or also cross-examination)	Costa Rica	(Prohibited in general) The court will reject questions and answers that are not directly related to the disputed facts or the object of dilatory intent, which refers to evident, notorious, or admitted facts or those in which the question is suggestive, insinuates the answer, offensive, harassing, or capricious (Art. 41.4).
Prohibited expressly and/ or in general terms (does not only distinguish between examination or also cross-examination)	Honduras	(Expressly prohibited during cross-examination). "Art. 306. Examination by the other parties. 1. Once the questions formulated by the party's legal professional have been answered, the party that proposed the testimonial evidence referred to in the previous article may ask the witness questions that go to proving the facts as long as they have not yet been asked. 2. Capricious, suggestive, irrelevant, or prejudicial questions will not be allowed. Questions that do not refer to the witness' own knowledge will not be allowed." (Our translation).
	Nicaragua	(Prohibited in general) The questions put to the witness must be formulated orally with due clarity and precision without including opinions or qualifications. Any questions that do so shall be taken as not formulated. Capricious, diffuse, suggestive, ambiguous, impertinent, useless questions and those that may be prejudicial to the witness shall not be permitted. Questions that do not refer to the witness' own knowledge will not be allowed.(Art. 296)
Not expressly allowed, but not prohibited. (May be included as best practice.)	Bolivia	Questions may not refer to more than one fact and must be clear and concrete. No harassing or offensive questions will be allowed (Art. 176)

Type of regulation	Country	Regulation
Expressly regulated.	Ecuador	Suggestive questions about introductory issues that do not impact the disputed facts, review information contributed by the witness in the past or are put to a witness that the judge has recognized as hostile may be asked. They are also allowed during cross-examination when the statement of a party is offered at the request of the other (Art. 177).
	El Salvador	Once the direct questioning is complete, if the other party does not wish to cross-examine the witness, the judge or president of the court shall be allowed to ask questions, and suggestive questions are permitted (Art. 367).

Source: Developed by the authors.

As one can see, although all of the countries have consecrated the principle of the use of oral procedures in their regulations and, with the exception of Ecuador and Costa Rica, have also regulated the principle of adversarial proceedings, only two have regulated and considered one of the basic tools that allow both of those principles to be operational. Only Ecuador and El Salvador understand that suggestive questions are the only way to cross-examine the evidence and, as such, they are the only countries that follow the use of oral, adversarial procedures from this perspective.

On the opposite side, we found that five of the eight countries analyzed expressly prohibit suggestive questions during questioning. These are Brazil, Colombia, Costa Rica, Honduras, and Nicaragua.

In regard to this group, it is important to note that the only country that actually prohibits suggestive questions in cross-examination is Honduras, for which another interpretation is unfortunately not possible. However, in the other four countries, the prohibition against suggestive questions is generic, and there is no specific information or clarification about whether this is for direct questioning and/or cross-examination. In regard to the use of oral procedures, it is clear that direct questioning cannot include suggestive questions, and, in that regard, there are no issues with the regulations. However, in order for the aforementioned principles to be operational, we believe that said regulations could –based on a systemic and comprehensive interpretation that considers the principles that inspired the system– conclude that said generic prohibition refers to direct questioning and not cross-examination.

Finally, the analysis of the Bolivian case shows us that suggestive questions are not prohibited even in general terms. As such, the previous interpretation could be perfectly applicable, and the use of suggestive questions could be introduced in cross-examination through protocols and/or best practices.

The table below lists who begins the respective examinations.

Table 21: Who begins witness examination in practice?

Who examines the witness?	Country	Regulation
The parties	Brazil	The parties will put questions to the witness directly, beginning with the party who subpoenaed him or her. The judge may ask the witness questions before or after the parties do so. The parties pose questions separately and in turn (Art. 459 and 456).
	Costa Rica	The party will formulate the questions without the mediation of the court. The witness shall be questioned by the party that presents them, then the opposing party, and finally the court, for whom intervening is mandatory (Arts. 41.3 and 43.4).
	Ecuador	Following the oath and other formalities, the party that has requested the presence of the witness shall examine them. Once that process is complete, the counterpart may cross-examine. The court may ask for clarifications on specific points if such action is determined to be necessary (Arts. 174 and 178).
	El Salvador	The judge places the witness under oath and then the party who presents the witness must identify them. The party who proposed the witness will then conduct their examination and, once that process is complete, the opposing party may cross-examine the witness (Arts. 366 and 367).
	Nicaragua	The questioning begins with formal questions posed by the judge in order to identify the witness and determine if there is a reason to disqualify them. Each party will then examine their witnesses after which the opposing party may ask questions. The court may ask questions in order to clarify or add information (Arts. 295, 296 and 298).
	Honduras	Each party will examine its witnesses and then the other parties may ask questions. Once the general questions have been answered, the witness may be questioned by the party who proposed them and, if they were proposed by both parties, the complainant's questions will be asked first. (Arts. 300 and 302)
Judge	Bolivia	The judicial official will question the witness on formal aspects and causes for disqualification and will then order the witness to present the facts that they have in regard to the object of the dispute. The witness is also asked to justify their statements, explaining the circumstances in terms of time, mode, and place in which each event occurred. Once the witness has finished their testimony, the parties may freely examine them through their attorneys and under the direction of the judge, who may formulate new questions at any point in time (Art. 176).
	Colombia	The judge shall succinctly inform the witness of the facts that their statement must address and will order them to offer a narrative of what they know. Once this is complete, the parties will examine the witness to determine precisely what they may know about those facts and to secure a spontaneous report on them from the witness. The judge may then question the party who requested the evidence and cross-examine the opposing party. The judge may question them at any point (Art. 221).

Source: Developed by the authors.

In regard to this aspect of the proceedings, these trends are a bit more auspicious given that examination is initiated by the parties in the majority of the countries, though, as we noted above, the role of the judicial authority continues to be very prominent in some of them. However, we see that this role is only dominant in Bolivia and Colombia. There judges are charged with managing the examination by law. This reading of the rule shows that the parties have a practically residual role in the process. This trend follows the Uruguayan COGEP model.

3. *Documentary evidence*

The provisions regarding documentary evidence are fairly uniform. In general, they regulate the types of documents that may be used, the requirements for submitting them, their value, the process of challenging them and means of comparison. All of the procedural systems are complemented by substantive rules and special laws.⁵³

In terms of access to evidence, the Codes have broad criteria. The notion of the documents that they receive is quite broad, which maximizes their condition as an instrumental input for proving facts. In that regard, document is understood as any element that gathers, contains, or represents a fact or states, constitutes, or incorporates a piece of information.

Colombia's CGP even regulates data messages, stating that they will be assessed as documents that have been contributed to the same format in which they were generated, sent, or received, or in another format that precisely reproduces them. The simple printing of a data message on paper will be assessed in accordance with the general rules on documents.⁵⁴ Brazil's CPC contains a similar rule (Arts. 441, 439 and 440).

They are also uniform in regard to when such evidence is offered and produced at trial. The general rule is that the parties offer the documents and accompany them with written pleadings. Some documents that have taken on importance as a result of the arguments made by the counterpart are excluded. In these cases, the party may present the evidence during the initial or multipurpose hearing. Suppositions of further knowledge must be duly justified.⁵⁵

The regulatory problem is the quality of the information that these documents contribute to the process. This is the case because the majority of the codes do not offer clear rules about how to litigate these documents (make them speak). They contain rigid statements associated with the nature of the tool or their lack of information, or do not guarantee a robust discussion about the generation, circumstances, and scope of the information that they contain.

In contrast to the majority of the regulations, Ecuador's COGEP states that the documents –having been developed by a person– must be incorporated into the proceedings during a hearing in accordance with the nature of the proceedings. In that sense,

⁵³ See, for example, Articles 267, 269, 274 and following in the Nicaraguan CPC, 269, 270, 273, 274, 278 and following in the Honduran CPC and Articles 45 and following in the Costa Rican CPC.

⁵⁴ Arts. 243, 246, 247, 257, 260 and following, Colombian CGP.

⁵⁵ See, for example, Arts. 285, Nicaraguan CPC; 287 and following, Honduran CPC; or 435 and following, Brazilian CPC.

the documents are read and presented publicly by the pertinent party, and photographs, recordings and audiovisual, computer and any other electronic elements that can be attested to also will be reproduced by the pertinent party during the hearing using any appropriate means of sharing them with those in attendance (Art. 196).

In regard to material or tangible evidence, El Salvador's CPCM stipulates that when one of the parties seeks to prove their facts through an object, photograph, video, means of data storage, image, voice, or information or using any instrument or document that must not be included in the claim or response, they must be included in the hearing through testimony (Art. 325).

4. *Expert evidence*

When the ability to prove a fact depends on technical or scientific knowledge, all of the Codes require –under the condition of inadmissibility– the offering and production of reports, studies, or expert analyses.

Given that the facts in dispute that must be examined may be more or less complex, Brazil's regulation is interesting in that it states that if the point in dispute is fairly straightforward, the expert testimony may be replaced with simplified technical evidence.⁵⁶

In general, the regulations order that a single expert be appointed, though each party may have consultants (for example, Arts. 193 and following, Bolivian CPC). The goal is to optimize the use of time, achieve economy of resources, and simplify the proceedings.

The expert is considered a judicial assistant and the role is commonly a public position. All of the codes allow the judicial agency or parties to use specialized public or private entities. We are not referring to the expert advising services that exist in some countries as part of the judiciary or another state agency, but to universities or even private laboratories.

For example, Honduras' CPC states that the parties may choose between presenting a report drafted by a private expert and requesting that an official expert appointed by the court participates. Private reports must be included in the initial documents or pleadings unless it is impossible to do so. In that case, they must be included prior to the preliminary or multipurpose hearing.⁵⁷ However, the party that withdraws or cannot offer a private report may ask the court to appoint an official expert. The court shall rule on the legitimacy of the report and the aspects that it should cover based on the parties' proposals and those that it decides to formulate *ex officio* (Arts. 321 and following).

By contrast, judicial officials in Costa Rica are designated using a list developed by the judiciary based on the nature and purpose of the expert testimony. This is the case even

⁵⁶ The simplified technical evidence consists of the examination of the specialist by the judge regarding the point in dispute in the case that requires special scientific or technical knowledge. During the examination, the specialist, who should have specific academic training in the area about which he or she will testify, may use any technological resources required to transmit sounds and images in order to clarify the points in dispute in the case (Art. 464, paragraphs 3 and 4, CPC, our translation).

⁵⁷ Arts. 315, 319, 324.2, 425.6 and following, CPC.

when the parties can have technical experts or consultants to examine the report and expert's results during the hearing (Art. 44.2, CPC).

In many cases, professionals must register with databases that the countries maintain. This can be positive for ensuring adequacy in the abstract and for generating professional monitoring and oversight mechanisms. However, it seems problematic when registration is taken as sufficient to base the case on the expert's credibility and expertise.⁵⁸ The discussion regarding the expert's qualifications or lack thereof during the trial hearing prior to the presentation of his or her testimony is key.

In that regard, Ecuador's COGEP states that the expert may be asked questions during the trial hearing and presented with evidence that has not been announced in advance in order to determine their partiality and lack of adequacy, to disprove the technical or scientific rigor of the conclusions reached and any other purpose in order to establish or challenge their credibility (Art. 223).

There are various rules regarding the offering and production of evidence. Some countries require that the expert testimony be submitted with the claim or response (375 of El Salvador's CPCM). In others, when the expert evidence is admitted, produced, and sustained prior to the hearing, it may simply be offered, and the expert may –according to the legislation– appear in order to provide explanations on the report issued and answer questions posed.

This is a critical point given that the likelihood that quality information will be procured diminishes when the expert does not participate in the trial hearing. This is especially true for experts because their condition as such derives from proper questioning of their credibility; the degree of adversarial exchanges; the dynamism of the hearing; the immediacy of the expert's presence and the parties discussing the methodology, quality, and solidity of the report; and the court's ability to receive all of this.

For example, in Brazil the expert must submit their report at least 20 days prior to the investigation hearing and trial. The result will be substantiated by the parties' interaction, and they may ask questions that complement or contrast with the technical assistant's opinion.⁵⁹ The judge may reject questions that they deem to be impertinent and formulate those necessary to clarify the case. The expert has the duty to clarify the points made and, only where there is a need for clarification, the party will ask the judge to require the expert or technical assistant to appear at the investigative hearing and trial (Arts. 469, 470, 477 and following).

Colombia's CGP states that the party that intends to use expert testimony must provide it when evidence is requested. When the timeframe provided is insufficient, this may be explained in the respective document and submitted within the period provided by the judge.⁶⁰ The party that has not submitted the report may ask the expert to appear at the

⁵⁸ See Arts. 156, 157, 465, 471, 476 and following, Brazilian CPC.

⁵⁹ The expert must give the parties' assistants access to and the opportunity to attend the tasks and examinations that they conduct. The communication must be logged in the documentation and the parties must be given at least five days' notice (Art. 466, paragraph 2, CPC).

⁶⁰ Arts. 47, 48.2, 226, 227, 234 and following, CGP.

hearing, submit another report or do both. The judge will subpoena the expert to speak when they deem such action necessary (Art. 227).

The legal requirements for the submission of the report also go against the quality of the information that can be obtained for the dispute. While most of the codes set out standards, they are not always clear and precise.

For example, the Colombia CGP stipulates that the ruling must be clear, precise, exhaustive, and detailed, explaining and documenting the methodology and basis for their conclusions (Art. 226).

By contrast, Brazil's CPC is much more stringent, stating that the expert report must contain the presentation of the object of the analysis, the technical or scientific analysis conducted, the method used –clarifying and showing that it is the method accepted by most specialists in the field in which it originated–, and a conclusive answer to all of the questions posed. The rationale must be stated in plain language and exhibit logical coherence, indicating how the expert arrived at their conclusions (Arts. 473 and 475).

As is the case with testimonial evidence, the codes have differing positions on the methodology for presenting the expert report during the hearing. In some cases, the parties ask questions first. In others, the judge begins the process. All of the codes allow the judicial agency to ask questions of the expert, whether or not they began the discussion.

A related point to consider is the assessment of the expert's work and their level of connection to the judicial agency. In general, the legislation does not provide more specific information about how the testimony is to be weighted on its own and with the other sources of evidence.

Other problems that are common in the area of expert evidence and regarding which the codes do not tend to provide adequate answers are: (i) the financing of costs related to advances in cases of benefits of litigating without expenses or legal exemptions for subjects or disputes with preferential protection and (ii) the construction of a design that adequately articulates the public and private systems, builds financing tools, sets clear guidelines for regulating honoraria and guarantees timely collection of payments.

In regard to this, the creation of public-private funds for cases of legal exemption is relevant, as is the incorporation of rules for regulating oral proceedings (which require the parties' presence and work during the hearing); setting guidelines for limiting the judge's discretion in the regulation; the inclusion of a guideline for distinct enforceability (for example, charging honoraria based on the defense of the ruling during the hearing) and/or, in their absence, provisional or special execution for this type of procedural costs.

4. ASSESSMENT OF THE EVIDENCE

The fourth and final level of analysis of the evidence is focused on what has been one of the most problematic and least developed areas in evidentiary theory. We are referring

to the structure and legitimacy of the judge's decision, that is, the assessment of the evidence and resulting basis for the sentence. In this regard, González Postigo (2018) –citing Binder– explains that evidentiary theory has focused on all matters related to the basis for the sentence but has left aside the analysis of the rationality of its structure, that is, the assessment of the evidence.

The assessment of the evidence has been understood as the “activity of perception” that the judge engages in regarding “the results of evidentiary activity that is conducted during the proceedings.” It is an activity that includes the critical examination of evidentiary material and the process of reaching conclusions about it (Nieva, 2010, p. 34, our translation.) In other words, we are referring to the process of critical perception and evaluation or credibility that the judicial official conducts regarding the information that has been produced –ideally– through litigation in an oral, public, and adversarial hearing.

In general, the ways in which this activity of perceiving and judging evidentiary material can be conducted have oscillated between free assessment and legal assessment of the evidence. In the first, the judicial official conducts the aforementioned mental exercise without any external restriction other than their logic. In the second, and as a result of the discretion that the former generated, that activity must be conducted in accordance with certain requirements that begin to crystallize in positive rules (Nieva, 2010). We also know this as the system of evidence of free conviction or the system of legal/weighted evidence.

The purpose of the second system was to oversee the judicial discretion. It includes various legal regulations that seek to limit it and require judges to follow previously established guidelines in order to reach their conclusions. As such, and as is well known, a legal evidence system contains, among many other guidelines, rules that refer to the need to prove the facts through witnesses (and even a specific number of them) or documents; to define the assessment of a means of evidence in the abstract without leaving room for the judge to do so (for example, that a document with specific characteristics consists of full evidence); or to prevent certain people from testifying by law (Nieva, 2010).

For its part, the free assessment of evidence system has had a long evolution and various legal expressions. One of the best known and broadly implemented in regulatory systems is what is called the evidence assessment system that follows the rules of sound judgment or consideration based on judicial awareness.

Below, we explain which systems for assessing evidence have been used in the codes analyzed and how said regulation materializes.

While we recognize that there will be no fully free or fully legal system, both comparative law and doctrine have recognized the existence of a long process of moving away from the legal evidence system and the advantages of this approach.⁶¹ This is fundamental from the perspective that we have been using to analyze rules of evidence. That is the

⁶¹ See: Cappelletti (2006), p. 94 and following.

case because if one observes the existence or dominance of the evidentiary rules associated with a legal system, the advantages that an oral system generates in terms of improving the quality of the information upon which a ruling is based, given that it is the law, in the abstract and, *ex ante*, that which defines a certain way of evaluating each category of evidence. And this, logically, regardless of the level of conviction or credibility that said evidence generated in the specific case (Duce, Marín & Riego, 2008).

A first point that emerges is that, at least formally, the majority of the regulations refer to sound judgment as a system for assessing evidence. As we can see from the table below, nearly all of the codes have expressly and literally established that judges should assess evidence using this system. Brazil and Costa Rica have not regulated it in a literal manner, but the way in which the rules are written undoubtedly suggests this.

In general, all of the countries have established this system in fairly general and vague terms, indicating only that the evidence will be assessed “in accordance with the rules of sound judgment” or using similar expressions. A few codes reveal an effort to expand or delineate its scope and meaning, though this is still not sufficient. For example, the Honduran CPC stipulates that the judge must assess the evidence in a precise and reasoned manner in the sentence, always following the rules of sound judgment, knowledge, human criterion, and logical reasoning (Arts. 13, 245 and 479, CPC). Similar efforts can be observed in the regulations put forth in Brazil, Bolivia, and Costa Rica.

In addition, *no clear guidelines or methodological and interpretive standards that might guide the mechanics of assessment are observed*. The codes only include rudimentary rules associated with general issues. These include: the duty to consider the evidence as a whole, considering the each individual element produced; the duty to consider each and every piece of evidence produced, identifying those that may help form an opinion and those which must be dismissed; developing criteria or –when more than one piece of evidence is directed at determining the existence of a single fact or the way in which it was produced, the duty to put them together; paying special attention to and reasoning the final result that is reached.

While these can be applied based on the conventional framework or substantive laws, the procedural regimes analyzed do not present changes or special standards regarding certain types of disputes (such as cases of gender violence). The only one that is included is that sound judgment operates “leaving aside the existence of special rules.”

Bolivia is, in this sense, the only country that states that the judicial official will consider the cultural reality in which the evidence has been produced (Art. 145.III CPC). While this does not provide the desired level of precision, it does contribute a new element and perspective to this activity.

In regard to expert evidence, it is important to note in a positive sense that the majority of the codes include specific elements that should be considered in the assessment of the report. These include the expert’s competency; the scientific or technical principles upon which it is based; the solidness, clarity, exhaustiveness, precision, and quality of its foundations; and the alignment of its application with the rules of sound judgment and other elements that the case offers.

Having noted that, though there are important lacks in regard to regulation, all of the countries have looked to introduce a free evidence assessment system based on the rules of sound judgment, it is problematic that *all of the codes preserve legal evidence assessment guidelines*. We will see below that either through the regulation of testimonial disqualifications or the ex-ante allocation of evidentiary value, the regulations maintain weighted assessment of certain evidence. This is not consistent epistemically (that is, in terms of accumulating contradictory assessment systems) and reflects dysfunctionality in regard to comprehensive assessment and the comprehensive implementation of a system based on oral proceedings.

For example, the Honduran CPC states that legal assessment of evidence is only admissible in the examination conducted by the parties and documentary evidence, and solely when a rule expressly states as much or is unequivocally deduced from it (Arts. 13.2 and 479.2). The same is true in the case of El Salvador (Art. 416) and the other legislation that preserves a weighted value for certain documents or statements. In regard to documentary evidence, we will see that all of the countries assign the evidentiary value that it must have by law to a greater or lesser extent. Something similar occurs with statements by the parties or confessions. There, too, the law assigns an abstract value, and Ecuador is the only exception in this regard. We found variations in the opportunity to contradict the respective presumptions with greater or lesser intensity.

Finally, and as we noted in the section on evidentiary admissibility and explained in regard to the analysis of testimonial evidence, nearly all of the countries—with the exception of Costa Rica, Ecuador, and El Salvador—include complaints or disqualifications as vestiges of legal evidence.

Table 22 provides more detailed information.

Table 22: Systems for assessing evidence

Country	System expressly set out in the code	Regulation	Vestiges of weighted legal evidence system
Bolivia	Sound judgment	The evidence will be assessed as a whole, considering each of the pieces of evidence produced and based on the rules of sound judgment or prudent criterion unless the law expressly states something to the contrary. The judicial official will consider the evidence based on the cultural reality in which the evidence has been generated (Art. 145).	YES <ul style="list-style-type: none"> • Testimonial disqualification • Statement from one of the parties • Documents
Brazil	Suggests sound judgment	The judge will evaluate the evidence independently of the subject who has presented it and will rule based on the reasons they reached that conclusion. They will apply the rules of common experience based on the observation of that which ordinarily occurs and the rules of technical experience with the exception of expert testimony (Arts. 371 and 375).	YES <ul style="list-style-type: none"> • Testimonial disqualification • Statement from one of the parties • Documents

Country	System expressly set out in the code	Regulation	Vestiges of weighted legal evidence system
Colombia	Sound judgment	The evidence must be evaluated as a whole based on the rules of sound notwithstanding the formalities set out in substantive law for the existence or validity of certain acts. The judge shall present a reasoned opinion on the merit assigned to each piece of evidence (Art. 176).	YES <ul style="list-style-type: none"> • Testimonial disqualification • Statement from one of the parties • Documents
Costa Rica	Suggests sound judgment	The evidence will be evaluated as a whole based on the criteria of logic, experience, science, and correct human understanding except for legal texts that expressly set a different rule for evaluation. The conduct of the parties during the proceedings may constitute an element that ratifies the appreciation of the evidence (Art. 41.5).	YES <ul style="list-style-type: none"> • Statement from one of the parties • Documents
Ecuador	Sound judgment	The evidence must be evaluated as a whole based on the rules of sound judgment notwithstanding the formalities set out in substantive law for the existence or validity of certain acts. The judge is required to convey the assessment of all of the evidence offered in order to justify their decision in their ruling (Art. 164).	YES <ul style="list-style-type: none"> • Documents
El Salvador	Sound judgment	The judge must assess the evidence as a whole in accordance with the rules of sound judgment. However, the terms set out on weighted value will be considered for documentary evidence. The court must attribute value or meaning to each specific piece of evidence, determining whether or not it contributes to establishing the existence of a fact and the way in which it was produced. When more than one piece of evidence has been presented to establish the existence or mode of a single fact, said evidence must be assessed together with special motivation and reasoning (Art. 416).	YES <ul style="list-style-type: none"> • Statement from one of the parties • Documents
Honduras	Sound judgment	The judge must assess the evidence in a precise and reasoned manner in the sentence, following the rules of sound judgment, knowledge, human criterion, and logical reasoning unless a specific assessment is set out in the code or another law. The legal assessment of the evidence is only admissible during the examination of the parties and in documentary evidence, and solely when a rule expressly establishes this, or it is unequivocally deduced from it. In any case, the sentence must include the reasons that led the judge to assess the evidence and arrive at their decision whether or not a rule requires them to do so. Arbitrariness is prohibited. (Arts. 13 and 245).	YES <ul style="list-style-type: none"> • Testimonial evidence (assessment based on express text and disqualification) • Statement from one of the parties • Documents

Country	System expressly set out in the code	Regulation	Vestiges of weighted legal evidence system
Nicaragua	Sound judgment	The assessment of the evidence must be clear, precise, and based on reason in the sentence, always following the rules of sound judgment, knowledge, and human criterion and on the basis of the rules that govern logical reasoning. The evidence will be assessed as a whole and each of the pieces of evidence used to consider one of the facts proved must be noted clearly and definitively as the basis of the sentence (Art. 251).	YES <ul style="list-style-type: none"> • Testimonial disqualification • Statement from one of the parties • Documents

Source: Developed by the authors.

Clearly, despite the codes that sought to formally install a system of free evidence under the rules of sound judgment, that system *coexists with important and clear rules that demonstrate the persistence of the legal evidence system*. As we noted at the beginning of this section, this systemic incoherence in the codes is very problematic, “given that it involves excluding some means of evidence from the oversight systems that the procedural system itself introduces, such as confrontation and reasoning”. Furthermore, said exclusion is conducted “in an abstract and general manner without considering, for example, the degree of controversy that may be generated regarding that evidence in that specific case” (Duce, Marín & Riego, 2008, p. 88, our translation).

Evidentiary standards

One important aspect to explore in regard to evidence is related to evidentiary standards or standards of conviction that refer to the level of confirmation required to reach a certain judicial decision. The evidentiary standard is the criterion that indicates the level of corroboration that a certain hypothesis must have to be considered proven. In other words, this is the criterion that defines the threshold above which a hypothesis can be attributed to the category of proven fact (Ferrer, 2010).

The regulatory analysis confirms that this debate is ongoing, which aligns with the weakness in regard to evidence assessment that has been noted (González Postigo, 2018). None of the codes has a guideline or criterion that indicates the level of confirmation required in order to consider a hypothesis proven. While it is common to observe and argue that a preponderant or prevalent standard of evidence operates in civil justice, there are no criteria for determining what, specifically, is required for evidence to be preponderant. In other words, we do not know what level of confirmation is required to state that a hypothesis can be taken as proven and another one not (Ferrer, 2010; González Postigo, 2018).

This is not the first time that scholars have observed that there is a lack of regulatory criteria for defining this evidentiary threshold. Ferrer (2010) argues that in both common and civil law, the evidentiary standards are practically non-existent and that they must be built and regulated given that the epistemology does not constitute a sufficient

guide for this work based on its nature. In this regard and based on the fact that the epistemology cannot determine the standard of evidence, the adoption of this criterion is a social/legal decision that is made based on the consideration of the assets at play and the cost that a judicial error may have for them.

Understanding the evidentiary standard is a choice that will allow for the importance of its regulation to be recognized and thus establish objective criteria which allows for intersubjective control of the rationality of a decision. Laudan, cited by Ferrer, illustrates this problem: "if we do not have a criterion that tells us the conditions under which doubt would be reasonable (which could not be quantitative), we cannot say in any case that we have an objective standard of decision (or at least an intersubjective one) that is cognizable a priori." (in Ferrer, 2010, p. 18, our translation).

V. Alternative Dispute Resolution Mechanisms (ADR)

In general, the term alternative dispute resolution or ADR covers all of the conflict management mechanisms that fall outside of the judicial process that traditional courts of justice handle.

These have been included in the judicial reform agenda since the end of the last century. In addition to seeking higher levels of efficiency in justice systems, they were designed to increase or even out access to the entire population. ADR were included as *one of the most promising options for improving justice systems* (Lillo, Cabezón & Fandiño, 2016).

However, the first assessments suggest that, regardless of the position of these mechanisms on judicial agendas and the sustained and broad support that they received, they were not solidified as part of the reforms and were relegated to a fairly marginal space or yielded limited results. By 2002, it was clear that although various countries passed legislation that expressly introduced these mechanisms (such as Argentina, Bolivia, and Colombia), their implementation continued to cover a very small number of matters compared to the number of cases that the courts heard. Furthermore, it was clear that in other countries (such as Chile and El Salvador), the use of ADR mechanisms was limited to pilot projects that were difficult to replicate on a larger scale because there were issues with their definition and implementation (Vargas, 2002).

Given this context, we have decided to focus on the place that ADRs hold in civil justice reform processes. Specifically, we understand that "IACHR case law, doctrine and the main international agencies agree on the need to discuss access to justice as a broad right that covers extrajudicial solutions to conflict". (Lillo, Cabezón & Fandiño, 2016, p. 23, our translation).

Given the growing importance that ADRs have acquired in policies, public discourse, and the understanding of access to justice, one would expect justice reforms to have prioritized the use of these mechanisms. We would expect to find recommendations in the reforms analyzed for an adequate implementation of ADRs as a form of access to justice (Fandiño, 2016). We especially note:

- (i) the expansion of the catalog of conflict management mechanisms such that they are not limited to a restricted and traditional vision that only included arbitration, conciliation and mediation;
- (ii) the rationalization of the use of mandatory pretrial mediation or conciliation through incentives that increase acceptance of these mechanisms or limiting mandatory practices to a single information session at no cost to the participants;
- (iii) constant coordination between these mechanisms and the traditional justice system; review and adaptation of the requirement of judicial alignment of

agreements reached through these processes in order to ensure that it does not become a slow and bureaucratic process; and

- (iv) progress towards the full integration of ADR and ordinary justice in which judicial processes use settlements and ADR can hear cases that come from this type of proceedings.

As such, and based on the above, the main objective of this section is to analyze the role that ADRs have played in the procedure codes studied in order to *identify the level of integration between these mechanisms and the judicial process*. To put it another way, we seek to identify the logic or regulatory trend that underlies the relationship between process and ADR; whether the latter are understood as abnormal dispute resolution methods that are subordinate to the judicial process; or if, on the contrary, progress has been made towards what we will call the *logic of integration*.

To that end, we have focused on analyzing how and where these mechanisms are regulated; whether there is a principle of preference and/or incentives for settlement and, if it exists, at which point it is considered and whether the execution is achieved; whether there are spaces for referring and providing constant coordination between the proceedings and ADR; and the value of the agreements reached in these spaces.

Below, we briefly describe some of the aspects that will allow us to determine whether there is a regulatory trend in this regard.

1. REGULATORY CHARACTERISTICS OF ADR MECHANISMS PROMOTING CONCILIATION IN THE ABSENCE OF GENERAL PRINCIPLES OR ADEQUATE INCENTIVES FOR REACHING A SETTLEMENT

First, we have wanted to identify where these mechanisms are regulated so that we can then explore how the regulation was implemented and identify its main characteristics.

A first common element that emerges is *regulatory dispersion*. In other words, the various settlement mechanisms allowed through dispute resolution in each country tend to be regulated in various regulatory bodies. In order to identify the full system that governs a consensual mechanism, we would have to consider the terms set out in the procedure codes and in certain special laws, which may be general or specific regulations in different areas, as is the case in Nicaragua.

Though the legislative techniques vary, all of the countries have chosen to preserve differentiated regulations when the most logical, reasonable, and useful approach would have been a comprehensive one that structures various mechanisms through and for the dispute.

For example, the table below presents the regulatory bodies in which ADRs are regulated in the countries covered in this study:

Table 23: Regulatory sources of ADR

Country	Regulation
Bolivia	<ul style="list-style-type: none"> • Civil Procedure Code • Law No. 708 on Arbitration and Conciliation of 2015
Brazil	<ul style="list-style-type: none"> • Civil Procedure Code • Law 13.140 of 2015
Colombia	<ul style="list-style-type: none"> • General Procedure Code • Law 23 of 1991 creates mechanisms for relieving congestion in judicial offices, which was regulated by Decree 800 of 1991. • Decree 2651 of 1991 establishes temporary rules that extend the previous decree, and Law 192 of 1995 extended this decree. • Law 446 of 1998 on relieving judicial congestion. • Decree 1818 of 1998 issuing the Statute of Alternative Dispute Resolution Mechanisms. • Law 640 of 2001 modifies conciliation rules and adds others.
Costa Rica	<ul style="list-style-type: none"> • Civil Procedure Code. • Law 7727 of 1997 on Alternative Dispute Resolution and the Promotion of Social Peace. • Decree 32152 of 2004 creating the National Dispute Resolution Directorate.
Ecuador	<ul style="list-style-type: none"> • Organic General Procedure Code. • Law No. 2006-014 on Arbitration and Mediation. • Art 191.1 of the Constitution
El Salvador	<ul style="list-style-type: none"> • Civil and Commercial Procedure Code. • Law on Mediation, Conciliation and Arbitration of 2002.
Honduras	<ul style="list-style-type: none"> • Civil Procedure Code. • Law on Conciliation and Arbitration of 2001 issued by Decree No. 161-2000.
Nicaragua	<ul style="list-style-type: none"> • Civil Procedure Code. • Law No. 540 on Arbitration and Conciliation of 2005. • Art. 260 of the Organic Law of the Judiciary (Non-criminal Mediation) Law 278 Reformed, Urban and Farming Property. • Law 286 Exploration and Exploitation of Hydrocarbons Law 127 Foreign Investments. • Law 272 Electricity Industry Labor Code.

Source: Developed by the authors based on Lillo, Cabezón & Fandiño (2016).

Given that all of the countries have chosen to regulate these mechanisms through various regulatory bodies, we have endeavored to describe this regulation, focusing mainly on what has been regulated in the codes and, to the extent necessary, complementing it with the respective special laws.

As such, a second characteristic observed in the regulations is the absence (except for in Brazil) of rules that regulate essential aspects of these mechanisms and especially rules that create agencies or incorporate modes of achieving adequate coordination of the proceedings and ADRs. This is questionable if one considers the fact this decision to preserve these separate instances and differentiated regulations.

When we look at the main systems regulated, we can see that the majority of the countries regulate *judicial and extrajudicial mechanisms*, except for Nicaragua, where only extrajudicial settlement is allowed. We describe them briefly below.

Bolivia regulates conciliation as part of the proceedings and outside of them. During the preliminary hearing, the judicial official has the duty to encourage the parties to use conciliation. If they fail to do so, the penalty is invalidation. The parties may engage in conciliation at *any point in the process*, but the regulations do not establish this as an obligation. For its part, "prior conciliation" is included in the regulations on preliminary procedures. It establishes the mandatory nature of conciliation prior to the judicial proceedings and is a *sine qua non* requirement. When the main claim is presented, a document issued and signed by an authorized conciliator is included. In Ecuador, the code only regulates conciliation, which must be conducted by the judge during the preliminary hearing. The parties may engage in conciliation at any point in the process, but there is no duty to encourage them to do so.

Prior conciliation is also mandatory in Colombia, and complaints may not be filed until an attempt is made using this mechanism. The official must also diligently encourage the parties to settle their differences through conciliation and must propose arrangements and make it clear that this does not represent prejudgment.

The situation in Nicaragua is similar, as mediation is a requirement for filing a claim. However, this country is different from the first two in the sense that it does not allow for intraprocedural conciliation, and the judge must always encourage the parties to reach an agreement. This process can be completed in Alternative Dispute Resolution Directorate offices or at an authorized alternative dispute resolution management center. Nicaragua expressly establishes that the parties may use the services of an Alternative Dispute Resolution Directorate or similar entities in order to reach an agreement through the execution phase (Art. 408).

Similar regulations exist in El Salvador with an interesting variation on the terms set out in the case of Honduras. The judge is not required to encourage conciliation or the use of a mediation agency (Art. 415), and mandatory use of these mechanisms is the exception. For example, it is mandatory in cases associated with industrial property linked to labor inventions or when the public administration is sued in a civil process for disputes based in private law (Arts. 414 and following).

Costa Rica's regulations are similar to those of the countries described above. The court must encourage conciliatory agreements during the stages as established by law, mainly during the preliminary hearing, but may also do so when the circumstances favor the arrangement or if the parties request such an outcome by mutual agreement. Article 6 of Law No. 7727 states that the court may propose a conciliation hearing at any stage in the proceedings. One interesting point to note is that section III of the new Civil Procedure Code regulates "Extraordinary Forms of Procedural Conclusion," which include extrajudicial and judicial conciliation, making it very clear which logic regulates these mechanisms.

In that sense, various countries maintain a section similar to that of Costa Rica. For example, the fact that Bolivia and Ecuador expressly state that an agreement may be reached

at any stage of the process is a positive, but it is contradicted and obscured by the way in which the code refers to consensual mechanisms. Bolivia regulates them in Title V under the title “Extraordinary Forms of Procedural Conclusion,” and the section on conciliation (Arts. 234-238) regulates the transaction and withdrawal. Ecuador’s COGEP contains a similar regulation in Title II, which includes conciliation, transaction, withdrawal, compromise, and abandonment as extraordinary forms of procedural conclusion (Arts. 233 and following).

Colombia offers a variation on this type of regulation. It has a Single Title on “Abnormal Termination of the Proceedings,” which includes transaction and withdrawal. In regard to the importance of the mechanism, it is positive that conciliation is not included in this list.

In the case of El Salvador, tools like transaction or withdrawal are regulated as “early” forms of terminating the process without giving it a connotation of abnormality or characterizing it as an extraordinary element. The same occurs in Honduras. Its Section VII regulates “Termination of the proceedings without a contradictory sentence,” which includes lack of cause, extra-procedural satisfaction, transaction, waiver, warrant, withdrawal, and abandonment. Nicaragua’s regulations are nearly identical to those of Honduras. Section VII regulates the aforementioned potential outcomes in the section “The parties’ power of disposition.”

Brazil merits mention in this regard as well because from a regulatory perspective and based on the characteristics of its regulations, this is the country that presents a model that is similar to the logic of integrating ADR and judicial proceedings. In general, as we will see below, both its principles and its procedural structures are coherent with this approach.

First, it is the only country that has established a principle in this regard, the settlement principle, which is one of the fundamental rules of the proceedings. It is regulated in Article 3 of the code, which states that “the State will always encourage the parties to reach a consensual solution to the dispute” and that conciliation, mediation and other settlement methods should be promoted by judges, attorneys, public defenders, and members of the prosecution service, *even during the judicial proceedings*. As such, it is clear that settlements are encouraged throughout the process. There are clear and adequate incentives for engaging in such discussions.

Furthermore, the regulations clearly state that *all* of the stakeholders have a duty to encourage this and that, in fact, there should be a preference for settlements whenever possible. It is a *general principle of prevalence of non-judicial solutions* to disputes that is not limited to available rights.

Furthermore, and as we saw in the previous sections, the procedural structures align with this integrative logic. For example, the rules state that after the claim is filed, the next procedural action is a Mediation and Conciliation Hearing –unless the parties expressly state something to the contrary–, and that the response is offered once that hearing has been held. Furthermore, the family law code states that the respondent must receive the subpoena to appear at the hearing without the copy of the initial request in order to refrain from increasing animosity (Article 695, § 1º, CPC).

Based on all of this, it is interesting to note that the regulations allow for the possibility of anticipated evidence, which is meant to verify the possibility of reaching a settlement (Article 381, II, CPC).

Furthermore, the code regulates certain aspects of these mechanisms, such as the role of mediators and conciliators or their characteristics, distinctions, principles, and the procedure itself (Arts. 165-175, CPC). Finally, it is important to mention that in addition to all of the provisions described above and in accordance with Article 319 numeral VII, in Brazil, prior to submitting the claim and initiating legal proceedings, one must complete a mediation process.

As we have noted, the regulations in the rest of the countries are more or less similar and is quite different from that which takes place in Brazil. None establishes any principle related to the preference for or integration of ADR and they all tend to only regulate aspects of conciliation and/or mediation during the proceedings.

2. LEGAL VALUE OF AGREEMENTS REACHED OUTSIDE OF THE JUDICIAL PROCESS

A second major factor that tends to be analyzed to understand the type of relationship that ADR mechanisms have (or do not have) with the formal justice system is the legal value of the agreements reached outside of the judicial venue. In other words, we are referring to processes in which the judge does not preside over or direct the proceedings in order to reach the respective agreement.

There are two major trends in this area: countries in which agreements reached by the parties are enforceable and, as such, enjoy the effect of *res judicata* without the need for subsequent legal processes, and those in which a judge must intervene to verify the agreement in order to produce a document issued through traditional judicial proceedings.

The first group includes Bolivia, Brazil, Ecuador, El Salvador, Colombia, and Honduras.

We would expect Brazilian regulations to choose a solution like this because, as we have noted, it is the only country in which one can say that fairly coherent progress has been made towards a logic of integration between ADR and judicial proceedings. Article 30 of Law 13.140 refers to the agreement reached in the mediation session and states that it has the value of a summary execution. Another example is found in Ecuador's legislation, which states that the act of mediation that results in an agreement is an enforceable sentence and *res judicata*, and shall be enforced in the same manner as final instance sentences following the legal proceedings (Art. 47, Law on Arbitration and Mediation). The code reinforces this, stating that extrajudicial mediation documents constitute an enforceable order (Art. 363).

El Salvador's regulations contain very similar provisions. Both the code (Art. 254) and the respective law (Art. 13) establish that agreements reached during the pretrial conciliation process will have enforceability between the parties and that the first in-

stance judge may enforce it using a procedure established for sentence execution. The certification that the Mediation Center issues for this purpose makes the agreement enforceable.

The second group –in which the agreements must be verified in order to be enforceable– includes only Costa Rica and Nicaragua. Article 9 of Law 7.727 of Costa Rica states: “Once they have been verified by the judge, judicial conciliation agreements shall have the authority and efficacy of material *res judicata* and shall be immediately enforceable”. (Our translation). In Nicaragua –the only country in which judges only have the duty to encourage the parties to reach a settlement but may not conciliate or mediate–, the agreements that are reached in an Alternative Dispute Resolution Center must be verified by a judge.

The table below outlines the regulatory trends identified.

Table 24: Regulatory trends involving ADR in most recent procedure reforms

Regulatory trend	Description	Country	ADRs as abnormal mechanisms	Principle of or preference for settlement	The agreement is enforceable
Integration	The process is not the sole or principal means of dispute resolution. Adjudicative and settlement mechanisms are adequate to resolve the dispute.	Brazil	NO		YES
Subordination	While settlement mechanisms are not regulated and are understood as extraordinary or abnormal methods, they are understood as “alternatives” to judicial process and thus as subordinate to it.	El Salvador	NO	NO	YES
		Honduras	NO	NO	YES
		Nicaragua	NO	NO	NO
		Colombia	Yes (but not conciliation)	NO	YES
Abnormality	ADR mechanisms continue to be regulated expressly as extraordinary or abnormal methods of terminating the proceedings.	Bolivia	YES	NO	YES
		Costa Rica	YES	NO	NO
		Ecuador	YES	NO	YES

Source: Developed by the authors.

As we can see, the regulations tend to be contradictory and inconsistent. With the exception of Brazil, these countries have regulations that are virtuous in one area, such as Ecuador and Bolivia, where the value of the agreement does not depend on judicial proceedings, but that explicitly suggest that ADR mechanisms are not on the same level as judicial proceedings. Colombia has not completely moved away from this trend, but it at least eliminates conciliation from this category.

The most noteworthy element (and not in a positive way) is the absence of principles, incentives and clear guidelines that would allow process-centric approaches to be replaced by comprehensive systems that allow for adequate management of disputes and protection of rights.

In general, and with some exceptions, we can conclude that reform processes reflect a strengthening of the idea of conciliation as a settlement mechanism within the process. All of the regulations establish the duty to engage in conciliation during the preliminary stage and, in general, one can do so at any point in the process. However, we do not observe a (re)structuring of the various mechanisms that exist in terms of conflict.

In regard to the principles regulated, the way in which ADR mechanisms are regulated and most especially the absence of certain regulations, we conclude that the epicenter of the regulations continues to be the process and that judicial discussion and the resulting decision (and not the individual or collective dispute) is at the center of the process even though settlement mechanisms play a greater role. It would seem that they continue to be conceived of and operate as secondary "instances" that precede the proceedings and are less important than them.

Only Brazil has moved towards the logic of integration. The other countries continue to use old logics of subordination or abnormality. The latter seem to ignore international trends in which ADR methods are considered the best approaches to conflict management and resolution and thus tend to be strongly encouraged during early stages and indeed throughout the proceedings. We will explore these trends and the logic of integration further in the second section of this publication.

VI. Collective or class action lawsuits

1. CONSTITUTIONAL-CONVENCIONAL RECOGNITION OF THE RIGHT TO COLLECTIVE DUE PROCESS

The constitutions of each of the countries analyzed expressly include the category of collective rights. This is manifested in various ways. In some cases, it takes on the form of recognition of the right to petition or access collective justice. In others, it emerges through the enunciation of specific collective interests or assets, legitimated collectives, or specific mechanisms such as class action.

The constitutions of Brazil and Colombia include “popular actions” and group or class actions, recognizing the individual, groups or the prosecutor’s office as extraordinary parties so that they may act on behalf of a class or group.

Bolivia recognizes collective interests, regulates popular action as a concrete mechanism, legitimates any person to exercise it, assigns the ombudsman to be the person responsible for protecting collective rights and highlights the environment as an asset of singular protection (Arts. 135, 218 and 349).

Ecuador alludes to the fact that all individuals, communities, peoples, and collectives are subjects of the rights guaranteed under the Constitution and in international instruments and may exercise, promote, and demand that they be protected individually or collectively before the competent authorities (Arts. 10, 11, 16, 34, 95, 98 and 439). Costa Rica and Nicaragua also guarantee freedom of individual and collective petition, highlighting consumers, users and the environment as specially protected subjects and assets.

El Salvador and Honduras have more austere references to these matters, though they are no less relevant. For example, they identify health and the environment as public goods and give the public prosecutor’s office special authorization to defend them.

In addition, all of the aforementioned countries are part of universal and regional human rights protection systems that recognize this collective aspect in both regulations and their interpretation of them.

As such, and based on the premise of constitutional-conventional proclamation, is it possible to affirm the existence of a collective right to due process? The answer is necessarily affirmative. No collective law and conflict can normatively, factually, or logically be conceived of without similar guarantees that make it possible to demand or discuss rights as a collective.

Breaking down the question posed above, it is possible to state that, in terms of regulations, the reception of this class of rights is based on the validity and efficacy of the authority to demand their enforcement as a collective and the correlative state duty to guarantee their equal exercise.

In factual terms, one can observe that the precursor to the admission of this category of rights and its legal establishment is the existence of collective disputes. This is so much the case that even if they had not been explicitly recognized in the Constitution, their previous existence and importance would be limited to developing forms to channel them. Along these same lines, we see that this type of dispute (polycentric, complex, massive, and high impact) is completely different from disputes between individuals, and their issues break with the logic of a process structured for individual disputes, highlighting inconsistencies and the need for their own rules of discussion.

Finally, in terms of logic, it is incoherent and unreasonable to recognize the existence of collective rights and not guarantee an adequate structure (rules, resources and means) for their correct exercise and defense and to seek to validly process a collective dispute with guidelines for access, application, legitimation, representation, contradiction, debate, ruling and sentence execution that were designed for individual disputes.

Why discuss a constitutional right to collective due process? What is its purpose and usefulness? Returning to the arguments presented, we could enumerate and summarize the points that speak to its importance:

- a) It helps to make visible and establish the difference in size between collective and individual rights, disputes and procedural systems;
- b) It allows us to understand the absence of adequate regulation as a violation that is not only adjective (a product of the lack of appropriate rules for discussion) or a violation in and of itself, but as one that is substantive and or reflective (that affects the provision and exercise of the collective right as such);
- c) It facilitates the identification of a shared matrix (due process as a form of discussion) and the necessary existence of radically different rules (for example, adequate representation or collective *res judicata*);
- d) It contributes to offering a constitutional reading of each one of the rights associated with the processing of disputes in a collective manner, reaffirming its regulatory vigor; and
- e) It favors the identification of the right in question, its scope and the state's legal duty to guarantee it in due form.

Similarly, Verbic states that "the identification and determination of the scope of the right to collective due process configures a useful conceptual task for establishing the essential characteristics that adequate legislation should have in this regard. It also serves to provide –in the interim– the minimum legal security required for the key discussions developed in this type of process regarding delicate social, political and economic issues that involve large groups of people." (Verbic, 2015, our translation).

2. (IN)ADEQUATE REGULATION OF COLLECTIVE DUE PROCESS: UNCONSTITUTIONAL OMISSION?

What would happen if there were no adequate regulations for processing individual disputes in the 21st century, or if the parties or judge did not know which rules to follow?

The regulation of collective processes in Latin America is problematic. In general, we observe the absence of legal regulations or, where there are framework systems or approaches in specific areas, deficient treatment. In that sense, it is common to observe that certain elements specific to this sort of proceedings (for example, the identification of claimants) are regulated while other essential ones without which it is impossible to sustain the validity of the system, proceedings and collective dispute resolution are omitted.

The reform processes analyzed present uneven treatment of these matters. Bolivia's Civil Procedure Code contains no references to them. The only exception is popular action, which is regulated in the Constitutional Procedure Code (Arts. 68- 71). However, this does not cover the universe of collective disputes and is not adequate for judging various types of responsibilities. It cannot be considered an adequate regulation because it fails to address various elements that are essential to any collective process (such as adequate representation, measures taken to ensure that the proceedings are public, res judicata or sentence execution).

Costa Rica had regulated collective processes in its Civil Procedure Code. However, during the processing and approval of the code, this was eliminated and just a few isolated rules were left. These include recognizing that those who are recognized as legitimate members of the group may form part of organized collectives as well as anyone who asserts diffuse interests in the interests of a group (Art. 19.6 and 7).

El Salvador does not have any specific or systemic regulations regarding this area in its code. We can only find a few references, for example, in preliminary tasks, which include the opportunity to judicially determine the scope of the group of affected parties in proceedings for the defense of the collective interests of consumers and users (Art. 256.6).

The same is true in Ecuador, which only includes a regulation on the ability of communities, peoples, or collectives to sue or be sued (Art. 30.3).

By contrast, Nicaragua, Honduras, Brazil, and Colombia do have special regulations that seek to be systematic though they present varying types of lacks or objections.

Nicaragua and Honduras include collective lawsuits as a specialty within ordinary proceedings, demonstrating a unique concern for the defense of consumers and users (which results in certain regulatory deficiencies). However, in both cases, the conception and regulation allow collective rights conflicts to be enforced, discussed, and resolved.

Brazil and Colombia have a long tradition in this regard, and the first is a leader in the region in this area. Colombia has the advantage of having condensed the regulation of group and class actions in Law No. 472. Brazil has a variety of rules which may work against its systemic approach and the adequate exercise of rights.

In both cases, it is notable that the procedure reforms promoted in 2012 and 2015 did not systematically address this within and on the basis of the code itself. They could have used the opportunity to work from conflict, unifying regulations, integrating plural mechanisms, and adequately regulating the individual and collective dimension. The practices and developments that existed before may explain but not justify this decision,

particularly in regard to Brazil, which has a code structured from a constitutional-conventional perspective with a focus on conflict and the goal of providing comprehensive dispute resolution mechanisms. Brazil incorporated a repetitive case resolution model through an incident or appeal in its CPC but maintains a representative-type collective system in the code and other regulations.

As such, the regulations that both procedure codes receive through their articles are also questionable. First, this is not coherent with the decision to maintain an autonomous and differentiated regulation. Second, the regulation is partial and fragmented, and does not seem to have an integrative purpose or tools that contribute in that regard.

Along those lines, Brazil's CPC regulates the incidence of repetitive claims, *amicus curiae* (Art. 138), the duty of the public defender's office to defend collective rights (Art. 185), recognition of the collective legitimation of the public prosecutor's office (Art. 176) or its duty to intervene as a prosecutor in (collective) cases that involve public or social interests or the possession of rural or urban land (Art. 178). Colombia's CPC recognizes the right of all groups to effective legal protection (Art. 2), the jurisdiction of civil judges over popular actions and those of groups not attributed to the contentious-administrative jurisdiction (Arts.20.7 and 390) and the collective legitimation of the public prosecutor's office (Art. 46).

3. DESCRIPTION OF REGULATED COLLECTIVE PROCESSES

There are multiple judicial mechanisms for collective protection of rights. These include the German witness system and the repetitive case resolution model set out in Brazil's CPC. However, representative-type collective processes dominate in the region. The four countries that expressly regulate the collective dimension (and even Bolivia through popular action) opt for that system.

They present at least two central characteristics regardless of the name used in the legislation of each country (which include collective protection, collective proceedings, collective action or popular or class action). The first characteristic is that the representative who files the claim names him or herself as the representative. In other words, they are not chosen by the group or its representatives. They are allowed to take such action because the legal framework authorizes them to do so. The second is that the result of the process that is undertaken will affect the entire group that he or she represented as collective *res judicata*.

It is important to mention that Brazil's CPC reform introduced the incident of repetitive case resolution. In other words, it incorporated a model of aggregation that coexists with the representative type included in the legislative block of collective rights protection comprised of popular action (Law No. 4.717/1965), public civil action (Law No. 7.347/1985) and the Consumer Defense Code (Law No. 8.078/1990).

This is not necessarily contradictory, although it may be considered problematic in the Brazilian context for several reasons. The main reasons include: (i) the existing regula-

tory dispersion; (ii) the lack of clarity regarding the concept of the model for addressing collective conflict, which is exacerbated in intellectual and political disputes; (iii) the absence of adequate integration between these systems and the lack of tools to effectively coordinate them; (iv) the design defects in the representative and aggregation system regulations; and (v) the practices that define their use.

Another common characteristic of the reforms evaluated is that they have opted to build hybrid procedural systems, that is, to create categories of collective rights in the Brazilian style (a model that follows the European continental tradition and the Ibero-American Model Code on Collective Processes) but regulates a process that is closer to US-style class action suits. For example, Honduras and Nicaragua have implemented the same collective rights categories as Brazil's Consumer Defense Code (diffuse rights, collective rights, and homogeneous individual rights), adopting identical definitions of them. The Colombian case follows a similar logic, even though the categories have been defined through case law and Law No. 472 assigns a path for the protection of collective rights and interests (popular actions) and another for homogeneous individual claims (group action).

It is important to note that Brazil, Honduras, and Nicaragua allow for passive collective claims to be filed. This topic tends not to be explored given that the majority of regulations focus on active collective actions. However, it is a tool that must be regulated given that it is key for resolving passive collective conflicts.

In regard to collective legal standing, broad recognition is given at the constitutional and regulatory levels. The entities that have such standing include the affected party, citizens, unions, civil associations, the ombudsman, and the public prosecutor's office. This is important because it involves empowering a series of subjects to discuss matters as a collective, which would in principle provide better and more enforceability.

Certain specific problematic issues have been observed. For example, the CPCs in Nicaragua and Honduras –which think of collective conflict as focused on civil matters and consumption in particular–, stipulate that when the affected group is unspecified or difficult to identify, only legally constituted associations of consumers and users will be legitimate (Arts. 71 and 570.3, respectively). An adequate interpretation of the regulation may serve to minimize the impact of the bias in conflict and objection presented in the area of legitimation, maximizing access to collective justice.

In representative-type proceedings, the notion of legitimation in the abstract is complemented by the idea of adequate representation. This element is a fundamental form of reassurance in this sort of process, particularly because the collective representative may act without the knowledge of those he or she claims to represent (or even against their will in cases of indivisible claims) and the effects of *res judicata* are collective.

Adequate representation involves overseeing the expertise, knowledge, history, and adequacy of the party with legal standing who named themselves in each specific case. Without a document or robust oversight throughout the process (and not only when determining admissibility and certification), the validity of the process is placed at risk. Its effectiveness is also threatened given that one of the advantages of collective processes is optimizing resources and time through a single useful discussion.

In this regard, the regulations of the countries of the region can be criticized because they tend to omit this aspect and those that regulate it do so in a lacking manner. The objections in the regulation do not only focus on conditions to be met to be considered an adequate representative, but also address effective oversight of the reports and when they should be issued. For example, Brazil's regulations do not allow for mechanisms for analyzing whether the person who intends to undertake the defense of a certain group or class is an adequate representative. Colombia does not do so either. Honduras and Nicaragua do have regulations regarding this matter in keeping with the CMPC for Ibero-America. They even state that the judge has the duty to analyze whether the individual is an adequate representative at any point prior to issuing a ruling (Arts. 571 and 488, respectively).

Another point that the countries of the region share is the system of *res judicata* that they have adopted. In that regard, the majority chose to expand the effects based on the result of the proceedings and not a *pro et contra* (win or lose) approach as seen in North America.

There is no doubt that the regulation of collective *res judicata* always involves the search for a harmonious solution that allows the two objectives that are currently competing in this area to be balanced. On the one hand, the judging of collective actions must be concentrated through the binding nature of the sentence on a group that is impacted by a given problem. On the other, due process must be guaranteed, recognizing that the matter may be revisited under certain circumstances.

In the North American class action model, the balance seems to tip towards the search for speed, efficiency, and concentration of the collective process, ensuring that litigation on common issues is defined just once and cannot be changed regardless of the result of the litigation. As a rule, new collective or individual actions aimed at changing the decision that has been reached may not be introduced. The binding nature of the final decision in the case is issued in favor and against the members of the class in that system. As such, the legislation provides certain tools designed to prevent anyone from being deprived of their rights. These include a system for notifying absent members of the group, the right to opt out in certain types of actions, and rigorous analysis of adequate representation.

However, North American case law has engaged in interpretations that temper the rigor of that legal definition in order to allow the collective discussion to be revisited. In other words, even within this apparently rigid framework of full binding decisions, case law has allowed the sentence issued in the initial process to be challenged by demonstrating the absence of adequate representation of the group in the original litigation.

The dominant model in the region –in which the Brazilian CDC and CMPC for Ibero-America have had a significant influence– establishes that the expansion of *res judicata* depends on how the process is conducted. The guidelines of this system are:

- a) An any collective process, the sentence –as a rule, has *erga omnes* effects unless it provides for the rejection of a claim of evidentiary insufficiency. The legislation identified a general hypothesis of “absence of adequate representation” –such as evidentiary insufficiency– and raised it as a fixed cause for review of the col-

lective decision in all cases. Under any other circumstances in which we could demonstrate the absence of adequate representation, the immutability of the effects could not be sustained. This is because if there were not adequate representation, a fundamental element of collective due process upon which this type of exceptional procedural protection depends was violated.

- b) In collective processes related to the protection of homogeneous (divisible) individual rights, the *res judicata* regime is based on the impact on utility or maximum benefit of the decision that takes up the claim in favor of the remaining members of the group. If the action is rejected, the matter cannot be revisited collectively, but each injured party may seek to have their interests satisfied individually. As one can see, this is a model of extending the individual scope of the collective sense based on the result of the litigation (*secundum eventum litis*). In this last case, it is not necessary to demonstrate that the representation at the prior trial was inadequate. It is enough to have rejected the collective action, as the affected parties can submit their claim individually.

Some countries have adopted intermediate criteria. For example, in regard to collective and diffuse interests, Honduras would seem to follow the *prot et contra* criterion (given that it does not expressly create escape valves), but the effects are extended based on the result of the claim in homogeneous individual claims (Art. 580). We note that Colombia's Law No. 472 adopts a similar criterion in Art. 35. However, the Constitutional Court understood that this was the case as long as a sentence dismissing the action based on key new evidence that could change the previous decision did not emerge.

The adoption of the *res judicata* system is one of the main topics to discuss and resolve in the area of collective processes. This decision directly impacts the assessment of the tool's effectiveness and its validity in light of the guarantee of due process. To that end, we must be very clear on the indivisible relationship that exists between the collective *res judicata* system and the remaining essential elements of collective due process.

In regard to these last points, various types of lacks can be observed in the regulations, particularly in Honduras and Nicaragua. In that sense, we can say that –as these are representative-type systems– the option for the member of the class is open to manifesting their interest in the claim and not to be excluded (which denaturalizes the reason for being and usefulness of that type of system); the regulation is designed for consumer or environmental cases, leaving aside other types of conflicts; and no clear rules are set in regard to determining jurisdiction, records of publicity to that end or sentence execution (which is a key aspect of this type of dispute).

The same is true for the creation of the social participation mechanisms for the development of the discussion, procurement of quality information and construction of the decision. The figure of the friend of the court and mechanisms for procuring information or assessments from public or private entities are not regulated. There are also no differentiated rules in regard to the role of the judge, special standards for weighting or a duty of qualified motivation. The class attorney is not focused on as an element to be considered or regulated, and it is a key factor given that those who mainly advance the strategy and litigation of the collective case are attorneys.

Similarly, the region has serious problems in regard to establishing adequate incentives. For example, the issue of costs and honoraria tends to be ignored or treated in an unreasonable manner. There are no adequate rules and interpretations that advance shared rules (which are not meant to address collective disputes), show the lack of knowledge of the complexity of the work, the importance of this type of mechanism and their remaining effects.

In regard to the points presented, Brazil and Colombia are not exempt from criticism. However, their greater level of experience, regulatory development and the interpretive work conducted through case law has allowed them to remedy many of these deficits.

VII. Appeals or challenge procedures

1. THE APPEALS SYSTEM: DESCRIPTION AND MAPPING OF APPEALS

Historically, appeals are meant to acquire power or justice. The constitutionalization of law has strengthened the search for justice by reinforcing the appeal as a right for protecting interests and ensuring control in the case of incorrect critical appraisal (Arts. 8 and 25, IACHR or 14.5 of the International Covenant on Civil and Political Rights). For example, Honduras states that “the parties and participants in the proceedings and third parties to whom the ruling causes direct or indirect harm, shall have the right to appeal” (Art. 690, CPC, our translation).

In addition to the existence of the fallibility of the human condition as a supposition of the appeals system and its goal of correcting it, other weighty arguments have emerged: the complexity of the system of sources, the visibilization and preponderance of decision-making as an interpretive effort and/or the assessment of certain conflicts or subjects (collective disputes).

In that sense, the IACHR has stated that the right to appeal a ruling is a basic guarantee that must be respected in the context of legal due process in order to allow an adverse sentence to be overturned by a higher ranking judge or court prior to the sentence acquiring the quality of *res judicata* (“*Herrera Ulloa vs. Costa Rica*,” ruling issued on July 2, 2004, Series C No. 107, para. 158, our translation).

In regard to the scope of the right to appeal, the same court ruled in the case of *Baena Ricardo et al. vs. Panama* that based on the object and purpose of the American Convention –the effective protection of human rights– it must be understood that the appeal provided for in Art. 8.2.H of said agreement must be an effective ordinary appeal through which a higher judge or court corrects judicial decisions that go against the law (Sentence issued November 28, 2003, Series C No. 104, our translation).

But it was not only the reason of justice that was strengthened. That same conventional constitutional process also redefined the power of appeals. It is no longer simply a matter of giving a superior the authority to control sentences. It is also a question of rethinking the appeal as a means of obtaining more accountability and/or transparency, and the appeals system as a means of achieving greater stability, security, equality, and uniformity in the decisions. This includes, for example, the gradual introduction of precedent either directly or elliptically (through the reinforcement of the regulation and management of extraordinary appeals routes).

Although the procedural reforms analyzed do not introduce major structural changes to appeals systems and their dynamic, we do observe the search for a certain balance between power and justice. One example is the strengthening of the appeal as a right and/or the breadth of questioning the ruling.

The elements shared by reformed appeals systems include:

- a) Appeals are regulated in a unitary and unified manner. In general, the codes have established that grievances against rulings must be channeled through challenge routes (appeals) and not autonomous challenge actions. For example, Costa Rica's CPC states that judicial rulings may only be challenged through the channels and in the cases that are expressly established (Art. 65.1).

The exception is the incorporation of review "appeals" (or actions) meant to question rulings based on material *res judicata* authority, but it vexes. Costa Rica's CPC states that the review appeal for cases in which the final ruling has been issued as a result of prevarication or in any other case in which a serious and vital violation of due process has occurred (Arts. 72 and following).

- b) The fundamental principles that govern the appeals system are formality, singleness of purpose and/or prohibition of contingency. Their exigency and intensity vary based on whether the appeal is ordinary and/or extraordinary.

The principle of formality implies that appeals must be based on the adjective guidelines prescribed by the applicable laws regarding rites. Each has its own form, and it cannot be used by analogy or applied to unanticipated cases.

Singleness of purpose means that for each grievance there is one route of challenge and not various. This principle is more relative in the area of ordinary appeals given that certain errors can be corrected using various means. In extraordinary appeals, by contrast, this principle is strictly applied. As a rule, contingent exercise, excessive filing or when the cassation appeal is unique, the lack of specification of the type of grievance is prohibited.

The exception is appeal for reconsideration with a supplementary appeal. Aside from that exception, the systems do not allow for supplementary appeals. As such, more than one appeal may be filed autonomously but not on contingency.

- c) The existence of a legal system with a double ordinary instance. In some cases, like that of Bolivia, this is expressly established by constitutional mandate. In others, it could be built through conventional interpretation based on Articles 8 and 25 of the American Convention on Human Rights or similar contents of general (International Covenant on Civil and Political Rights) or special (Convention on the Elimination of All Forms of Discrimination Against Women or the Convention on the Rights of the Child) instruments.

In regard to the double instance, the IACHR has been categorical regarding the duty of guaranteeing it in criminal matters but not clearly in the rest of them unless the law expressly establishes this or certain subjects or conflicts that have preferential protection (such as children or adolescents) are involved. Given that this is the case, the fact that there is a double instance system in the majority of matters and countries qualifies the impact of the discussion.

However, future reforms may attempt to reintroduce a single instance regime. In this case, it is key to note that all legislative policy decisions must pass the

scrutiny of the rights approach and its guiding principles (for example, progressiveness and not regression, indivisibility, and interdependence). Current regulations constitute a minimum level. This conditions the measures to be taken and the need to demonstrate their reasonableness and the greater efficiency that their implementation would represent in regard to the protection of rights. That judgment –and the analysis of the non-regressive nature of the measures of any nature– must be analyzed specifically and comprehensively, not in the abstract or subject to bias.

Palomo Vélez states that removing the double instance in the area of civil procedure would constitute an undeniable step back in the guarantee system that citizens have in the area of civil process given its condition as an oversight and guarantee instance meant to ensure that judicial decisions are high quality and fair (2010).

- d) The appeals recognized maintain the division between ordinary and extraordinary in function of the type of grievances that allow for their filing, the breadth of knowledge and the body before which they are presented.

In this way, ordinary appeals allow for treatment of questions of fact and law (errors in judgment) and the forms of the act of reaching a decision (nullity). Extraordinary appeals are generally limited to questions of law. At the same time, ordinary instances only require that general procedures be followed. Extraordinary instances add special or aggravated requirements.

The former include appeals for revocation, clarification, review, and complaint (comparison and reversal). The latter include cassation and review.

Nicaragua, for example, regulates reinstatement, review and cassation appeals. If one of the latter two is defined, a resolution of denial appeal may be filed (Art. 539, CPC). Ecuador allows for clarification, reform, expansion, revocation, review, cassation, and appeal on points of fact (Art. 250, COGEP). Brazil adds others, such as interlocutory appeal, and cassation is considered extraordinary. Honduras adds cancellation which, in a strict sense, is not an appeal but rather a process through which the appealing party may seek a hearing meant to block the final sentence (Arts. 735-741, CPC).

- e) It preserves the structure of horizontal and vertical appeals, and no substantive changes have been made. For example, the introduction of pools of judges or corporate courts allows for horizontal appeals that may be heard within the same pool. That does not only optimize the use of time and resources, but also reinforces the instance by generating synergies, goals and objectives and more efficient controls. At the same time, it discharges the appeals instance and assigns the workload that is seen as most relevant. In other words, it builds a different type of rationality and dialogue in appeals.
- f) The jurisdiction of the courts that will hear the appeals is determined by their type and scope. In other words, grievances define the congruency of appeals and the jurisdiction of the reviewing body. In those terms, they constitute a bud-

get and limit on judicial action. Colombia's COGEP, for example, states that the review appeal is meant to allow a superior to examine the matter that has been decided solely in regard to the specific challenges formulated by the appellant (Art. 320).

The only exception that some systems allow to this limitation is the existence of manifest violations of fundamental guarantees. In those cases, the reviewing court may act *ex officio*. We believe that such provisions must be truly exception and with restrictive interpretation. This is especially important if, as occurs in many countries' legislation, the cassation appeals are allowed for broad procedural matters and are not limited to the sentence as a final act.

That type of regulation may constitute a problematic design and a perverse incentive in the administration of the process as a useful dispute resolution mechanism, not only on the part of the attorneys as a litigation strategy (that they can propose and insist on this sort of matter indefinitely until they reach an extraordinary instance), but also for the courts themselves (which can use that route to nullify decisions that they do not agree with or to achieve better performance that benefits their personal or organizational evaluation). While certain conditions are incorporated by regulating appeals and/or cassation (such as the violation of essential rules of due process), clear rules and standards for their application and/or interpretation are not observed.

- g) While the changes have not been drastic in regard to the organizational and structural form of appeals routes, there is a concern about making their processing more efficient.

This translates into a limitation of the cases that can be appealed or challenged, in the orchestration of the deferred effect of challenges as a way to simplify or concentrate challenges into a single moment; or the inability to file horizontal or vertical resources successively or subsidiarily except in the case of clarification or replacement (Art. 322, II, COGEP, Colombia).

For example, in order to reinforce the processing and procedural economy of the first instance, Brazil's CPC establishes that appeals of ordinances are not allowed (Art. 1001). Bolivia's prohibits appeals of simple substantiation and resolutions against which the law expressly prohibits them (Art. 258, CPC). Costa Rica has a similar rule, though it does allow the courts to set them aside or change them within three days following their notification either *ex officio* or based on the written or oral observations presented by the interested party. If the observations are found to be inadmissible, no resolution is issued (Art. 65.9).

- h) In the majority of the reformed procedural systems, the search for balance in the appeals system is complemented by the strengthening of the internal efficiency of the process. This tends to take the form of strengthening the guarantees within each instance (remediation) and the increase in the review authority or jurisdiction (which is not limited to mere legality but includes the fairness of the decision).

One guideline for regulatory policy is the requirement of preventing deviations before trying to amend them a posteriori (which is always more onerous and slower), accentuating the exercise of the corrective duties of judges. This is key for avoiding appeals associated with procedural deficits whether in an ordinary instance or an extraordinary one.

- i) The reforms implemented do not show clear trends towards deformalization of appeals, even in ordinary instances. For example, none of the systems incorporates the indifferent appeal either expressly (through its regulation as a type of appeal) or implicitly (stipulating rules that allow for the admission of the appeal regardless of its qualification).

In the best cases, that could be constituted interpretatively through the remediation duties imposed on the judicial official or certain forms of flexibility that are exceptionally allowed. In other words, when an error has been omitted in the qualification of the appeal and, based on the substance or expression of grievances, the judicial official allows it making the existence of a charge prevail over the formality of its labeling. However, no special rules are found that guide interpretative work in that sense. That is a problem given that the formalities of appeals are analyzed more strictly due to the nature of the procedural act.

They do not simplify the processing of appeals or reconfigure them based on their type or the characteristics of the cases, which could improve their processing.

- j) Except for Brazil, the procedure reforms have not incorporated systems of precedents. They maintain extraordinary or cassation appeals routes designed to achieve uniformity in decision criteria. However, this does not seem to constitute an adequate or sufficient means to guarantee systematic approaches, security, the ability to anticipate the outcome and equality in the application and interpretation of the law. Basically, it is not designed or organized in systemic terms. Uniformity is to be achieved through the application of a legalistic concept and not one focused "on the case" (making the decision rule invisible) and there are no clear rules on horizontal and vertical binding.

In Brazil, the legislation stipulates that the courts have a duty to ensure that their case law is uniform and stable, comprehensive, and coherent. They must develop summary statements that reflect dominant case law, following the factual circumstances of the precedents that led to their creation. In other words, judges and the courts must follow, observe, and respect the precedents and their binding nature (Arts. 926 and following, CPC).

- k) The majority of the rules have incorporated provisional execution of appealed decisions, though they are uneven and have objections of varying tenor.

For example, in Brazil, appeals do not impede the efficacy of the decision except where there exists an opposing legal provision or judicial decision. In order to suspend the execution, the party must demonstrate that: (i) the immediate production of its effects would generate a risk of serious harm that would be diffi-

cult or impossible to repair and (ii) demonstrate the likelihood of the admissibility of the appeal (Art. 995). However, as a rule, appeals in Brazil have a suspensive effect except in expressly established areas. These include sentences that verify the division and demarcation of land or sentences that order someone to pay child support (Arts. 1012 and following, CPC).

In Costa Rica, the general rule of appeal is that it has no suspensive effect. As such, challenged convictions that have not been finalized may be executed provisionally (Art. 65.7, CPC).

2. PURPOSES AND STRUCTURING OF APPEAL AND CASSATION

a. Appeal for nullification

Appeal for nullification is the most important means of ordinary challenge because it is the first instance of vertical review and because of its use and the breadth of questioning that it allows.

1. Object

The object is characterized similarly in all procedure systems: an appeal that is meant to allow an agency other than the one that issued the ruling (appeal chamber) to modify part or all of it and to be authorized to analyze, oversee, and review both errors related to the appreciation and assessment of the facts and evidence and the application and interpretation of the law.

The formal defects of the ruling (that is, failure to observe the requirements of the sentence as an act of legal procedure) also are challenged through the appeal for nullification. In some cases, it is called a nullity appeal and it is subsumed as such. In others, only the nullification of the process and/or ruling is specified as the grievance that allows for the appeal.

It is important to note that there are varying positions. Some systems state that nullity is limited to the ruling, and defects in processing sit outside of its area of application. Others opt for a broad criterion, allowing the appellant to report any type of violation of procedural guarantees or lack of protection experienced (for example, El Salvador or Nicaragua).

Brazil's CPC, for example, stipulates that the appeal must specify why the appellant is requesting a change or nullification (Art. 1010). Bolivia's states that the purpose of the appeal is to allow a higher court to modify, revoke, set aside or nullify a legal ruling that has caused harm to the litigating party that files it (Art. 256).

For its part, El Salvador's CPCM expressly states that the appeal for nullification has as its goals: (i) the application of rules that govern procedural acts and guarantees; (ii) the proven facts that are established in the ruling and assessment of the evidence; (iii) The law applied to resolve the matters debated; and (iv) the evidence that had not been ad-

mitted (Arts. 510, our translation). As one can see, by allowing a questioning of the rules that govern procedural acts and guarantees in the appeal, the scope is broad, and it is not restricted to the sentence or ruling (Arts. 511, 516 and following).

2. *Decisions that are subject to appeal*

As we have noted, the trend has been to decrease the number of decisions that can be appealed, though this has fared differently in different countries. For example, Costa Rica's CPC states that only decisions that specifically state that they are subject to appeal may be appealed. However, when identifying which fall into this category, it lists not only final sentences but also 32 different types of rulings, the last of which is "any order allowed under the law" (Arts. 66 and 67, our translation).

In general, definitive, and expressly established interlocutory decisions can be appealed. As a rule, all other rulings are not subject to appeal. This limitation has been complemented by the change of the effects of the appeal and accentuation of enforceability and deferment as a rule.

3. *Production of evidence in the second instance*

All of the regulations allow for the opportunity to reproduce means of evidence rejected initially and/or new elements under certain conditions. The production of evidence in the second instance is generally regulated exceptionally.

For example, Bolivia's CPC states that any party may request, in their respective written documents, evidence in the second instance, and the court must agree to said request in the following cases: (i) when the parties agree to request it; (ii) when evidence presented in the first instance have not been explored due to causes that cannot be attributed to the party that offered it; and (iii) it involves events that occurred after the sentence and (iv) detract from a document that could not be presented in the first instance due to force majeure, unforeseen circumstances or due to the action of the opposing party (Art. 261).

El Salvador's CPCM contains a similar provision, including the opportunity to allow evidence when the evidentiary means refer to the occurrence of events relevant for the law or interest under discussion, but which occurred after the timeframe for issuing the sentence in the first instance has begun. The ruling rejecting the evidentiary means offered cannot be challenged (Art. 514).

In sentence appeals, Colombia's COGEP states that the judge may order the production of evidence at the request of a party or ex officio (Art. 327).

Costa Rica's CPC also establishes the restrictive and exceptional nature of admissibility of evidence as a general rule. Only evidence that is strictly necessary to rule will be allowed or evidence that could not be submitted in the first instance due to reasons not attributable to the party and/or evidence that the judge believes to be necessary (Art. 67.2).

Brazil's system is exception in that it also allows for matters of fact that were not proposed during the previous trial to be introduced as long as the party can prove that they did not present it due to reasons of force majeure (Art. 1014, CPC).

4. *Review (and no new trial): Congruency*

The appeal does not result in a new trial, in that it is limited by the arguments made during the first instance and the limitations of the appeal itself. In other words, the congruency of the decision is doubly conditioned. First, it is conditioned by that which is decided at the level in relation to the claims effectively submitted and the elements presented and discussed. Second, it is limited by the scope of the allegations made against the sentence (dispositive congruency). As such, matters judge in the lower instance that have not been appealed may not be decided. The same is true for matters that go beyond or fall outside of it.

Colombia's COGEP establishes that the second instance judge may only rule on the arguments presented by the appellant regardless of the decisions that they must make *ex officio* under the law (Art. 328).

Honduras' CPC states that the appeal allows for a broad review of the facts and law that is conditioned by the prohibition of the reform (Art. 692) and the dispositive congruency of the claims introduced. However, it states that as an exception, the court may review aspects of public order or fundamental guarantees that have been violated *ex officio*.

5. *Absence of additional restrictions*

In contrast to cassation or extraordinary appeals, ordinary appeals do not –as a rule and in general– have any restrictions (such as *suma gravimminis*). As such, only the recommendations unique to each appeal may be implemented:

- (i) The quality of the party (those covered or impacted by the decision). When a third party has intervened in the process, they are considered to be a party for said purposes. In general, the regulations condition their power of appeals to the condition under which the incorporation into the trial and effective action was allowed. The parties' attorneys and assistant may appeal the decisions that affect them (for example, regulation of experts' honoraria) as long as they meet the remaining enabling requirements.
- (ii) The ruling must be subject to appeal in accordance with the terms set out in each system. As such, the information presented must be assessed in advance based on the limitation of the decisions that can be appealed.
- (iii) Existence of a charge. In other words, the existence of a lien or concrete and real loss emanating from the sentence due to a difference between that which is intended and that which is (not) stated. That charge is what materializes the interest in the appeals sphere and drives it.
- (iv) Submission of the appeal prior to the deadline and following the appropriate format. The calculation of that deadline begins the day after the notification that causes the charge and, generally, is individual for each of the parties. In regard to format, this includes both the requirements for any sort of judicial submission and meeting the burden of technical sufficiency. In other words, the appeal

must contain a specific, substantiated, and sufficient critique of the main arguments contained in the ruling.

6. *Deadlines*

The deadlines for filing appeals tend to be similar, ranging from three to 15 days based on the type of ruling appealed (final sentence or interlocutory ruling). These are peremptory and individual deadlines, and thus apply individually to each of the parties following the notification of the procedural order in question.

7. *Form of the filing of the appeal*

The appeal may be presented in writing or verbally. In general, it tends to be written, though if this takes place in the context of a hearing, there are no challenges to be articulated in that manner. If the hearing is recorded, a record will exist. If that is not the case, a court clerk or competent official must take minutes.

In most systems, the rule is that the appeal must be filed and substantiated at the same time. However, some legislation allows for a differentiation between those two processes when the decision has been made during a hearing. In that case, the party filing the appeal may announce or state that it is appealing the decision and substantiate the appeal within the legally established timeframe.

For example, in Bolivia the appeal against a sentence must be filed in writing within ten days (Art. 261) and appeals that are filed against interlocutory rulings issued during a hearing must be announced during the proceedings and written arguments may be submitted within three days (Art. 262). Ecuador's COGEP also allows for the appeal to be announced orally during the hearing with written arguments due within five or ten days depending on whether the matter involves children or adolescents (Arts. 256 and 257).

Colombia's system is unique in that it stipulates that when a sentence is appealed (during or outside of the hearing), a brief description of the specific objections to the decision must be given addressing the substantiation to be provided before the higher court. An appeal can be substantiated based on the appellant describing their issues with the appealed ruling (Art. 322, COGEP).

8. *Substantiation of the appeal: Technical sufficiency*

One recurrent problem in the design of the appeal is the lack of precise information about the standards that allow for an appeal to be considered sufficiently substantiated. In general, procedural regimes do not contain precise information that could allow one to determine when and under which conditions an appeal can be considered such. The rule that these must be sufficiently substantiated does not seem to be adequate to improve the arguments and/or their quality, or to provide tools that could correctly control their admissibility.

For example, the general rules set out in Costa Rica's CPC include the burden of motivation of the challenge. The appellant is required to prove that the challenge contains,

under penalty of inadmissibility, clear and precise reasons that justify the modification or nullity of the ruling and the offering of evidence. We first list the procedural motives and then substantive ones (Art. 65.5).

El Salvador states that the document used to file the appeal must clearly and precisely state the grounds, distinguishing between those that refer to review and interpretation of the law applied and those that affect the review of the establishment of the facts and assessment of the evidence. Challenged rulings must be clearly determined. If the appellant alleges that procedural rules or guarantees were breached in the first instance, the document must list which they believe were violated and provide an argument outlining the impact suffered (Art. 511).

For its part, Ecuador's COGEP does not provide any precise information about requirements for substantiation. It only states that the appeal must be substantiated and that any appeal and accession that are not will be rejected at the outset (Arts. 257 and 258).

9. *Substantiation and adhesive appeal*

The appeal for nullification is substantiated with the counterpart in order to guarantee the opportunity to present a counter-argument. Responding to grievances is an option and not a burden in all of the systems.

In some codes, responding to grievances represents an opportunity to file a cross-appeal. In other cases, filing that appeal is unnecessary given that if the decision is revoked by a higher court, the judge must address unresolved matters that recover their legal effect and could not have been appealed due to the absence of actual damages.

Brazil's CPC requires that cross-appeals be filed in the response to the grievances, which can even be substantiated with the counterpart (Arts. 1010 and following). By contrast, Colombia's COGEP establishes that when both parties have appealed the entire sentence or the party that does not appeal has joined the appeal, the higher court shall rule without limitations (Art. 328).

10. *Processing of second instance appeals: Rigidity*

In general, the processing of the appeal for nullification continues to be rigid in the various systems. In other words, there is no reformulation in the organization or management of the appeals instance of the use of oral procedures or immediacy as guiding principles or a review based on the greater or lesser complexity of the appeal. The process is the same, regardless of the type of ruling appealed, grievance filed and underlying conflict.

The shared mechanism is substantiating it in the first instance in order to exercise an initial verification of admissibility that is never final because if it is rejected, the party can file a complaint which, if granted, allows a higher court to reveal the ex officio statement as the appeals judge. Once the case has been moved to a higher court, most codes maintain a written analysis of admissibility. The variation is whether a judge rapporteur is appointed for that purpose.

In Brazil, for example, once the appeal is received by the higher court, it is immediately assigned. If the appeal is unfounded, the rapporteur rules it inadmissible. In other cases, the rapporteur develops their vote for the appeal to be heard by the collegiate entity (Arts. 1009, 1010 and 1011).

Once the appeal is admitted, the systems split between those that provide for a hearing for addressing and resolving the matter. However, even in those that provide for a hearing, it can be observed that it was developed in a rigid manner (without adaptability of the appeal-case), exceptionally (when there is evidence) and discretionally (when the court allows it).

Colombia stipulates that the call to a hearing to substantiate the appeal and rule on the case of appeal of sentences. It is important to note that the appellant must submit their allegation to develop the arguments presented before the first instance judge. If evidence is admitted, it is also presented during this hearing. However, when interlocutory rulings are appealed, the admissibility and origin of the appeal is determined in writing and without a hearing (Arts. 322, 326, 327 and subsequent COGEP).

Admittance is written in El Salvador. When the appeal is admissible, a hearing is scheduled during which the parties may be heard. The appellant may not expand the motives of the appeal. This is also the space for determining the admission of the reconsideration or new evidence that should be presented in order to be admitted. The hearing concludes with the party's final arguments and the possibility that the court may request clarification (Arts. 513 and 514).

Costa Rica's CPC allows written admissibility of the appeal. After that point, only evidence is allowed, or, if one of the parties requests it and the court deems it pertinent, an oral hearing will be scheduled within 15 days. The court's decision may not be appealed. The evidence that is allowed will be presented during the hearing and the appellants will offer testimony followed by the other parties. The court may question the parties on the issued presented. The final sentence will be issued at the end of the hearing (Art. 67.6 and 7).

Similarly, Nicaragua establishes that the court that must hear the appeal –at the request of the party and if necessary– shall convene and hold a hearing in accordance with the summary proceedings established in this Code. The parties will offer arguments to support their positions and respond to counterclaims and will present evidence when it is allowed during the hearing (Art. 557). This suggests that it is not always mandatory and, on the contrary, is more residual in nature.

Ecuador's COGEP states that a hearing will be held in accordance with the general rules and that the court will issue a ruling once it is complete (Art. 260).

11. *Decision-making: Assessing the elements produced in the judgment*

All of the reformed codes allow for video recording of hearings, appeal as a broad tool (fact, evidence, and law) and rulings based on that which is presented (with or without a hearing) but –in any case– without the repetition of the judgment. As such, one can conclude that decision-making is conducted based on said video recording. It is im-

portant to note that the regulations do not include any rules that state how the court should proceed if there is no recording or only a partial one.

12. *Resubmission as a problem*

Another problematic point that appears in some legislation is the opportunity to resubmit a case to the first instance when the sentence is revoked or annulled. This is even more serious if we consider the breadth with which the arguments associated with the violation of due process, failure to limit the sentence or any other vulnerability produced during the proceedings are allowed.

As a rule, if the court of appeal has all of the elements to rule in the case, it must assume positive jurisdiction and refrain from resubmitting it. This violates due process, effective judicial protection, and the guarantee of reasonable timeframes. For example, Brazil's CPC states that –when the process is able to– the court of appeal should immediately determine the merits and not return the case to the first instance. This happens when the sentence is annulled because it does not align with the limitations of the request or case, when an omission is identified in the examination of one of the requests, in which case it could judge it, and when the sentence is annulled due to a lack of justification (Art. 1013).

b. *Cassation appeal or extraordinary appeals*

1. *Decisions subject to appeal*

Cassation or extraordinary appeals may be applied against final rulings or those equivalent to decisions made by second instance courts. In general, they are limited to those issued in notice proceedings in which limitations are established due to the type of proceedings or amount. These appeals allow Superior or Supreme Courts to exercise (part of) their most important judicial function (cassation), which is specific to their role as the highest constitutional-conventional interpreter in the internal system.

2. *Purposes and grounds*

The exercise of this function is meant to obtain and maximize the coherence, foreseeability, equality, and security in the application of the decisions adopted (standardizing function), arrive at a correct application of the law (nomophylactic function) and receive a fair resolution of the litigation (axiological function).

Colombia's COGEP states that the cassation appeal should defend the unity and integrity of the legal order, achieve the effectiveness of the international instruments signed by Colombia in internal law, protect constitutional rights, oversee the legality of the rulings, unify national case law and repair violations suffered by the parties by the order being challenged (Arts. 333 and following).

For its part, Costa Rica's CPC introduces a “general” cassation appeal (Art. 69) as well as cassation appeals in the interest of law and case law (Arts. 70 and 71). El Salvador's CPCM similarly establishes that the rules on the cassation appeal must be applied in the man-

ner that most favors the uniformity of case law as a means to ensure equality before the law as well as legal security and certainty (Art. 524). Honduras' CPC contains the same rule (Art. 716).

The cassation or extraordinary appeal tends to remedy certain violations that are specific and taxative. We can highlight the following grounds or offenses:

- (i) The applicability and interpretation of the law that the second instance courts used as the basis of their ruling on the matter in question. This is a supposition of indirect connection of the preceding in that the lower agencies must observe the holding rule set by the Superior Court before the identification (factual, evidentiary, and legal) of the case-grounds.

In that regard, El Salvador's CPCM states that having violated the Superior Court's legal doctrine is substantive grounds for cassation, and it is configured with three or more constant, uniform, or uninterrupted sentences (Art. 522).

- (ii) The erroneous assessment of matters of fact or evidence. As we know, the extraordinary jurisdiction of Superior Courts is limited to matters of law. As such, by allowing for matters of fact and evidence to be presented, this institution makes an exception to that rule.

In general, it is required that that violation emerge in a blatant manner. In other words, it may not be a mere discrepancy with the assessment made, but a significant break with the foundation of the thought, an extreme anomaly, a flagrant lack in mental processes that makes manifest the irrationality of the conclusions reached in logical, factual, and evidentiary terms. This explains why certain countries (such as Argentina) call it arbitrariness or absurd. The purpose is to preserve the correct, adequate, and just resolution of the litigation and the meaning of the open judicial function.

Nicaragua's CPC states that cassation cannot be used to review the facts or evaluate the evidence contained in sentences issued in the instance. However, oversight of the factual motivation for the sentence may be requested in cassation in order to review its existence, sufficiency, rationality, and logical nature, as long as it would be crucial to a different ruling (Art. 566).

Bolivia's CPC also states that the cassation appeal can be used when the consideration of the evidence has involved an error of law or fact, which must be proved through documentation or authentic acts that demonstrate a manifest error on the part of the judicial official (Art. 271).

Similarly, the Colombian COGEP defines as a cause the error of manifest and transcendent fact in the evaluation of the claim, response, or a specific piece of evidence. The appeal also may be advanced if the sentence does not align with the facts, the purposes of the claim, the exceptions proposed by the respondent or that the judge was meant to recognize *ex officio* (Art. 336).

In Ecuador, issues of fact and evidence may be addressed. While it is established that the cassation does not apply as a rule when its clear purpose is to review the evidence (Art.

270), it is allowed if improper or erroneous application in the interpretation of the legal precepts applicable to the assessment of evidence is proved as long as they have led to an erroneous application of rules of substantive law in the sentence or ruling (Art. 268.4).

Finally, Costa Rica's CPC –which divides the reasons for allowing cassation into substantial and procedural– includes rules on assessment of evidence and erroneous interpretation in the first category (Art. 69.2). El Salvador's CPCM has an identical rule (Arts. 519 and 522).

- (iii) The annulment of decisions that had violated the formalities imposed as a condition of validity of final rulings or comparable to those from second instance courts (for example, omission of an essential matter, existence of a form of agreement or absence of individual vote) or the process as such.

In regard to this last point, most of the codes include a broad regulation. In other words, it is not limited to the violation of the forms of the decision but any action that presents a transgression of due process.

Colombia's COGEP establishes as a cause for cassation having issued a sentence in a trial that violates one of the nullification causes set out in the law unless said violations had been remedied (Art. 336).

Similarly, Ecuador expands the rule by stating that the cassation appeal applies in cases of undue application, lack of application or erroneous interpretation of procedural rules that have violated the process of nullity that cannot be remedied or caused helplessness or influenced the ruling as long as the respective nullification has not been remedied (Art. 268).

Similarly, Costa Rica's CPC allows for cassation for violations based on procedural causes. These include the unremedied violation or erroneous application of procedural regulations essential to due process or a sentence issued by a smaller number of judges than that which is required by law (Art. 69).

El Salvador's CPCM also outlines numerous suppositions for failing to follow regulations essential to due process that range from the lack of jurisdiction and improper structuring of the proceedings to rejection of legally admissible evidence (Art. 523).

Nicaragua's CPC allows for a cassation appeal to be submitted on the basis of the violation of the procedural norms that regulate procedural acts and guarantees when said violation results in absolute nullification or produces a lack of defense; and the form and contents of the sentence (Art. 562).

3. *Form of application and worsening of conditions*

As a rule, the cassation or extraordinary appeal must be submitted in writing and before the second instance court that issued the ruling that is challenged.

Colombia's COGEP adopts a special mode: it requires that the appeal be submitted although the parties must submit their "cassation complaint" once it is allowed. Beyond

the various names used, the terms are similar to those of any special appeal (Arts. 342, 343, 344 and subsequent).

The aggravation of the protections in the cassation appeal operates in two ways. First, in regard to the incorporation of considerations in addition to the general protections of all appeals. For example –and notwithstanding our consideration of the usefulness and reasonableness of the quantitative filters, the value of the grievance or litigation (directly or indirectly determinable), which cannot be lower than a certain sum. Second, in the level of exigency of the foundation of the appeal and its technical sufficiency. The cassation appeal must be self-sufficient and self-reliant, clearly identifying the required suppositions and rules or doctrine violated based on the proven circumstances of the case. This requires the detailed development of the violations and technical sufficiency of the appeal. Both limitations are justified by the extraordinary nature of the instance and the work that it seeks to do as such.

For example, Colombia's COGEP sets a quantitative limit on the appeals power when essentially economic ends are involved. The appeal is only admissible in such cases when the actual value of a ruling that is unfavorable for the complainant is over one thousand current monthly legal minimum salaries. However, when one party meets said conditions and appeals, the CGP allows this to be granted to the other litigant who has filed within the timeframe even if the value of interest is insufficient. In this case, the appeals will be considered to be autonomous (Arts. 335, 338 and 339).

In regard to the requirement that the appeal be substantiated, Bolivia's CPC establishes that the appeal must clearly and precisely identify the laws broken, violated, or applied and interpreted unduly or erroneously, specifying the substance of the infraction, violation, misrepresentation or error. These specifications must be made precisely in the appeal and may not be based on prior briefs or replaced (Art. 274.1 and subsequent).

Similarly, Colombia's regime states that the Court may not consider cassation cases other than those that have been expressly argued by the complainant. However, the sentence may be quashed, even *ex officio*, when it is ostensible that this seriously involves public order or patrimony or goes against constitutional rights and guarantees (Art. 336, COGEP).

4. *Admissibility and processing in special courts*

In the analysis of the admissibility (and possible applicability) of the cassation or extraordinary appeal, the constitutionally established rules and procedural regimes that meet the conditions for the exercise of the right to be challenged apply.

The second instant court that hears the case shall conduct the first analysis of admissibility, issuing the respective ruling. In certain systems, this is omitted, and the role is limited to receiving the document and either submitting it or trying and addressing it (Arts. 529 and following, CPCM of El Salvador).

In general, the test is limited to the verification of the aforementioned requirements without addressing the technical sufficiency of the appeal. The lack of compliance of one of the records shall lead to the declaration of inadmissibility of the appeal except

in cases in which the rules allow for its amendment through notification. If the appeal is vacated or inadmissible, the complainant must submit a complaint resort before the Superior or Supreme Court.

In any case, once the resort is filed, the Superior Court will again analyze the admissibility of the cassation request and it shall not be conditioned by the second instance court's decision. Their condition as a judge allows them to broadly analyze the precautions, and they may dismiss it based only on the omission of a precaution, partial fulfillment of such, lack of technical sufficiency or, when recognized, the invocation of one of the grounds of relevance.

Colombia's COGEP stipulates that even if the cassation complaint meets the formal requirements, the Chamber may reject it when there is an essential identity of the case with reiterated case law of the court unless the complainant shows the need to vary its meaning; the alleged procedural errors do not exist or were remedied or did not affect the parties' guarantees; and they do not comprise meaningful harm of the regulation or the transgression of the legal regulation to the detriment of the complainant is not evident (Art. 347).

Nicaragua's CPC also introduces the "cassational interest" designed to unify case law. This would exist when the contested judgment issued by a district judge or court of appeal opposes Supreme Court doctrine; when the sentence of the district judge addresses issues regarding which there is a contraction with the ruling issued by another district judge acting as second instance; and when the sentence issued by a court of appeal contradicts the ruling issued by another court of the same instance (Art. 563).

While the Superior Courts show a certain tendency to make the rules for sensitive cases linked to preferential protection more flexible, this does not alter the restrictive condition that governs the admissibility of the cassation appeal. As such, when an appeal is submitted, steps must be taken to meet the requirements set.

The processing of the appeal in special circumstances is similar to that of the appeal. As such, the lacks discussed are replicated. In fact, they may be aggravated due to the lack of oversight mechanisms regarding its operation, the lack of clear rules regarding the administration of their jurisdiction, its condition as the highest court within the internal system and the accountability limitations.

Ecuador's COGEP stipulates that once the file is received in cassation, a hearing is called after 30 days in accordance with the general hearing rules set out in this Code (Art. 272).

Bolivia's CPC states that the analysis of admissibility must be written. When it is accepted, the judge-rapporteur is drawn and will be responsible for relating the case that is the subject of the appeal. Then, if the party requests it (and the court allows it), a hearing is held to make the pertinent clarifications. The judges may also ask questions. The hearing is either held or not held, and the rapporteur must draft a document on the ruling and submit it to the Chamber for its consideration (Art. 277).

The approach adopted for Costa Rica's CPC was similar. A hearing may be organized once admissibility is established and if the court deems such action necessary. The ex-

ceptional and restrictive possibility of producing evidence is anticipated. If the hearing is held, the discussion should be organized on the basis of each of the charges (Art. 69.7, 2 and 4).

Colombia's COGEP allows a hearing to be held once the draft ruling has been crafted, which will be directed by the Chief Justice of the Chamber. The court has discretionary authority over its contents. The judges may question the attorneys regarding the foundations of the challenges to the sentence. Prior to issuing a sentence, the Chamber may require evidence *ex officio* if it deems such action necessary (Art. 349).

One unique approach that the Brazilian CPC allows for is the opportunity for the Superior Court to select two or more representative appeals when there are multiple extraordinary or special appeals based on an identical matter of law to be judged. In that case, the suspension of all of the pending individual or collective processes in the state or region shall be ordered as appropriate (Art. 1036 and following).

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The story of non-criminal justice reforms in the region has been one of missed encounters.

There has been no clear agenda that brings together and organizes reform processes and their scope or that allows for dialogue or the creation of consensus in the region. With the exception of the past decade, the progress made has been difficult, partial, and skewed.

This study, which was made possible by the financial support of Global Affairs Canada (GAC), reflects this concern for building bridges of dialogue that allow a Latin American tradition to be recovered, for experiences to be shared and for inputs to be generated in order to seek out solutions to the regulatory disruptions or deficiencies identified.

Is there a Latin American model of civil justice? What characteristics should justice have in order to make that possible? What should that model look like as we begin the second decade of this millennium?

Answering those questions required a long and complex process of analysis, reflections, and discussions that were completed based on what we imagine the foundations of a Latin American civil justice model that expands access to justice, guarantees rights and strategically manages today's social conflicts may look like.

