The Genealogy of Prosecutorial Discretion in Latin America: A Comparative and Historical Analysis of the Adversarial Reforms in the Region

Daniel Pulecio-Boek

Pontificia Universidad Javeriana, dpulecio@gmail.com

Follow this and additional works at: http://scholarship.richmond.edu/global

Part of the Comparative and Foreign Law Commons, and the Criminal Procedure Commons

Recommended Citation


Available at: http://scholarship.richmond.edu/global/vol13/iss1/4

This Article is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in Richmond Journal of Global Law & Business by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.
THE GENEALOGY OF PROSECUTORIAL DISCRETION IN LATIN AMERICA: A COMPARATIVE AND HISTORICAL ANALYSIS OF THE ADVERSARIAL REFORMS IN THE REGION

By: Daniel Pulecio-Boek*†

INTRODUCTION

This paper examines whether there is a regional consensus in Latin America about the necessity of replacing inquisitorial systems. Thus, the question one needs to ask is whether the Latin American jurisdictions that have reformed their Criminal Procedure Codes to implement an adversarial system have “followed” a trend. In other words, are nations acting according to a commonly held belief that reform is compulsory because one criminal procedure structure is fundamentally better than the other?

If this is the case, one would expect to find that all the Latin America states that have experienced “adversarial” or “accusatorial”

* LL.B from the Pontificia Universidad Javeriana (Colombia); graduated with various honors. LL.B from the University of the Basque Country (Spain); graduated first in the class. Masters Degree in Philosophy from the Pontificia Universidad Javeriana. (Thesis pending). LL.M. from Harvard Law School; LL.M. Paper received Honors. Formerly practiced in Colombia for nearly 4 years as a litigator and consultant with the firm Sampedro & Riveros Abogados. Later practiced as an international lawyer at the firm Cleary Gottlieb Steen & Hamilton LLP (Washington D.C.) Currently part of the White Collar and Enforcement practice group at Quinn Emanuel Urquhart & Sullivan LLP (Washington D.C.) (Admission to the New York State Bar pending.) Author of the books Crimes Against the Social and Economic Order, and The Dynamic Burden of Proof in Criminal Matters. Author of several articles and essays published nationally and internationally. Former Professor at the Pontificia Universidad Javeriana. dpulecio@gmail.com.

† This piece is the result of nearly one year of research at Harvard Law School while earning an LL.M. A longer and more detailed version was presented to the program as my official LL.M. Paper for graduation. I would like to thank very specially Professor Lloyd Weinreb, for serving as my Paper supervisor. His constant guidance, profound analytic capability and encyclopedic knowledge of the law, made this paper substantially stronger. I would also like to thank Professors Maximo Langer and Julio Maier for taking the time to provide importance advice regarding the general architecture of this paper. Likewise, this paper was possible in great part thanks to the comprehensive knowledge of criminal procedure and evidentiary law that Professors Ronald Sullivan and Emily Schulman shared with me. Lastly, I want to very warmly thank the LL.M. program at Harvard Law School for their support in the various stages of drafting this paper.
criminal procedure reforms have identical resulting Codes. I discovered something different. This paper shows that there is no such thing as "adversarial systems," at least in the context of Latin American comparative criminal procedure. It is true that every country promoted its reform as "adversarial." However, the resulting laws in all Latin American jurisdictions have very little in common, and what they do have in common, has nothing to do with what scholars tell us we should understand as "adversarial."

The only truly new universal trait I was able to find as a product of the reforms was prosecutorial discretion. Prosecutorial discretion is the only legal notion that appeared in the region as a consequence of the reforms, and it is the only feature that appeared in all the reforms. This led me to trace the genealogy of discretion in Latin America. I thought it would be interesting to find out where this notion of affording prosecutors discretionary powers came from, as it was the only notion present in all fifteen Latin American "adversarial" criminal procedure reforms.

I found it was directly imitated from German law. Furthermore, I discovered authors suggesting that Germany itself, borrowed—and adapted—prosecutorial discretion, from Anglo-American criminal procedure systems. Thus, I will conclude that Latin America's adversarial Reform Movement looked for inspiration in a Continent that did not have accusatorial models, and ended up copying—as the central trait of the reform era—an institution developed outside the Continent.

Following the ideas stated above, this paper contains four chapters. In the first chapter I explore the inquisitorial/adversarial dichotomy. In other words, I will reproduce what the main scholars in the field have understood as "typically adversarial" and "typically inquisitorial." I hope to show, at least in theory, what can be construed as an "adversarial" criminal procedure system. Then I will show that leading scholars and commentators have undoubtedly categorized the Latin American Reform Movement as "adversarial." Therefore, I will prove that the express purpose of reforms in the region was to leave behind inquisitorial models of criminal procedure, and to replace them with adversarial ideals and institutions.

The history of the Movement in the region—which I will briefly narrate—is also helpful to understand this explicit purpose. I will call this discourse, the discourse holding that the region uniformly and consistently sought to replace inquisitorial models with adversarial systems, hence, embracing the features advertised in academia as "typically adversarial": the mainstream discourse.

At the end of the first chapter I will compare the concrete rules included in each of the new Codes resulting from the reforms. Further, I compare these new Codes with the traits enlisted by scholars as "ad-
versarial.” This comparison allows me to discover that the normative features that are commonly shared across the region either existed before the Reform Movement or, in any event, are not a direct consequence of it. With one exception, there are no new traits arising as a result of the Movement that can be found in all the Codes.

In the second chapter I will explore the conclusions of the first chapter. The comparison undertaken before will lead me to conclude that there was no such thing as an “adversarial” reform in Latin America. Each jurisdiction understood differently what it meant to have an “adversarial system.” Only one “adversarial” feature appears in all the reforms. The rest of the traits portrayed by academics as “adversarial,” either do not appear at all in the region, or appear only in some Codes. Therefore, I will argue that only one universal trait appeared after the Reform Movement in all the new Codes: prosecutorial discretion.

The third chapter focuses on the genealogy of prosecutorial discretion in Latin America. Where did it come from? What was its source? I was able to identify that discretion in the region was first introduced by the 1986 Draft for a new Federal Criminal Procedure Code in Argentina. The 1986 Draft, in turn, directly used German law as inspiration for embracing prosecutorial discretion. When I turn to German law, I find that—at least according to some scholars—discretion was copied from Anglo-American systems. This leads me to compare discretion in Latin America with discretion in the U.S.

In conclusion, I will show that Latin America adopted discretion, as the only universal trait present in all “adversarial” reforms, from German law, when discretion had not originated—and was not widely practiced—in Europe. Finally, I suggest that discretion reflects the level of trust that cultures award to their public officials.

1. THE ADVERSARIAL REFORM IN LATIN AMERICA

1.1. Inquisitorial v. Adversarial

If one analyzes the history of criminal procedure, one could eventually argue, as many have, that it has had, from a comparative

---

1 Cf. Mirjan R. Damaska, The Faces of Justice and State Authority. A Comparative Approach to the Legal Process (1986). Professor Damaska’s book is, in my opinion, the most extraordinary text published thus far in the field of comparative procedure. It opens up infinite lines of investigation and broadens without limits any current debate about legal process design. However, in my opinion, the book presents an abstract view of judicial systems. See id. at 3-4 (setting aside the adversarial/inquisitorial dichotomy and, in turn, asserting that “only the core meaning of the opposition remains reasonably certain.”). Beyond that core meaning, it is uncertain what those terms signify. Damaska points out that authors tend to describe each model by enlisting a collection of features, but
perspective, only two systems: the inquisitorial and the adversarial. Some authors hold that criminal procedure laws can only fall under one of those two structures, in accordance with the system adopted. Of course, it has become increasingly clear that it is almost impossible to find a jurisdiction with a system that is purely adversarial or purely inquisitorial. After all, what is “purely” adversarial? Or furthermore, what is “adversarial”? It seems then that criminal procedure systems are becoming a mix of features borrowed from both of the two classical schemes.

Leading commentators in Latin America claim that the adversary system is consistent with a “republican system of political power.” It is not clear what can be understood by a “republican system” but one could conclude it is a reference to political cultures that embrace democratic values and the Rule of Law. Thus it governed criminal procedure legislation in Greece, Rome, Germanic Law until this only makes the dichotomy more uncertain and ambiguous. *Id.* at 16-17.

Focusing on the classical dichotomy he explains that any legal process (civil, criminal or administrative) can be (and should be) understood and analyzed within broader frameworks. Those frameworks are the structures of authority in a given jurisdiction and the types of government. The types of authority are: hierarchical and coordinate. *Id.* at 97-178. The two types of states are: reactive and activist. *Id.* at 181-231. The two types of authority and government can intertwine and create different types of legal proceedings. My paper could be read as empirical and comparative evidence that the classical dichotomy is insufficient to truly describe and understand the dynamics of legal design and judicial reform, such as Damaksa suggests. In that sense, it would fit within his theoretical claim. However, it is not my intention to use his framework to understand legal reforms in Latin America, although the implications of such an undertaking would be extremely relevant. The point of my paper is precisely to steer away from theoretical abstractions of comparative criminal procedure, notwithstanding if they fall or not within the classical dichotomy. My objective is to investigate the reforms, based on the reforms themselves. This is, based on a careful analysis of the new Codes and based on how local commentators actually construed the reforms. I want to try to understand the reality of the reforms as such, rather than to make them fit into pre-established scholarly and doctrinal categories, classical (inquisitorial/adversarial) or revolutionary (hierarchical/coordinate/reactive/activist based on structures of authority and forms of political government), as may be the ones Damaka suggests. In that sense I intend my work to be a concrete study of the reality of the reforms.

---

the XIII century, and France in the XIX century. Allegedly, France, as a consequence of a liberal reform thrust brought by the ideals of the revolution, adopted features of the adversarial model precisely because of the articulation among accusatory and republican ideals. In “pure” adversarial schemes of procedure, no general public authority or institution was in charge of prosecution. Instead, individuals were responsible for enforcement efforts. In some cases the victim of a crime (private accuser), and in others, any person in representation of the community (public accuser), could investigate and put on trial the offender of the law.6

The inquisitorial system replaced Germanic Law and governed most areas of continental Europe from the XIII century up until the liberal revolutions of the XVIII century. In the inquisitorial model of criminal justice, a centralized conception of power was fundamental. In turn, a strong public administration of justice was organized hierarchically within the state and its power emanated from the state. The individual had little value because the interests of the social order were primary.7

The French Revolution brought upon mixed systems, better categorized as reformed versions of inquisitorial models in which some elements of the adversary process were included. This supposedly translated into proceedings with more delimited stages, public/oral trials, congruence between accusations, and sentences and more possibilities of superior judicial review.8 The French Criminal Instruction Code of 1808 accepted the basic principles of the inquisitorial rationale but tried to implement elements from popular accusatory systems, thus it may be properly characterized as a “reformed” inquisitorial model. It had three basic stages: a preparatory instruction, a written/secret investigation, and a public/oral trial.9 Tribunals were independent; the prosecutorial and adjudicatory functions were divided though they were part of the state globally speaking; and the primary purpose was to seek the truth.10

Let’s assume for a moment that there are in fact, at least in the abstraction of theory, two structures of criminal procedure. Some scholars have identified the definitive traits that allow us to distinguish adversarial and inquisitorial systems. Several authors have undertaken lengthy efforts to define each system and thus have produced

5 See id.
6 See id.
7 See id.
8 See id.
9 See Julio B.J. Maier, Exposición de Motivos, in El Proyecto de Código Procesal Penal de la Nación 650 (1987) (Arg.).
10 Id.
important scholarly research on the topic. This paper does not have the intention of attempting to produce new "definitions" of each criminal procedure category. Rather my aspiration is to test those "definitions."

Several approaches have been used by the mainstream legal scholar discourse to identify the "schemes" of adversarial and inquisitorial.11 Parallel to those approaches, some scholars consider that the dualism of adversarial and inquisitorial "models" does not just refer to normative structures but also to different methods of understanding criminal procedure.12 According to this "difference in understanding," adversarial systems are traditional under common law jurisdictions and inquisitorial are typical under civil law jurisdictions.13 Academic scholars in comparative criminal procedure have explained that the Anglo-American system is usually referred to as an "adversarial" model, whereas civil law jurisdictions in Europe and Latin America have had systems categorized as inquisitorial.

We can attempt to summarize the distinguishing traits of the adversarial and inquisitorial theoretical categories—normative—and with respect to the "meaning and understanding" of criminal procedure:14

- Inquisitorial:

  A) The meaning of the term "inquisitorial" has to do with extensive and secret pre-trial investigations, reflecting official inquiries rather than disputes.15 "Basic to the inquisitorial system as it exists today in 'civil law' countries is that its processes cannot be aborted by the accused's 'guilty' plea. Even if the accused does admit guilt, the inquiry must continue through a formal trial to decide the proper application of the law to the facts. A formal trial is also necessary to decide what punishment, if any, or rehabilitation steps are needed."16 (footnotes omitted). A de-

---

11 See Langer, supra note 3, at 7-8 (explaining the approaches with which scholars have tried to define "inquisitorial" and "adversarial").
12 See id. at 9 ("The adversarial and the inquisitorial models are not only two ways to structure criminal proceedings, but also two ways of understanding and representing criminal procedure."); see also id. at 10 ("In other words, the adversarial and the inquisitorial can be understood as two different structures of interpretation and meaning through which the actors of a given criminal justice system understand both criminal procedure and their role within the system.") (Footnotes omitted) (Emphasis in the original).
13 See id. at 16.
14 See McLeod, supra note 2, at 116-17.
16 Id. at 390.
fendant cannot end the phase of determination of guilt by admitting his responsibility before the court. Admission of guilt—a confession—is only an element of proof, and thus, does not preclude litigation, so pleas of guilt do not fit in the system. Plea bargains do not exist either.

B) A complete written record of the proceedings is kept in the form of a “dossier.”\textsuperscript{17} The dossier, or file, is central in inquisitorial systems.\textsuperscript{18}

C) Judges actively participate in the interrogation of witnesses. The officer of the court will begin the interrogation of witnesses because they belong to “the process.” This means that witnesses and pieces of evidence are not subject to control of the parties, but rather, once they are admitted, are controlled by the judge.\textsuperscript{19} For example, once admitted, a witness would have to declare, if the Court so desires, even against the will of the party who originally requested the Court to order the declaration of such witness. Therefore, judges are understood as investigators.\textsuperscript{20} Decision makers are usually professional judges and there is more hierarchical control.\textsuperscript{21}

D) The inquisitorial decision-maker has more procedural power. The defense is comparatively less powerful. For example the defense has no power to do its own pre-trial investigation.\textsuperscript{22}

E) Investigations are conducted by state officials in order to determine the truth. Prosecutors are understood as “impartial magistrates whose role is to investigate the truth.”\textsuperscript{23}

\textsuperscript{17} See id.

\textsuperscript{18} See Langer, supra note 3, at 14. Professor Langer explains at length the importance of the dossier in inquisitorial criminal proceedings. I claim that reliance on a record of the proceedings is just as important in the United States. Records of trials have to accurately show what takes place and preservation of the record is imperative for appellate purposes. The difference is that U.S. “records” reflect procedural activity rather than evidentiary material (i.e., in a dossier a declaration of a witness, is embodied as evidence in the transcript as such.) Another difference is that, American records reflect occurrences at several hearings, whereas inquisitorial dossiers show the succession of every stage of the proceedings, stages that generally do not take place orally. In any event, reliance on the record procedurally and substantively is fundamental in both systems.

\textsuperscript{19} See id. at 22.

\textsuperscript{20} See id. at 18-19.

\textsuperscript{21} See id. at 25-26.

\textsuperscript{22} See id. at 13.

\textsuperscript{23} Id. at 10.
F) Inquisitorial proceedings are written and secret, with no clear divide of adjudicatory and investigative phases. Prosecution and adjudication roles are not clearly divided.24

G) The pretrial investigation consumes a lengthy amount of time during which the defendant will likely remain in pre-trial detention.25

H) Parties do not confront each other's case by cross-examination.26

I) There is no discretion since compulsory prosecution is the absolute rule (admitting no exceptions) and truth seeking is the primary function of the proceedings.27

J) Among other distinctive features, authors assert that investigations are controlled by the police, that the rights of defendants are restricted during the pre-trial phase, that there is no way of terminating proceedings before going to trial, and that victims and lay adjudicators do not play a large role in the proceedings.28

- Adversarial:

A) Judges are passive in the interrogation of witnesses. They are "passive umpires" in the dispute between prosecution and defense.29 Furthermore, decision-makers are usually juries.

B) Prosecutors are understood as parties in a "dispute with an interest at stake in the outcome of the procedure."30

C) Defendants can plead guilty and bargain.31

D) Decision makers have less procedural power and the prosecution and defense comparatively have more.32

---

26 See Bischoff, supra note 25, at 40-41.
27 See Maier, supra note 4, at 205-218.
28 See Langer, supra note 3, at 18-22; Bischoff, supra note 25, at 25-42.
29 Langer, supra note 3, at 10-13 (explaining that judges in adversarial systems are passive umpires). I will contest this notion because in bench trials, judges in the United States are considerably less passive and substantially more active, suggesting that their attitude during proceedings, has more to do with fear of exposing their opinions to the jury than with an "adversarial understanding of their role."
30 Langer, supra note 3, at 10.
31 See id. at 39.
32 See id. at 13.
E) There is no compulsory duty to keep a dossier or "file" which contains all elements with evidentiary value.\textsuperscript{33}

F) The prosecution and the defense conduct their own pre-trial investigations and present the evidence obtained to a passive decision maker. This evidence will usually have been disclosed before trial. Parties decide what evidence to present, which witnesses to bring, and in what order. Thus, parties are equal adversaries.\textsuperscript{34}

G) Among other distinctive features, authors assert that in adversarial schemes of procedure there is less hierarchical control, proceedings are public and oral, adjudicatory and investigative functions are clearly divided, roles are clearly divided among the prosecutor, the defendant and the adjudicator, parties may terminate proceedings without going to trial, defendants are awarded broad rights at every stage, and there is more victim intervention in the proceedings.\textsuperscript{35}

We can see then that scholarly research shows two distinct categories of criminal procedure systems—models/schemes—that, at least at a theoretical level, appear to have a fixed set of features. Where is Latin America? As part of a civil law continental European tradition, Latin America has traditionally been governed by inquisitorial systems. A great deal of literature has been spent in trying to define what is adversarial and what is inquisitorial. That is not the purpose of this text. I do not aspire to find that definitive feature that allows us to distinguish a truly adversarial system. This paper wants to argue the paradox, or rather, the impossibility of attempting to define these categories. I will approach this task going to the text of the Codes passed in Latin America over the last two decades. I plan to focus on the reforms themselves, and on what legislatively was understood by each country that made part of the adversarial reform movement "adversarial." My hope is that by focusing on what actually and legally was understood by each jurisdiction as "adversarial reform," we will be able to better grasp, not the theoretical features of said category or model, but the true and real shared concerns of the reforms. Is there anything in common among them? Is there a common concern in the reforms as a consequence of which we can dare call of them "adversarial"? My claim is that we should let legislative reality teach us, if there is anything we can call "adversarial" among the reforms, and thus, if there is any issue we can identify as a common trait, concern, or feature in the adversarial Latin American movement. Maybe then

\textsuperscript{33} See id. at 14.

\textsuperscript{34} See id. at 20-21.

\textsuperscript{35} See Langer, supra note 24, at 621; Maier, supra note 4, at 205-218.
we will be able to better understand this process that Latin America has undertaken in the last two decades.

With respect to the inquisitorial/adversarial dichotomy, and more precisely, with respect to the essential ideals of the adversary process, a brief reference to the United States Supreme Court may be useful. One could not consider Supreme Court opinions strictly as "academic literature" since, notwithstanding their academic importance, they are not law journal articles. Nonetheless, certain passages in some cases are valuable for observing what is understood—by a high court in an adversarial system—as "typical adversarial features." It is intellectually provocative to observe when and how the Supreme Court includes references to the "nature of the adversary process." This, of course, is not an exhaustive analysis of how the Supreme Court understands the adversary process, but merely a superficial selection of cases in which it has considered some traits as inherent to the adversarial model.

The Supreme Court has usually referred to the inquisitorial/adversarial dichotomy when discussing two issues: effective assistance of counsel and the right against compelled self-incrimination. The Court has repeatedly held that the adversary process demands strong and effective defense counsel to test the prosecution's case. Lack of effective counsel renders the process unreliable. Likewise, the Court has held that a main characteristic of the accusatorial model—in opposition to the inquisitorial scheme of procedure—is that defendants cannot be compelled to testify. The prosecution, thus, must prove its case without relying on any activity by the defendant.

However, in some cases regarding discovery the Court has considered that sufficient pretrial disclosure of evidence between parties can reduce the perception of the justice system as a "sporting contest." Consequently, the presentation of each party's case is fairer. The Court even stated that the adversary process could not function without some sort of discovery rules. In conclusion, among the primary typical characteristics and definitive traits of the adversary system—according to the United States Supreme Court—we can find the right to effective assistance of counsel, the protection of the privilege against

compelled self-incrimination, and rules that regulate some sort of pre-trial discovery.

1.2. Was there an Adversarial Reform Movement in Latin America? If so, what was it about?

It is fair to say there is a unanimous consensus with respect to the following assertion: Latin America has historically been, and in fact was until the reform era, governed by inquisitorial criminal procedure models. It is also commonly agreed that over the past two decades Latin America has endured a Reform Movement. This Reform Movement caused jurisdictions to modify their criminal procedure laws in order to adopt adversarial schemes of investigation and adjudication, thus, leaving behind the inquisitional tradition.

I propose to take a look at the mainstream discourse surrounding the Reform Era. I can summarize this discourse in the following statement: several jurisdictions in Latin America over the past decades modified their Criminal Procedure codes in order to leave behind inquisitorial models and adopt adversarial schemes or structures. In the following pages we will explore a good deal of the comments that have surrounded the reform. I will call this the "official and mainstream discourse" about the Reform. A discourse issued, constructed, and fed by academia, international organizations, and reformers themselves.

According to the official mainstream discourse about the Reform Movement, Spain and Portugal introduced inquisitorial systems in Latin America during colonial times. The features of this model Latin America "inherited" include a bureaucratic judicial organization, with vertical and centralized powers, no real judicial independence, with written, secret, judicial investigations conducted by a public officer that concentrated investigatory and adjudicatory functions, burdened with the duty of finding the truth, and no oral/public trials.

---


Additionally, written files or dossiers of the proceedings had to be mandatorily kept.\textsuperscript{41}

Following this discourse, several countries in Latin America and Continental Europe (commonly referred to as part of a historical “civil law” tradition) have recently tried to move towards the adversarial model of criminal investigation and adjudication.\textsuperscript{42} One trend of this movement has been to attribute a passive role to the fact-finder/decision maker, while giving more procedural influence to the prosecution and the defense. This influence refers to investigative powers, and the authority to freely find, select, and present the evidence of their choice. This of course includes a preference for cross-examination as the quintessential adversarial method for introducing testimonial evidence.\textsuperscript{43} Basically, the reforms allegedly attempted to make trial the central stage in the proceedings and the prosecution/defense dispute the essential trait of the system. Reducing procedural delays, and thus creating a more effective system, was also a main concern in the region.\textsuperscript{44}

Countries in this Reform Movement have also opted for softening compulsory prosecution. Compulsory prosecution is a typical trait of inquisitorial systems.\textsuperscript{45} Following the official discourse about the Reforms, other legislative options to transform criminal procedure models include the introduction of juries, the adoption of oral techniques of case management, and mechanisms that allow termination of the proceedings before trial, such as plea bargaining, or at least, instruments which resemble or are inspired by plea bargains.\textsuperscript{46}


\textsuperscript{42} José I. Cafferata Nores, La Reforma Procesal en América Latina [The Procedural Reform in Latin America] 11-28 (last visited April 15, 2013), http://enj.org/portal/biblioteca/penal/derecho_procesal_penal/19.pdf (analyzing what has changed with the reforms and what should keep changing within Courts, the Public Ministry, etc. Also listing paradigmatic features of the reforms; the opportunity principle heads the list. Among other universal features of the reforms, Professor Cafferata also includes victims, the defendants, the courts, the Public Ministry, reparation to victims); see also id. at 11 (evaluating the reforms). Professor Cafferata lists as universal traits of the reforms abstract rights included in the new Codes. I claim that the only truly operational and practical trait is the opportunity principle.

\textsuperscript{43} See Langer, supra note 3, at 27.

\textsuperscript{44} See Linn Hammergren, Fifteen Years Of Judicial Reform in Latin America: Where We Are And Why We Haven't Made More Progress, 4-5, ftp://pogar.org/Local User/pogarp/judiciary/linn2/latin.pdf (last visited February 7, 2013).

\textsuperscript{45} See Langer, supra note 3, at 28.

\textsuperscript{46} See id.
The adversarial reforms in the region can be summarized in the aspiration of leaving behind secret, written, and judicial investigations, in exchange for public/oral trials in front of impartial fact-finders, where parties have the opportunity of actively and directly confronting opposing counsel's evidence and witnesses.\(^{47}\) It has also been argued that the reformed Codes intended to heighten respect for human rights and democratic values.\(^{48}\)

It is also a matter of consensus among commentators within the mainstream discourse that the United States directly influenced the Reform Movement in Latin America. In fact, U.S. advisors worked closely with Latin American counterparts in the late 1980s and early 1990s to redact the new Codes.\(^{49}\) The U.S. channeled support mainly through the United States Agency for International Development's (USAID) criminal justice reform projects.\(^{50}\)

The Reform Movement's main leader was Professor Binder from Argentina, and the Córdoba Province Criminal Procedure Code (1938-1940) and the Criminal Procedure Code of Costa Rica (1973) provided normative inspiration (Argentina is a Federal nation and Córdoba is one of its provinces). Some commentators suggest that the procedural model adopted in Córdoba with the 1939 Code was advertised as a "mix." In reality, it imported elements from the Italian, German, and Spanish Codes, which the Napoleonic French Code had influenced. Thus, it was in fact still inquisitorial. Calling the Córdoba

\(^{47}\) See Riego, supra note 40, at 7-10.

\(^{48}\) See Las Reformas Procesales Penales, supra note 41, at 28 (explaining that part of the reason for the reforms was overcoming dictatorships and the consequent entry to democratic governments); Universidad Católica de Temuco, Seminario Reforma Procesal Penal 23 - 27 (2001) [hereinafter Seminario Reforma Procesal Penal] (Chile) (holding that part of the reason for reform movements after the 1980s was democratization); id. at 26 (explaining that within the agenda for development in Latin America, criminal justice reform began to play an important role); see Fernando Carrillo Flórez, Los Retos de la Reforma de la Justicia en América Latina [The Challenges of Justice Reform in Latin America] 29-42. Minter Carrillo was at the time he wrote the cited article an Inter-American Development Bank, specialist for Rule of Law. He held that consolidation of the Rule of Law and democratic government is necessary for economic development, which in turn made judicial reforms necessary.

\(^{49}\) See Hammergren, supra note 44, at 4-5.

\(^{50}\) See Bischoff, supra note 25, at 40-50 (explaining that the reforms redefined the roles of judges and prosecutors). The reforms also resulted in better funded and organized public defender services, abbreviated proceedings, discretion, and limits in incarceration. The reforms have been accompanied by training programs.) See id.
Code a “mixed system” does not do justice to the fact that it was actually strongly inquisitorial.\textsuperscript{51}

Nonetheless, according to the official discourse, the Code that enlightened and influenced the adversarial Reform Movement was the Criminal Procedure Code of Córdoba. This Code represented, according to some commentators, the “reception” of criminal procedure law in continental Europe at the time, which had displaced the classical inquisitorial features. Thus, the main normative sources of influence for Córdoba were the German Criminal Procedure Code of 1875, the Italian Criminal Procedure Codes of 1911 and 1930, and the Spanish Criminal Procedure Code of 1882. Other major sources of influence over the Reform Movement were the draft of the Federal Criminal Procedure Code of Argentina (1986)—though it was never passed—and the Model Criminal Procedure Code for Ibero-America.\textsuperscript{52} Allegedly, the “prestige” of the Model Code allowed several jurisdictions in the Reforms to use it.\textsuperscript{53} These included Guatemala, Costa Rica, and El Salvador, among others.\textsuperscript{54}

Some reforms have not been fully well received because there is a tendency in some jurisdictions to perpetuate old power structures implicit to the inquisitorial model.\textsuperscript{55} Additionally, the reforms face a

\textsuperscript{51} See Walter Richard Trinchari, \textit{El Rol del Juez Chileno en el Nuevo Código Procesal Penal}, \textit{in Seminario Reforma Procesal Penal}, \textit{supra} note 48, at 23-27 (explaining that the mix system was adopted in Argentina in 1938 in the Córdoba Province. It was imported from the 1913 Italian Code, which, in turn, was inspired by the Napoleon Code. The author holds that even though it is called a mixed system, it does not in fact replace the basis of the inquisitorial model.).

\textsuperscript{52} See \textit{Las Reformas Procesales Penales}, \textit{supra} note 41, at 26 (explaining that the Argentina Criminal Procedure Code Draft inspired the Ibero-American Model Criminal Procedure Code).

\textsuperscript{53} See Kai Ambos & Jan Woischnik, \textit{Las Reformas Procesales en América Latin}, \textit{in Las Reformas Procesales Penales}, \textit{supra} note 41, at 835-96 (explaining that the Model Code was strongly influential and the cornerstone of the reform movement. However, the authors concede legislative results in several jurisdictions have taken some distance from the Model rules.).

\textsuperscript{54} See \textit{Las Reformas Procesales Penales}, \textit{supra} note 41, at 26-29 (explaining that other jurisdictions in the region used the Model Code because of its prestige).

\textsuperscript{55} See Cafferata, \textit{supra} note 42, at 12-15 (explaining that even though each reform was led locally, international support was provided. He also claims that the Córdoba Code and the Costa Rica 1973 Code, both with a mixed system of public/oral trials, were very influential in the reform movement. Additionally, he asserts that the goal of the reform was – or should have been – to create systems which respect human rights. Until the time when he wrote this paper, El Salvador, Venezuela, Guatemala, Córdoba, and Buenos Aires had already adopted such a system. According to him, Professor Binder was the leader of the reform movement in the region. The reforms intended to leave behind jurisdictional, written, and secret investigations, as well as adopt contradictory trials in the direct presence of the
number of challenges for their adequate implementation.\textsuperscript{56} It is also important to remember that the reforms have been (and are still) supplemented with intensive training and financial support from international organizations and U.S. agencies. The Departments of State and Justice established programs such as the Offices of Overseas Prosecutorial Development, Assistance and Training (OPDAT), International Law Enforcement Academies (ILEA), and the International Criminal Investigative Training Assistance Program (ICITAP), and they continue to assist the adversarial criminal procedure reforms initially supported by USAID.\textsuperscript{57}

In sum, according to the mainstream discourse, a “wave” of criminal procedure reforms has covered Latin America. The Reform Movement brought revolutionary changes to the antiquated criminal justice structures of investigation and adjudication.\textsuperscript{58} The new Codes supposedly embody an accusatorial conception of litigation, following the trend set by other civil law jurisdictions in Europe (e.g., Spain, Italy and Portugal).\textsuperscript{59} Thus, a uniform procedural reform has occurred, producing “considerable similarity” among the new Codes in the region. This is because all of the new pieces of legislation share a common influence epicenter: the Model Criminal Procedure Code for Ibero-America (inspired itself by the Cordoba Criminal Procedure Code). These Codes “emphasized” the introduction of oral proceedings, procedural efficiency, short periods of pre-trial detention, and more guarantees for the defendant. This emphasis allegedly shifted power and discretion from judges to prosecutors while it simultaneously created stronger, well organized, and efficient public defender services. Therefore, the roles of the parties involved in criminal litigation were redefined.\textsuperscript{60} This shift of power meant that with the Reforms, the use of prosecutorial discretion and abbreviated proceedings was permissible.\textsuperscript{61} The Reform Movement introduced to the region “new traits,” in-

---

\textsuperscript{56} See Kai Ambos & Jan Woischnik, supra note 53, at 835-96 (listing among the future problems of criminal justice systems in the region: increasing crime rates, new forms of criminality, and new forms of investigation).

\textsuperscript{57} See McLeod, supra note 2, at 122-23.

\textsuperscript{58} See Bischoff, supra note 25, at 34.

\textsuperscript{59} See id.

\textsuperscript{60} See id.

\textsuperscript{61} See id. at 42-44, 46-47.
cluding alternative dispute resolution methods, private prosecutorial actions, and guilty pleas.\textsuperscript{62}

In conclusion, it is safe to say that there is a universal conception among commentators who have analyzed the legal developments in Latin America over the past two decades that the region did in fact have a Reform Movement. That movement brought, as a consequence, the introduction of adversarial criminal procedure systems, while leaving behind inquisitorial structures.

1.3. General history of the Reform Movement

Latin America’s criminal procedure historical tradition has developed from Spanish legacy.\textsuperscript{63} When nations in the region achieved independence, they chose to maintain the criminal procedure scheme they had inherited from Spain.\textsuperscript{64} Thereinafter, Latin American countries drifted away from the reforms that took place in Europe over the 19th century.\textsuperscript{65}

The new and independent nations in the region modeled their procedural structures after European codifications such as the Spanish Code of 1822.\textsuperscript{66} While Europe and Latin America shared a common understanding of substantive criminal law throughout the 19th and 20th centuries, Latin American jurisdictions adamantly held on to traditional inquisitorial systems.\textsuperscript{67} In comparison, European legislations experienced strong procedural reform efforts— influenced by the Napoleonic Code— during those centuries.\textsuperscript{68} When some of the countries in Latin America reformed their Codes over the 19th and 20th centuries, they allegedly adopted a “mix” of inquisitorial and adversarial features.\textsuperscript{69} Nonetheless,

Latin American systems in practice afforded the accusatory elements very little relevance. The region stayed bound to the pure inquisitorial system in a form almost identical to that formerly employed by the colonial administrations. Astonishingly, Latin America preserved this structure almost entirely for another century and a half until a wave of reforms began a decade ago, result-

\textsuperscript{62} See Hendrix, supra note 15, at 389-90, 397-400 (pointing out that discretion, guilty pleas and other alternative dispute resolution methods like private prosecution appear as new traits in the reforms).

\textsuperscript{63} See Langer, supra note 24, at 627.

\textsuperscript{64} See id. at 628

\textsuperscript{65} See id.

\textsuperscript{66} See Bischoff, supra note 25, at 34.

\textsuperscript{67} See id.

\textsuperscript{68} See Langer, supra note 24, at 627.

\textsuperscript{69} See Bischoff, supra note 25, at 34.
ing in nearly five hundred years without any meaningful criminal procedural reform (in spite of reforms in other areas of the law).\textsuperscript{70}

The Napoleon Code of 1808, while following the inquisitorial tradition in Continental Europe, adopted elements such as oral/public trials from the criminal procedure structure in the United Kingdom. However, its essence—written and secret investigations with few rights for the defendant—pervaded. Some described the Napoleon Code of Criminal Instruction as a "mixed model," since it included features and traits from the inquisitorial scheme in its pre-trial phase, and from the adversarial system during trial.\textsuperscript{71} The French Criminal Procedure Code spread throughout Continental Europe.\textsuperscript{72} This legal phenomenon did not go unnoticed in Latin America. Nevertheless, reform efforts in the European direction were rejected.\textsuperscript{73} Therefore, Latin American jurisdictions upheld legislations that closely mimicked the typical inquisitorial model inherited from colonial times.

Even though several Latin American political actors advocated adopting one of these mixed models, most countries in the region ultimately rejected them. Latin American elites rejected the more liberal codes mainly because they deeply distrusted and disliked the jury as well as oral and public trials, believing that their populations were not ready for them. Instead, the criminal procedures that the young, independent Latin American republics adopted generally followed the inquisitorial model (created by the Catholic Church and absolutist monarchies) that had prevailed in continental Europe and the Portuguese and Spanish Americas between the 13th and 19th centuries. The new codes deviated from the original inquisitorial codes by refusing to authorize torture to obtain confessions and by limiting the system of legal proofs. Nevertheless, the main features of a typical Latin American criminal procedure code followed the inquisitorial model.\textsuperscript{74}

Among the main traits of the governing criminal procedure structure in Latin America over the 19th and 20th centuries one can identify, among others, are the absence of prosecutorial discretion, the secret nature of the proceedings, the lack of division of roles and functions among the actors involved, and the requirement of written files.

\textsuperscript{70} Id.
\textsuperscript{71} See Langer, \textit{supra} note 24, at 627.
\textsuperscript{72} See id.
\textsuperscript{73} See id. at 628.
\textsuperscript{74} Id.
or dossiers. Therefore, the adjudication phase was still inquisitorial in nature, since it was written, it was secret, and it occurred before a professional judge with no intervention of lay fact-finders. Before the Reform Era, Latin American legislations embraced inquisitorial schemes with these features. As one author notes, "[a]ll of this changed, however, during the last fifteen years, as fourteen Latin American countries as well as numerous Latin American province and state jurisdictions replaced their inquisitorial codes with accusatorial ones."

The Reform's causes overlap and are diverse in nature. Authors argue that explanations for the Reform Movement include the transition of various governments in the region to democracy, the interest of the international community, and a messianic aspiration that new Codes were needed to solve all judicial problems. The history of the reforms requires a necessary reference to the Ibero-American Institute of Procedural Law. The Institute was created in 1957. Its first president, Niceto Alcalá Zamora y Castillo, was the first to put forward the idea that the Institute should issue a Model Criminal Procedure Code. He believed that the base for this Model Code should be the Criminal Procedure Code of Córdoba. The Institute advocated for a "Model" Code with the hope it would integrate the region.

In 1937 a "commission" was set up to draft the Córdoba Code, and the members of this commission were Professors Soler and Vélez. The Code was passed in 1939. The Italian Criminal Procedure Codes of 1911 and 1930 directly influenced the Córdoba Code. The Criminal Procedure Codes of Spain (1882) and Germany (1875) also served as sources of inspiration for Córdoba. Notwithstanding those external normative influences, Professors Vélez and Mariconde did not just "copy" foreign legislations, they adjusted the rules to fit

---

75 See id. at 629-30.
76 See Langer, supra note 24, at 629-30.
77 Id. at 631.
78 See id. at 632-33.
79 See id. at 642.
80 See id.
81 See id.
82 See Langer, supra note 24, at 642.
83 See id. at 642-43.
84 See id. at 634.
85 See id. at 635.
86 See id. at 634.
their own reality. Some suggest this Code had many "accusatorial aspects," such as public/oral trials and more rights for the defendant in the pre-trial phase. Nevertheless, several inquisitorial traits survived in the Code, such as a lack of juries, written, and secret proceedings, an absence of prosecutorial discretion, and a use of judges as instructors for serious felonies (only minor offenses had prosecutors in charge of the investigation).

Afterwards, Costa Rica adopted a new Criminal Procedure Code in 1973. It based the reform on Córdoba’s Code, and Professor Vélez participated in the drafting. Allegedly, due to the presence of military dictatorships and a general lack of interest in judicial reform, the Córdoba Code did not expand beyond Costa Rica.

Between 1967 and 1978 the Institute undertook the necessary work to draft the Model Code. Ultimately, a commission was selected to redraft the text. Professor Julio Maier, an Argentinian lawyer and scholar, was part of that commission. As we will see, his efforts have been decisive in the history of the reform movement. In 1988 during the 11th Conference of the Institute, Professor Maier presented the Model Criminal Procedure Code for Ibero-America. The Institute approved the Code. Primarily, Córdoba’s Code of 1939 and the German Criminal Procedure Code inspired the commission. Professor Maier admits the most outstanding achievement of the Code was to leave behind the inquisitorial tradition.

Meanwhile, Professor Maier also led procedural reform efforts in Argentina. Those efforts culminated in the 1986 Federal Procedure Code Draft. Unfortunately, the Draft failed to gain approval from the legislature, and was never enacted. The 1986 Draft has a

---

88 See Langer, supra note 24, at 634.
89 See id. at 634.
90 See id. at 634-36; see Binder, supra note 39, at 50-58.
91 See Langer, supra note 24, at 636.
92 See id.
93 See Langer, supra note 24, at 636.
94 See Maier, supra note 87, at 11.
95 See Langer, supra note 24, at 642.
96 See id.
97 See id. at 643.
98 See id. at 642-43.
99 See id. at 642 (abbreviating the German Code of Criminal Procedure as “StPO”).
100 See Maier, supra note 87, at 18.
101 See Langer, supra note 24, at 637.
102 See id.
103 See id. at 641.
close connection with the rest of the reforms in the region. The Model Code of 1988 followed the general features included in the 1986 Draft. Some variations were incorporated regarding the possibility victims and non-profit organizations to serve as private prosecutors in some cases, and the adoption of lay juries or “mixed” adjudicatory bodies with professional and lay decision makers.

Simultaneously, Guatemala hired Professors Maier and Binder to draft its Criminal Procedure Code. They recommended and redacted an accusatorial code. The professors presented a project influenced by the Model Code and the 1986 Draft. After the ordinary legislative process, Congress passed the new Criminal Procedure Code in 1992. It came into effect in 1994. After Guatemala, more than a dozen criminal procedure reforms followed.

Which countries do commentators include as being part of the Reform Movement? Which reforms are catalogued as adversarial? Notwithstanding the consensus on the fact that a Reform Movement existed and that it intended to replace inquisitorial Codes with adversarial models, there is no consensus regarding which legislations became “truly” accusatory. Commentators differ. Based on their own lists of adversarial “attributes,” lists that generally tend to be homogeneous, they conclude that some countries deserve to be considered adversarial. Paradoxically, though different commentators claim more

104 See id. at 643.
105 See id.
106 See id.
107 See Maier, supra note 87, at 18
108 See Langer, supra note 24, at 643.
109 See id. at 646.
110 See id.
111 See id.
113 Compare Bischoff, supra note 25, at 34; with Kai Ambos & Jan Woischnik, supra note 53, at 870-872 (According to Ambos and Woischnik, Costa Rica and Guatemala had the first reforms. Until the time when they wrote their paper, if passed, Codes in Bolivia, Chile, Honduras, Paraguay and Venezuela would also be construed as “adversarial” or respectful of the Rule of Law. According to them, Codes in Cuba, Uruguay, Mexico and Peru had not yet entered the Reform Movements. Argentina was “half-way” and Brazil, El Salvador and Colombia, had only timid reforms. Finally, in their opinion, only Bolivia, Chile, Honduras, Panamá, Venezuela, Costa Rica and Guatemala in their Codes or approved reforms, deserved a “positive evaluation.”), and Cafferata, supra note 42. (Includes as part of
or less the same features to be typically "adversarial," not all of them include the same jurisdictions within the Reform Movement. Therefore this paper will include as part of the Reform Movement any Latin American country that has been construed to have experienced an adversarial reform, even if there is no consensus about it among commentators.


There are some methodological difficulties with Mexico and Argentina. Since they are federal nations, the research for this paper would extend infinitely if we were to include all their states or provinces within the Movement. There is also a problematic issue worth noting about Ecuador.

Mexico reformed its Constitution in 2008. The amendment established the constitutional basis for adversarial reform at the federal and state levels.\footnote{Clare Ribando Seelke, Cong. Research Serv., R43001, Supporting Criminal Justice System Reform in Mexico: The U.S. Role 4 (2013).} Legislators at every level have until 2016 to adopt
and implement accusatory Codes. Commentators suggest some states had important criminal procedure reforms before 2008, reforms that could even be catalogued as adversarial. After the constitutional reform, several legislations replaced (or are in the way of replacing) their old inquisitorial codes with adversarial schemes of procedure. Furthermore, the National Commission of Superior Courts of the United Mexican States issued a “Model Criminal Procedure Code,” as a parameter for future legal reforms after the amendments.

I choose to work only with the Mexican constitutional reform itself, and the rules provided thereof, regarding criminal procedure. Including only some of the states’ reformed adversarial codes within the Reform Movement would be arbitrary. Given that federal as well as state legislations (even if they had significant procedural reforms before 2008) have to adapt to the newly established constitutional standards of criminal procedure, it seems reasonable to only include as part of the Reform Movement, at least for the purposes of this paper, the text of the Mexican constitution itself.

The Mexican Constitution allows us to analyze only at a very superficial level what the accusatory process in Mexico will look like. The Constitution only mandates the minimum foundations for future legislation, so in no way does it let us rigorously grasp the results of adversarial reform in Mexico. According to the minimums set forth by the Constitution, any future legislation should: safeguard basic procedural guarantees common to human rights in America and other sys-

---

115 Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.).
117 See Código Federal De Procedimientos Penales [CFPP] [Federal Criminal Procedure Code], as amended, Diario Oficial de la Federación [DO], 3 de Mayo de 2013 (Mex.) (Several recent decrees have altered sections of this code); see also, Secretaria de Servicios Parlamentarios, Código Federal de Procedimientos Penales: Decretos de Reforma, LXII LEGISLATURA (Last modified May 3, 2013), http://www.diputados.gob.mx/LeyesBiblio/req/cfpp.htm.
119 Of the pre-constitutional reform “adversarial” States (Oaxaca, Nuevo México, Nuevo León, Chihuahua) it seems only Chihuahua had prosecutorial discretion. The Constitution implemented discretion. The new Code for the State of Mexico also has discretion. The model Code and the Project for the Federal Criminal Procedure Code adopt discretion.
tems in the region, guarantee the parties access to the proceedings during the investigative phase, adopt public/oral trials with direct presence of the fact-finder/decision maker, include rules about arrest, pretrial detention and seizure of property, regulate the police as a supportive investigative force under the supervision of the prosecutorial body, allow victims to participate in the proceedings, and permit private prosecution for certain offenses.\textsuperscript{120}

As explained supra Argentina has been a central force in the Reform Movement. In fact, commentators suggest unanimously that the 1986 Draft was the first adversarial reform effort in Latin America. I choose to use the Draft—in representation of Argentina—as part of the Reform Movement. Even though that exact draft was not approved, commentators hold that it heavily influenced future criminal procedure reforms in Argentina's federal and state levels. Ecuador is a very particular example of the Reform Movement in Latin America. Ecuador replaced its criminal justice system with an adversarial model. The new Code has been in effect since 2001.\textsuperscript{121} The Code has been criticized because some of its rules, still rooted within inquisitorial rationale, openly contradict the oral proceedings that are inherent to accusatory systems.\textsuperscript{122}

Among other elements that set Ecuador apart from the rest of the region, one can mention that it is the only jurisdiction in which prosecutorial discretion was not introduced immediately with the reform, but instead, several years later.\textsuperscript{123} The opportunity principle was created in the 2008 Constitution and was included in the Code until 2009.\textsuperscript{124} Therefore, elements of the adversary process have been slowly making their way into Ecuadorian criminal procedure law. In any event, Ecuador today can be considered as one of the countries involved in the Reform Movement. However, for the purposes of this paper, and given Ecuador's peculiarities, in order to completely replace the old inquisitorial model, it will not be included in any further analysis. It is impossible to pinpoint the exact moment over the past decade when the Code actually became adversarial. Hence, it would be arbitrary to select for the inquiries that are to come in this paper, one ver-

\textsuperscript{120}See, Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, Title 1 Chap. 1, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) (detailing the basic rights of Mexican citizens that cannot be abridged).

\textsuperscript{121}See generally, Código De Procedimiento Penal [Code of Criminal Procedure] (Ecu.)

\textsuperscript{122}See Informe Ecuador, in Reformas Procesales Penales en América Latina: Resultados del Proyecto de Seguimiento, supra note 39, at 104-07.

\textsuperscript{123}See Constitución de la República del Ecuador [Constitution] 20 de Octubre de 2008, Sec. 10, art. 195 (Ecu)

\textsuperscript{124}See id; see also, Código de Procedimiento Penal [Code of Criminal Procedure] art. 33 (Ecu.).
sion of the Code that was in effect at any given point in time since 2001.

Notwithstanding the risk of over-generalizing, the particular histories of the reforms in each country can be summarized as follows. When one consults the available sources for each of the reformed jurisdictions, one can draw a fairly coherent map of the path of all the reforms. Those sources include local scholars, governmental agents, and reports from international organizations or NGOs. Nonetheless, we must not forget that each nation has historical details and specificities that account for the political, legal, social, and economic climate leading up to the reform.

The new Codes were charged with messianic aspirations. Voices of renewal claimed that enactment of adversarial legislations would solve (or at least help solve to a considerable extent) all problems in the criminal justice systems. Thus, the reforms were seen as “necessary.” Reform efforts generally began in the region with local events or forums where the convenience of the adversarial transformation was discussed. Commissions were then appointed to draft the new Codes. In some instances, such commissions had the broader task of assessing and suggesting modifications to the justice system in general, not just criminal procedure legislation specifically.

Reforms sometimes encompassed the Constitution as well as statutes, and the new Codes were not always immediately applied after approval. Rather, a number of jurisdictions chose gradual or deferred mechanisms of implementation, while the particular country


126 See Informe El Salvador, in Reformas Procesales Penales en América Latina: Resultados del Proyecto de Seguimiento, supra note 39, at 112

127 See id.

128 See SEELKE, supra note 114, at 4 (discussing the changes to the Mexican Constitution as part of the effort to reform criminal procedure).
adapted its infrastructure—and even its culture—to the demands of an adversarial system.129

The reforms were generally read as "historical revolutionary landmarks," resulting from ample debates and broad consensus.130 Local commentators assert, in general, that pre-reform systems were inefficient, lacked transparency and respect for human rights.131 No jurisdiction prior to the reform allowed prosecutorial discretion.132 The reformed legislations on the other hand are generally valued as positive adversarial transformations, with public oral trials, clear division of investigative and judicial functions and roles, impartial judges, efficient and transparent proceedings, and prosecutorial discretion.133 The adversarial reforms are also advertised as means to respect human rights international instruments and incorporate decisions from the Inter-American Court of Human Rights.134

The new Codes, as stated by local commentators, were inspired by one or several of the following normative instruments: the Córdoba Code, the Model Code, the German Criminal Procedure Code, and the Italian Criminal Procedure Code.135 Local authors also cite as a source of inspiration the preceding reformed Codes in the region. USAID played a central role in the Reform Movement.136 Therefore, replacing inquisitorial codes became the essential mission of USAID in the region.137 Other international organizations also supported a number of reform efforts in Latin America.

Implementation of the reforms has not been without challenges. Commentators agree that reform efforts have not been simple and that transformations of criminal justice systems in the region have not gone as expected.138 The region still has a long way to go before fully embracing the premises and rationale of adversarial litigation. There is a consensus that for a system to truly function as adversarial, more than mere legislative reforms with abstract and non-

---

129 See Informe Ecuador, supra note 122, at 104; see also, Informe El Salvador, supra note 112, at 112.
130 See Binder, supra note 39, at 12.
131 See Bischoff, supra note 25, at 37.
132 Id. at 44.
133 See Binder, supra note 39, at 19.
134 See Bischoff, supra note 25, at 50.
135 See id. at 42. See generally, STRAFFPROZESSORDNUNG [STPO] [Code of Criminal Procedure], Feb. 1, 1877, BUNDESGESETZBLATT [BGBl] 1, as amended (Ger.); CODICE DI PROCEDURA PENALE [C.p.p.] [Code of Criminal Procedure], 24 ottobre 1988 (It.).
136 See McLeod, supra note 2, at 116.
137 Id.
138 See Bischoff, supra note 25, at 50–51; see also, Binder, supra note 39, at 19.
transformative provisions are needed.\textsuperscript{139} Lacking criticisms to normative design, the literature has focused on the administrative, operational, and cultural challenges posed by the reform.\textsuperscript{140} Therefore, if accusatorial Codes demand changes in the way public institutions operate then, without adequate organizational, administrative, and cultural transformations, commentators have alerted about possible failures of the reform movement.\textsuperscript{141} Inappropriate legal design does not seem to be a reason of concern.\textsuperscript{142} Rather, attention for the success of the reforms focused on infrastructure, culture, training of litigators in the abilities demanded by an adversarial system, and administrative adaptation of already existent, or in some cases, newly created institutions such as the Public Ministry, the Public Defender, the Police,\textsuperscript{143} and Courthouses.\textsuperscript{144} The relationship between prosecutors and police forces, as well as supervision and management of police investigatory work, is also a troubling issue for commentators in the region.

1.4. Preliminary conclusions

Thus far we have analyzed the Reform Movement in Latin America. But what have we really analyzed? We have analyzed literature from two types of commentators.

Since the beginning of the Reform Era a number of commentators have dealt with causes and consequences for the reforms. Once each country added to the movement, local authors started publishing about the reform. Therefore, within this type of commentators (scholars, public officials, consultants, etc.), we find texts analyzing the reform, which are usually contemporary with the approval of the new Code. This dimension of literary production is fundamental, since it allows us to reflect upon how local operators were actually reacting to

\textsuperscript{139} See Bischoff, supra note 25, at 51.
\textsuperscript{140} See Binder, supra note 39, at 12-13.
\textsuperscript{141} See Reformas Procesales Penales en América Latina: Resultados del Proyecto de Seguimiento, supra note 39, at 128, 147-150.
\textsuperscript{142} See id. at 89-95 (showing that some reforms could actually not reform anything if they only contain abstract and non-transformative provisions and explaining the administrative and cultural challenges of the reforms).
\textsuperscript{143} See id. at 100 (showing that the working relationship between prosecutors and police officers is problematic in a number of the reforms). CEJA, in the different reports it has issued, has been particularly concerned with the roles in the proceedings, which actors exercise those roles, how the different actors are administratively organized and how they are performing their roles.
\textsuperscript{144} See Rodolfo Daniel Barroso Griffith & Marcelo Fernando Di Biase, La Reforma Procesal Penal en Chubut. Implementación de una Nueva Gestión Judicial, in Reformas de la Justicia en América Latina: Experiencias de Innovación supra note 40, at 93-129.
the reforms, how they were characterizing them, and how they have judged their outcomes.

Within the second dimension of commentators we find authors that produce literature about the Reform Movement in general. They have written texts evaluating adversarial legislations in Latin America from a broader perspective. Notwithstanding the differences between both dimensions of commentators, their discourses are fundamentally the same. This paper has used as sources both kinds of commentators. These commentators are part of what I called in the first pages, the “mainstream discourse” about the Reform Movement.  

Thus far we have reconstructed the mainstream discourse about the inquisitorial/adversarial dichotomy and about criminal procedure reform in Latin America. Now, let us test that discourse. We will analyze the concrete rules of each of the new Codes (including the Model Ibero-American Code) in order to evaluate if they in fact adhere to the “traits” assigned by scholars to adversarial models and to assess if they were in fact “global reforms” of procedural schemes. According to the mainstream discourse the legislations in the region were dramatically replaced and the resulting statutes universally share several “new” characteristics, due to the adversarial nature of the reform. The following analysis will allow us to see if any new legal institution was in fact homogeneously implemented and is now commonly shared across the region as a result of the reform.

1.5. Analysis of the reforms

Parallel to the similarities and differences analyzed below, it is important to take into account a preliminary consideration. The comparative analysis I undertook used as a base the text of the reformed Codes. Complementary laws and further reform efforts in each jurisdiction were not factored into the analysis. In fact, one whole different subject of academic interest could be the reforms of the reforms. Such a study would reveal the acceptance that each reform generated in the legal community. Apparently only Venezuela has had, after the adversarial reform, a new major transformation of its criminal justice system, a transformation that occurred in 2012. For the purpose of this paper our focus is placed in the Venezuelan Code passed during the time that Latin America was experiencing the reform movement.

1.5.1. The commonly shared traits of the new Codes and the Model Code.

When one analyzes and compares the new statutes, one can actually observe they share several features. However, two interesting claims come from this comparison. First, those traits do not fit into the catalogue of characteristics asserted by scholars as typically adversarial, and in some cases, openly contradict the ideals advertised as adversarial. Second, many of those traits existed even before the reform movement and are common to criminal procedure structures in the region, before and after the reform era. Let us analyze and compare the common rules we can find in all the fifteen new Codes and the Model Code:

A. All the Codes begin with a list of procedural/substantive guarantees.146 This catalogue includes, among others, the right to a defense, the right to counsel, to liberty, the prohibition against double jeopardy, and the presumption of innocence.147 These guarantees existed in the region even before the reform, in the old inquisitorial Codes, and in several Latin American constitutions.148 One can hardly say that they are a consequence of adversarial reforms, or that criminal procedure systems in the region before the Reform Era disregarded such fundamental rights.

B. All of the Codes include a set of rules about the parties (or participants) involved in the proceedings.149 More specifically, they include rules about their rights and duties. With respect to the defendant, all legislations in the region protect the right to effective assistance of counsel during all stages of the process and along all encounters with public officials in charge of the inves-

148 See, e.g., Constitución de la República del Ecuador [Constitution] 20 de Octubre de 2008, art. 3(Ecu); Constitución Política de la República de Costa Rica 7de noviembre de 1949, título III (Costa Rica).
149 See, e.g., Código Procesal Penal Modelo para Iberoamérica [Criminal Procedure Model Code of Ibero-America] [hereinafter M.C.]; Código de Procedimiento Penal de El Salvador [Criminal Procedure Code of El Salvador] [hereinafter C.P.P. El Salvador]; Código de Procedimiento Penal de Honduras [Criminal Procedure Code of Honduras] [hereinafter C.P.P. Honduras].
tigation and trial.\textsuperscript{150} All the new Codes also protect the right against self-incrimination.\textsuperscript{151} These rights existed all across the region since before the reform movement.\textsuperscript{152}

With respect to the defendant, none of the new Codes (except Colombia's law) include rules that encourage or even permit the defendant and defense counsel to conduct private investigations.\textsuperscript{153} Thus, of all the fifteen new adversarial models in the region, only one expressly allows the defense to obtain evidence in preparation for trial.\textsuperscript{154}

Can this allow us to assert that systems that fall under the inquisitorial category, according to the mainstream discourse, prohibit private investigations? It does not. It seems obvious that any system—no matter its characterization as “adversarial” or “inquisitorial”—demands that a party prove what it argues. It is obvious that defense counsel is always entitled, and even required, to provide evidence in support of its theory. One could argue that adversarial systems incentivize defense counsel to be more active and diligent in the execution of its role. Nonetheless, it is self-evident that even in inquisitorial systems, if the defendant does not want to remain silent and simply wait for the prosecution to discharge its burden, he must present exculpatory evidence that can he can only obtain through private investigations. No inquisitorial system prior to the reform in the region expressly prohibited the defendant from finding and presenting evidence.\textsuperscript{155}

\textsuperscript{150} See, e.g., M.C., supra note 149, art. 5; C.P.P. El Salvador, supra note 149, art. 10; C.P.P. Honduras, supra note 149, arts. 14-15.
\textsuperscript{151} See, e.g., M.C., supra note 149, art. 41; C.P.P. El Salvador, supra note 149, art. 82; C.P.P. Honduras, supra note 149, art. 102.
\textsuperscript{152} See generally, e.g., Langer, supra note 24, at 638-39 (explaining that while rights to defense and against self-incrimination existed in pre-reform Argentinia, keeping pretrial investigations secret and defendants ignorant of charges against them violated these rights).
\textsuperscript{153} Compare CÓDIGO DE PROCEDIMIENTO PENAL DE COLOMBIA [Criminal Procedure Code of Colombia] arts. 267-68 [hereinafter C.P.P. Colombia] (permitting defendant to request his own investigation), with, e.g., C.P.P. El Salvador, supra note 149 (does not permit a private investigation by the defendant), and C.P.P. Honduras, supra note 149 (does not permit a private investigation by the defendant).
\textsuperscript{154} Compare C.P.P. Colombia, supra note 153, arts. 267-68, with, e.g., C.P.P. El Salvador, supra note 149, and C.P.P. Honduras, supra note 149.
\textsuperscript{155} In Colombia, under a typically inquisitorial scheme, one of the most famous cases in its recent history resulted in an acquittal precisely thanks to investigatory efforts undertaken by defense counsel after which a conspiracy against the defendant was unraveled. I am referring to the Gabriel Arango Bacci case before the Supreme Court. See generally HERNANDO DE LA ROSA, TRAS LA HUELLA DEL ALMI-
Furthermore, it seems paradoxical, commentators claim, that allowing defendants to engage more actively in the investigative phase and awarding them more rights were objectives of the reform. Some authors in the U.S. have precisely complained that the adversarial model lacks sufficient possibilities for the defendant to participate in pretrial activities. In the context of grand jury investigations, proceedings are secret, so defendants have no access or real participation in the pretrial phase. In the U.S., only in probable cause hearings may defendants intervene within an adversary context before trial.

With respect to the prosecution, the new Codes regulate the existence and activity of the Public Ministry, also known as the prosecutorial body. They generally say that the Ministry must execute its duties objectively. Prosecutors must be unbiased and conduct integral investigations. “Integral” means investigations that must seek exculpatory evidence in addition to incriminatory evidence. This trait is common in criminal procedure systems in the region before and after the reform. However, this trait is not adversarial according to the catalogue of features structured by commentators. If one were to confront this rule of “integral investigations” with the catalogue of adversarial ideals expressed by commentators, one could say that there is nothing accusatorial in a system that commands one of the adversaries to actively search for evidence that benefits the opposing party. For all purposes, this means the prosecution substitutes defense counsel in its role and, in turn, replaces it confusing the main functions of prosecution and defense. The prosecution is thus an impartial truth-finder rather than an adversary.

One could argue that the existence alone of an institution such as the Public Ministry is a revolution that brought a new institution unknown to inquisitorial schemes prior to the

---

157 See, e.g., M.C., supra note 149, arts. 68-72; C.P.P. El Salvador, supra note 149, arts. 74-79; C.P.P. Honduras, supra note 149, art. 92.
158 See, e.g., M.C., supra note 149, art. 68; C.P.P. El Salvador, supra note 149, art. 75; C.P.P. Honduras, supra note 149, art. 93.
159 See, e.g., M.C., supra note 149, art. 68; C.P.P. El Salvador, supra note 149, art. 75; C.P.P. Honduras, supra note 149, art. 93.
160 See generally, e.g., Langer, supra note 24, at 639-41 (discussing the progression of Argentinian law with regard to prosecutorial investigations).
reforms. After all, there were no Public Ministries before the reforms. Is this really the case? Does the existence alone of a prosecutorial body translate into the incorporation of adversarial ideals, at least in the sense the mainstream discourse would expect? I believe it does not. The Public Ministry created by the reforms in many cases simply replaced the old instruction judges. In many Latin American countries it was just a change in name. Even though Public Ministries exist, if they are assigned the same functions of old instruction judges, the operational outcome is identical and no substantial legal difference appears. Cultural and legal transformations are necessary to overcome the legacy of inquisitorial investigations.

The creation of a new public institution alone, without regard to its functions, does not itself necessarily result in the profound transformation of a criminal procedure system. Therefore, I reject the idea that the creation of Public Ministries across the region as a consequence of adversarial reforms actually reflects—in all fifteen countries—an adversarial reform. We must also keep in mind that that some jurisdictions had Public Ministries or some sort of "independent" prosecutorial body since before the reform, although performing typically inquisitorial functions (e.g. Colombia). Furthermore, even after the reform, prosecutorial bodies are not always independent from the judiciary. On the contrary, it many cases they are still part of the judicial branch.

Finally, all the Codes regulate civil actors or victims. The procedural and substantive rights assigned to them are in

161 See Riego, supra note 40, at 7.
162 See, e.g., Claudio Pavlic Véliz, Criminal Justice Reform: A New Form of Criminal Justice for Chile, 80 U. Cin. L. Rev. 1363, 1366-69 (2012) (discussing the creation of the Public Ministry in Chile during the reform process).
163 See, e.g., Langer, supra note 24, at 639-41 (discussing Argentina’s switch from a pre-reform system in which the judge was responsible for conducting a pretrial investigation to a post-reform system in which that responsibility lies with the prosecutor).
166 MAURICIO DUCE, REFORMA PROCESAL PENAL Y RECONFIGURACION DEL MINISTERIO PUBLICO EN AMERICA LATINA (Facultad de Derecho Universidad Diego Portales 2000).
some cases broad and in others, narrow and restricted to economic reparation. The involvement of civil actors in criminal proceedings, as parties or participants, at least for seeking reparation, was a common feature before the reforms.

However, awarding broad rights to victims, and especially allowing them to actively participate in the proceedings, does not appear as a characteristic of adversarial models according to commentators. Furthermore, systems none would contest are adversarial in nature—such as federal criminal procedure in the U.S.—do not come close to any Latin American jurisdiction, before or after the reform, with respect to the generosity of rights awarded to victims and their possibility of participating in the process. Hence, respect for victims' rights does not appear to be a typical trait of the accusatory process incorporated in the region as a consequence of the reform movement. The similarity among Latin American systems with respect to the protection they provide to victims has other causes, independent from the adversarial era. However, it is not the purpose of this paper to analyze the history and the reasons for victims' rights in the region.

C. Several new Codes require the maintenance of written files of the proceedings.\(^{167}\) The compulsory existence of a "file" or "dossier," along the investigation and trial is, according to commentators, a typical trait of inquisitorial systems.\(^{168}\) Nonetheless, several Latin American jurisdictions, even after the adversarial reform, include the obligation for officials to keep some sort of file that integrates in writing every single relevant event, act, or proof. There are, however, a number of exceptions in the region.

D. All Codes have rules concerning arrest, seizure of property, and pre-trial detention.\(^{169}\) Concern for these issues has been homogeneously shared in the region since before the reforms.

However, we must remember that several commentators on Latin American reform expressed that the reforms


\(^{168}\) See, e.g., C.P.P. Costa Rica, supra note 167, art. 275; C.P.P. Paraguay, supra note 167, arts. 281, 283; C.P.P. Perú, supra note 167, arts. 134-41.

\(^{169}\) See, e.g., C.P.P. El Salvador, supra note 149, art. 275 (concerns arrests), arts. 284-93 (concerns seizure of property), arts. 320-35 (concerns pre-trial detention); C.P.P. Colombia, supra note 153, arts. 297-305 (concerns arrests), arts. 82-91 (concerns seizure of property), arts. 307-20 (concerns pre-trial detention).
would bring greater respect for liberty, hence, reducing pre-trial detentions. The Inter-American Court of Human Rights and the Inter-American Commission, without suggesting or requiring party-states (several of which have participated in the reform era) to transform to the accusatory process, had held that parties should ensure that pre-trial detention be imposed only when strictly necessary (e.g., flight risk, danger to the community, and possibility of tampering with evidence or witnesses). Therefore, can respect for liberty be catalogued as a strictly adversarial trait?

It is paradoxical to observe that an adversarial system such as the one found in U.S. federal criminal procedure, shows numbers of pre-trial detention higher than the ones produced by several inquisitorial Latin American systems before the reform and by accusatorial systems after the reform.

---

170 See generally, e.g., Aya Fujimura-Fanselow & Elisabeth Wickeri, “We are Left to Rot.” Arbitrary and Excessive Pretrial Detention in Bolivia, 36 FORDHAM INT’L L.J. 812, 822-30 (2013) (detailing Bolivia’s pre-reform lack of respect for liberty, and explaining how reforms were intended to rectify the issue of lengthy and frequent pretrial detentions).

171 See, e.g., Hendrix, supra note 15, at 391-95 (describing Guatemalan reform’s goal to cut down on pretrial detention); Langer, supra note 24, at 632 (stating that a goal of criminal procedure reform in many Latin American countries was to shorten pretrial detention periods).


174 See CRISTIÁN RIEGO Y MAURICIO DUCE, PRISIÓN PREVENTIVA Y REFORMA PROCESAL PENAL EN AMÉRICA LATINA: EVALUACIÓN Y PERSPECTIVAS (2009), available at cejaprisionpreventiva.pdf; LETICIA LORENZO, CRISTIÁN RIEGO Y MAURICIO
E. In the majority of new Codes, judges during trial can search for and collect evidence, and can call witnesses.¹⁷⁵ According to commentators that catalogue the role of judges as “passive umpires,” this feature seems to openly contradict the nature of adversarial models.¹⁷⁶ Evidently, this trait existed in inquisitorial codes before the reform movement. It is paradoxical that this feature is treated as typically inquisitorial by commentators, when the Federal Rules of Evidence in the U.S. include it.¹⁷⁷

F. No Code includes rules regarding character evidence or the best evidence rule with the exception of Colombia’s codification of the best evidence rule.¹⁷⁸ Rules concerning such issues are typical in U.S. adversarial criminal procedure at the federal and state levels.¹⁷⁹ However, no Latin American jurisdictions included these topics in the new adversarial legislations.

G. It is true all Codes after the reform era assert that trials shall be oral and public, and that evidence and witnesses shall be presented in the immediate presence of the fact-finder/decision-maker.¹⁸⁰ Some argue, as seen supra, that the adversarial reform brought a universal shift in the region, by replacing written/secret proceedings with public/oral trials. Are trials in the region actually public and oral after the reform movement? I claim that the normative statement alone proclaiming that tri-

¹⁷⁵ See, e.g., C.P.P. Colombia, supra note 153, art. 397 (allows judges to ask additional questions of witnesses following the parties’ examinations). See generally Leonard L. Cavise, The Transition from the Inquisitorial to the Accusatorial System of Trial Procedure: Why Some Latin American Lawyers Hesitate, 53 WAYNE L. REV. 785, 807-08 (2007) (explaining that even after reforms, Latin American judges are unaccustomed to taking a passive, referee-like role in the courtroom).

¹⁷⁶ See, e.g., Maximo Langer, The Rise of Managerial Judging in International Criminal Law, 53 AM. J. COMP. L. 835, 878-85 (2005) (detailing the differences between the traditional “passive umpire” role of adversarial court judges and the more managerial role that many have begun to play).


¹⁷⁸ Compare, e.g., M.C., supra note 149 (no rules regarding character evidence or best evidence rule), and C.P.P. El Salvador, supra note 149 (no rules regarding character evidence or best evidence rule), with C.P.P. Colombia, supra note 153, art. 424-34 (deals with production of documents and best evidence rule).


¹⁸⁰ See, e.g., M.C., supra note 149, arts. 291-331; C.P.P. El Salvador, supra note 149, arts. 366-391; C.P.P. Honduras, supra note 149, arts. 308-310.
als shall be public and oral is not enough to hold that trials in the new Codes are actually oral/public and thus, adversarial, as commentators state.  

No Code recognizes hearsay as an evidentiary issue. In the majority of Codes, hearsay is not even mentioned as a topic or subject of any rule. Furthermore, no Code includes rules concerning out of court statements that are offered in trial, or for that matter, during the investigation. When one actually analyzes the Codes, one can observe that none show concern for the presentation of out of court statements. This shows two contradictions with the adversarial rationale: accusatory systems prefer, and are deeply respectful of, live-in-court testimony. Testimony is not really oral and public and in the presence of the fact finder when it was given out of court and is brought by documents or hearsay witnesses. This affects not only the credibility of witnesses but also disregards the very nature of adversarial models, which depend on testing through cross-examination the reliability and accuracy of statements. In Crawford, the United States Supreme Court argued that the problem with hearsay is not just about reliability of the untested out of court statement, it is also about the possibility for the defendant to contradict and confront witnesses offered against him. When out of court statements are offered, and admitted, opposing counsel does not actually have a chance to test and examine the evidence that is being offered against him.

Only the new Codes in Colombia and Peru included rules that explicitly show concern for hearsay or out of court statements. Honduras (Art. 199) does not expressly regulate hearsay but exhibits some “preference” for non-hearsay statements.

---

182 Compare, e.g., M.C., supra note 149 (does not mention hearsay), and C.P.P. El Salvador, supra note 149 (does not mention hearsay), with, e.g., C.P.P. Honduras, supra note 149, art. 199 (does not expressly regulate hearsay, but exhibits preference for non-hearsay statements).
183 See, e.g., C.P.P. El Salvador, supra note 149; C.P.P. Paraguay, supra note 167; Código de Procedimiento Penal de Venezuela [Criminal Procedure Code of Venezuela] [hereinafter C.P.P. Venezuela].
184 See e.g., C.P.P. El Salvador, supra note 149; C.P.P. Venezuela, supra note 183.
186 See C.P.P. Perú, supra note 167, art. 378.
187 See C.P.P. Honduras, supra note 149, art. 199.
Therefore I reject the claim that only because a system adopts abstract rules proclaiming public/oral trials, an adversarial model is implemented. A system that is not concerned for, and does not prefer, live-in-court testimony, which opposing counsel can directly examine and confront as a true adversary, at least according to the list of features structured by commentators, is not adversarial. Concern for hearsay, and regulation of it, is not just a formal issue: it reflects the ideals a system protects and respects.

Thus, if we apply the catalogue of features considered as adversarial by commentators, then the common Latin American post-reform rule declaring that trials shall be “public and oral” does not by itself truly create an accusatory process.

I offer further arguments to sustain this claim. Every Code, as they did prior to the reforms, regulates documents as one of the means of proof. 188 However, after the reform, no Code shows concern for hearsay that can be imbedded and thus introduced at trial with documents. 189 Documents can be admitted without considering the nature of the statements they include.

Moreover, nine Codes (Model, El Salvador, Guatemala, Costa Rica, Paraguay, the 1986 Draft, Venezuela, Honduras, and Peru) allow evidence and witnesses to be presented during appeals when the case is before superior courts for review. 190 Does this in any way respect the principle of public/oral trials before the fact-finder? Appellate review can hardly be considered the proper space of adversarial confrontation, at least in the terms in which commentators deal with accusatory ideals.

Furthermore, all Codes include rules that allow reading documents and prior out-of-court statements during trial. 191

---

188 See, e.g., C.P.P. Colombia, supra note 153, art. 259; C.P.P. Costa Rica, supra note 167, art. 354; Código Procesal Penal De Argentino [Criminal Procedure Code of Argentina] [hereinafter C.P.P. Argentina] art. 265.

189 See generally C.P.P. El Salvador, supra note 149; C.P.P. Paraguay, supra note 167; C.P.P. Venezuela, supra note 183.

190 See M.C., supra note 149; C.P.P. El Salvador, supra note 149, art. 474; Código de Procedimiento Penal de Guatemala [C.P.P.] [Criminal Procedure Code of Guatemala] [hereinafter C.P.P. Guatemalan]; C.P.P. Costa Rica, supra note 167, art. 441; C.P.P. Paraguay, supra note 167, art. 464; Proyecto de Código de Procedimiento Penal para la República de Argentina de 1986 [Criminal Procedure Code 1986 Draft for the Republic of Argentina] [hereinafter Draft] C.P.P. Venezuela, supra note 182, art. 450; C.P.P. Honduras, supra note 149, art. 452; C.P.P. Perú, supra note 167, art. 424.

191 See, e.g., C.P.P. El Salvador, supra note 149, art. 350; Código de Procedimiento Penal de Bolivia [C.P.P.] [Criminal Procedure Code of Bolivia] [hereinafter C.P.P. Bolivia] art. 355.
This possibility of course, although restricted—or narrowly tailored—in several Latin American new legislations, was a typical trait of previous inquisitorial models in the region.\(^{192}\) Perhaps only Colombia, as an exception to the general rule in the region, does not have any rule explicitly allowing witnesses to read documents during trial, in substitution for live testimony.

Likewise, the way expert opinions are presented, is a procedural concern that shows more or less respect for the adversarial traits highlighted by commentators. If experts do not mandatorily have to testify, but rather, can submit their opinions in writing to the Court, without being subject to live-in-court cross examination, respect for public/oral trials and adversarial ideals, seems weak. Reformed Codes in Costa Rica (Art. 353), El Salvador (Art. 346), Peru (Art. 346), Colombia (Art. 412), Honduras (Arts. 244, 326 and 327), and Chile (Art. 329) demand experts to testify about their opinions in court, subject to interrogation by other parties and in some cases, even the judge.\(^{193}\) Panama (Art. 413), with some exceptions, requires testimony from experts.\(^{194}\) However, Guatemala (Arts. 364.1 and 376) and the Model Code (Art. 300.5) allow expert opinions to be read in evidence without the presence of the experts.\(^{195}\) The Draft (Art. 187), Dominican Republic (Art. 312.3), Venezuela (Art. 341), and Paraguay (Art. 388) also allow written opinions without expert testimony, thus, to introduce expert

\(^{192}\) See M.C., supra note 149, arts. 300(3), 300(6), 300(7) (allowing reading documents and prior out of court statements during trial); C.P.P. Guatemala, supra note 190, arts. 363, 364, 380; C.P.P. El Salvador, supra note 149, arts. 330, 351; C.P.P. Costa Rica, supra note 167:, arts. 334, 354; C.P.P. Paraguay, supra note 167, arts. 371, 393; C.P.P. Venezuela, supra note 183, arts. 341, 359; C.P.P. Código de Procedimiento Penal de Chile [C.P.P.] [Criminal Procedure Code of Chile] [hereinafter C.P.P. Chile] arts. 331, 332. 333; C.P.P. Bolivia, supra note 191, art. 355; C.P.P. Honduras, supra note 149, arts. 311, 332; Código de Procedimiento Penal de Dominicana Republic [C.P.P.] [Criminal Procedure Code of Dominican Republic] [hereinafter C.P.P. Dominican Republic], arts. 312, 329; C.P.P. Perú, supra note 167, art. 383; Códico de Procedimiento Penal de Panamá [C.P.P.] [Criminal Procedure Code of Panama] [hereinafter C.P.P. Panamá] art. 379; Draft, supra note 190, arts. 191, 192, 300, 316.

\(^{193}\) See C.P.P. Costa Rica, supra note 167, art. 353; C.P.P. El Salvador, supra note 149, art. 346; C.P.P. Perú, supra note 167, art. 346; C.P.P. Colombia, supra note 153, art. 412; C.P.P. Honduras, supra note 149, arts. 244, 326, 327; C.P.P. Bolivia, supra note 192, art. 329.

\(^{194}\) C.P.P. Panama, supra note 192, art 413.

\(^{195}\) See C.P.P. Guatemala, supra note 190, arts. 364.1, 376; M.C., supra note 149, art. 300.5.
opinions, the expert does not have to testify. In Bolivia the new Code included no rule demanding experts to testify about their opinions. One could hardly claim these Codes actually introduced the adversarial ideal of public/oral trials where live-in-court testimony is respected. Therefore, according to the traits pointed out by commentators, these jurisdictions show an absence of some very important accusatorial features.

H. The exclusionary rule is an interesting trait that can be found in all the new Codes. However, excluding evidence as a remedy for violation of fundamental rights or procedural rules, although not always falling in the region under the rubric of the “exclusionary rule,” has been present since before the reforms. Several Constitutions in Latin America (for example Honduras, Colombia, and Paraguay) before the enactment of new criminal procedure legislations, declared null or void any evidence obtained with violation of at least some fundamental guarantees. Furthermore, the Inter-American Court of Human Rights, independent from any suggestion that party-states needed to adopt adversary systems, considered that exclusion is the appropriate remedy for violation of certain safeguards. Therefore, one could hardly argue that the presence of the exclusionary rule in all the new Codes is a direct consequence of incorporating adversarial ideals in the region. Nonetheless, one should keep in mind that not all exclusionary rules in the region operate in the same way. Some countries adopt such a remedy only for some police conduct, like torture, others adopt

196 See Draft, supra note 190, art. 187; C.P.P. Dominican Republic, supra note 192, art. 312.3; C.P.P. Venezuela, supra note 182, art. 341; C.P.P. Paraguay, supra note 167, art. 388.
197 See generally C.P.P. Bolivia, supra note 191; C.P.P. Guatemala, supra note 190.
198 See, e.g., C.P.P. Argentina, supra note 188, art. 237; C.P.P. Dominican Republic, supra note 192, art. 130; C.P.P. Colombia, supra note 153, art. 123.
199 See, e.g., Constitución Política de Honduras [C.P.] art. 100; Constitución Política de Colombia [C.P.] art. 29; Constitución Política de Paraguay [C.P.] art. 17.
it in a broader fashion.\textsuperscript{201} Some expressly amplify the rule to evidence obtained as the direct or indirect consequence of the initial illegal evidence, known as “fruit of the poisonous tree.”\textsuperscript{202}

I. Symbolic issues—typical in adversarial systems—as simple as the obligation for judges to use robes during oral hearings are only found in two Codes in the region: Venezuela and Colombia.\textsuperscript{203}

J. All Codes include articles concerning mandatory judicial intervention/authorization prior to the execution of investigatory acts that restrict fundamental rights, such as searches of homes, eavesdropping in communications, or anticipated proofs.\textsuperscript{204} Authorizations, in some cases, take the form of warrants.\textsuperscript{205} This mandatory authorization is always given by judicial officers, independent from the prosecutorial body.\textsuperscript{206} These types of rules were not present in any legislation in the region.

\textsuperscript{201} See M.C., supra note 149, art. 148 (adopting the exclusionary rule as a remedy only for certain police conduct); C.P.P. Guatemala, supra note 190, art. 186 (adopting the exclusionary rule as a remedy only for certain police conduct). \textit{But} see M.C., supra note 149, arts. 148-149 (possibly interpreted as rules that generate any illegal proofs to be excluded); M.C., supra note 149, arts. 281, 183-186, 149 (interpreting rules that generate any illegal proofs as excluded); C.P.P. El Salvador, supra note 149, art. 15 (exclusionary rule); C.P.P. Costa Rica, supra note 167, art. 181, exclusionary rule; C.P.P. Paraguay, supra note 167, arts. 17 and 36 (1992) (excluding illegal evidence before the criminal procedure reform); C.P.P. Costa Rica, supra note 167, art. 174 (new Code adopting the exclusionary rule); C.P.P. Venezuela, supra note 183, art. 197; C.P.P. Bolivia, supra note 192, art. 276; C.P.P. Bolivia, supra note 191, art. 172; C.P.P. Honduras, supra note 149, art. 88 (1982) (before the procedural reform- declared null any evidence obtained in violation of the right against self-incrimination); C.P.P. Costa Rica, supra note 167, art. 200 (new Code adopting the exclusionary rule); C.P.P. Dominican Republic, supra note 192, art. 167; C.P.P. Perú, supra note 167, art. VIII; C.P.P. Panamá, supra note 192, arts. 17, 381; C.P.P. Colombia, supra note 153, art. 29 (1991) (Old Constitution before the reform era- excluding any evidence obtained in violation of due process); C.P.P. Colombia, supra note 153, Law 600 f(2000) (inquisitorial law prior to the new legislation and thus replaced by the adversary system, excluding evidence obtained in violation of procedural rules); \textit{Draft}, supra note 190, arts. 225-228, 147-149; Política de los Estados Unidos Meianos [C.P.], art. 20(a)(IX) Diario Oficial de la Federación [DP], 5 de Febrero de 1917 (Mex.).

\textsuperscript{202} See C.P.P. Colombia, supra note 153, art. 23 (new Code adopting the exclusionary rule and the theory of “fruits of the poisonous tree”).

\textsuperscript{203} See C.P.P. Perú, supra note 167.; C.P.P. Colombia, supra note 153, art. 185; C.P.P. Venezuela, supra note 183, art. 148.

\textsuperscript{204} See e.g., C.P.P., Paraguay, supra note 167, art. 128; C.P.P. Perú, supra note 167, art. 186; C.P.P. El Salvador, supra note 149, art. 187.

\textsuperscript{205} See e.g., C.P.P. Bolivia, supra note 191, art. 181.

\textsuperscript{206} See Bischoff, supra note 25 at 37.
before the reform, and they are, in consequence, a result of the adversarial movement in Latin America.\textsuperscript{207} According to commentators, one of the goals of the introduction of accusatory systems was to separate, segregate, and divide the roles of prosecution and adjudication, during investigation and trial.\textsuperscript{208} Hence, the idea of previous authorizations is that a judge—indepedent from the prosecutor—intervenes to control any limitation of essential guarantees, thus stripping the prosecutor from what should be a strictly judicial function: restricting fundamental rights. Any limitation on rights is to some extent judicial, and therefore should only be the result, as a general rule, of judicial decisions.\textsuperscript{209} The question about how effective judicial intervention has actually been in the protection of fundamental rights, will not be addressed in this paper.

Even though intervention of independent judges is new in the region, we must not forget that prosecutorial bodies (mainly instruction judges) in the region used to have judicial functions.\textsuperscript{210} Thus, it would be inaccurate to state that judicial intervention in the restriction of fundamental rights was unknown in Latin America. Thus, I claim one could not argue this is truly a new feature incorporated as a result of the Reform Movement. In any event, this transformation would not be homogeneous in the region because at least one country retained some sort of judicial investigation: El Salvador maintains instruction judges during the last part of the investigation phase.\textsuperscript{211}

\textsuperscript{207} See id. at 5.

\textsuperscript{208} See \textit{Las Reformas Procesales Penales en América Latina}, supra note 41, at 23.


\textsuperscript{210} See Bischoff, supra note 25, at 37.

\textsuperscript{211} See C.P.P. El Salvador, supra note 149, art. 411.
K. Every jurisdiction in the region allows parties to access the evidence that prosecutors have gathered.\textsuperscript{212} Access may come early in the proceedings when the investigative phase begins, or later on, when the accusation, or some sort of indictment, is presented.\textsuperscript{213} The notion that parties—primarily the victims and the defense—must be allowed at some point to study the case that the prosecution is going to present, or is presenting, seems common to adversarial and inquisitorial models. Jurisdictions may present regulatory particularities with respect to the extent of evidence that needs to be provided to the parties, the means for accessing such evidence, the moment for it, or the obligation of the defendant to show its evidence to the prosecution and the victim. Therefore, I claim that access to the file, in inquisitorial systems, and discovery/disclosure of evidence, in adversarial systems, shows a common concern in both criminal procedure models. A concern for permitting parties in preparation of trial to study the evidence that will be presented by others.

L. All the new Codes include rules regarding: jurisdiction, competence and organization of tribunals within the judiciary, causes for recusing judges, the police—or better, the judicial police—general procedural rules, permitted investigative actions and their requirements, notification to the parties of procedural decisions, invalid procedural acts, ways of initiating proceedings and of giving notice to the prosecution about the commission of offenses (noticia criminis), appeals, the possibility of dismissing cases before trial if certain requirements are met, congruence between charging decisions and sentences, sentencing, treatment of prisoners, and parole.\textsuperscript{214} These rules existed in the region even before the reform, in the old inquisitorial Codes. Thus, they are common in Latin American systems before and after the Movement, and cannot be construed as a result of adversarial reforms.

1.5.2. \textit{Some distinctions among the new Codes.}

Parallel to the various similarities pointed out above, some Codes include distinct rules that set them from the majority. Below we

\textsuperscript{212} See e.g., \textit{id.}, art. 76; \textit{C.P.P. Paraguay, supra} note 167, art. 297; \textit{C.P.P. Perú, supra} note 167, art. 68.

\textsuperscript{213} See e.g., \textit{C.P.P. Perú, supra} note 167, art. 68 (allowing access to research conducted by police).

\textsuperscript{214} See, e.g., \textit{C.P.P. Colombia, supra} note 153; \textit{C.P.P. Paraguay, supra} note 167, \textit{C.P.P. Honduras, supra} note 149,
will analyze those differences that distinguish a number of jurisdictions, at least with respect to some traits.

A. All constitutions in Latin America, before and after the reform included mandatory defense counsel for defendants when they could not afford to retain it. This means that even before the reform it was mandatory to appoint free defense counsel to indigent defendants. Some countries had public defender services whereas others appointed counsel randomly from the list of active attorneys within the jurisdiction.

As a consequence of the reform, some jurisdictions in Latin America created, or made mandatory for the state to later create, public institutions in charge of providing defense counsel to indigent defendants: institutional public defender services. Some countries that already had these types of institutions strengthened them as a consequence of the reform, mainly by providing more training and/or funding. There-

---

215 See, e.g., Constitucion Politica de los Estados Unidos Mexicanos [C.P.], art. 20 § IX, Diario Oficial de la Federacion [DO], 5 de Febrero de 1917 (Mex.); Constitucion Politica De Colombia [C.P.] art.29.

216 E.g., M.C., supra note 149 (No institutional public defender service is mandated but appointed counsel must always be provided); C.P.P. Guatemala, supra note 190 (Public defense as a public service has existed in Guatemala since 1999. After the 1988 Draft of Professors Maier and Binder and the subsequent approval of the new Code in 1992 and its entry in effect in 1994, the Supreme Court issued a regulation about the Criminal Defense Service. This service depended entirely on the Supreme Court. In 1997, while the country was advancing in overcoming the challenges of the adversarial reform, Congress approved a law after which Public Defense gained independence from the head of the judiciary.); C.P.P. El Salvador, supra note 149 (No institutional public defender service is mandated but appointed counsel must always be provided). El Salvador's Constitution in 1983 – according to article 194 – assigned to the Procurador the obligation of providing representation to indigent defendants. In consequence, a Unit of Public Defense was created within the Procuraduría; C.P.P. Costa Rica, supra note 167, (No institutional public defender service is mandated but appointed counsel must always be provided. In Costa Rica public defense was part of the judicial branch since 1970 when the Department of Public Defenders was created. With time, more tasks were assigned to this department, including juvenile defense and post-conviction representation); C.P.P. Paraguay, supra note 167 (It is not clear if an institutional public defender service is mandated by the Code. A Public Defense institution was created by the 1992 Constitution but according to the text of the article it was not given functions related to criminal defense.); C.P.P. Venezuela, supra note 183, art. 528. (mandating institutional public defender service); C.P.P. Bolivia, supra note 191, art. 107 (An institutional public defender service is mandated but the 1994 Constitution regulated a public defense institution and a law in 2003 developed the constitutional provision.); C.P.P. Honduras, supra note 149, art. 119. (mandating institutional public defender service); C.P.P. Dominican Republic, supra note 192 (An institutional public defender's service was made legally
fore, one could argue that creation and/or professionalization and reorganization of public defender services, was a general consequence of all the adversarial reforms in Latin America.\textsuperscript{217} I believe that, as part of the adversarial ideals expressed by commentators, jurisdictions felt they needed to create strong defense counsels that could confront, as true adversaries, the powers of the prosecution. A robust prosecutorial role, within the accusatory process, demands zealous defense counsel. However, even though public defender services were created and/or professionalized and reorganized with the reforms, appointment of gratuitous defense counsel to indigent defendants has always been mandatory in the majority of the region.

B. Several of the new Codes require a written file of the proceedings to be kept.\textsuperscript{218} Four countries differ from the general rule in the region of allowing judges to collect evidence and call witnesses. Chile expressly forbids and prohibits judges from engaging in such conducts.\textsuperscript{219}

C. With respect to the Public Ministry, two countries require it discharge its duties in an objective manner (the general rule in the region) but do not require the investigation to be "integral." Thus, in Chile and Colombia, the prosecutorial body needs only to investigate and collect evidence for its case-in-chief, in order to fulfill its burden at trial.

D. In El Salvador, the second phase of the investigation stage is called instruction.\textsuperscript{220} Distinctively from all the Codes in the region, which left behind instruction judges as prosecutors, El Salvador maintained this feature.\textsuperscript{221} Therefore, El Salvador is the only country in the region that even after the adversarial reform, retained instruction judges with prosecutorial functions.

---

official simultaneously with the Reform); \textit{C.P.P. Colombia}, supra note 153 (mandating an institutional public defender service and creating it by Reform); \textit{C.P.P. Perú}, supra note 167, art. 80. mandating an institutional public defender service; \textit{C.P.P. Panamá}, supra note 192 (institutional public defender service is mandated but existed before the reform; \textit{Draft}, supra note 190 (No institutional public defender service seems to have been mandated within the text of the Draft.).

\textsuperscript{217} See Riego, supra note 40, at 7.

\textsuperscript{218} M.C., supra note 149, art. 254; \textit{C.P.P. Panama}, supra note 192, art. 140; \textit{C.P.P. Colombia, supra note} 153, art. 147; \textit{C.P.P. Dominican Republic, supra note} 192, arts 138-139; \textit{C.P.P. Honduras, supra note} 149, art. 147; \textit{C.P.P. Chile, supra note} 192, art. 161; \textit{C.P.P. Bolivia, supra note} 191, art. 120; \textit{C.P.P. El Salvador, supra note} 149, art. 140; \textit{C.P.P. Venezuela, supra note} 182, art. 169.

\textsuperscript{219} \textit{C.P.P. Chile, supra note} 192, art. 8.

\textsuperscript{220} See generally, \textit{C.P.P. El Salvador, supra note} 149, art. 303.

\textsuperscript{221} \textit{C.P.P. El Salvador, supra note} 149, arts. 301-306.
1.5.3. Certain unique features that deserve special consideration.

Some features of the adversarial reform deserve special consideration. Codes regulate these issues in dissimilar manner.

A. Assigning the fact-finding/decision-making function to lay adjudicators is a main feature of the accusatory process. Juries are a typical trait of adversarial systems, according to commentators of the mainstream discourse.\(^{222}\) This claim is partially accurate. In reality, only the U.S. still preserves great respect for jury trials, whereas Great Britain for example, does not award juries the same role. Notwithstanding, very few Latin American jurisdictions that were part of the reform movement included juries in their new Codes. Panama and El Salvador included chapters with special rules concerning jury trials. Bolivia and Venezuela incorporated, as a result of the reform, mix tribunals, with judges and lay fact-finders deciding together.\(^{223}\) The Model Code included an appendix about juries in case countries decided to adopt them.\(^{224}\) However, even though commentators catalogue juries as typically adversarial, some systems that could be characterized as strongly inquisitorial, have adopted juries.\(^{225}\) Therefore, one could ask, are juries necessarily and solely found in adversarial systems?

B. A number of Latin American jurisdictions before the reform allowed defendants to unilaterally plead guilty. After the reform, all the Codes in the region allow it.\(^{226}\) This type of plea is an unconditional acceptance of criminal responsibility. The judge, in turn, has to mandatorily reduce the sentence in some proportion. This type of plea does not depend on the will of the prosecution. Therefore, no agreement or negotiation is required in order to obtain such a punitive benefit. We must also remember that the prosecution had no discretion before the reforms, so

---

223 C.P.P. Panama, supra note 192, art. 435, C.P.P. El Salvador, supra note 149; art. 404, C.P.P. Bolivia, supra note 191, arts. 57, 58; C.P.P. Venezuela, supra note 183, arts. 147, 148.
224 M.C., supra note 149, app. 2.
226 M.C., supra note 149, art. 371; C.P.P. Panama, supra note 192, art. 464; C.P.P. Paraguay, supra note 167, art. 420; C.P.P. El Salvador, supra note 149, art. 379; C.P.P. Costa Rica, supra note 167, art. 373; C.P.P. Honduras, supra note 149, art. 373; C.P.P. Chile, supra note 192, art. 406; C.P.P. Dominican Republic, supra note 192, arts. 363, 366; C.P.P. Honduras, supra note 149, art. 391; C.P.P. Panama, supra note 192, arts. 220, 282, 461; C.C.P. Colombia, supra note 153, art. 356.
there was no bargaining tool that could be used with defendants to obtain a plea.

That being said, some inquisitorial systems have historically not allowed this possibility. When it was precluded, even with the admission of responsibility a trial had to be conducted and a confession was just another element of proof—along with testimonies, documents and expert opinions—to convict.

Anglo-American criminal procedure does not allow—using as an example the U.S. Federal Rules of Criminal Procedure—that type of plea. According to Rule 11 pleas of guilt, or other types of pleas, are a result of agreements with the prosecution. The prosecution accepts to dismiss charges, or assume certain positions during sentencing, in exchange for waiver of trial rights on the part of the defendant.

Hence, it is reasonable to ask: Where under adversarial criminal proceedings, in the U.S. or elsewhere, do we find the type of plea present in the region prior and after the reform? It appears then, that guilty pleas in the Latin American legal historical tradition are not a result of the influence of adversarial ideals.

Plea bargaining, understood as negotiation of charges or sentences, on the other hand, is clearly linked to prosecutorial discretion and to the history of criminal procedure in Anglo-American tradition as we will see later in this analysis.

Across the reformed Codes in Latin America we can find a number of combinations in the rules concerning pleas. Therefore, some could argue that the possibility of pleading guilty is a universal feature of the reforms in Latin America—a shared common denominator. Nonetheless, it is my argument that systems since before the reform had mechanisms for reducing penalties as a consequence of accepting responsibility. Before the reforms it was common in several jurisdictions in the region to allow sentencing benefits when defendants confessed.

227 Langer, supra note 3 at 10.
228 Id.
229 FED. R. CRIM. P. 11.
230 Id.
231 M.C., supra note 149, art.371; C.C.P. Panama, supra note 192, art. 464; C.P.P. Paraguay, supra note 167, art. 420; C.P.P. El Salvador, supra note 149, art. 379; C.P.P. Costa Rica, supra note 167, art. 373; C.P.P. Honduras, supra note 149, art. 373; C.C.P. Chile, supra note 192, art. 406; C.C.P. Dominican Republic, supra note 192, arts. 363, 366; C.P.P. Venezuela, supra note 182., art. 391; C.P.P. Panama, supra note 192, arts. 220, 282, 461; C.P.P. Colombia, supra note 153, art. 356.
Therefore, I reject the claim that this type of guilty plea is an essential characteristic of the adversary process, and that it was introduced in the region as a direct result of the reform movement. A plea bargain, on the other hand, reflects prosecutorial discretion, something unknown in the region before the reforms. However, only a minority of countries in Latin American incorporated bargaining.

C. Cross examination is a method for receiving testimony, typical in the adversary process.\textsuperscript{232} However, cross examination, narrowly construed, can be only found in Panama and Colombia.\textsuperscript{233} Eventually one could argue it was also incorporated in El Salvador (Art. 348) and Costa Rica (Art. 352).\textsuperscript{234} The rest of the Codes include methods of interrogation that do not reflect a process of adversaries in confrontation, to test the accuracy of a witness's testimony.\textsuperscript{235} Codes in the region generally permit judges to have broad participation in the interrogation of witnesses and allow parties, besides the prosecution and the defense, to question witnesses, present evidence, and offer testimony of other witnesses. Therefore, the majority of the reformed Codes did not adopt cross-examination.

D. Several Codes in the region allow some sort of prosecution and/or trial when the defendant is absent, either because he cannot be located or because he has fled.\textsuperscript{236} Even though assistance of counsel is always guaranteed, the adversarial nature of litigation is substantially reduced when the defendant can be tried even in his absence. Nonetheless, in several of the reformed adversarial Codes, a number of jurisdictions in the region permit in some cases prosecution and/or trial of absent defendants.

E. Grand juries are a typical feature of criminal procedure in the U.S. Grand juries are present in the federal level and in several states.\textsuperscript{237} However, no such body was created in any system within the region, as a consequence of the reform.

F. Legislations in the region differ in the particular regulation of certain concrete issues. These issues have little to do with adversarial reform either because they were present in Codes before the movement or because they are not related to the cata-

\textsuperscript{232} Black's Law Dictionary (9th ed. 2009).
\textsuperscript{233} C.P.P. Panama, supra note 192, art. 398; C.P.P. Colombia, supra note 153, arts. 276, 277.
\textsuperscript{234} C.P.P. El Salvador, supra note 149, art. 209; C.P.P. Costa Rica, supra note 167, art. 352.
\textsuperscript{235} See, e.g., Venezuela, supra note 183, art. 132; C.P.P. Honduras, supra note 149, art 224.
\textsuperscript{236} C.P.P. Bolivia, supra note 191, art. 91.
\textsuperscript{237} Fed. R. Crim. P. 6; LA. Const. art.I § 15, TX. Const. art. I § 10.
logue of adversarial features established by mainstream commentators. These issues, among others, are: arrests in flagrante, criminal treatment of minors, treatment of insane defendants, minor offenses, private prosecutions, alternative dispute resolution methods, and restorative justice.

2. The Adversarial System in Latin America and Prosecutorial Discretion

2.1. What is adversarial?

Thus far we have analyzed the history of the reform movement in Latin America as well as the final outcomes of such undertaking: the new Codes. The reform effort in the region resulted in fifteen new accusatorial Codes (including the 1986 Draft and the Mexican Constitution). We have called the “mainstream discourse” the literature produced by commentators with respect to the reform movement and the “typical” features of “each of the two procedural models.”

Commentators, as we have seen, usually enumerate abstract characteristics of the two criminal procedure systems. If we compare the reformed legislations with the a priori catalogue of “adversarial” traits enlisted by authors then, this exercise should, in theory, tell us if a criminal procedure system is “truly” adversarial or inquisitorial. However, I claim it is impossible to understand in such a manner, any of the criminal procedure reforms endured in the region over the past two decades.

There is no doubt that the reforms in Latin America have been unanimously characterized—and advertised—as adversarial. Nonetheless, as we have seen, no Latin American reform completely yields to all the “typical” adversarial traits. On the other hand, several new Codes still hold on to traits classified as “typically” inquisitorial. Are all the commentators in the region wrong? Did the region not undertake an adversarial reform?

My contention is that “adversarial” can be understood under multiple perspectives. The idea is simple: within the context of comparative criminal procedure in Latin America—a propos procedural reform over the past two decades—“adversarial” has different meanings, or at least, can mean different things. Put differently, the reform movement shows us there is no abstract or prefixed group of categories with which we can identify systems, to characterize them as adversarial or inquisitorial. The notion of an adversarial model is as diverse as each of the systems that call themselves adversarial.

My claim finds empirical support in the legal reality shown to us by the reforms. The reform movement in Latin America reveals that fifteen jurisdictions called their Codes adversarial. Notwithstanding, the use of this category signified something different in every case. In-
instead of focusing in abstract classifications to assess/evaluate legislations, we should analyze legislations as such, and observe what their normative reality teaches us.

What was this reform about? We would expect to find, following all the authors cited, fifteen homogeneous Codes that unite all the typical adversarial ideals, completely replacing old inquisitorial Codes. After the analysis undertaken in the last chapter, we can see this is not the case. The normative result of the reform movement exposes a different reality.

Codes share a number of features, but few of those features are a direct consequence of adversarial reform. In general, when we find in the new Codes common traits, no typical adversarial values are present (i.e. victim’s rights). In fact, such traits, in many cases, existed in the region even before the reform era. Furthermore, some of the shared features across the region, after the reform era, are proper of inquisitorial models, or are at least, openly contradictory of ideals advertised by commentators as accusatory (i.e., mandatory written file of the proceedings). Additionally, "typical distinctive adversary features"—classified as such according to commentators—are sometimes absent in the reformed legislations (i.e., lay adjudicators, cross-examination). When any of those features do exist at least in some jurisdictions in the region they are not universal, meaning, they are not present in all the Codes. Of course, in their general formulations, they all adopt public/oral trials, but when one analyzes the concrete rules that try to make such an abstract idea a reality, one can see that a number of Codes are not in fact, according to this feature, adversarial.

I do not claim that the fifteen new Codes are completely different among each other. I only contend that where adversarial "ideals" are to be found, the Codes are heterogenous. When accusatory values are found in concrete rules, such as jury trials, they are not universally embraced in the region. This means only some jurisdictions include such rules. Therefore, when it comes to "adversarial" traits, the Codes are, in general, heterogeneous. With the exception of prosecutorial discretion, there is not a single trait that is catalogued as adversarial found in all the reformed Codes.

Codes are identical in certain abstract formulations. Thus, one could argue some adversarial ideals are universally found in the reforms, at least in an abstract fashion. I have shown supra that abstract formulations of adversarial values may be easily discarded (i.e. public/oral trials). If abstract formulations fully determined criminal procedure rules, then not only would all the Codes in Latin America be substantially similar, but also most procedural legislations in western civilizations would be substantially similar. Does any Code assertively deny human rights, a concern for efficiency, the rule of law, or the truth-seeking function? Weren’t public/oral trials introduced in conti-
nental Europe more than 200 years ago with the Napoleonic Code? Doesn't every western Code have a division between investigation and adjudication with institutionally or normatively different actors in charge of each phase? What matters in comparative criminal procedure are the concrete normative structures of the Codes, not the abstract formulations.

The lack of accusatorial similarity among the new Codes has a simple explanation: all the reforms were diverse because they resulted from different causes and received varied influences. It would be impossible to fit, under abstract categories, such dissimilar reform undertakings in a multiplicity of jurisdictions with important legal, historical, social, and cultural differences.

Therefore, if we adopt the Latin American example to understand the adversarial/inquisitorial dichotomy, and if we use this lesson in comparative criminal procedure, my conclusion seems plausible: "adversarial" adapts to legislations in different manners. Each adversarial Code has a different normative design and diverse procedural rules. Some come closer to adversarial abstract ideals, others are more distant. The reform movement in the region teaches us that there is no such thing as a pure adversarial model. Criminal Procedure Code reforms are concrete events and cannot be easily compared to fixed a priori catalogues of traits. What is adversarial can be said to mean very different things.

After witnessing the Latin American reforms, another possibility is to claim that there is no longer an adversarial/inquisitorial dichotomy because one can no longer hold such categories exist. Perhaps, we are left with legislations resulting from multiple causes and diverse influences, with no adequate fit in any type of category. We are witnessing the birth of systems embodying unique normative combinations that constitute independent experiments and realities.

2.2. Prosecutorial discretion

An important question remains. Can we find any common denominator in the region as a direct result of the reforms? Is there a shared feature in Latin America incorporated as a consequence of the adversarial movement? Or, are all the Codes completely dissimilar, and in fact, have nothing in common when it comes to "adversarial ideals"?

I claim we can identify two universal traits adopted in every jurisdiction in Latin America as a direct consequence of the adversarial reform movement: judicial review of investigative acts that restrict fundamental rights and prosecutorial discretion.

Let's focus then, on one of the only two universal features that can be homogenously found in every Latin America jurisdiction: prosecutorial discretion. The reason for this choice is that even though
judicial review is now common in the region, it does not appear listed in the catalogue of adversarial traits constructed by mainstream commentators as something "typically adversarial." Furthermore, the creation of judicial review is to some extent deceitful. Fundamental rights have long been subject in the region to restriction only with judicial intervention. What used to happen is that prosecutors—or whoever was assigned the prosecutorial duty—had judicial functions. Now, judicial functions, that is, decisions that affect fundamental rights, are segregated and given to independent officials.

Therefore prosecutorial discretion is the only new adversarial trait commonly found in all Latin American jurisdictions. I have no intention of holding that "adversarial" means, within the region, prosecutorial discretion. Such a claim would fall under the same effort of abstract definition, classification, and categorization undertaken by other authors, which I previously criticized. If that were my claim then future reforms could only be judged as "adversarial" if they included prosecutorial discretion, and without which, we could discard them as inquisitorial. I simply intend to show that the only new common concern in the region, after the reform, is prosecutorial discretion. My claim is empirical. Looking at the reality of criminal procedure in the region, prosecutorial discretion appears as the only universal trait. What jurisdiction, if any, inspired discretion in the region?

3. **Prosecutorial Discretion in Latin America**

We have identified discretion of the prosecutorial body, as the main—and practically the only—universal trait of Latin American criminal procedure reform. The purpose of this paper is to analyze the origin of prosecutorial discretion in the region. Where did it first appear?

3.1. **The 1986 Draft**

For the first time in the history of Latin American criminal procedure, prosecutorial discretion appeared in the Argentinean 1986 Criminal Procedure Code Draft.238 After this initial appearance, discretion was included in the Model Ibero-American Code, and subsequently in the rest of the new Codes.239 Why was it included in the 1986 Draft?

---

238 See Draft, supra note 190.
239 M.C., supra note 149, ch.3. See generally, C.P.P. Panama, supra note 192, art. 464; C.P.P. Paraguay, supra note 167, art. 420; C.P.P. El Salvador, supra note 149, art. 379; C.P.P. Costa Rica, supra note 167, art. 373; C.P.P. Honduras, supra note 149, art. 373; C.P.P. Chile, supra note 192, art. 406; C.P.P. Dominican Republic, supra note 192, arts. 363, 366; C.P.P. Venezuela, supra note 183, art. 391.
In 1983, Argentina overcame the dictatorial regime it endured for decades, causing the return to a constitutional democracy.\textsuperscript{240} This new environment of respect for democratic values and liberties incentivized the desire of reforming the criminal justice system at a federal level. After the end of the dictatorship period, the newly elected President of Argentina was motivated to promote reforms. The government appointed Professor Maier as head of the group in charge of drafting the Criminal Procedure Code project.\textsuperscript{241} He had been a student of Professor Vélez.\textsuperscript{242} It is important to highlight that Professor Maier had studied in Germany.\textsuperscript{243}

Argentina, at least at its Federal level, had an inquisitorial model of criminal procedure which burdened the system with human rights issues and constitutional violations. The criminal justice situation in Argentina’s Federal level was catalogued as inefficient, non-transparent, non-reliable, and without sufficient due process.\textsuperscript{244} Professor Maier intended to draft an accusatory code. The new Code was drafted in 1986. Professor Maier found inspiration for the preparation of the Code in the Córdoba Code of 1939 and the documents that had been drafted over previous years for the Model Code.\textsuperscript{245}

However, the other major source was the German criminal procedure code Strafprozessordnung (StPO) which contained many of the main ideas for his project. Maier did not simply duplicate the ideas presented in his sources; rather he was careful to critically examine them and translate them into political and legal principles that met his standards and fit Argentina’s reality.\textsuperscript{246}

Maier severely criticized the inquisitorial procedure scheme. He endorsed public/oral trials, more rights for defendants in the pre-trial phase, a reform of preventive detention, and he followed Germany with respect to having “mixed” bodies of adjudicators including both professional and lay decision-makers.\textsuperscript{247} Professor Maier also condemned the Argentinian Federal Code of 1888 and the Córdoba Code of 1940 for lacking the flexibility necessary for an efficient criminal justice system. The rule of compulsory prosecution did

\textsuperscript{241} See Langer, supra note 24, at 637.
\textsuperscript{242} Id.
\textsuperscript{243} Id.
\textsuperscript{244} Id.
\textsuperscript{245} Id.
\textsuperscript{246} Langer, supra note 24, at 637-38.
\textsuperscript{247} Id. at 638.
not allow investigating officials to concentrate on important cases and dismiss less serious ones. In addition, Maier thought that requiring a trial to adjudicate every minor offense was an unnecessary waste of resources. As a result, the Draft of 1986 included a number of mechanisms designed to relieve the criminal justice system of minor cases and allow cases to be processed more quickly. Inspired again by the German StPO—instead of the U.S. principle of almost unlimited prosecutorial discretion—the Draft employed the opportunity principle provided for the use of diversion mechanisms and contained a plea-bargaining-like mechanism for minor offenses.248

For the purpose of this paper, this is perhaps the most important moment in the history of the Reform Era. Prosecutorial discretion appeared in the region under the rubric of the “opportunity principle.” Thus, the opportunity principle is the statutory name of prosecutorial discretion and it was first introduced in Latin America with the Criminal Procedure Code Project for Argentina’s Federal level.249 Its introduction responded to the drafter’s yearning for “the necessary flexibility for an efficient criminal justice system.”250 Thus, prosecutorial discretion was understood, at least in its origins, within the Latin American context, as a necessary mechanism for allowing law enforcement officials to select where to concentrate their efforts. Concentrating efforts would, hence, provide flexibility. Without flexibility the criminal justice system would fail to be efficient. The 1986 Draft, therefore, included prosecutorial discretion, as a “mechanism of relief” for the burdensome pressure that compulsory prosecution exerted upon the criminal justice system’s resources.251 The German “version” of prosecutorial discretion—the opportunity principle—was selected over the U.S. version.252

Unfortunately the project was never passed by the legislature. This situation prompted Professor Maier, with the help of Professor Binder, to finish drafting the text of the Model Code. Hence, the failed Criminal Procedure Code Project for Argentina shared several similarities with the Model Code.253 In 1991 a Code was passed in Argentina for the Federal level, and incorporated only some of the ideas advanced

248 Id. at 640 (footnotes omitted) (emphasis added).
249 See Langer, supra note 24, at 640.
250 Id.
251 Id.
252 Id.
253 See Maier, supra note 87, at 14-15.
by the 1986 Draft. In 1992, the Province of Córdoba, under the leadership of its Justice Minister, José Cafferata Nores, reformed its criminal procedure legislation based too on the Draft. Subsequent reforms of Argentina’s federal criminal procedure laws have included more features of the 1986 Draft.

Likewise, other commentators in the region also accept that no system is capable of processing and giving exactly the same full treatment—investigation and trial—to every single offense. Limited resources and case overload, with no discretion, would make judicial systems collapse. Not every case can get and furthermore does not deserve, the same treatment. Prosecutorial discretion is a reality, as well as a pragmatic necessity.

In conclusion, one can observe that the specific purpose of prosecutorial discretion in Argentina was to generate a more “efficient” process. Additionally, the German version of prosecutorial discretion was purposefully selected over the American version. Furthermore, the text of the 1986 Draft contains marginal comments with references to the concrete normative sources of inspiration used by the drafters. The specific legal influence for prosecutorial discretion—as it expressly appears in the marginal notes of the Draft—is contained in Articles 152 and 153 of the German Criminal Procedure Code. It is unclear, however, why Argentina chose the German system. Why did Argentinean drafters prefer a European version of a procedural trait invented, practiced, exercised, and historically applied exclusively by the Anglo-American tradition of criminal procedure?

254 See Langer, supra note 24, at 641.
255 Id.
256 See Langer, supra note 24, at 641; see also id. at 641 n.116.
257 This paper does not pretend to assert that the exact motivation of every Latin American reform, for introducing the opportunity principle, was efficiency. Jurisdictions may claim they had different independent motives. I refer to the “efficiency discourse” only to claim that it was the underlying philosophy of the genealogy of the opportunity principle in the region. However, in the extensive literature I have revised for this paper, no reference to other motivations appears in any jurisdiction. Nonetheless it is conceivable that some countries adopted discretion not only as a result of pragmatic necessity but also, for example, to embrace the possibilities of restorative justice that discretionary powers provide. In any event, even if necessity of efficiency was not the only motivation, for sure, in every country, it played a central part.
258 See César E. San Martín Castro, Informe Peru, in Las Reformas Procesales Penales en América Latina, supra note 41, at 669-70.
259 See Langer, supra note 24, at 640.
260 See Draft, supra note 190.
261 Strafprozessordnung [StPO] [Code of Criminal Procedure], Apr. 7, 1987, Bundesgesetzbblatt [BGBl] 1074, as amended, arts. 152, 153.
The procedural device chosen in Germany's legislation to govern discretion—and therefore inherited in Latin America—is embodied in the so-called "opportunity principle." This legal device generally appears in the region in the company of a diversion mechanism called "provisional suspension of proceedings." Both normative instruments represent prosecutorial discretion, and thus, replace mandatory prosecution. In turn, prosecutors are allowed to exercise some selectivity, which brings about efficient concentration of resources.

Mandatory prosecution was an absolute rule in every country in the region, until that moment in history. It meant every offense had to be prosecuted and given exactly the same procedural treatment. Descending to the concrete rules that finally appeared in the Draft, Article 230 incorporated the opportunity principle:

230. Opportunity. In the cases in which the law permits the application of opportunity criteria to avoid promotion of penal prosecution or to make it cease, the public ministry, through the official that the Law of Judicial Organization determines, will request dismissal to the competent instruction judge, who will decide without further means of attacking such decision. The court may require the opinion of the public ministry about the issue, when it considers it convenient.

Dismissal does not mean the definitive termination of penal prosecution, which may by reinitiated by the public ministry when it considers it convenient, unless penal law attaches other effects.

Article 231 incorporated provisional suspension of proceedings:

231. Suspension of the process subject to conditions. When penal law permits the suspension of penal prosecution, the monitory process (arts. 371 and ss.) will be applied with the following modifications:

1) after hearing the defendant, the court will decide about the suspension of the proceedings, and in case of conceding it, will specify concretely the instructions and impositions to which the defendant shall submit;

2) on the contrary, it will order the process to continue, through the tracks that corresponds.

The resolution according to incise 1 will be notified to the defendant, always in his presence and by the

---

262 El Proyecto de Código Procesal Penal de la Nación, supra note 9 (translated from Spanish).
judge, with express warning about the instructions and impositions and the consequence of not observing them.

The execution Court will provide to the control about the observance of the impositions and instructions, for the purpose of which it will receive a copy of the resolution; it shall communicate any lack of observance to the court that suspended the proceeding.

The decision is not subject to attack, except for the defendant and the public ministry, when they hold they have not given consent for the suspension of the proceedings, or when the instructions or impositions are illegitimate, in which case they can file an extraordinary appeal.

In case of breach or lack of observance of the imposed conditions, impositions or instructions, the Court will give a hearing possibility to the public ministry and the defendant, and will resolve, with a motivated decision, about the reanimation of the penal prosecution. The decision may be preceded by a summary investigation and it is not subject to attack.²⁶³

Though initially exercised by the prosecutor, discretion ultimately relies on judicial review. It is a narrowly construed discretion with judicial review, which makes it in essence different from the broad exercise of prosecutorial discretion in the Anglo-American tradition. The opportunity principle and the provisional suspension of proceedings, notwithstanding the concrete procedural particularities in the draft-judicial approval and satisfaction of certain conditions, allow criminal prosecutions to be interrupted, suspended, or terminated, even though an offense has been actually committed. This revolutionary possibility left behind centuries of mandatory prosecution. Discretion means that criminal offenses can be dealt with differently and that the prosecutorial body can weigh its response to each particular event of criminality.

Finally, what is the difference between the opportunity principle and provisional suspension? In the Draft and within the rest of Codes in the region, provisional suspension allows prosecutors to place on hold the proceedings while defendants obey certain conditions, which would lead subsequently, to the termination of the prosecution.²⁶⁴ The opportunity principle may be applied to terminate or interrupt the prosecution directly, given the presence of certain legal motivations or reasons.

²⁶³ Id. (translated from Spanish).
²⁶⁴ See Langer, supra note 24, at 640 n. 108.
3.2. A correct understanding of discretion in Latin America

It is important to understand exactly what was introduced in the 1986 Draft, and later dispersed across the region. Prosecutorial discretion under the 1986 Draft—and for that matter, under all the rest of Latin American adversarial legislations—is a mechanism that allows prosecutors to dismiss a case (i.e., refuse or avoid prosecution by interrupting or suspending it), subject to judicial review. Therefore, Latin American discretion is about dismissal of charges—or better, decisions not to charge—even though there is sufficient evidence to support bringing a case to trial. It is obvious that before or after the reform, prosecutorial bodies cannot legitimately continue cases if they don’t have sufficient evidence to make a citizen stand trial. Decisions to dismiss charges, when there is not sufficient evidence to show criminal responsibility, and thus to prove guilt at trial, have always been, and will be, under the ambit of prosecutorial bodies.

The revolution in Latin America’s adversarial legislations is represented in the opportunity for prosecutors to avoid prosecution, even though there would be enough evidence to successfully prosecute. All jurisdictions still adopt as a general rule the “legality principle,” or mandatory prosecution, under which conduct that appear to be criminal must always be investigated.265 The opportunity principle, hence, is included in the Codes as an exception allowing prosecutors, given certain grounds—and the satisfaction of a number of legal requirements—to cease or suspend an investigation.266

Perhaps the most interesting feature of the introduction of prosecutorial discretion in Latin America is that it had nothing to do with plea-bargaining. The relationship between discretion and bargaining in the United States is extremely close. On the contrary, in Latin America only a handful of countries adopted plea-bargaining.

Even in those jurisdictions with bargaining, like Colombia, discretion does not play a central role in the negotiation process. Prosecutors under Colombian law do not have discretion to select charges or sentencing ranges in plea agreements. Therefore, they are stripped of discretion in the plea-bargaining process.267

Likewise, the German model—as we will see infra—influential over the 1986 Drafters, does not have discretion traditionally connected with plea bargaining. It is important to realize that

266 See id. at 71.
267 See generally, e.g., decisions of the Criminal Chamber of the Supreme Court of Justice of Colombia: Corte Suprema de Justicia [C.S.J.] [Supreme Court], octubre 20, 2005, Sentencia 24026; Corte Suprema de Justicia [C.S.J.] [Supreme Court], abril 6, 2006, Sentencia 24668.
prosecutorial discretion in Latin America, from its origins in the 1986 Draft to its regulation in every other Code in the region, has no rooted association with plea-bargaining.

Discretion in Latin America, hence, is not about allowing prosecutors to negotiate benefits in exchange for waivers of rights, it is about allowing prosecutors to cease or suspend investigations, given certain legal requirements, even though there would be sufficient evidence to follow through with the proceedings.

3.3. The rest of the Codes

The opportunity principle spread across the region. The small table below summarizes in chronological order, each of the reform undertakings in the region, and references the concrete rules governing discretion.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal Procedure Code of Guatemala - in effect since 1993</td>
<td>Arts. 25 and 286</td>
<td>Arts. 27 and 287</td>
</tr>
<tr>
<td>Criminal Procedure Code El Salvador - in effect since 1998</td>
<td>Art. 20</td>
<td>Art. 22</td>
</tr>
<tr>
<td>Criminal Procedure Code of Costa Rica - in effect since 1998</td>
<td>Art. 22</td>
<td>Art. 25</td>
</tr>
<tr>
<td>Criminal Procedure Code of Paraguay - in effect since 1999</td>
<td>Art. 19</td>
<td>Art. 21</td>
</tr>
<tr>
<td>Criminal Procedure Code of Venezuela - in full effect since 1999(^{268})</td>
<td>Art. 37</td>
<td>Art. 42</td>
</tr>
<tr>
<td>Criminal Procedure Code of Chile - gradual entry into effect since 2000</td>
<td>Art. 170</td>
<td>Art. 237</td>
</tr>
<tr>
<td>Criminal Procedure Code of Bolivia - fully in effect since 2001</td>
<td>Art. 21</td>
<td>Art. 23</td>
</tr>
<tr>
<td>Criminal Procedure Code of Honduras - in effect since 2002</td>
<td>Art. 28</td>
<td>Art. 36</td>
</tr>
<tr>
<td>Criminal Procedure Code of Dominican Republic - in effect since 2004</td>
<td>Art. 34</td>
<td>Art. 40</td>
</tr>
<tr>
<td>Criminal Procedure Code of Colombia - gradual entry into effect since 2005</td>
<td>Art. 321</td>
<td>Art. 325</td>
</tr>
<tr>
<td>Criminal Procedure Code of Peru - gradual entry into effect since 2006</td>
<td>Art. 2</td>
<td>Art. 20 (c) (VII)</td>
</tr>
<tr>
<td>Mexican Constitution. Amendments passed in 2008.</td>
<td>Art. 21</td>
<td></td>
</tr>
<tr>
<td>Criminal Procedure Code of Panama - gradual entry into effect since 2011</td>
<td>Art. 212</td>
<td>Art. 215</td>
</tr>
</tbody>
</table>

\(^{268}\) It is important to note that two almost identical Codes were passed in Venezuela with very little time difference. The first in 1998 by Congress and the second in 2001 by the National Assembly. However, in their articles 501 and 516 respectively, the Code state that it will be in effect in 1999. It appears that the "Code" passed in 2001 merely reformed some provisions of the 1998 statute, as a
The table includes only the general opportunity principle clause and the general provisional suspension provision. Each Code has more than one article governing these procedural devices. Usually the articles immediately following the ones highlighted in the table have to do with the same subject matter. This table only shows the general possibility of discretion, not the concrete governing procedural rules in each jurisdiction.

If this table were to analyze in detail the rest of the rules and, hence, each concrete normative design we would find differences regarding: A) Temporal limits within which discretion may be applied during the proceedings; B) Reasons that can motivate the exercise of discretion by prosecutors; C) Conditions that can be imposed during the provisional suspension; D) Types of offenses in which discretion can be applied; E) Different degrees of victim participation, and consideration or deference for its rights when discretion is exercised; F) When and how prosecution can be reinitiated after discretion is applied. None of these differences affect the shared nature of prosecutorial discretion in Latin America: prosecutors were granted the chance to select cases. However, it is clear there is no “pure ideal discretion” or a “universal conception” of discretion.

Discretion, in opposition to other “adversarial traits” is not an abstract ideal, like public/oral trials. Discretion is itself a concrete normative feature with a common denominator in every jurisdiction, notwithstanding differences in regulation. The conclusion is simple: prosecutorial discretion in the region follows the German model, even though we can find differences among jurisdiction with respect to concrete procedural rules. Prosecutorial discretion in the region has two distinct universal characteristics: it is statutorily regulated and it is subject to strict/mandatory judicial review (it is a common denominator in the region that judges always have the last word in the application of discretion). In opposition to this model, one can find in other countries with “adversarial” systems, broad discretion (not regulated by any statute) with no judicial review. In Latin America, therefore, prosecutorial discretion is legislatively delimited and structured, as well as judicially controlled.

The purpose of this paper is not to compare in detail the legal designs for which each country opted. Nor is its purpose to assess if

consequence of the political turmoil Venezuela endured during that time. In any event, the Code received a major reform in 2012. For the purposes of this paper our focus is placed on the Code passed during the time the adversarial reform movement was taking place in Latin America.

broader or narrower schemes of discretion are more convenient from a public policy standpoint. Other academic works may pursue these objectives. The purpose of this paper is simply to show that prosecutorial discretion is the only new universal trait resulting from adversarial criminal reform in Latin America and to review its genealogy in the region.

Germany strongly influenced criminal procedure reform in Latin America. The German version of the adversary process not only inspired Latin America, but was fundamental, because adversarial transformations in Central and East Europe were filtered through the German reception of the adversary process.270

3.4. German inspiration

The 1986 Drafters were influenced by German criminal procedure law, with respect to prosecutorial discretion. However, when one analyzes German law, it is clear that Latin America did not just copy or imitate. The 1986 Draft and all the rest of legislations in the region, have several regulatory differences with German law. This paper will not compare exactly the breadth of prosecutorial discretion in Germany with the exact terms in which the opportunity principle appeared—and was further reproduced—in the region. We need not to. The point of this remains the same: prosecutorial discretion, notwithstanding concrete regulatory differences, as a procedural device for granting prosecutors the choice of avoiding or suspending an investigation, was adopted from Germany.

The history of mandatory prosecution in Germany grows parallel to the creation of public prosecution. Germany’s office of the public prosecution was created in the middle of the nineteenth century with the purpose of stripping inquisitorial judges of investigatory duties.271 At the time, it was believed that combining investigatory and adjudicatory functions prejudiced the defendant.272 As a result, “[t]he responsibility for investigation on report or suspicion of crime was split from the judicial office and made the job of the public prosecutor.”273

---


273 Id.
Even though the prosecutorial power was separated from instruction judges, the office of the public prosecutor remained a part of the judicial branch. In effect, "[t]he prosecutor . . . did not act as an administrator trying to attain practical goals. Instead, his function was limited to the judicial task of applying the provisions of the Penal Code to the facts of each case." Since the creation of public prosecution, mandatory prosecution was embraced under the philosophy of equal enforcement of the law and protection against arbitrary prosecutorial conduct. Despite some small changes, the German Criminal Procedure Code has been in effect since 1877.

Claus Roxin, one of the most important criminal law professors in Germany, and one of the most influential European scholars in Latin America, claims that the legality principle even today dominates German law. Under said principle, the prosecution must investigate offenses and accuse defendants when, after the investigation, there is a strong suspicion of criminal responsibility. This principle is different than the opportunity principle. Under this principle the prosecution may refuse to bring a case to trial even though there is a strong suspicion that the defendant is guilty.

It is important to note that one of the socio-political and cultural origins of the legality principle in German law was, according to Professor Roxin, mistrust in the prosecution. Mandatory and compulsory prosecution, embodied in the legality principle was introduced in the German Criminal Procedure Code (StPO) because the prosecution was not trusted because prosecution was subordinate to the Monarchy.

The underlying philosophy of compulsory prosecution was that justice should be absolute. Therefore every offense should be punished equally and without exception. With time, punitive philosophies based on prevention, social necessity, and convenience have weakened the legality principle's reputation. Notwithstanding, it is still widely recognized and applied because democracy and the Rule of Law demand certainty and equality.

---

275 Id. at 469-70; see generally Michael Bohlander, Principles of German Criminal Procedure 55-57, 108-113 (2012).
276 Herrmann, supra note 274, at 469-470.
278 Id. at 89.
279 Id.
280 Id.
281 Id.
It is important to understand that the prosecutorial body in Germany is neutral and thus must investigate charging evidence as well as exculpatory evidence.\textsuperscript{282} This means the investigation is “integral.” Police forces and the prosecution work closely in Germany to secure sufficient evidence for a conviction. Lack of satisfactory levels of evidence will result in a dismissal of the case.\textsuperscript{283}

Therefore, the general rule under the StPO is the principle of legality.\textsuperscript{284} Under Articles 152 and 170, the prosecution must investigate every conduct if there is suspicion about its criminal nature and accuse the defendant if sufficient evidence is obtained.\textsuperscript{285} However, this principle suffers a number of exceptions, especially with respect to low and medium criminality.\textsuperscript{286} German criminal procedure law has at least four categories under which investigations can be ceased or suspended, even though there would be sufficient evidence to follow through with the case.\textsuperscript{287} It is important to note that discretion is applied precisely when there is enough evidence to support a prosecution. If there is deficient evidence, an application of regular dismissal powers will suffice.\textsuperscript{288}

First, the opportunity principle may be applied when an offense is “insignificant” and there is no interest in prosecution; second, when the prosecutorial interest may be satisfied through other means; third, when prosecutorial interests find opposition in national interests; fourth, when the victim can carry out on his own the prosecutorial efforts.\textsuperscript{289} Article 153 allows imposing conditions on defendants, conditions that if satisfied can preclude the prosecution.\textsuperscript{290} Some American scholars have claimed that German law adopts even more forms of prosecutorial discretion.\textsuperscript{291}

We can extract two highly provocative conclusions after this very brief and superficial summary of the opportunity principle in Germany. First, plea-bargaining, though it exists for some cases, is not

\textsuperscript{282} \textsc{Julia Fionda}, \textit{Public Prosecutors and Discretion A Comparative Study} 133 (1995).
\textsuperscript{283} \textit{Id.} at 135.
\textsuperscript{284} \textsc{Teresa Armenta Deu}, \textit{Criminalidad de Bagatela y Principio de Oportunidad: Alemania y España} [Small Criminality and the Opportunity Principle: Germany and Spain] 43-47 (2001).
\textsuperscript{285} \textsc{Roxin}, \textit{supra} note 277, at 90.
\textsuperscript{286} \textsc{Armenta Deu}, \textit{supra} note 284, at 43.
\textsuperscript{287} \textsc{Roxin}, \textit{supra} note 277, at 90.
\textsuperscript{288} \textsc{Fionda}, \textit{supra} note 282, at 135-39.
\textsuperscript{289} \textsc{Roxin}, \textit{supra} note 277, at 90-91.
\textsuperscript{290} \textit{Id.} at 92.
\textsuperscript{291} \textsc{Herrmann}, \textit{supra} note 274, at 475-502.
part of the discourse regarding prosecutorial discretion in Germany. This means that in Germany, plea-bargaining is not institutionally, legally, and culturally associated with discretion. Second, though the 1986 drafters based the inclusion of prosecutorial discretion on German law, the structure and the concrete regulation of the opportunity principle and the conditional suspension of proceedings in the Draft does not mimic German legislation. Furthermore, no code in the region does.

Actually, as we have mentioned, though all the new legislation stems from the same reform effort and from the same set of comparative, doctrinal, and normative influences. Among them we can find several differences with respect to the concrete regulation of discretion.

In any event, the German version of the opportunity principle—as a legislative embodiment of prosecutorial discretion—was determinative of the genealogy of discretion in Latin America, and, notwithstanding concrete differences, it has spread across all the reforms undertaken over the past decades. Its essence is simple and clear: prosecutors can refuse to try a case subject to a regulated judicial review and with the fulfillment of certain statutory elements or grounds.

3.5. Germany and the Anglo-American tradition from a comparative criminal justice perspective

It is interesting to analyze at least part of the literature produced, with respect to German procedural law, in a comparative perspective. Within comparative criminal procedure literature, German law and the Anglo-American tradition have been repeatedly evaluated. From a comparative criminal justice perspective, a traditional category used to distinguish models of criminal procedure is embodied in the opportunity/legality dichotomy. Models based on mandatory or compulsory prosecution are governed by the legality principle. Under this principle the prosecutor has a restricted decision-making freedom.

---

292 See Armenta Deu, supra note 284, at 43-138 (does not mention in her very detailed history of discretion, an explanation of anything related to bargaining).
293 See Fionda, supra note 282, at 141-45 (explaining penal orders. A penal order is an abbreviated form of prosecutorial sentencing, but it is not a product of discretion. It is a document containing facts, offenses and the supporting evidence, with a recommendation of sentence. A defendant can accept the order. Some could understand it as a form of plea bargain. In any event it has little to do with discretion as such.).
Nonetheless, some recognize certain elements of discretion within procedural models that adopt the legality principle.294

The opportunity or expediency principle, on the contrary, applies when a prosecutor convinced of criminal responsibility, nonetheless, avoids prosecution. In some jurisdictions, the prosecution must have previous legally defined grounds to apply the principle of expediency or opportunity. In the Anglo-American tradition, prosecution can be refused on pragmatic reasons, not necessarily defined previously by statute.295

Focusing on the United States, we must say that prosecutorial discretion is a debated topic. Prosecutors have to undertake complex decision making processes. When deciding if they should charge, and what to charge, they must assess a number of factors.296 "Given the complex nature of prosecutorial decision making, it is well recognized that prosecutors must be afforded certain degree of discretion."297 It has been suggested that beyond the power of deciding whether or not to charge—and what to charge—lies the power "not to prosecute further even in the face of sufficient evidence."298 Prosecutorial discretion is nearly unlimited, even though there are some prohibitions regarding consideration of illegitimate grounds according to the Constitution. Claims against improper prosecution, however, rarely succeed.299

Discretion, even though problematic, is a systematic necessity, and advances the interests of justice. Thus, commentators are generally not concerned with the existence of discretion as such, but with the improper exercise of broad discretion lacking supervision or control.300

Discretion becomes a matter of concern for authors when they consider its relation with plea-bargaining.301 Commentators have identified several forms of “coercive” plea bargaining by American

---

294 See Mirjan Damaska, The Reality of Prosecutorial Discretions: Comments on a German Monograph, 29 Am. J. Comp. L. 119, 120 (1981); Klaus Ludersen, Overview of Different Types of Procedure from a German Point of View/ Arguments Against the Inquisitorial Type of Criminal Procedure, in CRIMINAL JUSTICE BETWEEN CRIMINAL CONTROL AND DUE PROCESS. CONVERGENCE AND DIVERGENCE IN CRIMINAL PROCEDURE SYSTEMS 20 (2004) (Germ.); see Herrmann, supra note 274, at 472–73.

295 See Damaska, supra note 294, at 120.

296 See Yue Ma, Prosecutorial Discretion and Plea Bargaining In The United States, France, Germany, And Italy: A Comparative Perspective, 12 INT’L CRIM. JUST. REV. 22 (2002).

297 Id. at 22.

298 Id. at 25.

299 See id. at 29.

300 See id. at 22.

301 See id. at 28.
prosecutors, such as overreaching, charging without probable cause, filing multiple charges, and charging under penalty-enhancing statutes. Nevertheless, plea-bargaining "plays an important role in conserving the limited justice resources."\textsuperscript{302} In any event, we must not forget that even though the exercise of discretion to decide not to charge may generally go unchecked, plea bargains are always subject to judicial approval. Although judges have the authority to reject plea agreements, rejection is a rare occurrence.\textsuperscript{303}

Within this complex legal and institutional environment some U.S. scholars have turned to continental Europe in search of ideas for restraining discretion and spoke with approval about earlier mandatory prosecution models.\textsuperscript{304} While European legislators have been gradually adopting several forms of prosecutorial discretion the broad and unchecked nature of discretion in the United States remains unique in comparative criminal justice.\textsuperscript{305}

Certain promoters of American reform, finding inspiration in German law, rely specially on the principle of mandatory/compulsory prosecution. Under this principle, ideally, all cases with sufficient evidentiary support should be prosecuted, allowing no space for discretion.\textsuperscript{306} However, as we have seen, German criminal procedure laws lack prosecutorial discretion.\textsuperscript{307} Therefore, it is clear that even Germany—a historically inquisitorial system with mandatory/compulsory prosecution—adopted prosecutorial discretion.\textsuperscript{308} Currently the German criminal procedure system represents a mix of both principles, but the legality principle, and thus compulsory prosecution, still prevails.\textsuperscript{309} Mandatory prosecution has weakened over the years. However, German discretion is limited when compared to American prosecutorial activity.\textsuperscript{310} For various reasons, commentators suggest that discretion in "non-minor criminal cases remains limited."\textsuperscript{311}

In conclusion, as we have seen, Germany, like the U.S. has empowered prosecutors with at least some discretionary power. Neither the German nor the U.S. systems are efficient enough to prosecute all

\textsuperscript{302} See id. at 26-43.

\textsuperscript{303} William Pizzi, Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform 54 Ohio St. L.J. 1325, 1356 (1993).

\textsuperscript{304} See Yue Ma, supra note 296, at 23.

\textsuperscript{305} See id. at 24.

\textsuperscript{306} See id. at 35.

\textsuperscript{307} Id.

\textsuperscript{308} See Fionda, supra note 282, at 167.

\textsuperscript{309} See Damaska, supra note 294, at 120-22.

\textsuperscript{310} See Pizzi, supra note 303, at 1332-33.

\textsuperscript{311} Id.
crimes. However, Germans have articulated some rigorous factors to select cases.\textsuperscript{312}

Furthermore, some authors claim Germany has also implemented plea-bargaining. Since 1970 Germany witnessed a severe rise in plea bargaining, eventually making it a prevalent practice.\textsuperscript{313} In several respects, German plea bargaining differs from plea bargaining in the United States.\textsuperscript{314} However, this is not a peaceful issue. Other authors assert that Germany has purposefully avoided plea-bargaining.\textsuperscript{315} Professor Langbein in particular, argues that absence of bargaining in Germany represents one of the most acute differences with the U.S. criminal justice system.\textsuperscript{316}

In essence one could assert that it is the notion of "supervised discretion" within German law which seems appealing to comparative criminal justice academics.\textsuperscript{317} Judges have controlling power of charging decisions.\textsuperscript{318} On the contrary, prosecutorial discretion in the American system is rooted in the separation of powers. Within that institutional framework, judicial review presents a number of complications.\textsuperscript{319}

Under European inspiration, some scholars advancing American reform also suggest lowering penalties and granting broader pretrial discovery rights.\textsuperscript{320} High penalties, in comparison to the punishment imposed in Germany and other European jurisdictions for similar offenses, have been considered one of the reasons why prosecutors need more discretion in the United States.\textsuperscript{321}

We must also bear in mind that some authors are skeptical of using discretion found in civil law models of criminal procedure as a source of inspiration for reforms in America.\textsuperscript{322} Parallel to these considerations, some scholars consider that the American legal system

\textsuperscript{312} See Langbein, supra note 272, at 467.
\textsuperscript{314} Yue Ma, supra note 296, at 38.
\textsuperscript{316} See id. at 205.
\textsuperscript{317} Yue Ma, supra note 296, at 42; see Langbein, supra note 272, at 439.
\textsuperscript{318} See Pizzi, supra note 303, at 1353.
\textsuperscript{319} See id. at 1354.
\textsuperscript{320} See Yue Ma, supra note 296, at 44-49 (claiming that in continental Europe, one can find lower penalties, broader pretrial discovery rights, and judicial supervision).
\textsuperscript{321} See Pizzi, supra note 303, at 1340; Herrmann, supra note 274, at 473.
\textsuperscript{322} See Pizzi, supra note 303, at 1373.
does impose controls over prosecutorial discretion.\textsuperscript{323} Nevertheless, such controls are informal, whereas, civil law models usually opt for hierarchical and formal controls.\textsuperscript{324}

One issue rarely mentioned in literature about comparative criminal procedure and German law, is the one related to normative influences over Germany. This is perhaps the most fascinating topic for the purposes of this paper. If the origin of discretion in Latin America was influenced by Germany, then one should ask if Germany, in turn, found inspiration in any other legislation. Did Germany adopt prosecutorial discretion autonomously and without any influence from other jurisdictions or procedural models? Does Germany have its own version of discretion as a product of its independent legal evolution, without regard to values promoted by countries with other criminal justice traditions?

This is a very difficult question to answer. It cannot, of course, be fully answered in this paper. Texts about German criminal procedure history strongly suggest that discretion was just a product of Germany’s own legal evolution.\textsuperscript{325} It was an autonomous response to Germany’s judicial needs, resulting from an intuitive debate among statute drafters and academics.

Among the scarce comments one can find regarding this matter, another theory emerges. Professor Damaska advances an alternative—and very reasonable—insightful claim. According to Professor Damaska every criminal procedure structure suffers pressures for change.\textsuperscript{326} These pressures, then, are sources of transformation. Pressures can be pragmatic or ideological.\textsuperscript{327} Pragmatic pressures are generally related to limited resources in the justice system. Ideological pressures are associated with respect of human rights.\textsuperscript{328} The human rights discourse has acquired great rhetorical force recently, so it has become a strong pressure for change over judicial structures.\textsuperscript{329}

Following Damaska, Anglo-American procedural models—particularly the U.S. justice system—suffered pressures for which no apparent solutions were offered in continental Europe.\textsuperscript{330} Pragmatic pressures in the U.S., therefore, were met with alternatives coming from within its own rationale, history, and legal tradition: an increase in the use of prosecutorial discretion, plea-bargaining, and in general

\textsuperscript{323} See id. at 1337-38.
\textsuperscript{324} See id. at 1337-50.
\textsuperscript{325} See generally Armenta Deu, supra note 284.
\textsuperscript{326} See Damaska, supra note 270, at 1-10.
\textsuperscript{327} See id.
\textsuperscript{328} See id.
\textsuperscript{329} See id.
\textsuperscript{330} See id.
methods for avoiding trial (i.e., terminating proceedings in anticipation of the trial phase). The United States already had discretion and bargaining, so it simply faced the challenges it was experiencing, by increasing, and even refining, the use of common and ordinary long existing mechanisms.

The United States suffered sharp pragmatic pressures. High criminal rates and the elevated costs of full blown criminal prosecutions ending up in complete trials, strained the system. Mechanisms already in place within the American legal culture, designed to avoid trial, began to be more widely applied. The result was, and is, that jury trials are the exception because the majority of cases are decided through guilty pleas and bargaining, and in general, through the exercise of discretion. For solving these types of pressures, there was nothing that jurisdictions within the Anglo-American tradition could learn from rigid civil law/inquisitorial models.

Ideological pressures—resulting among others, from racial injustices—were dealt with by broadening and strengthening constitutional interpretation of procedural guarantees. In contrast, the pressures countries in Europe suffered led them to look for answers outside their own tradition and procedural rationale. Europe was forced to search for solutions in the U.S. Within their own institutional and legal history, Europeans found no tools for successfully confronting pragmatic and ideological pressures. This, for example, explains the Italian criminal procedure reform of 1988. Ideological pressures relating to respect for human rights led Europe to adopt ideas embraced and promoted by procedural systems which had historically incorporated a methodical protection scheme of substantive guarantees (e.g., right to counsel, impartial judges, due process, etc.); mainly, the adversary process. Pragmatic pressures were faced by imitating prosecutorial discretion.

Therefore, the opportunity principle is the European version of Anglo-American discretion, "invented" as a consequence of the necessity to find in foreign legal traditions what traditional European rationales did not offer: instruments to deal with disturbing resource shortcomings.

Damaska claims that the movement of ideas between the two main procedural cultures (i.e., the Anglo-American adversary process

---

331 See id.
332 Damaska, supra note 270, at 3.
333 See id.
334 See id. at 1-10.
335 See id.
336 See id.
337 See Damaska, supra note 270.
and the Continental European inquisitorial model) has been almost entirely unidirectional.\textsuperscript{338} Common law institutions have exerted a robust influence over civil law jurisdictions.\textsuperscript{339} Nonetheless, almost no movement can be observed in the other direction.\textsuperscript{340} Anglo-American criminal procedure models have historically developed free from foreign influences, however, European systems over the past two centuries have been adopting procedural institutions whose origin can only be traced to the adversarial process.\textsuperscript{341} This is a difficult claim to support because, as Professor Damaska acknowledges, Europe has not always openly recognized this flow of normative incorporation, and because the origin of legal reforms in Europe is not in general easily discoverable since Europeans surround the imported institutions with a number of variations.\textsuperscript{342}

In opposition to Professor Damaska’s claim, Professor Langbein suggests that systemic pressures in Europe brought by case overload led to reforms that “preserved the trial.”\textsuperscript{343} Therefore, in his opinion, no discretion was implemented because the jury trial retained its character as a summary proceeding.\textsuperscript{344}

3.6. Prosecutorial discretion in the Anglo-American tradition

If we follow Damaska’s claim about prosecutorial discretion in Germany and continental Europe, we must explore, at least superficially, the Anglo-American tradition of criminal procedure. Retracing our steps, thus far, this paper has shown that the origin of prosecutorial discretion in Latin America can be found in the normative influence exerted by Germany. If we credit Professor Damaska, and believe discretion in Europe was imported/adopted from the Anglo-American tradition, then the logical step—if one wants to continue discovering the genealogy of discretion in Latin America—is to try to understand the origins of discretion in the Anglo-American tradition of criminal justice.

Discretion and plea bargaining in the United States have been, without a doubt, among the most debated topics in criminal procedure.

\textsuperscript{338} See id. at 3.
\textsuperscript{339} Id.
\textsuperscript{340} See id. at 2.
\textsuperscript{341} See id. at 4.
\textsuperscript{342} See id.
\textsuperscript{343} John H. Langbein, \textit{Understanding the Short History of Plea Bargaining} 13 Law & Soc’y Rev. 261, 261 -270 (1979) (explaining that the U.S. and continental Europe endured the same pressures, but those pressures led in continental Europe to reforms that preserved trial. Therefore, Professor Langbein holds that Europeans did not develop plea bargaining while their jury trial retained its character as a summary proceeding.).
\textsuperscript{344} See id.
This paper, of course, does not pretend to recreate every discussion and it does not aspire to present a full picture of these issues. We will focus on the history of discretion and bargaining through some brief references to a small part of the academic literature produced with respect to these matters. Mainly, there are three interlocked factors that ought to be considered when inquiring about the origins of discretion in the United States: the heritage left by common practices in early private prosecutions, the increase in the use of plea-bargaining, and the loss of efficiency of jury trials. These factors are deeply related to one another and they overlap historically and systemically.

Historically, with respect to the influence of early private prosecutions in the development of U.S. criminal procedure, according to Professor Langbein:

The common law’s concept of the prosecutorial function formed over centuries of predominantly private or citizen prosecution. Official or public prosecution initially developed as an adjunct to private prosecution and was steeped in the forms of private prosecution, as it continues to be in England today. Those forms helped conceal the development of the professional public prosecutor in America. By the time the American prosecutor’s monopoly could be perceived, new factors were operating that seemed to require expansive prosecutorial discretion the changes in the law of criminal procedure and evidence that brought about the need for plea bargaining... The public prosecutor at common law thus grew up in the shoes of the old citizen prosecutor, occasionally displacing or supplementing him, but more usually deferring to him\textsuperscript{345}... The tradition of private prosecution has been a feature of English criminal procedure as nearly as striking and tenacious as jury trials... Although the English did place some limits upon the power of the prosecutor to compromise criminal litigation, the prosecutorial function nevertheless grew up steeped in the conceptual forms of private discretion as opposed to official duty. Even in America, where the public prosecutor has a longer history than in the mother jurisdiction, the district attorney fell heir to the discretion of the citizen prosecutor whom he succeeded\textsuperscript{346}

Therefore, prosecutorial discretion can be explained with reference to the function of public prosecution. Public prosecution stemmed from private prosecution, where discretion operated pervasively. In

\textsuperscript{345} Langbein, \textit{supra} note 272, at 443-44.

\textsuperscript{346} Langbein, \textit{supra} note 343, at 266-67.
other words, discretion in the Anglo-American system can be understood as a consequence of a long tradition of private enforcement of the law, in which it was widely practiced.

Management of enforcement efforts by professional and public prosecutorial bodies became the general rule, only until recently. Private criminal litigation—carried out by victims or their families—was substantial in the beginning of the nineteenth century. For multiple reasons, public prosecutors and professional police departments began to spread within England and the Unites States.

Secondly, it is also important to highlight that some commentators trace the evolution of discretion in close relation with bargaining. Thus, at least in the Anglo-American tradition, discretion and bargaining need to be understood together because they are closely connected. Professor Langbein further explains that bargaining was unknown until the nineteenth century, when jury trials were considerably efficient. "It should surprise no one that in a system of trial as rough and rapid as this there was no particular pressure to develop non-trial procedure, or otherwise to encourage the accused to waive his right to jury trial." However, when jury trials became complicated enterprises, with discretion already in place as a result of private prosecution, prosecutors and defendants were incentivized to negotiate agreements. These plea bargains required prosecutors to give something up—charging less serious offenses or seeking favorable sentences—in exchange for waivers of rights held by defendants, and especially the opportunity to be tried before a jury. Prosecutors had the power—the discretion—to make these concessions and give up what was required to get defendants to relinquish their rights.

Authors assert that it is not uncommon to find, in comparative criminal procedure, models that allow favorable punitive treatment if defendants accept responsibility. In turn, trials are usually reserved for a minority of cases, cases in which defendants contest the charges brought by the state. Therefore, one could argue that encouragement to accept guilt in exchange for lenient punishment, and a struc-

\[347\] See Ronald Jay Allen et. al., Comprehensive Criminal Procedure 961 (3rd ed. 2011) (explaining that, for multiple reasons, private prosecutors gave way to public prosecutors. Also holding that movements of crime victims over the last two decades are a result of displacement of private interests from the prosecution.).

\[348\] See id. at 961.

\[349\] See id.

\[350\] Langbein, supra note 343, at 264-67.

\[351\] See Langbein, supra 315, at 214.

\[352\] See Allen, supra note 347, at 1231 (explaining that the difference between American bargains and methods in other jurisdictions for terminating proceedings is the "contract like manner" in which defendants are led to waive their rights in exchange for favorable treatment).
tural trend to preserve resources, is universal.\textsuperscript{353} The distinguishing characteristic of the U.S. system, thus, would be the "contract like manner" of negotiations between prosecutors and defendants directed at securing punitive benefits in exchange for abdication of trial rights.\textsuperscript{354}

Professor Fisher explains that the triumph of plea bargaining in some parts of the U.S. was a consequence of removing discretion from judges during the 19th century. The legislature set fixed penalties for some offenses, driving discretion from judges to prosecutors.\textsuperscript{355} I consider this a very important argument for the purposes of this paper. It shows that prosecutors began exercising more extensively discretion precisely because they already had discretion. No discretion could have shifted towards them if they already did not have the systematically imbedded possibility of exercising discretionary powers.

Professor Fisher also explains the birth of "on file plea bargaining": a discretionary power used during the 19th century. This power allowed prosecutors to suspend proceedings—and avoid trials—pending that the defendant respected certain obligations.\textsuperscript{356} I claim this is a precursor of provisional suspension in the European and Latin American contexts: charges can be dropped if the defendant first satisfies some obligations. Nonetheless, "on file pleas" were originally used when judges were going to deny plea agreements.

Therefore, we can observe that discretion in the U.S. criminal procedure tradition is not just about dismissing charges, even though successful prosecutions could be carried out. It is also about exercising the discretionary power to decide what to charge and what punishment to seek, in exchange for a compromise by the defendant to sacrifice its trial rights and enjoy a lesser punishment. Discretion, in plea bargaining, is materialized in the power to negotiate. In Latin America and Europe where plea bargaining has not evolved, or in some cases, is not even allowed, prosecutors lack the power to negotiate offenses or sentences, and thus, discretion has a different dimension. Latin American discretion is about dismissal of charges. It has nothing to do with selecting charges, recommending sentences, or bargaining. On the contrary, the only way to understand the crisis of—and the criticisms to—prosecutorial discretion in the United States is by grasping its strong connection with bargaining. Discretion as such can only be comprehended within the evolution of plea bargaining, and plea bargaining is only explicable as an outgrowth of discretion. Discretion and plea bargaining are intertwined. Within the U.S., prosecutorial discretion, as

\textsuperscript{353} See id. at 1231.

\textsuperscript{354} See id. at 1231.


\textsuperscript{356} See id. at 864-68.
the power to refuse prosecution—indeed, considered—does not appear to be a central concern.

Third, with respect to the relationship between loss of efficiency of jury trials and discretion, some authors claim that as a result of a number of factors, jury trials became long and complicated undertakings. Consequently, jury trials ceased to be the ordinary general rule type of procedure. While the system drifted away from jury trials to preserve resources, prosecutorial discretion and plea bargaining evolved naturally and rapidly spread as a common practice.

When, therefore, the transformation of jury trial left the trial system clogged, the pressure of caseloads could find release in the exercise of prosecutorial discretion much more naturally than on the Continent, where the prosecutorial function has for so long been performed by officials and where there has been constant concern to regulate their discretion.

Today, in the United States, prosecutorial discretion and plea bargaining constitute accepted and pervasive practices, recognized and protected by Supreme Court doctrine. Prosecutors decide whether to file charges and what charges to file. Also, lack of judicial review has been upheld by Supreme Court opinions, among other reasons, as a consequence of the separation of powers doctrine.

One can conclude, therefore, that discretion is imbedded in the system. The adversary process evolved—for a number of reasons—into a model that commonly applies discretion. Thus, we have seen that discretion is congruent with the history of Anglo-American criminal procedure. Historically, it seems "natural" that discretion and bargaining were born in the accusatory system. As a response to its own systemic needs and its own tradition, discretion began to be consistently practiced.

Hence, at least historically, Professor Damaska's claim seems plausible. Anglo-American models gave birth to discretion because they evolved towards it, within their own rationales, responding to

357 See Langbein supra note 343, at 263-64.
359 Langbein, supra note 343, at 261-67.
their own particular necessities, and as a consequence of their own history stemming from private prosecution, plea-bargaining, and complicated jury trials. Once discretionary mechanisms were in place, and imbedded in the system itself, logically, pragmatic pressures led to an expansion of their use. On the contrary, it does not appear consistent with European history for discretion to be have been born there. Discretion had no natural way of arising in civil law/inquisitorial models, simply because it was an idea foreign to their values: they were never governed by private prosecution, they never negotiated waivers of rights, and trials were never perceived as inefficient.

If no disposition of private criminal prosecution was predominantly exercised, but rather, prosecution was an official and public duty, then discretion could not have possibly been a systemic outcome—or a response to pragmatic necessities—in continental Europe. So, it is possible that Damaska is correct when he claims that discretion was imported to Europe from the Anglo-American tradition.

If this is the case, Latin America ended up importing the main—and only—universal trait of adversarial reforms, from a criminal procedure code (Germany) that found inspiration in the Anglo-American tradition. Latin America, instead of looking for inspiration in a model that naturally and systemically practiced and embraced discretion, imitated the European version of it.

3.7. What is discretion?

Thus far we have tried to understand the genealogy of prosecutorial discretion in Latin America. Discretion in Latin America ultimately comes from the Anglo-American tradition of criminal procedure. Notwithstanding differences in the exercise of discretion, its regulation, and its pervasiveness in Anglo-American and Continental European/Latin American systems, I offer an understanding of discretion.

Discretion means trust. Why else would a system give discretionary powers to an actor in the proceedings? Discretion is given because systems—for historical, social, political, cultural, or economic reasons—trust some of the actors in the criminal justice context. Who to entrust with the power of discretion is the question systems face. An even greater question is the one related to supervisory controls over the exercise of discretion. Who controls the discretion others exercise?

Trust, as many other issues in legal design, is a matter of degree. Actors may have broad or narrow spaces for discretion in different stages of the proceedings. Some manifestations of discretion may not be recognized at all by the law, and they may be informal. I am particularly interested in the legal or institutional dimension of trust.

In the Latin American context, is there any way in which we can try to identify who is institutionally trusted? I claim there is a
way. All Constitutions in Latin America contain a clause that demonstrates the level of trust in public officials.\textsuperscript{362}

All the Latin American Constitutions—where adversarial reforms have taken place—include a clause under which private citizens can do anything the law does not forbid, whereas public officials can only do what is expressly allowed by law.\textsuperscript{363} The relationship between public officials and the law is closed: they can only act according to the duties they have been specifically and expressly entrusted to perform. Therefore officials are bound to the strict text of the law in the execution of their functions. Private citizens hold an open relationship with the law: they can undertake any action as long as the law does not forbid it.

I believe these Constitutional clauses show an essential trait of legal design in Latin America: public officials are institutionally and systematically not trusted. Their conduct cannot fall outside the scope strictly delimit ed by law. Hence, applied to the topic of prosecutorial discretion, prosecutorial bodies could have never exercised discretion unless the law expressly awarded that possibility.

The distribution of discretionary powers, and thus, the allocation of trust, responds—at least in part—to historical and institutional necessities. This paper will not explore other possible causes for allocation of trust, such as political culture or social reasons.

As we have seen, in the Latin American context discretion was a response to one fundamental need: efficiency. The idea that no system can adequately prosecute to the same extent every offense, underlines the genealogy of discretion in Latin America. To avoid the collapse of systems as a result of case overload, discretionary mechanisms were put in place. Even in Germany, prosecutorial discretion has increased as a solution to resource necessities. In fact, Professor Fionda claims that prosecutors in Germany have become the central

\textsuperscript{362} The concepts of positive and negative relation to the law are common in administrative law literature within civil law systems. See generally Felipe Rotondo Tornaría, Manual de Derecho Administrativo (7th ed. 2009); Agustín Gordillo, 1 Tratado de Derecho Administrativo. Parte General; Miguel Sánchez Morón, Derecho Administrativo. Parte General (8th ed. 2012).

\textsuperscript{363} E.g., Constitución Política del Perú [C.P.] art. 2, §24., art. 41; Constitución Política de la República de Guatemala [C.P.] art. 5, art. 154; Constitución Política de la República de El Salvador [C.P.] art. 8, art. 235; Constitución Política de Costa Rica [C.P.] art. 11; Constitución Política de la República de Panamá [C.P.] art. 18; Constitución Política de los Estados Unidos Mexicanos [C.P.] Capítulo I, Diario Oficial de la Federación [DO], 5 de Febrero de 1977; Constitución Política de Colombia [C.P.] art. 6; Constitución de la República Bolivariana de Venezuela [C.P.] art. 20, art. 137, art. 139; Constitución Política de la República de Chile [C.P.] art. 7, art. 8.
players in the criminal justice system. Their broad discretionary powers are a real-world need to process cases and prevent overload.\footnote{364}{See Fionda, supra note 282, at 169.}

Anglo-American criminal procedure history, as explained \textit{supra}, shows that discretion and bargaining evolved as an outcome of the system's needs. Discretion was developed from within the own Anglo-American rationale. Discretion is so imbedded in the system that, for example, in the U.S. it would be difficult to pinpoint a "rule" that awards discretion to the Executive Branch. According to Article II, Section 3 of the U.S. Constitution the Executive Branch "shall take care that the laws be faithfully executed."\footnote{365}{U.S. Const. art. II § 3.} Discretion is not specifically awarded in the Constitution or in the U.S. Federal Rules of Criminal Procedure. Prosecutorial offices in the federal and state levels rely heavily on internal guidelines for the exercise of discretionary powers.\footnote{366}{See generally United States Attorneys' Manual, § 9-2.020.} On the contrary, discretion in Latin America is the product of statutory reform. It is not common to find in U.S. criminal procedure legislations closed lists of what prosecutorial bodies can do. These lists are part of all Latin American criminal procedure Codes.

As an explanation for prosecutorial discretion in general, Professor Wiegned asserts that: "The criminal process cannot function without a filter that prevents undeserving cases from advancing to trial . . . [I]t is typically the prosecutor who is entrusted with sifting out those cases that do not merit the attention of the court—a task that cannot be carried out adequately without measures of discretionary power."\footnote{367}{3 Thomas Weigend, Prosecution: Comparative Aspects, in Encyclopedia of Crime and Justice 1296 (S. H. Kadish ed., Free Press 1983).}

References to trust—or lack of trust—in criminal justice system design are not uncommon. Professor Herrmann asserts that broad discretionary powers were "feared," among other reasons, because of the risk that local enforcement officials would be politically influenced.\footnote{368}{See Herrmann, supra note 274, at 469-70.} Professor Pizzi suggests that the history of prosecutorial discretion in the United States is related to trust in local governmental structures.\footnote{369}{See Pizzi, supra note 303, at 1342.} Relaxation of mandatory prosecution in Germany, according to Professor Damaska, among other reasons, was a consequence of the "increased legitimacy of prosecutors."\footnote{370}{See Damaska, supra note 294, 125-27.} Hence, more trust brings more power.
4. Conclusion

In this paper we have reviewed the criminal procedure reforms fifteen Latin American countries undertook over the past two decades. I showed that according to the mainstream discourse constructed by leading scholars and commentators in the region, as a result of the Reform Movement, systems with adversarial traits replaced inquisitorial models.

Nonetheless, it is clear that when one compares features categorized doctrinally as “adversarial” with the rules finally adopted in the new fifteen legislations, one can hardly contend that Latin America actually experienced an accusatorial revolution. Typical adversarial characteristics only appear in some of the new Codes. Thus, “adversarial” in the context of Latin American comparative criminal procedure, has many faces. Each jurisdiction understood differently what it meant to reform inquisitorial models.

Furthermore, the comparative analysis exhibited in this paper demonstrates that only one new feature appeared in all the Codes as a consequence of the reforms. Prosecutorial discretion, previously unknown in the region, is now a shared characteristic in Latin American post-reform criminal procedure.

This paper then explored prosecutorial discretion. I explained how it was initially introduced in the region, by Argentinean reformers. Its genealogy can be traced even further, to German law. German law, in turn, imitated discretion from the Anglo-American tradition, where it was, and is now, widely applied. However, discretionary powers in the U.S. and in Latin America are different in one fundamental aspect: Latin America does not connect discretion with plea-bargaining.

Regardless, Latin America mirrored, in all its reforms, a procedural institution that had been in turn transplanted by Europeans from outside the Continent. Consequently, the definitive trait of Latin American criminal procedure reform was not directly adopted from the Anglo-American legal tradition, the tradition that had systematically and historically invented and practiced discretion. In fact, some authors have pointed out that, in general, German legal culture has defeated U.S. legal culture as the main source of influence over Latin American normative design.371

The German-Latin American legislative version of prosecutorial discretion is called “the opportunity principle.” One might consider that adversarial systems in Latin America are to some degree tied to

the opportunity principle. I claim that according to the experience of adversarial reform in Latin America, from a comparative criminal justice perspective, the only universal transformation was prosecutorial discretion. Prior Codes were anchored in mandatory prosecution, I suggest, as a consequence of normative absence of trust in public officials.

Finally, this paper shows that the main problem with discretion is the review of its exercise. Notwithstanding the challenges of supervising discretionary powers, it is uncontested by Latin American, European, and U.S. commentators that it affords systemic efficiency.

My conclusion is that this brings attention to a consistent reality in Latin American procedures: the pressure of overload is a general matter of concern. When the majority of the region had an opportunity to "dramatically" revolutionize its procedural models, the only transformation homogenously embraced was providing prosecutors with at least some discretionary power, abandoning centuries of mandatory prosecution. Discretion is the only typical adversarial trait present in all the reforms, precisely because it alleviates that which equally affects all the systems. Therefore, this paper allows that the central necessity of criminal procedure structures, at least in Latin America, is dealing with the burden of caseload.

Discretion thus is the only one true unique conquest of the Latin American Reform Movement. Jurisdictions should embrace this transformation and extract from it all possible virtues. Maybe, within discretionary powers, lies a healthy and viable alternative to improve the quality of criminal justice in the region. It is possible that discretion could succeed where abstract notions of public/oral trials and endless lists of procedural safeguards failed. If the reforms wanted to create "better" judicial models, it is likely that discretion—more than any other feature—served this purpose.

Discretion is not an abstract notion like an "oral trial." Hence, the only way for it to decay is by refusing its application. Discretion was adopted in the region with concrete rules, providing specific powers. It will be up to the cultural reception of the reform in each jurisdiction to truly enjoy the possible benefits of discretion or, on the contrary, hide behind a long-standing tradition of the "legality principle." Even better, discretion can be useful for more than dealing with systemic pressures; it can be employed to achieve restorative and alternative solutions that satisfy the interests of defendants, victims, and the community.

Discretion awards more than efficiency, it can award justice. It is up to Latin American countries to embrace this possibility and to

---

372 See Sofía Libedinsky, Negociación y Salidas Alternativas, in SEMINARIO REFORMA PROCESAL PENAL, supra note 48, at 146-47.
reject the notion that every offense deserves and must receive the same treatment. Discretion may allow us to create differential approaches to diverse judicial necessities.