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Approach to the Amendment Process of the Procedural Penal Codes in Latin America

Mg. iur. **Hardy Torres López**
Facultad de Derecho Universidad de Tarapacá, Chile
Professor of Criminal Law
Attorney's General Office of Chile
Head Prosecutor, Pozo Almonte Local District Attorney's Office,
E-mail: *htorres@minpublico.cl*

The current article aims to provide the reader with a close view of the genesis of the movement and later the development of the Amendment Process of the Procedural Penal Codes that took place in Latin America at the end of the XX century and at the beginning of the XXI century, trying to focus in the common aspects that such a change had for the region and the challenges that the different Latin American countries had to face at the moment in which they had to implement a new Procedural Penal Code; as will be shown, those challenges were approached by all these states from diverse perspectives and not in a uniform way. At the conclusion of this article, a prognosis will be given regarding the road to be followed to solve some critical loopholes that still persevere.

Keywords: Latin America, Procedural Penal Code, Implementation of the Procedural Code, Latin American Courts, due process.

Content

Introduction

Since the times of both the Spanish and the Portuguese Colonies in Latin America (XVI century), the influences that Spain and Portugal on the most

different aspects of the Latin American peoples' life could not be contested, and it also reached into the legal field and particularly affected the Penal Law and the Procedural Law of the first colonies and then the newly established countries that developed thereof.

Immediately after these countries obtained their independence as of the XIX century and along all their Republican Period, the new countries that were formed in Latin America retained their Procedural Penal Code based on the concepts of the Inquisition, namely: secret procedures without open court and a vertical judicial governmental organization. Nevertheless, that situation gradually started to change as of 1940, when in some sectors of the Latin American countries a different concept from the Penal Procedure started to be developed, a process which was originally of an academic character rather than a political one and that, together with some democratic processes that developed in the region during the 1980s, started to build the necessary basis that would eventually complete changing the Procedural Penal Codes of the whole region.

The current article will provide an insight into the abovementioned process and, at the same time, enlighten the reader about the path which enabled the Latin American countries to abandon the inquisition system normally used in procedural penal matters and to eventually replace it by a new antagonistic, open and adversarial procedure.

It is correct to state that to understand this process as a whole, it is necessary to go much more deeper than possible within the limits of the current article, but the author will attempt to introduce the development of the process that brought about the tremendous change in the Procedural Penal Codes of the Latin American countries and the complexities thereof, including the difficulties that are still far from being solved today.

1. Previous Outlook to the Amendment Process of the Procedural Penal Codes

Prior to the Independence Declaration of the Latin American countries (starting at the dawn of the XIX century), the model that ruled in the colony was that of the Inquisition, and its main characteristics were a vertical hierarchy structure, limits in relation to rights, a clear inequality between the defense and the prosecution (which was fulfilled by the judge who embodied all the functions of the process, that is to say, he had the function of investigating and of judging[1]). Consequently, the interaction with the Procedural Law deeply influenced the way in which judges adopted their decisions, they were based on the presumption of guilt.[2]

When the Latin American countries declared their independence, Procedural Law was modified in certain ways, basically due to the influence of the British colonies in North America and, subsequently, the influence of the French Criminal Examining Code in 1808, however, such influences only meant some compliance changes, thus, Procedural Law largely retained its basic features

This scene persisted for more than a century, and only after all the Latin American countries first subscribed to, then ratified the International Human

[1] *Ambos, K., Montealegre, L.* (comp.). Constitución y sistema acusatorio. Un estudio comparado, Universidad de Colombia, Bogotá, 2005, p. 101.

[2] *Ferrajoli, L.* Citado por Bovino, Alberto, Ingeniería de la verdad. In: *Problemas del derecho procesal contemporáneo*. Editorial del Puerto, Buenos Aires, 1998.

Rights Treaties, and finally these treaties took effect regarding those specific indications about certain rules of procedure that were contained in those treaties[3] slowly but steadily, some scholars started to shape a movement so as to make those changes effective in their own countries. The so-called Cordova School in Argentina stood out among others due to the fact that they created a Procedural Penal Code for the Cordova Province.

Notwithstanding the above, this creative impulse lead by the scholars faced a tough resistance of the political world mainly because there was a military government ruling those countries during the 1970s.

Once democracy started to return to Latin America around the 1980s, an institute called "The 1988 Procedural Penal Model Code for Ibero-America" was developed and the text of this document eventually served as the basis of many of the Procedural Codes that were finally approved in Latin American countries, e.g. Chile, Argentina, Venezuela, Ecuador, Bolivia, Peru, Costa Rica, Guatemala, Panama, El Salvador and Dominican Republic.

2. Common Characteristics of the Procedural Penal Amendment in Latin America

Even though the cultural, economic and political reality of every single country in Latin America meant that the reforms of the criminal proceedings had certain differences in each country, it did not mean that there were no common features that united them. These features include the following:

a) The Procedural Penal Amendment in Latin America was a regional movement, that is to say, there was a supranational effort implying that not only the development but also the implementation of the amendment in Latin America had a rather parallel and a more or less homogenous characteristic in every country of the region. This reality was favoured by the academic support that the amendment had, which meant a common ground for the pursued objectives.

b) The incorporation of the Procedural Penal Amendment in the political agendas of the Latin American countries along with the democratizing process that the region underwent as of the 1980s, showed that the legal system of the Latin American countries and particularly the Procedural Penal Law met the requirements that a real Rule of Law needed and that the society of those days had started to demand. However, the process was not as smooth as desired, and, although Chile and Colombia soon made a crucial progress, making themselves a model for the rest of the countries to follow, there were some of the countries that faced numerous difficulties on their way to reaching a general consent that would help them to obtain a new scheme and thus implement the required changes.

c) The Procedural Penal Amendment was a part of an integral process of changes that Latin America had; as previously stated, the Procedural Penal Amendment was not an isolated fact in the region, furthermore, it was fulfilled in a context of many transformations that the region underwent. All of this created the necessary preconditions to conceive the Procedural

[3] Declaración Universal de Derechos Humanos, 1948; Pacto Internacional de Derechos Civiles y Políticos, 1966; Declaración Americana de los Derechos y deberes del Hombre, 1948 y la Convención Americana sobre Derechos Humanos, 1969.

Amendment, create it from the very basis regarding its design and later implementation, and producing a serious attempt to change the setup, and to implement this process differently, not as traditionally done in the region (only through legislative changes),[4] therefore, some aspects, as training and participation of administrative experts who could back up the work of the institutions that were participating in the process, were taken into consideration. And finally, along with the design and the implementation, there had to be a due intra-systemic coherence between the Procedural Penal Amendment and the rest of the nominative bodies of the system.

3. Common Stages of the Procedural Penal Amendment in Latin America

The structure of the new Procedural Penal Model in Latin America is a process of a unique type (regarding the indictable criminal activity prosecuted by the Public Penal Action), that starts with the activity of investigation led by the prosecutor, continues with the accusation, the preliminary hearing and the oral trial. This unique process does not exclude the presence of consensual processes and abbreviated processes, namely, the conditional suspension of the process among others, that can be fulfilled during the whole preparatory stage and even before the presentation of the charges.

Now, it is possible to distinguish three stages in this common process that are clearly differentiated:

a) An initial investigative stage led by the prosecutor;
d) A probationary stage, exclusively practiced by the parties;
e) An intermediate stage serving as a filter or as a control station of the evidence.

Hence, the investigation has a clear goal of accumulating the conviction elements of charge and of deposition that help the prosecutor to decide whether to dismiss a case or not, whether to make an accusation or not, and whether to ask for a adjournment or whether the prosecutor would suggest an alternative way out, and, furthermore, this stage will assist the person under investigation in preparing his defense.

Apart from the above, it is necessary to add that the elements of conviction gathered in this stage would additionally be used as legal grounds both by the prosecutor and also by the defense to ask the judge the implementation or variation of the precautionary measures that may be requested or had been requested. In this stage, the judge controls the legality of the actions of both parties and takes into consideration the personal provisional remedy or the modification of the personal provisional remedy.

These stages re succeeded by the oral hearing, that is, *par excellence,* the moment to act upon the principles of orality, publicity, immediacy with full validity of the challenge. Taking into account the special characteristics of every Latin American

[4] *Vargas Viancos, J. E.* La nueva generación de reformas procesales penales en Latinoamérica. Ponencia presentada al congreso Internacional de Derecho Penal – VII Jornadas sobre Justicia Penal, organizado por la Universidad Autónoma de México, ciudad de Mexico, junio de 2006.

country, the structure of the oral hearing may vary among them, but there are several procedures that all of them share:[5]

a) The opening of the hearing;
f) The preliminary statements or opening statements;
g) The conformance or probatory evidence;
h) The probatory action;
i) The final pleas;
j) The deliberation;
k) The sentence.

Finally, between the investigation implemented by the prosecutor and the public, open and challenging hearing, there is an intermediate stage that serves as a filter because, through this, excessive, overabundant evidence or evidence that had been legally obtained is prevented from reaching the oral hearing stage. To enable this function, this intermediate stage has a series of mechanisms that are used in order to:

a) Control the prosecution;
l) Control the evidence that will be presented in the trial;
m) Delimit the subject matter of the hearing.

4. Implementation of the Procedural Penal Amendment in Latin America

4.1. Two Different Models for Implementation of the Procedural Penal Amendment Introduced in Latin America

a) *Total or Full Implementation*: The purpose of this system implies that the Procedural Penal Amendment was applied or became effective at once and all over a specific country, including in this implementation all the contents covered by the amendment. Some examples, where this approach of implementation was carried out in Latin America, were: Bolivia, Costa Rica, Paraguay, El Salvador and Venezuela. This system implied that all the parties concerned had to know and adapt the new model prior to its coming into force. The modification of the legal system was of such a magnitude that it meant a radical change for the parties involved. Due to this, it was not an easy task for the countries that applied this approach of implementation, nor was it as successful as intended.[6]

n) *Progressive Implementation:* On the other hand, the progressive implementation of the Procedural Penal Amendment implied that the validity of the new system was gradually introduced in the area of an specific country, and that, in general, it began in less complex scenarios: territory extension (districts, regions, etc.), or according to the extent or type of felony. Subsequently, the new experiences and competences that were acquired, were eventually passed on to the rest of the territory of the country. Such approach

[5] *Oré Guardia, A., Ramos Dávila, L.* Aspectos comunes de la Reforma Procesal Penal en América Latina, 2000.

[6] Regarding the case of Ecuador, see *Zamalea León, D*. Audiencias en la etapa de investigación; en reformas procesales penales en América Latina, Discusiones Locales, Ceja-JSCA, Santiago, 2005, p. 573 y ss, para este autor: "Basically, there was no understanding of what it really meant to set up a new procedural model in place, in praxis it was treated as a legislative change that basically required actors to know a normative corpus".

enabled foreseeing the failures in the system and at the same time improved the working methodologies for the parties concerned. The considerations that made this model more convenient, include economic reasons (enabling the division of the implementation cost); technical and cultural reasons (enabling learning of the operators).[7] The Latin American countries that introduced the progressive system, were Chile, Mexico, Nicaragua, Peru and Argentina.

4.2. Costs of Procedural Penal Amendment

The economic costs of the Procedural Penal Amendment in Latin America were always a stumbling block for the attempts to modify the procedural amendment because of the fact that the strict compliance of the principle of the procedural legality compelled the states to investigate and penalize all of the felonies committed in their respective territories; however, this principle could be no more than a declaration without a chance to become a reality, among other reasons, because of the shortage of the economic resources.[8]

In the case of Chile, studies concluded that the new criminal justice system was by 24% more economic than the old system, hence, the cost of investigating a felony in the old system was USD 721 but in the new system the cost would not exceed USD 548.

6. Final Considerations

The Procedural Penal Amendment in Latin America strengthened the principles of orality and challenging, and brought them to life, thereby generating challenging spaces in hearings and eventually making possible criminal justice with greater degrees of transparency, obtaining the criminal justice and bringing the understanding of the same closer to the community, thereby obtaining higher levels of celerity than in the previous system, besides, consequently diminishing the time that the suspect was under a personal provisional remedy, for example, in custody. The transparency of the litigation process made the actionable person into a witness and, at the same time, a participant of the decision making in his own case. For example, a 81% of the people surveyed regarding the transparency of the Criminal Court (Juzgados de Garantía) in Chile considered it good or excellent.[9]

However, not everything was so positive when implementing the Procedural Penal Amendment in the Latin American countries. The community demands of public security are rising, partly because of the way in which the communities have been informed about the Procedural Penal Amendment, that is to say, as a means to fight against the sensation of insecurity, experienced by a part of society. Nevertheless, the figures do not show that the Procedural Penal Amendment has

[7] *Espinoza Goyena, J.* El nuevo Código Procesal Penal. Apuntes preliminares respecto a su implementación. Código Penal, Dike editora, Lima, 2004, p. 23.

[8] *Vargas Viancos, J. E.* Criterios económicos en la reforma procesal penal. Revista Apuntes de Derecho Facultad de Derecho, Universidad Diego Portales. Available at http://www.udp.cl/DERECHO/publicaciones/criterios_econ.pdf [last viewed 20.06.2017].

[9] Encuesta de Intercorp solicitada por el Instituto de Estudios Judiciales, *Vera Quilodrán, A.* En Avances en la Implementación de la Reforma Procesal Penal en Países Latinoamericanos. Santiago de Chile, Ministerio de Justicia, 2004, p. 193.

had any effects to significantly lower the levels of insecurity that the authorities have declared at the moment the Amendment was introduced.[10]

It is difficult to deny the huge impact that the demands of specific sectors of the society have brought about a criminal proceeding that is not made to reduce crime, but that always results in declaring a person guilty of charge, when criminals are on the rise, or even when other prevention areas fail to deal with crime. This is clear, for instance, when the community senses that crime does not decrease, when the mass media coverage is excessive regarding certain criminal behaviours and therefore produces insecurity in the community; when the police states that they fulfil their duties but the prosecutor or the judges set the criminal free. All of this generates mistrust in the new model without a direct relationship to its actual advantages or disadvantages.

For example, a study in Chile could not find a direct relation between the introduction of a new criminal proceeding model and the insecurity in the people, in other words, it showed that the Procedural Penal Amendment was not a key factor or even a variable in explaining the fluctuations in the perception of fear or insecurity in the population. On the same grounds, the fact that an increasing number of police reports has been understood, by this same study, as a proof of more extensive trust in the system on behalf of the community (decrease in the figures characterising criminality).[11]

Moreover, the Procedural Penal Amendment provided the Attorney's General Office with a greater role when assigning the direction of the investigation establishing that the police, in the context of a criminal investigation, must follow the same direction. This forethought created a sensation of invasion in the police, and even the sensation of being submitted to a hierarchy.[12] Obviously, this conflict is only apparent. As stated by Horvitz, in the background there is a distribution of competences as a part of the Rule of Law.[13]

Even though the police is a collaborator in the criminal investigation, its function is essential during the preparatory investigation of a crime.[14] The determination of the type of information required to establish a case lies upon the prosecutor, but obtaining that information and the responsibility for the quality of the information is that of the police.

Today, there are some conflicts of competence that might have a negative influence in the development of an amendment. Thus, in some cases, there is an open rejection of the new model and its argument deals with the decrease in the faculties of the police, insufficient understanding of the dynamics of the police duties or even the tolerance toward crime or promotion of impunity. In some other cases, the rejection of the amendment is hidden under apparently harmless lack of coordination (for example, lack of information of timely *notitia criminis* or the

[10] *Matus Acuña, J. P.* Por qué no bajan las tasas de criminalidad en Chile? *Revista de Derecho Penal y Criminología,* Universidad nacional de Educación a Distancia. 2º Época, Madrid, Julio 2006, No. 18, p. 562.

[11] *Baytelman, A., Duce, M.* Evaluación de la reforma procesal penal. p. 35; *Vargas J. E., Binder, A.* (Dir.) Sistemas Judiciales, Una perspectiva integral sobre la administración de justicia, CEJA, Buenos Aires, 2002, p. 18.

[12] *Maier, J. Ambos, K., Woischnik, J.* Las reformas procesales penales en América Latina. Editorial Ad-hoc, Argentina, 2001, p. 844.

[13] *Horvitz Lennon, M. I., Lopez Masle, J.* Derecho Procesal Penal Chileno. Tomo I, Editorial Jurídica Chile, 2005, p. 123

[14] *Horvitz Lennon, M. I., López Masle, J.* Derecho Procesal Penal Chileno. Tomo I, Editorial Jurídica de Chile, 2005, p. 173

arrest being carried out within the correct deadline), which may be perceived as a failure, when applying the Code or the lack of understanding of the new order, but when practiced in a systematic manner actually shows the resistance to the model. as well as the institutional struggle for sharing the power.

In any case, it is clear that the Procedural Penal Amendment in Latin America is here to stay and has become a criminal justice with a more extensive certainty and respect for the rights and principles of the Rule of Law, and over the years, it has gradually been solving the problems arising from its implementation and set into motion in the region.

Conclusions

1. Since the colonial times, the Procedural Penal Code in Latin America was based on the Inquisition's model characterized by its secrecy and lack of respect for guaranteeing of a due process.
2. This system began to transform in the middle of the XX century, when a regional movement started, first of all, with academic support, and then grew to become the basis that allowed the changing of the Procedural Penal Codes in the whole region that, along with the development of democratic governments in all the Latin American countries starting in the 1980s, inspired many, so that the change from the Inquisition model to the contradictory model could happen.
3. However, such changes had common difficulties in all the Latin American countries; one of them, and maybe the most important one, were the associated costs to implement the new Procedural Penal Code. This was clearly seen when the new parties concerned were introduced into the system, trained, and a whole new infrastructure was developed for them. The difficulties were not limited only to these aspects, they also surfaced regarding the way in which the Latin American countries set in motion the Amendment of the Procedural Penal Code; hence, there were two systems, the first one, implemented by Bolivia and Mexico among other countries, foresaw introduction of this amendment on a national basis, all at once and for the whole state, and other countries, e.g., Argentina and Chile, made the change gradually, trying to improve this model while developing it in different regions of their countries.
4. Once the new procedural Penal Code was implemented in the region, it was clear that it was less expensive than the previous one and, furthermore, it better represented the regional democracies, respecting the due process and the celerity of the Penal Code.
5. Notwithstanding the above, not everything has been effortless and efficient this process, as a wider prominence of some parties concerned, mainly the Attorney's Office, has produced some conflicts with others, that feel displaced. These conflicts are on the decrease, but they still continue. Consequently, a single inter-institutional coordination would be the fundamental basis for the system to work properly and guarantee a rational and just process in each of its phases.

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