

CRIMINAL JUSTICE REFORM IN LATIN AMERICA: SUCSESSES AND DIFFICULTIES

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Santiago, June 2003

I. INTRODUCTION

During the last two decades, a vigorous process of criminal justice system reform has taken place in the majority of Latin American countries. These reforms, which in general can be characterized as a move from the inquisitive to an accusatory system, have involved the participation of many actors, given rise to important legal changes, and implied the investment of significant resources. In spite of their importance, these reforms have not been followed by a process of evaluation of the results that would allow a clearer view of the problems encountered and a solution to those difficulties.

Section II describes the features of the criminal justice reform process, its scope, its strength and the reasons for continuing to work toward this reform as a central strategy in the modernization of the judicial systems of Latin America.

Section III summarizes the work the JSCA has carried out in evaluating the reform implementation process, and Section IV shows the principal results of the evaluation, the major problems identified and some proposed solutions.

II. RELEVANCE OF CRIMINAL PROCEDURAL LAW REFORM AS A STRATEGY OF JUDICIAL REFORM

Criminal justice reform is the single most profound change initiative to have been carried out in judicial systems of the region in recent years. Almost without exception, the countries of Latin America have embraced this process of transformation in the last decade: from the timid and even frustrated reform carried out in the federal system in Argentina in 1991, to changes of great importance in Guatemala in 1994, Costa Rica and El Salvador in 1998, Venezuela in 1999, Chile and Paraguay in 2000, Bolivia, Ecuador and Nicaragua in 2001, and Honduras in 2002.

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In all of these countries new criminal procedure systems are being applied on a generalized basis,¹ thus overcoming one of the most common problems characteristic of justice reforms in the region: they tend to remain mere proposals or pilot plans rarely reaching the masses. Even in those countries, which have not, yet undertaken criminal procedure reform, the judicial reform agenda points clearly in that direction. This is the case in Colombia, where a constitutional reform approved this year establishes a new criminal procedure system and a tight timetable for the necessary laws to be passed and to enter into force; in the Dominican Republic, with a new Code approved and entering into force next year; in Peru, where a Code has been approved, abolishing the traditional inquisitive system, but that has not yet entered into force; and in Mexico, where a draft law has been prepared by the Government.

In addition to these concrete results, the ideas behind this reform have given rise to an intellectual, academic and political movement throughout the region of a scope, strength and duration over time that no other reform initiative has been able to arouse. This movement has been built and maintained over a long period of time, though it has at times been marginalized, and gone without the support of governments, judicial institutions and international cooperation.

In the text that follows we examine the main reasons that, in our opinion, explain the impact of these reforms.

1. Human rights.

The judicial reforms that have emerged or at least have been tried in the region during the last twenty years can only be understood as processes that go hand in hand with the transition process towards democratic governments and/or are the result of the end of the internal armed conflicts in the area. In both cases, the process has implied an increased emphasis on basic human rights, not only as an ethical obligation but also as the basis for the political agenda of the new governments. These governments have had to confront as priority issues the grave problems of massive violation of human rights during the past years, as well as the endemic shortcomings that have led to a culture of violence and crime that has become part of our society. Among those shortcomings, the most notable might be the structure and performance of our justice systems. These systems, which should defend essential rights, are in practice a source -perhaps the most important source in quantitative terms- of the violation of those rights; at the very least, they legitimize violence that others carry out. This is particularly evident in the criminal arena due to the importance of the rights involved.

¹ In the case of Chile, the reform is being implemented gradually, and will enter into force in the entire country at the end of 2004. In many Latin American countries the reform is applied only to crimes committed after the reform came into force, such that the prior system is still in effect for proceedings started before the reforms.

The criminal trial system inherited from the Spanish colonization of the Americas is characterized by the central role given to the judge, who also plays the role of investigator, the “inquisitor” of the Middle Ages who gives the name to this type of procedure. It is a method, follows a pre-democratic logic, in which subjects do not have any rights or at the very least have rights that are subordinate to general interests of the State. This inquisitory system is also characterized by its severe restrictions of the defense, the secrecy of the proceedings and the indiscriminate use of preventive detention either as a means to obtain a defendant’s confession or to anticipate imposition of the sentence due to the fact that the presumption of innocence is not recognized with respect to the facts of the case. The idea of process is essential and closely related to the creation of a written record and to the delegation of powers. There is no trial as such, but an accumulation of proceedings which, step by step, give rise to a decision, giving probative value to the evidence gathered during investigation without submitting it to confrontation in an open debate.

The basic idea of the reforms is to react to the situation just described, establishing authentic due process with adequate respect for the presumption of innocence and the right to a defense, all basic human rights. In order to achieve this objective, it is of utmost importance to dissociate the criminal investigation from the judge’s decision process that affects fundamental rights, including the decision as to guilt or innocence. This is achieved in the reformed systems largely because different entities are in charge of the procedures: on the one hand, the prosecutor of the Public Ministry and, on the other, the judges, who are separated by those who control the hearings and those who judge the case. In addition, in the new system all the information gathered during the investigation has no probative value, serving only as material used by the prosecutors as a basis for the accusation during trial, and converted into evidence only after having been contested by the defense and assessed by the court. The presumption of innocence is strengthened through limitations on the use of preventive detention. The right to a defense is given greater force in that a defendant is allowed the assistance of a lawyer from the very beginning of the proceedings, which makes it possible to access the investigation of the Public Ministry, ending (with certain exceptions) the secrecy which was typical of the investigative stage. The defense is also allowed to generate its own evidence through an autonomous investigation. The reforms advance toward reasonable timeliness in that they establish time limits for the investigative phase and, in some cases, for pre-trial incarceration. Respect for the physical and psychological integrity of the defendant is helped by recognition of the importance of a voluntary declaration, putting an end to the confession as the ultimate proof. A fair trial is guaranteed when it is established that it is only through a debate during an oral hearing that the evidence of the parties can be presented, contested and evaluated.

Thus understood, criminal procedure reform is of tremendous importance given the fact that it deals with some of the fundamental issues of the process of political transition, gathering around it many ideas and people who have previously fought for the respect of these rights. The presence of certain sectors of civil society that promote these reforms is another relevant feature that distinguishes criminal procedure reform from other justice reform initiatives. In each country where the reform is in process, it is possible to pinpoint

one or more civil society groups that have been instrumental in the adoption and development of these new procedures.²

2. Importance of criminal law

Traditionally, the legal systems in our region have been abandoned, excluded from public policies intended to modernize our societies. In a sense, this is due to the insignificance of the legal institutions: the most relevant questions and conflicts were not resolved by them but sent to other agencies and actors, save in some criminal matters where a rough system like the existing one was sufficient for the social control required. The deficiencies of this system were not a relevant subject. On the one hand, its lack of legitimacy, resulting from the problems mentioned above, was not a political issue due to a historic under-valuation of human rights and to the fact that people with real power were not, in fact, subject to this system; on the other, its inefficiency was not important, given that crime was not itself of public significance.

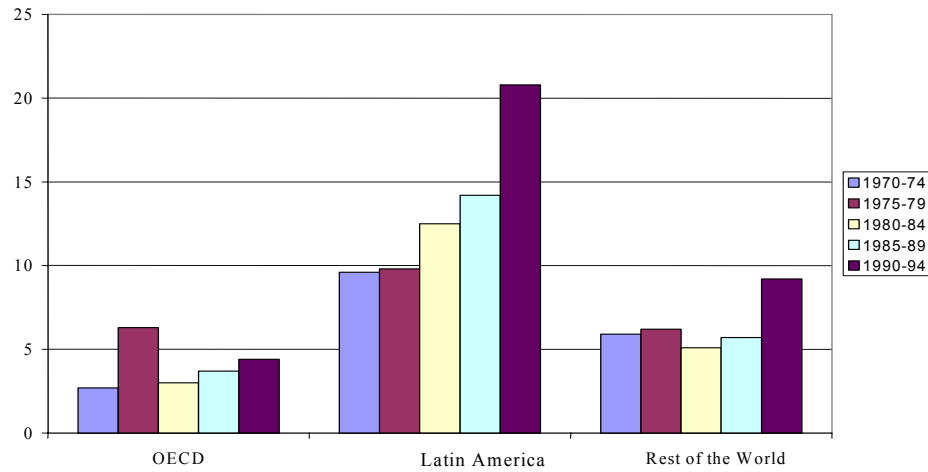
This situation has begun to change rapidly in the region. In addition to the importance that human rights have once again acquired, notable changes have occurred during recent years that have given legal systems –in particular the criminal system- great visibility. There is no transcendental issue in our society that does not end up, one way or another, being discussed in court, particularly in criminal courts, and it is not rare to see prominent people of our political and business classes appearing before judges. Members of parliament, ministers and even chiefs of state have been prosecuted for crimes linked to corruption.³ Many and powerful bankers have ended up in prison in the wake of economic crises suffered in the region during the last few years. Then, there are the military officers indicted precisely because they have violated human rights. Nowadays, for one reason or another, the political agenda in our countries seems always to be awaiting the most recent decision by some judge in a criminal trial.

For one thing, the crime rate in our societies has increased. Latin American has become the most violent region in the world, not due to “disappearances,” but also due to daily violence in our large cities. All public opinion surveys identify citizen security as the major concern of the population. The following tables show the magnitude of the problem, both in terms of the tremendous increase that the figures show, and the clear deterioration of the situation in the region in relation to the rest of the world.

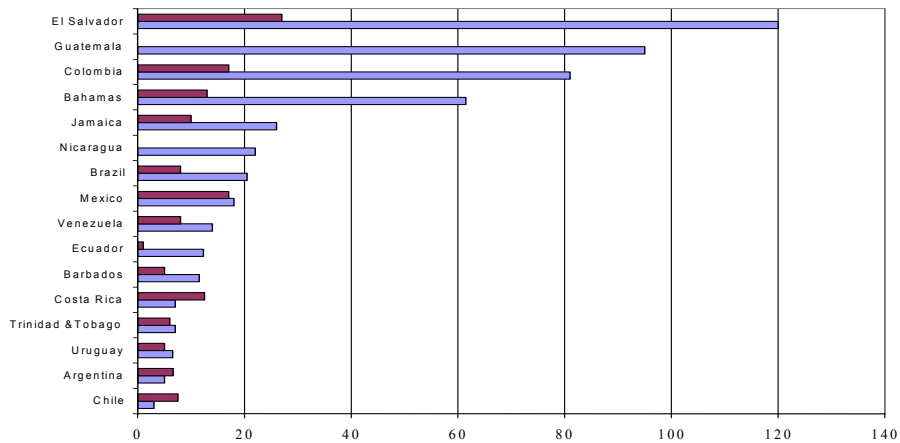
² In the case of Argentina and other countries of Latin America, the work of INECIP and its different local branches has been very important; Civil Peace Foundation, University *Diego Portales* and CPU, in Chile; Excellence in Justice Corporation, in Colombia; ICCPG, in Guatemala; Esquel and CLD, in Ecuador; Fespap in El Salvador; IMEJ, in Mexico; and FINJUS, in the Dominican Republic.

³ Two presidents were forced to leave their posts during their mandates due to judicial decisions handed down in criminal trials against them: Fernando Color de Mello in Brazil y Carlos Andrés Pérez in Venezuela.

Graphic N° 1
Homicide rate per 100,000 people⁴



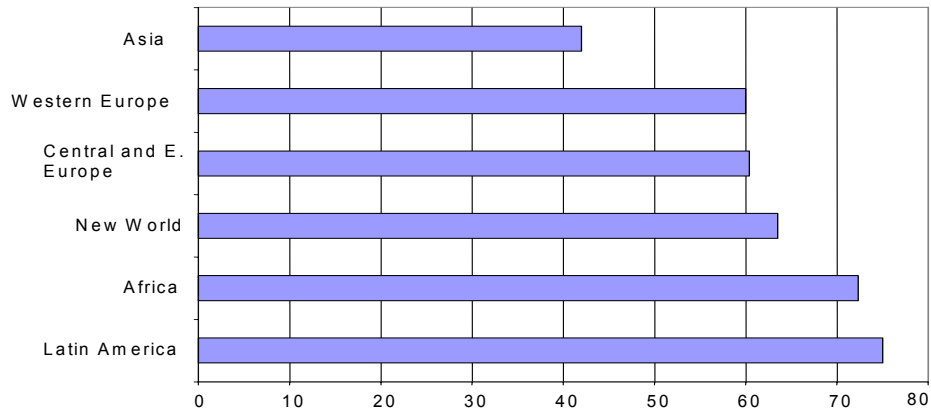
Graphic N° 2
International Homicides between 1970 and 1990⁵



⁴ Source: United Nations: The Fifth United Nations Survey of Crime Trends and Operations of Criminal Justice Systems. cited by Christina Biebesheimer and J. Mark Payne, "IDB Experience in Justice Reform", IDB, Sustainable Development Department, Technical Papers Series. Washington, 2001

⁵ Source: United Nations: The Fifth United Nations Survey of Crime Trends and Operations of Criminal Justice Systems except for the cases of El Salvador and Guatemala. For El Salvador, *The challenges of a sustainable and equitable development*, Discussion Paper, IDB. For Guatemala, Patrick Ball, et. al. "State of Violence in Guatemala, 1960-1996: A Quantitative Reflexion," AAAS. Includes disappearances and assassinations for 1995. Note: For Uruguay data from the 1980s and 1990s is used. Cited by Christina Biebesheimer and J. Mark Payne, "IDB Experience in Justice Reform", IDB, Sustainable Development Department, Technical Papers Series. Washington, 2001.

Graphic N° 3
Percentage of population victims of any crime in urban areas, by region
(1989-96)⁶



Another IDB study⁷ shows that the total cost of violence as a percentage of GDP in Latin America and the Caribbean is between 5% and 25%, depending on the country. The total cost of private security as a percentage of the GDP is between 8% and 25%. The total cost of domestic violence as percentage of the GDP is between 1.6% and 2%. Fifty nine percent of the Salvadorian population and 46% of the Guatemalan population state that crime and violence represent their greatest concern (greater even than other issues such as poverty and unemployment).

In view of these facts, any action taken in the area of criminal justice is of the utmost importance. On the one hand, the political classes are interested in establishing criminal proceedings with sufficient guarantees for all, including themselves. On the other, they see that it is of political benefit to develop a criminal justice system able to provide a response – of any type – to people who have been victims of crime, and that is, in aggregate terms, more efficient and effective in confronting crime.

The paradox of the inquisitive criminal procedure system is that its ceding of due process guarantees does not correlate with any gains in efficiency. That is, inquisitive proceedings fail to comply with human rights and they are, at the same time, highly inefficient, ending the majority of the cases without a resolution of any kind. The use of resources is also inefficient in this system, due in great part to the so-called principle of

⁶ Source: United Nations: Global Report on Crime and Justice, Graeme Newman, ed. New York: Oxford University Press (for the United Nations Office for Drug Control and Crime Prevention), 1999. P. 26. Cited by Christina Biebesheimer and J. Mark Payne, "IDB Experience in Justice Reform", IDB, Sustainable Development Department, Technical Papers Series. Washington, 2001.

⁷ Situation of Violence in Central America, IDB, Division of Modernization of the State and Civil Society, Regional Operations 2 Department. http://www.iadb.org/etica/documentos/ar_sap_situa.ppt

legality, according to which all illicit acts should be investigated and judged in the same way without discrimination among them in order to channel resources towards crimes of greater social importance or to cases in which there are better possibilities for success in prosecution.

Victims do not receive any special consideration because their interests are not relevant to the actors in the system, which consider them to be no more than a useful source of information. The conflict is taken away from the victims by the State, with the logic that it is the legal order that is broken by a crime, and not the relationship among people. The criminal process even creates a double victimation, by treating crime victims so badly.

In this context, reform is attractive if it at least in its discourse provides more space and recognition for the rights of the victims, since their participation and willingness to participate determine the course of the lawsuit. These reforms offer victims constant information, efficient protection, and recognition of their rights to oppose the decisions that could damage their interests. The reforms also ensure that those interests will be taken into account during the proceedings, and that victims may be compensated for consequences of a crime. In addition, the reforms allow for the provision of special services for the well-being of victims.

Though promoters of criminal procedure reform have always shied away from promises regarding public security, it has been possible to sell the reform for its contribution to the fight against crime. This is due to the change implied in handing the investigation over to the Public Ministry, thus creating a more effective channel of communication between the work of the police and the judicial decisions, resulting in efficiency gains. The informal aspect of the investigation by prosecutors, who do not have limitations in matters of competence that judges by definition have, should contribute to the accumulation and processing of more information by the Public Ministry than the information gathered by isolated judges. The reforms also grant a degree of discretion that should make it possible to direct efforts and resources to the investigation of cases of major social importance or cases that are able to be investigated effectively.

3. Extent of the reform

An important part of the strength of the criminal justice reform process is that different actors and institutions are taking part in the process of transformation, which is an advantage not only in that it broadens the potential sources of support, but also because it generates a sort of virtuous cycle in which the different actors and institutions involved provide checks on one another that are mutually controlled, limiting the possibilities that any institution will move too far from the initial objectives of the change process. This is not what ordinarily happens with judicial reforms that are focused more on organization and performance of courts, and that can facilitate the co-optation of the reform process by internal interests within the court.

Criminal procedure reform should bring substantive changes to the courts, Public Ministry and to defense institutions. It aims at generating a logic of competition among all the institutions, by which the strategic objective of each one is perfectly differentiated,

which is not the case in inquisitive proceedings. The definition of success for the Public Ministry in a trial is different than that of the courts and, obviously, different from that of the defense. This is not the case when prosecutors and defense attorney are considered as simply collaborators in justice, as happens in the old systems. Prosecutors and the defense will now be interested in assuring that judges do not favor the other party and these same judges will focus on keeping prosecutors and defense attorneys within the scope of their appropriate roles.

In addition, the reform expands its effects to the auxiliary organizations of justice. The whole system of expert witnesses becomes revolutionized by the demands of an oral trial. Institutions as important as the police are in one way or another affected by their new role in criminal investigation. Again, this has the effect of assuring that the criminal justice reform process does not become marginalized.

The criminal procedure reforms also serve to promote, from a more coherent angle, all the other issues that have commonly seen linked to judicial reform. The creation of oral trials, for example, provides new perspective on the issues of judicial independence, either in relation to external independence due to the increased relevance and visibility given to the work of the judges, or in relation to internal independence where the inconveniences of the forms of control traditionally exercised by superiors over subordinates are brought to light. This has had a direct consequence in changes to judicial career systems, and on the appeals process. The importance and significance of judicial management is also highlighted by the reform. Judicial management ceases to be simply a “technical feature” of the legal process, and instead obtains a much more specific content in order to address the needs that the new system imposes. We will discuss this in more detail in the section of the paper that deals with the main problems encountered by the reforms. Judicial training, about which so much has been said and so little done, takes on real meaning when it is closely linked to the implementation of the reform. The issue of access to justice acquires a new dimension given the necessity imposed by oral trials to have the presence of a defense attorney; in written proceedings this was satisfied with the formal appearance of a lawyer.

Finally, it should be emphasized that this reform has mobilized the most innovative minds of the legal community, as no other reform has been capable of doing. The idea of having authentic trials in criminal law is solidly based in the history of our legal development. It was one of the important components of the independence movements of our nations during the 19th Century. It has been the subject of numerous (though aborted) proposals for change in the last two centuries as well as an issue for regional initiatives, the most important of which is reflected in the Model Criminal Law Code for Ibero-America, which has been an inspiration for national legislation. In this sense it has been easy to motivate important sectors of the legal world to get behind this reform: academics, judges and lawyers have shown a great degree of personal commitment to the changes, seeing in this reform the opportunity to reach something long yearned for and thus to leave a strong legacy for the future. This does not mean that this reform will arouse unanimity in the judicial world, as there are many who see it as a serious threat to their interests. The reform has been strong enough, however, to confront this resistance, becoming the clear winner in legal debates. This is particularly obvious in the reaction of law students and young

lawyers, who for the most part find that the new procedures reconnect them to their true legal vocation.

We should not forget that this reform contains little that is original: it simply brings to our region procedures that have been in use for almost 200 years in Europe and in Anglo-Saxon institutions where they have always been applied. This is an additional factor that makes the reform politically attractive: it is not a mere discourse criticizing the old system, but a proposal for solutions already widely accepted in other parts of the world. This has been enhanced by efforts of European and American cooperation agencies who have worked on this process.

4. Real reform

As stated earlier, perhaps one of the most relevant and positive aspects of criminal reform in Latin America is that it has been translated into real changes in the way that the system imparts justice. Beyond the practical problems encountered in their implementation, which will be discussed later on and which have often kept the reforms from demonstrating expected results, the important thing is that the reform is not purely cosmetic, as have been many others in the justice sector. It was a common trend for judicial proceedings to undergo changes, adjusting time periods or procedures, without implying any change in their underlying logic. Even the attempt to introduce oral proceedings was rapidly captured and distorted by the traditional logic behind existing procedures, converting the hearing into a simple reading of documents or “dramatization” of written precedents already known by all, without any sense or real use.

In contrast, these reforms have solidly laid the foundations for oral hearings with an authentic debate between the parties. There is certainly much to be improved in this sense and litigation techniques have not been developed as they should have been, but we are dealing with hearings that meet the most basic demands of a proper process.

Important investments have been made in all the countries of the region in order to implement oral hearings and other procedures of the new system, thus creating new judicial, prosecutorial and defense positions, constructing or adapting buildings, and modifying aspects of the management of the system's institutions. There have been important efforts channeled toward the dissemination of information and training to explain the new system to functionaries and to the public in general.

All this is supported by an important group of people and ideas that have supported the reform, which has raised the standards of the debate and, in some cases, improved the professional level of those working in the criminal justice system. This has translated to a certain extent into a “change of face” of the system, contributing to its legitimacy and to the self-esteem of its operators who, in some cases, have seen an increase in their salaries. The vitality of the process has put an end to a fear of counter-reform, which could have taken advantage of the implementation problems inherent to radical change, in order to go back to an inquisitive system. Some of the reforms could have been interpreted as a step backwards in some countries, but in fact in no country has there been a counter reform that

calls into question the bases for the new system. The dynamism of the reform process has allowed problems detected during implementation to be fixed as the process goes forward.⁸

At least in the case of Chile, this is how the public perceives the reform. The studies carried out in Chile indicate that half of the population is not aware of the reforms (which is explained in part by the fact that the reform is not in force across the whole country); 70% of those who know about the reform think that it has a positive effect and only 7% think it is negative. (Estudio Paz Ciudadana – Adimark, July 2002, cited by Duce, unpublished).⁹ Another study that the Ministry of Justice commissioned to Adimark in 2002, which applies only to regions where the reform is being implemented, indicates that 70% of those surveyed know or have heard about the reform, 71% think that trials have been expedited and 68.1% think that justice is more transparent.¹⁰ The improvement in the quality of justice is one of the most significant benefits associated with the reform, something that has been unanimously called for by our citizens.

Other generalized benefits are found in the greater speed of cases;¹¹ in the end of the delegation of functions at the stage of the final decision; in the higher degree of internal independence of first-instance trial courts, since trials are held only in first-instance courts; in the impact that these changes have had in encouraging other types of justice reform; and in putting an end to the sort of schizophrenia between one part of the system that has undergone reform and the other part still operating as it has since colonial times.

The situation is different in different countries. There are differences not only in the choice of the legal model followed, but also in efforts in the implementation process. There are differences in planning, in institutional coordination, in training, in dissemination of information, in adaptation of auxiliary services and, in general, in the investment of resources, all of which have a direct, though not yet valued, consequence on the results obtained.

⁸ In the case of Chile, for example, subsequent to the first study conducted as part of the first version of the JSCA evaluation project, better performance of the routine work of the Public Ministry has produced a considerable increase in the number of oral trials carried out. The First Report prepared in Chile shows that in the two regions where the new system was in force, only a total of 22 oral trials had taken place. The Second Report prepared in Chile shows that a total of 281 oral trials had been carried out in the same regions at the end of 2002.

⁹ Duce, Mauricio. *Public Perception and Criminal Procedure Reform*. Article published in the Legal Bulletin of the Ministry of Justice in Chile, N°2-3, December 2002.

¹⁰ Ibid.

¹¹ Although there is no comparative data in this respect, the observations of trials carried out as part of the JSCA Evaluation Project allow, with the limitations stated therein, an approximate idea of how long the proceedings have taken in the countries that have followed the reform that were the target of this study. Thus, the total average time between the punishable act and the oral trial is 504 days. In the case of Chile, for example, the average time is 196 days, which represents a great advance if we take into account that under the old system a criminal case could take an average of two years to complete only the trial stage.

III. JSCA EVALUATION PROJECT¹²

During 2001 and 2002, the Justice Studies Center of the Americas (JSCA) with other local institutions, carried out a comparative study, aimed at finding out the results of the criminal justice reform process has taken place in eight countries of the Latin-American region: Argentina (in the province of Cordoba), Costa Rica, Chile and Paraguay in 2001; and Ecuador, El Salvador, Guatemala and Venezuela in 2002, plus a second study on Chile.

The institutions playing the counterpart role in each country, all entities with great experience in judicial reform process at local level, are: INECIP, in Argentina; teams from the law schools of the universities of Chile and Diego Portales, in Chile; a team linked with the Prosecution Science Association in Costa Rica; INECIP in Paraguay; ESQUEL Foundation, in Ecuador; The Criminal Studies Center in El Salvador (CEPES), of the Foundation of Studies for the Application of Law (FESPAD); the Institute of Comparative Studies in Criminal Science of Guatemala (ICCPG); and INVERTEC IGT, in Venezuela.

As mentioned above, criminal procedure reforms should translate into substantial changes in criminal procedure system practices; that is, in how the system works with in regard to treatment of the cases that come through it. These new practices should take into account a new paradigm or new logic, which expresses the values commonly set out as the final objectives of the reform. However, there is the perception that these processes have shown weakness in relation to their implementation, thus generating results that are less effective than expected.

There are three fundamental questions on which this project has been focused. Has the reform really been able to change the performance of the judicial system? To what extent? In which areas has this change been produced and in which areas has there not been change?

The evaluation project has the objective of contributing to the production of information about the implementation processes of the reforms in order to demonstrate how effectively the reformed systems are working and to determine to what extent the expected changes have been achieved as a result of the weaknesses of the implementation process.

The methodology used in this project, in all its phases, consists of a series of instruments for the collection of information prepared by the directors of the project, together with the representatives of the teams that took part in the first version during 2001¹³. On the basis of this set of instruments, each local team prepared a report based on the information gathered. The main instruments used were a questionnaire on the contents

¹² The evaluation project has been coordinated by the Academic Coordinator, Cristián Riego, the Director of Programs, Luciana Sánchez, and Project Assistants Fernando Santelices and Seija Olave.

¹³ This questionnaire and all of the methodological instruments of the project (manual, background document, general instructions, observation guidelines and others) are available for consultation in the section entitled "studies" on our web site, at <http://www.cejamericas.org/menu/proyseguiamiento.phtml>

of the procedural reform, the way in which the reform was implemented, the way in which the new system works in practice, and a set of guidelines for the observation of oral trials that took place in the jurisdiction studied, during a certain period of time, normally a month. The compilation of information and the preparation of the reports were constantly supervised by the coordinating team of the JSCA.

Once the national reports were prepared, each one was subjected to a process of validation in the respective country, which was done through discussions in which the different actors of the system took part, and whose conclusions were presented in the studies. On the basis of the information gathered, a comparative report was prepared in order to present the most relevant precedents emerging in each of the countries involved and to identify general tendencies that a comparative analysis brings to light.

The data used in this paper comes directly from the national reports, so that readers wanting a fuller or more detailed understanding of this document may want to consult the national reports. Each of the institutions and local groups is accountable for its report. The Justice Studies Center of the Americas sponsored and contributed, in some cases, to the funding of the reports. The complete text of the reports is found on the web site of the JSCA, at <http://www.cejamericas.org/menu/proyseguimiento.phtml>.

IV. MAIN PROBLEMS DETECTED

1. Definition of roles, and questions about how to make the new systems function well.

The new criminal procedural systems emerging from the reforms are more complex than prior systems, and their performance depends on interactions between groups of actors who do not necessarily share the same objectives. As a result, it is necessary to establish clear definitions of the various roles in the new systems and to promote institutional learning. Several weaknesses in the reform process are found precisely in these areas. The establishment of new roles and of their respective work methods has been difficult and reform implementation has generally lacked the necessary stimuli and force to systematically produce changes. These problems are evident in every institution involved in the reform process and are found at various working levels. In this section we present the most problematic areas of the reform process in terms of the relevant actors in the Public Ministry and defense.

a) *Tendency of the Public Ministry to reproduce traditional work methods*

A tendency apparent in the majority of countries in this study is the Public Ministry's inclination to reproduce the work methods of the inquisitive system. This tendency represents one of the core problems of the reform process.

It is clear that one of the main objectives of the reforms was to overcome the most commonly criticized areas of the inquisitive system, such as highly bureaucratic work methods, to which many problems related to the inefficiency of the system are attributed, as well as the system's tendency towards corruption.

The traditional magistrates' courts faced acute criticism because of their work methods. In practice, this court was the center of the inquisitive criminal process, working to accumulate information on each case through a written file. These files were generally dealt with in a bureaucratic fashion through the use of procedural guidelines and without any real analysis of the features and requirements of each case. Procedures were developed through a generalized system characterized by the delegation of duties. This, in turn, transferred substantial informal power to secondary officials, which created room for corruption. Another feature of the inquisitive instruction was the complete absence of discretion permitted for the of rejection cases. As a result, systems were filled with a large number of cases, and judges or other officials could not easily select the most relevant cases or those with the greatest potential for success, nor could they look for alternative methods of case resolution. The results were inefficiency throughout the system, which simply could not address such large numbers of cases, and the development of an informal selection system, which in many cases was arbitrary and lacked transparency.

From this point of view, the reform process proposes radical changes in the investigation and preparation of cases, at whose core is the transfer of duties from the judicial bodies to the public ministry. These changes were aimed at, on the one hand, the

achievement of judicial impartiality by reducing judges' power to intervene in the prosecution. On the other, the changes attempted to make prosecution less formal by separating it from operative formalities and limitations characteristic of the judicial process, transferring it to an administrative body that theoretically could develop new work methods geared towards efficiency.

With the objective of assisting the public ministries to fulfill the duties assigned to them, the public ministries have received significant resources for increasing their staff. In some cases, they have also developed reengineering projects to adapt their structures to new duties. The resulting situation is that after reform implementation the public ministries appear to be important institutional actors, at least with regard to their size and responsibilities.

TABLE 1
NUMBER OF PROSECUTORS, NUMBER OF PROSECUTORS PER 100,000
INHABITANTS, NUMBER OF COMPLAINTS AND NUMBER OF COMPLAINTS
PER PROSECUTOR

	No. of prosecutors	Prosecutors per 100,000 inhabitants	Complaints	Complaints per prosecutor
Cordoba (Argentina) ¹⁴	100	8.5	32,378	324
Costa Rica ¹⁵	252	6.5	122,239	485
Chile ¹⁶	129	4.1	157,737	1223
Ecuador ¹⁷	323	2.7	122,180	378
Salvador	647	9.9	92,888	144
Guatemala ¹⁸	545	4.5	222,436	408
Paraguay ¹⁹	179	3.2	33,305	186

Nevertheless, the identified country reports show a tendency for the Public Ministries to have limited capacities for innovation in relation to their new responsibilities. In fact, the tendency seems to be to reproduce the work methods of the inquisitive system, which basically means that work is assigned to each prosecutor on an individual basis according to jurisdiction or shift. Each prosecutor decides autonomously on each case, and work methods are characterized by the accumulation of information through a case file that is relatively formal in terms of the steps taken to complete it.

It is worth noting that interesting innovations have taken place in various countries. For example, in Ecuador, Chile and Guatemala, the Public Ministries have tended to form

¹⁴ Data year 2000. Source: JSCA Statistical Project.

¹⁵ Data year 2001. Source: JSCA Annual Report and World Bank.

¹⁶ Data corresponding to the presentation of cases since March 15, 2002, to March 15, 2003, in 5 regions of the country. Source: Public Accounts Statistical Bulletin 2003 from the Public Ministry.

¹⁷ Data year 2002. Source: Report on Ecuador

¹⁸ Data year 2001. Source: Report on Guatemala

¹⁹ Data year 2000. Source: JSCA Evaluation Project, World Bank and JSCA Annual Reports.

working groups in which cases can be handled in different ways according to a range of criteria. However, these initiatives seem to be rather weak and are not yet consolidated.

In other places, like in Guatemala and Chile, initiatives exist that are aimed at early case evaluation, designed for the resolution of cases through the use of decisions to close an investigation and other simple alternative solutions. These initiatives are carried out by groups that have the legitimacy to make such decisions and that consequently generate standardized criteria for decision making in this area.

Nevertheless, in the majority of cases, the public ministries have proven to have limited capacities to handle their workload. The tendency continues to be that the majority of cases are processed through prolonged investigations, which contributes to the growth of large numbers of unresolved cases. As a result, it is difficult to make progress on truly important cases. The tendency also creates delays in the system and allows for ambiguous selection that is often arbitrary and at times corrupt.

TABLE N° 2
USE OF ALTERNATIVE CASE RESOLUTION AND DISCRETIONARY
FACULTIES BY THE PUBLIC PROSECUTOR'S OFFICE

Cordoba ²⁰	1%
Costa Rica	64%
Chile ²¹	61%
Ecuador ²²	2%
El Salvador ²³	26%
Guatemala ²⁴	4%
Paraguay ²⁵	10%

The tendency to reproduce traditional work methods in the Public Ministry also results in limited use of more concise procedures permitted by the new Codes. In many countries methods developed for use in early stages of the simplest cases—for example, in the case of flagrant offenses for which there is a confession—are not being used at all. In other words, even in the simplest cases, prolonged investigations are opened. Even if an agreement is reached on the facts (brief proceedings), this tends to be done at later stages after a great amount of time and resources have been invested in the case.

²⁰ Decisions to close investigations and rapid sentencing, according to proceedings submitted to the control courts. Source: 2001 statistics from the Judiciary in the Province of Cordoba.

²¹ Data year 2002. Report on Chile - 2nd version

²² Data year 2002

²³ Data 2001

²⁴ Data 2001

²⁵ Data 2001, Evaluation project.

b) Formal Defense

The conditions of criminal public defense are heterogeneous across the countries in which reforms have taken place. There are some countries, like Ecuador, where the precariousness of means is so apparent that it is questionable to assert that a true defense exists. Guayaquil, with approximately 3 million inhabitants and four public defense lawyers covering criminal and civil cases, is an extreme example of this situation.

There is a tendency in some countries for reform to include strengthening the systems responsible for providing criminal defense to those who cannot afford it, often a great number of the accused. In fact, in the majority of countries in which reforms have been implemented, systems have been installed that have provided a considerable number of public defenders who have generally provided professional defenses in the trials carried out under the new system. This is a great improvement to systems that prior to reform were notably weak.

Table N° 3
NUMBER OF DEFENSE LAWYERS AND PROSECUTORS

	Defense lawyers	Defense lawyers per 100,000 inhabitants	Prosecutors per 100,000 inhabitants
Cordoba	17	1.4	8.5
Costa Rica	223	5.7	6.5
Chile	83	2.6	4.1
Ecuador	32	4.3	2.7
El Salvador	278	0.3	9.9
Guatemala	471	3.9	4.5
Paraguay	96	1.7	3.2

During the course of trials in each of the countries, defense lawyers were observed effectively performing a set of activities in favor of their clients. Table 4 shows the average number of submissions of evidence made by defense lawyers in relation to those submitted by prosecutors.

Table N° 4
Probative actions²⁶
(Number of submissions of evidence in the observed trials)

	Prosecutor	Defense lawyer
Cordoba	170	89
Costa Rica	54	19Chile
279	44	
Guatemala	486	119
Paraguay	152	107
Venezuela	265	66

In spite of these data, much information exists that shows that defense systems still lack development on the formal level. The main problem is that while defense lawyers are present in the proceedings and intervene, their capacity to question evidence introduced by prosecutors is relatively limited. Many of their actions seem to be oriented merely towards submitting personal background information in favor of the accused. Also, according to opinions of other actors in the system, their attitudes towards their responsibilities are generally rather passive.

There are two elements that seem to strongly condition this behavior. The first has to do with limitations in terms of training for defense lawyers. In general, they have not received the necessary training to carry out effective questioning of the evidence presented by the prosecution, nor have they had access to successful methods for defining defense strategies.

The second problem that defense lawyers face is related to the resources they have at their disposal, including their own time. They spend most of their time in court, and thus have limited opportunities to prepare cases, which strongly influences their ability to question evidence. In relation to case preparation activities, there are few opportunities to develop autonomous investigations. This problem has not been treated in depth as part of the reform process.

Finally, it is worth pointing out that in addition to the problems mentioned above, an analysis of the public defense system reveals that institutional mechanisms with the capacity to keep the defense in logical, effective opposition to the prosecution are not sufficiently developed. In general, defense lawyers do not have strong incentives to

²⁶ Similar results are seen in observations from Ecuador and El Salvador; however, the data are presented for other purposes. Data for Ecuador are shown in terms of the number of trials in which evidence is submitted. For example, prosecutors introduced witnesses in 73% of trials while defense lawyers introduced witnesses in 14% of trials. The data for El Salvador are presented in terms of the frequency of cases. For example, prosecutors introduced 1-5 witnesses in 54 cases while the defense introduced 1-5 witnesses in 14 cases.

develop aggressive stances for questioning the prosecution's evidence. There are lingering problems with the recognition of their roles by society. Also, vis-à-vis other institutions, incentives within the public defense system often create a certain docility in terms of public defenders' attitudes. Effective supervision systems have not been developed, nor has a precise definition of public defenders' duties.²⁷ The matter of organizing a defense system oriented towards that end is pending; it is a task that requires much debate and a rigorous evaluation of current experiences.

2. No reform linkages in the area of management. Need of a management model that meets the needs of the accusatory system.

In every country analyzed in this study, one problem in particular is apparent: the overall ineffectiveness of the process of holding oral hearings, which translates to delays, loss of prestige of the systems vis-à-vis its users, misuse of resources, and deterioration of public relations and of transparency. This problem, in fact, is probably the most visible problem related to the introduction of oral proceedings.

In the majority of the countries included in this study, the reform process went hand in hand with the creation of new, specialized courts and/or an increase in the number of judges required to handle oral hearings.²⁸ In fact, in many cases these new, specialized courts are one of the main investments in the reform implementation process and a key symbolic element.

TABLE N° 5
NUMBER OF COURTS, ORAL TRIAL JUDGES AND NUMBER OF THESE PER
100,000 INHABITANTS

	Number of Courts	Number of judges	Number of judges per 100,000 inhabitants
• Cordoba ¹	11	33	2.8
• Costa Rica	11	112	2.9
• Chile ¹	23	69	2.2
• Ecuador	43	129	1.0
• El Salvador	21	63	1.0
• Guatemala	43	129	1.0
• Paraguay ¹	–	48	0.9
• Venezuela ¹	33	33 ¹	-

²⁷ In many places public defenders spend a significant part of their time carrying out interviews that, while peripherally supportive of the case, are not directly useful, and could be carried out by other professionals.

²⁸ The exceptions are Cordoba and Costa Rica, jurisdictions that already had courts responsible for handling oral trials; nevertheless, in Cordoba, reforms increased the number of criminal chambers. Ecuador is another exception. There was a process that created new courts, but the responsibility to hold trials was fulfilled by the older courts.

As can be seen in Table 5, in all cases there are a considerable number of judges responsible for handling oral trials. In practically all countries, there were judicial resources available to hold a larger number of trials than the number that was actually performed.

TABLE N° 6
NUMBER OF JUDGES, NUMBER OF TRIALS OBSERVED AND NUMBER
OF TRIALS PER JUDGE DURING THE PERIOD COVERED BY THE
STUDY

	Number of Trials	Number of Judges	Number of trials per Judge
Cordoba	31	33	0.9
Costa Rica	54	28	1.9
Chile ²⁹	416	60	6.9
Ecuador	59	36	1.6
El Salvador	66	18	3.6
Guatemala	38	36	1.0
Paraguay	11	13	0.8
Venezuela	15	33	0.5

Given that the trial is the final stage of the process and that in some cases reforms have been implemented quite recently, the explanation of the data does not seem to be found in the functioning *per se* of the trial courts. Instead, it seems to lie in the preparation procedures and in the work of the Public Ministry, which was not successful in sending enough cases to trial during this stage. This explanation is plausible in relation to several cases. For example, in Chile in the period following the first study, better preparation of the Public Ministry's routine work produced a considerable increase in the number of trials held.³⁰ Nevertheless, the problems seem to be due to circumstances stemming mainly from the courts themselves, and are related to the inadequacy of the administrative system responsible for effectively organizing the hearings.

In El Salvador, for example, this circumstance is so clear that cases prepared by the Public Ministry accumulate and often are brought to trial after long waiting periods, while time and other resources for their execution are underused. In terms of the ratio of the

²⁹ This information corresponds to the national figures from the first 2 stages of implementation of the new system, according to Appraisal Report No. 2. The number of judges corresponds to the number of initial judges. According to the observation of the trials that took place during a month-long period in the 2 regions corresponding to the first implementation stage as part of the first Report prepared in 2001, the figures indicate that for 27 judges, 28 trials had taken place, with an average of 1 trial per judge.

³⁰ The first report prepared in Chile showed that in the two regions in which the new system was in force a total of 22 oral trials had taken place. The Second Report on Chile shows that the total number of oral trials carried out in the same region through the end of 2002 was 281.

number of trials that were on the agenda to the number that were actually performed, data vary significantly by country, as can be seen in Table 7.

TABLE N° 7
NUMBER OF TRIALS ON THE AGENDA AND NUMBER OF TRIALS EXECUTED

	Trials on the agenda	Trials executed	%
Cordoba	117	97	83%
Costa Rica	179	54	30%
Chile ³¹	65	64	98%
Ecuador	222	59	27%
El Salvador	170	69	41%
Guatemala	50	38	76%
Paraguay	17	13	76%
Venezuela ³²	(867)	(144)	(17%)

The situation is, in our opinion, primarily due to the fact that the reform process has not systematically accounted for the challenges that handling oral hearings implies for the area of administration. With the only exception being Chile, the introduction of the oral proceedings was not accompanied by a change in the administrative systems of the courts. On the contrary, the new courts responsible for oral trials reproduced the administrative structure typical of the inquisitive system. This translates into a lack of specialized personnel in administration management. Procedures are managed directly by judges, who have the support of the secretaries, the clerks of the courts, and/or clerks who are directly under judges' control and responsibility. Each judge or collegial court manages staff in the most convenient way for them and according to employees' experience. Generally, a standard work process for the entire system does not exist.

The fundamental problem is that the entire administrative apparatus was developed for processing cases in the written system and is, therefore, coherent with it, not the oral system. The work method used within the administrative apparatus consists in developing the judicial process through the incorporation of the information and the resolutions in the case file. The case file, whose preparation constitutes the materialization of the judicial process, is highly formalized. As a consequence, employees feel the burden of having to comply with the required formalities. The file is completed under the direct responsibility

³¹ These figures correspond to the court statistics of the Oral Trials in Antofagasta, Region II. According to the figures of the Observation of Trials in the First Report on Chile, of a total of 35 trials, 28 were performed, which corresponds to 80%.

³² The information for Venezuela is shown in terms of the number of trials on the agenda in the Criminal Circuit of Caracas.

of the judges through the delegation of functions method and, therefore, a direct relationship based on confidence and inter-dependency between employees and judges is necessary.

A problem arises when trying to make a system of hearings function within the existing administrative apparatus. The preparation of hearings has a logic of its own. The emphasis is placed on results—that the hearing takes place—and not on the process, as is the case in the earlier system, in which the task is to complete the case file in the required manner. Problems become generalized because the administrative apparatus is geared towards complying with the necessary formalities, a process that does not necessarily produce results. While all relevant participants are notified and official letters are sent, some who were summoned do not appear, because, for example, they may have other hearings scheduled at the same time. The task of preparing hearings requires another, much less formal approach, so that those in charge need to be able to adopt dynamic attitudes, be aware of methods to find compromises, be able to guarantee that compromises are honored, and be able to develop broad inter-institutional coordination. Experiences in various countries show that with the old method whether or not hearings are carried out depends greatly on the will of the judges. Some judges have a unique enthusiasm or commitment to holding hearings. These judges carry out hearings effectively and develop a proactive work style to guarantee that all those summoned appear. In contrast, others formally comply with all the procedures, while benefiting from a smaller workload brought on by the failure to hold hearings. However, they cannot be reproached for handling the process in this way because the administrative functioning of the courts is set up accordingly.

In truth, in countries such as Costa Rica, Ecuador, Guatemala and Venezuela, there have been programs to strengthen the administrative apparatus in a variety of ways. Nevertheless, the programs were not geared towards issues associated with the preparation of hearings, nor are they fundamentally linked to criminal prosecution reform implementation efforts. In all cases, the basic element of the conception of the administrative apparatus—that the objective of work is to complete the formal case file—has not been altered, even though substantive changes have been made to the judicial organization, such as the creation of secretariats and common services.

The consequences of having a gap between the oral trial method and the administrative support system are not limited to the failure of hearings. In many cases, they also lead to a deterioration of public perceptions of the courts' activities. For example, in various countries covered by the study there is no agenda for the trials. Therefore, it is very difficult for someone outside the system to learn the time and place in which a hearing will take place. Each court handles its cases through the case files. If an individual would like to know if a particular trial will take place, he or she must contact the employee in charge of the case and ask specifically for that information. Another common situation is a lack of respect for start times of hearings and continuations. This, in some cases, is because only at the moment that the trial begins does the court verify the failure to appear of one or more participants. Then, a real effort of informal production starts—telephone calls are made, the police are sent to arrest those who failed to appear, among other tasks. These types of delays happen quite frequently and often last hours without official notice. As access to the trials becomes more difficult, the trials are in fact no longer truly public.

Another practice that results from inadequate administration and that worsens the problem, is that courts, recognizing that many of the hearings fail to take place, schedule various hearings at the same time with the hope that one of them will go forward. This worsens the problems of coordination because the public defenders, prosecutors and other actors in the system receive many cases but do not know which to address on a priority basis since they know that many hearings fail to take place. This phenomenon was observed in Venezuela and Ecuador, especially in the town of Guayaquil.

These problems of organization of the hearings also have a tremendous impact on the other entities involved in the process, particularly on the Public Ministry, the defense, the police, the prison services, and expert witnesses, among others. The lack of certainty and effectiveness of the courts generates for these entities excessive time demands, dead time, and difficulty in coordination, all of which cause a distortion of their performance.

A notion current in some countries is to say that oral trials fail as a result of the public's unwillingness to participate in them. Whether or not the public is unwilling to participate in fact. Studies show that an important proportion of the causes of the failures of the hearings is caused by the failure of institutional actors public defenders, prosecutors and even judges- all these having to do with problems of coordination and not with the attitude of the public. Citations to members of the public are very formal and there is no personal contact that could induce a commitment to appear. Judicial noncompliance with the dates and times for hearings does not encourage the public to participate. In conclusion, until a systematic effort is made to organize hearings in a more professional way, it will be difficult to evaluate to what extent the lack of collaboration by the public represents a serious problem.

In Venezuela, El Salvador and Guatemala, the inability to organize hearings is extreme, including failure to appear by the accused who are deprived of their freedom and awaiting trial. Officials explained this situation as due to problems with prison transport services or the communication system between the courts and the prisons. This represents an extreme situation in that deprivation of freedom of the prosecuted person is only justified as a guarantee that he or she will appear in court; if it does not function as such a guarantee, this measure loses its legitimacy.

In the case of Ecuador and El Salvador, in addition to the problems with the administrative apparatus we observed that the infrastructure of the courts is very inadequate for the purpose that they should serve. This impedes the public nature and the transparency of trials, either because of limitations of space for the public or because of poor accessibility of the hearing rooms or of the building that house the hearing rooms.

Despite the generally bleak scenario in the region, there are some innovative experiences worthy of note. In Chile, criminal procedure reform was accompanied by the introduction of a completely new court administration system. In the guarantee courts and the oral trial courts, which operate through hearings, the post of secretary was abolished and instead there is a professional administration system common to several judges. At the head of this system is the administrator, who is a professional in the area of management,

directing a team of employees organized in units to serve the judges, among whom are employees in charge of the organization of hearings. This management plan has allowed the Chilean system to perform at higher levels than in other countries with regard to the organization of hearings, because it permits different activities to be dealt with in a systematic way, with the possibility of progressive improvement in work methods. We have observed that matters such as coordination with different institutions, or citation of external actors, are issues for which it is possible to design increasingly efficient work methodologies. However, the method implemented in Chile has also faced problems, the most important one being the resistance of judges to the loss of their administrative functions and, above all, to losing control over the management of their time.

V. CONCLUSIONS AND PERSPECTIVES

In synthesis, processes of criminal justice reform have been developed with great force over a fairly long period of time in various countries of Latin America. Important experience has been gained that merits examining towards the end of extracting useful lessons for the years ahead.

It is possible to assert in the first place that the problems in the criminal justice sector continue to be grave and urgent. Latin American countries should seek to solve them, because criminal justice systems are parts of the fundamental governance conditions for political, social and economic development. Criminal justice reform constitutes a proposal with great centrality, radicality and the capacity to convene, all of which are necessary to create dynamic changes and innovations in an area traditionally very resistant to modernization.

The experience of countries that have carried out the reform process demonstrates the vigor of these reforms, the important process of investment that countries have achieved, and the new expectations that the reforms have created for a system that was traditionally viewed as having little hope. In practice and despite its defects, the reform process has generated (and continues to generate) major innovations in the entire judicial system.

However, the process of implementation of the reforms has shown great weaknesses, such that intended changes have been only partially realized, particularly with respect to the improvement of services offered to the public.

From this diagnosis emerges the need to systematically address the task of developing the technical instruments for dealing with deficits in the implementation process. At the same time, institutional and political space must be created that will give a second impulse to the reform process, which should consist precisely in the completion of the implementation process, including the application of technical solutions appropriate to those issues showing the most acute problems.

The most thorny and critical problems for which it is necessary to find or create an answer are, in general, related to the need to create a modern management system for the different entities that will carry out the new procedural systems. At the same time, it is important to create innovative mechanisms for training that will help to appropriately train the different actors in the performance of their new roles and strengthen their role definitions within highly complex systems such as the new accusatory process. Finally, it is necessary to support monitoring and evaluation of the reform process, either institutional or independent, with the aim of generating a vigorous debate that will identify the problems and create pressure for their prompt solution.

The JSCA has, since its origin, addressed this task and will continue doing so, putting an emphasis on improving the technical instruments for the implementation process of criminal procedure reforms. In order to achieve these goals, the JSCA intends to look to

the countries of the region, for some of them have successful answers in areas that can be duplicated in other countries. It will be particularly useful to make the best use of the knowledge gained by countries with a higher degree of development, especially those that have for centuries been dealing with the challenges of effective operation of an accusatory justice system.

To achieve this goal, the JSCA is promoting the mutual exchange of knowledge among actors of the reform process across the region, and researching not only into the problems they face but also the mechanisms used to solve those problems, as well as the dissemination of the methods and systems that have been most successful.