Trials and trial by jury in Latin America*

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Abstract 1

Since the mid-1980s, very significant efforts have been taking place in most Latin American nations to reform their criminal procedures, with the implementation of oral and public trials being one of the most important innovations to date. As this use of public trials continues to evolve, there has recently been increasing debate about introducing different forms of trial by jury. This chapter provides a brief overview of some of the reforms implemented in the region's criminal justice systems, focusing particularly on said innovations before specifically considering the Chilean case concerning the use of public trials and the debate in Argentina regarding the implementation of juries. The chapter concludes by demonstrating that Latin America's embrace of public trials and juries as such is far from being a finished process, rather, it should be understood as an ongoing process that needs to be observed and carefully evaluated.

I. Introduction

Since the mid-1980s, very significant efforts to reform the administration of 2
justice have been taking place throughout Latin America, with Brazil and Cuba being the only two nations that have not yet been a part of these reforms. These efforts can be classed as somewhat radical in the sense that they are bringing systemic changes to all levels of the region's criminal justice systems rather than just introducing minor adjustments. One vitally important and high-profile aspect of these efforts has been the reformation of inquisitorial process, a type of criminal procedure adopted throughout the region after the colonial period that was largely characterised by practices typically associated with authoritarianism. In this regard, reform efforts have seeked to structurally transform national criminal justice systems

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and replace their pre-existing inquisitorial structures with entirely new and different institutions and processes.

3 At the procedural level, the overarching reform goal has been the introduction of new 'accusatorial procedures'. In Latin America, an accusatorial system is not synonymous with an adversarial system as the former refers to the procedural model consolidated in continental Europe at the beginning of the 1950s and 1960s rather than the adversarial model proper one may currently find in the United States or England (adversarial procedure).[1] Indeed, the model now implemented in most Latin American countries was based on the proposal developed by the *Instituto Iberoamericano de Derecho Procesal* during the mid-1980s which was primarily based on German procedure at the time.[2] While Portuguese and Italian legislation has also been very influential, several countries, especially Colombia, Chile and others that implemented the reforms in the early 2000s, adopted different aspects from the Anglo-American tradition, which is consistent with the convergence of the continental European model with that tradition.

4 Although each country had its own peculiarities, all these reforms initiatives were framed under the notion of an *accusatorial model*, sharing essential elements such as public hearings as the central part of the proceedings, the separation of the prosecution and judicial roles and functions, limiting prosecutors' discretion to reduce the costs and time requirements to bring a case as well as the recognition of basic due process guarantees for defendants and the rights of victims.[3] Regarding juries, while they have been a part of Latin American criminal procedure since independence in the 19th century, their implementation was not a central element when reforming the new accusatorial procedures. However, there has been increasing debate and several reform initiatives oriented towards introducing different forms of juries in Latin America in recent years.

5 The introduction of an oral and public trial is a symbolic aspect of the regional reform programme as it represents the abandonment of what was the backbone of the prior inquisitorial system. The old inquisitorial procedure methodology was based on the compilation of written information

1 Kai Ambos, El principio acusatorio y el proceso acusatorio: un intento de comprender su significado actual desde la perspectiva histórica. En: L. Bachmaier Winter (coord.), Proceso penal y sistemas acusatorios, Madrid (Marcial Pons) 2008, 49–72

2 *See* Máximo Langer, 'Revolution in Latin American Criminal Procedure: Diffusion of Legal ideas from the Periphery' (2007) 55 The American Journal of Comparative Law 617, at 642 and further.

3 In the same sense *See* Langer, *id.* at. 618.

on which the judges base their decisions, in other words, it was a process that principally entailed composing a written judicial dossier that served as the sole source of information for judges to base their decisions on. Thus, the development of the dossier was the primary task of a criminal tribunal and the cornerstone of the judges' work. Trial lawyers, for their part, were limited to working with the information accumulated in the dossier and doing what they could to ensure it reflected their version of the case. Consequently, the overbearing role of the dossier in the process created a litigation culture that was usually associated with bureaucratic and administrative proceedings rather than with the legal work normally carried out by attorneys outside of Latin America (e.g., oral arguments).

The new procedures now in place employ the evidence presented at an oral and public trial (a "trial") as the primary source of information on which judicial decisions are based. The best example of this understanding is the adoption in every Latin American country engaged in reforms of the use of a trial as the centrepiece of their respective new procedures. 6

This chapter serves to briefly describe the region's criminal procedure focusing on trials and trial by jury. Because of essential differences in the details of the legal rules in the region, the text's analysis is largely based on the results of two case studies: the introduction of public trials in Chile and Argentinian efforts to introduce trial by jury. However, even though these two case studies form the backbone of the research conducted here, the chapter will present its findings in a context that takes into consideration other regional examples. To begin with, section one provides an overview of the reform process and the main design aspects of the new accusatorial procedures implemented. In section two, the trial design in this model is analysed, taking Chile as the most prominent example and reviewing the reasons for the success of its implementation in this country. In section three, the debate surrounding the introduction of trial by jury and the advances made in this regard by Argentina will be examined. The chapter concludes with a section dedicated to a few final thoughts and observations of practical value that have arisen from this research. 7

II. The reform process and the new Latin American criminal procedure

1. Overview of the reform process

The region's criminal justice reform can be described as a joint movement rather than a series of isolated efforts performed differently in each country. 8

In fact, it would be accurate to assert that certain common elements comprising a kind of spinal column underlie the region's reforms. First, there was a broadly shared negative opinion concerning the way the inquisitorial criminal justice systems have operated in the region's different countries, based on the identification of common systemic deficiencies related to structural design rather than specific flaws. These systemic shortcomings led to the conclusion that the inquisitorial system constituted a source of structural problems due to its inability to function reasonably from the perspective of the criminal prosecution and its incompatibility with fundamental democratic values. Although acknowledging that a lack of adequate resources for criminal justice caused severe problems, the general perception was that while additional resources may improve some specific problems, they would not be sufficient by themselves to impact the structural problems associated with the inquisitorial system.

9 Faced with this critical and shared diagnosis, the strategy to implement the needed changes evolved as the realisation came that only the complete elimination of the inquisitorial process could resolve the system's problems, an objective soon embraced in most countries. Consequently, the reform strategy was premised on the need to radically transform existing procedures and institutions and replace them with new and different ones.

10 What factors explain to have countries throughout the region almost simultaneously deciding to structurally overhaul their judicial systems? The view presented here is that the depth of the criminal procedural reform now underway in Latin America is primarily the result of a complex combination of sometimes contradictory political and social forces. For example, it is necessary to remember that in most cases, these reform efforts were born from the transition to democracy at a time when human rights were being revalorised and many Latin American countries began receiving support from international players. A natural consequence of this paradigm shift was that judicial system reform was seen as a pivotal element to support these changes and help pave the way to further economic development. With differing specifics, these forces have been present in most of the region's countries since the reform debate started in the mid-1980s and throughout the implementation of the reform process. Furthermore, while most, if not virtually all of these forces are manifest in each country throughout the region, each force has weighed on the transformation process to varying degrees and with varied impacts in each country. Likewise, as the various national processes unfolded it was possible to observe close links

forming between the legal reformers that created a kind of community that shared a common vision concerning the need for and magnitude of the changes.[4] This community used the same experts to develop their reform models, gathered periodically to exchange experiences, and used similar sources to guide their work.

Since national debates about judicial reform started in the mid-1980s, to this day almost all the region's countries have introduced new accusatorial criminal procedures, as Table 1 shows, highlighting the year in which in each country began operations. As can be observed, some countries implemented the reforms at the same time in the whole country. In contrast, others followed a gradual path, implementing the new system in different parts of the country and over different years in successive stages. 11

Table 1: The status of the Criminal Procedure Reform in Latin America

Country	**Year in which reform was implemented**	**Comments concerning the implementation process**
Argentina	Various	The reform was first implemented at a provincial level (Argentina is a federal State), e.g., Buenos Aires 1998, Córdoba 1998, and Chubut 2006. In 2018 Argentina enacted a new Code of Criminal Procedure which regulates federal jurisdictions. Its entry into force will be gradual.
Bolivia	2001	Nationwide implementation at the same time.
Chile	2000	Gradual implementation by territory, concluded in 2005
Colombia	2005	Gradual implementation by territory, concluded in 2008.
Costa Rica	1998	Nationwide implementation at the same time.
Ecuador	2001	Nationwide implementation at the same time.
El Salvador	1999	Nationwide implementation at the same time.
Guatemala	1994	Nationwide implementation at the same time.
Honduras	2002	Nationwide implementation at the same time.
México	2016	México uses a federal system. In 2008 a constitutional reform was enacted that introduced the ability of and duty for the states to reform their criminal procedures. In 2014 a new National Code of Criminal Procedure was enacted that introduced uniform reforms to the whole country, beginning with a new accusatorial system in June 2016.

4 For a detailed explanation of the network of reformers and their evolution, *See* Maximo Langer, 'Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery', (2007) 55 (4) The American Journal of Comparative Law 617 l.

Country	Year in which reform was implemented	Comments concerning the implementation process
Nicaragua	2002	Nationwide implementation at the same time.
Panamá	2011	Gradual Implementation by territory, concluded in 2016
Paraguay	1999	Nationwide implementation at the same time.
Peru	2006	Gradual implementation by territory, concluded in 2021.
Dominican Republic	2005	Implementation of reformed procedural rules was completed in stages and the new code is currently in effect.
Uruguay	2017	Nationwide implementation at the same time.
Venezuela	1999	Nationwide implementation at the same time.

2. Overview of the new accusatorial criminal procedure implemente

12 After the reform, from the perspective of the procedural structure, most systems divide their processes into three main stages. The first stage is the *preliminary investigation* or *investigative phase* which involves collecting evidence concerning a crime or alleged crime. The second phase or *intermediate stage*, which begins once the investigative phase concludes, entails the preparations for trial while the third and final *judgment phase* is the public and oral trial.

13 The investigative phase structure is radically different from the previous model. The main change involved separating the roles and powers of the different participants, such as judicial functions no longer being handled by individuals dealing with criminal prosecution. Thus, in the reformed systems, prosecutors, with the assistance of the police, have been assigned the responsibility of conducting criminal investigations while investigating magistrates (which are still used in countries such as Spain) have been eliminated. Furthermore, the powers of judges in this phase have been limited to ensuring those prosecutorial investigations are conducted according to the law (e.g. authorising search warrants) and authorising measures that may affect constitutional rights (e.g. preventive detention). However, judges have no investigative roles, which has allowed prosecutors to emerge as figures with leading functions in the judicial process for the first time in Latin America. In addition, most countries now recognise that defendants and their attorneys have broad participation rights during the investigative stage, eliminating the unilateral character that such investigations had under the inquisitorial system. In this context, the investigation phase follows

the more 'normal' pattern of prosecutors and police compiling evidence to establish a basis for indictment and then bringing the case to trial. The evidence collected is (subject to exceptions) normally accessible to the accused early on in the criminal investigation and judges only intervene when prosecutors require judicial authorisation to conduct investigative measures or where a relevant rights issue arises.

Regarding this stage's dynamics, once a prosecutor receives a criminal 14
complaint, directly or through a referral from the police, the initial activity involves determining whether the case should be investigated or dismissed.[5] If the prosecution elects to proceed, it will then gather evidence to establish charges and take the case to trial, although such evidence will not have probative value in the sense of being admissible at trial, nor will it be evaluated at such time by the court. If it becomes necessary to undertake action that affects the constitutional rights of the accused during the investigation, the prosecutor will require prior judicial authorisation. In such a manner, prosecutorial investigative powers are subject to judicial restraints and controls.

Most of the region's reformed criminal procedures establish a prosecu- 15
torial obligation to advise the accused of the nature of any preliminary charges prior to deciding to proceed to the trial stage. Its purpose is to serve as a guarantee providing the accused with the opportunity to obtain counsel and initiate defence activities as soon as charges have been formulated. Normally, that activity sets off a series of procedural events (e.g. it starts a designated period during which the investigative phase must be

5 During the inquisitorial process, the fundamental governing precept was the 'principle of legality' (mandatory prosecution principle). That principle required criminal prosecution agencies to investigate crimes until they were resolved, with no authority to abandon or negotiate them except for a lack of evidence. Every case had to be fully investigated regardless of its importance. The reformed models, while maintaining the principle of legality as a rule, have recognised that prosecutors now have varying levels of discretion (generally referred to as the 'principle of opportunity'). Today prosecutors may dispense with criminal prosecution under varying circumstances, including the absence of public interest in a given prosecution and considerations of the minimal nature of the crime or the minimal role of the accused in the commission of a crime. The rationale behind this is that such powers provide prosecutors with the ability to streamline the system's workload and focus perpetually scarce resources on the most socially relevant crimes. This is the driving force behind why it is now common to find newly emerging practices, such as diversion and different types of pleas bargaining, among the region's reformed procedures. *See* Maximo Langer, 'Plea Bargaining, Conviction Without Trial, and the Global Administration of Criminal Convictions' (2021) 4 Annual Review of Criminology 377.

completed). However, the act of formulating charges is not a judicial decision concerning the merits of the case or the rights of the accused. Thus, if a prosecutor determines that preventive detention or other restrictive measures are necessary, he or she must request and justify such action on an independent basis, based on evidence beyond merely having informed the accused of the charges.

16 It is possible during this phase for the accused to negotiate with the prosecution or the victim to seek a resolution of the case through alternative non-trial means, such as reparation agreements for the victim or conditional dismissals subject to supervision and retained jurisdiction. These non-trial alternatives are playing an increasingly significant role throughout Latin America as reformers have placed their hopes for improved system efficiency on the availability of these kinds of mechanisms and the appropriate use of the discretionary powers granted to prosecutors. However, the powers to negotiate cases are currently limited in the region when compared, for example, with the leeway provided to American prosecutors. As such, Latin American prosecutors are normally limited to negotiating in cases involving offences that carry medium or low penalties and are always subject to strict judicial scrutiny.

17 If an investigation is completed without a negotiated settlement, the prosecutor must decide whether to bring the matter to the trial stage or end it. If a decision is made to proceed with the case, the *intermediate phase* begins. Here, the prosecutor prepares a written *accusation* (indictment), clearly stating the allegations against the accused, the prosecution's interpretation of the applicable law and the requested penalty.

18 Because prosecutors normally decide to only bring relatively serious cases with potentially severe punishments to the trial stage in most of the region's countries, this second phase's main objective is to establish an element of judicial review. Consequently, this part of the judicial process is usually initiated through a hearing where the prosecutor substantiates the accusation by presenting the supporting evidence and where the defence attempts to demonstrate the weakness of the case and the absence of justification for a trial. The details of this hearing and arguments presented by both sides are compiled into a record that the judge can review and reflect on when making a decision. If the judge concurs with the defence the case is dismissed, however, the case is forwarded for trial if the judge agrees with the prosecution. If so forwarded, an additional objective of the hearing is to adequately prepare for trial by establishing which facts will be at issue between the parties and determining what evidence the parties

may present at trial. In some countries, such as Chile, this is the phase at which the parties present arguments concerning whether evidence obtained in violation of constitutional rights should be excluded.

The public and oral trial constitutes the final phase and the focal point of 19
the new procedures, even though a relatively small percentage of cases are resolved in this manner. As will be seen, these trial are primarily presided over by a panel of professional judges who have had no prior involvement in the proceedings, and while this panel is also normally responsible for presenting a verdict, trial by jury is being increasingly used for this purpose. The basic structure of the trial involves an adversarial public hearing where each party has a right to introduce evidence and rebut evidence presented by the other party. It is also normal for such trials to begin and end with the parties presenting opening statements and closing arguments. While this seemingly follows typical aspects of US and European procedure, most countries in the region have retained elements of their old non-adversarial proceedings. Thus, in countries such as Costa Rica, Peru, and Guatemala, trial judges retain significant power to introduce evidence beyond that presented by the parties while in other jurisdictions, judges maintain particular prominence during the questioning of both witnesses and the parties. Finally, a few countries have relatively relaxed rules, regarding the introduction of evidence through judicial notice and permit the introduction of testimony transcripts compiled during the earlier stages of the proceeding instead of requiring in-person witness testimony. Another significant difference with respect the US model involves the statements of the accused made at trial, not only because it is relatively commonplace in Latin America for defendants to testify at trial but also because this testimony is subject to very different rules than those applicable to other witnesses.[6] As a result, to someone used to the adversarial approach taken in US courts, for example, trial in Latin America featuring these characteristics retain an inquisitorial flavour.

However, there are nuanced differences between the judicial systems 20
used by Latin American countries and some conduct trials that have features similar to more adversarial models, as seen in the method for obtaining witnesses' testimony through examination and cross-examination

6 For example, after a witness has been sworn she will immediately answer questions presented by the parties. On the contrary, when the defendant takes the stand, before she answers any questions, she will be questioned by the judges and only after questions by the parties will be allowed.

by the parties in Chile and Colombia. In contrast, many others involve trials conducted strongly tied to the most inquisitorial continental European tradition. This is an area with considerable divergence beyond basic general principles. One common element is that the trial is usually the only instance where the parties debate relevant evidence, whether to establish culpability or innocence of the accused or to determine the applicable sanction; consequently, no bifurcated proceedings are involved regarding matters such as the trial and sentencing. To a large extent, this is because the judges who conducted the trial and decided the verdict also determine the applicable sanction if the accused is found guilty.

21 Once a trial concludes, the court deliberates privately concerning the accused's guilt or innocence. Unanimity is not required, rather a simple majority of the judges suffices, with the standard of proof required for conviction usually equivalent to 'beyond a reasonable doubt'. After said deliberation, the decision is announced orally in the courtroom. Usually, the court then has a brief period to render a written version of its decision explaining, in detail, the basis for the oral decision and indicating the penalty in the event of a guilty verdict. In this written decision, the court must address the evidence relied on and the legal and doctrinal basis supporting the decision in its analysis. Such written decisions are essential aspects of the continental tradition that have survived Latin America's new embrace of oral trials.

22 The trend of the reformed model has been to limit the availability of review mechanisms in order to strengthen the trial and decisions taken at the trial stage. However, the party against whom judgment is rendered, whether the accused or the prosecution, can obtain a review of the ruling by superior courts. Review procedures tend to grant superior courts power to correct errors in interpretation of applicable law or violations of fundamental rights but not to re-decide the facts of the case, as was the case under the inquisitorial system. The goal is to prevent superior courts from changing the mix and weight of the facts without having personally evaluated the evidence as this would see the return of justice being dispensed based on an analysis of a written dossier rather than via a public trial, depriving the reform process of its central component.

III. Trials in the new accusatorial systems: the Chilean case from a comparative perspective[7]

1. Trials' implementation in Latin America: disparate results

Beyond the efforts conducted by the Justice Studies Center of the Americas (CEJA) – an Organization of American States' entity- between 2005 and 2008, no other known comparative reports attempted to measure the performance of the different reforms sweeping through Latin America's judicial systems. On the basis of CEJA's work, it is possible to conclude that most countries experienced different problems regarding the performance of oral procedures and the public trial. 23

For example, in 2005, CEJA's research concluded that: 'Facing the task of mass hearing production, the system of coordination and management confronts the challenge of moving to the next level or maintaining their old management structure. In the latter, which has been the general rule in Latin American countries, this artisanal system (…) has become a bureaucratic obstacle for the functioning of the reform. (…) Moreover, those hearings that take place when there is no serious effort related to management quickly start to experience notorious degradation in its formal aspects: scheduling, public access, the certainty of realization (…). These findings reflect in part the high percentage of hearing failure in several of the studied countries and the great length of time between the accusation and the public trial'.[8] Two years later, the second CEJA report showed that by 2007 some countries had resolved some of these issues while others, such as Costa Rica, Guatemala, and the Dominican Republic continued to have problems with the oral aspects introduced by the reform[9] 24

Today it is only possible to find national reports on these issues, however, which show that some countries still face their own unique mix of problems in this regard. In 2010, for example, an empirical study looking at the impacts of the Mexican judicial reform in five Mexican states reported the 25

7 This section is based on Claudio Fuentes' Doctoral Dissertation. See Claudio Fuentes, The Challenges and Complexities of Procedural Legal Transplants: The Case of Chile (Stanford University, 2020).

8 Centro de Estudios de Justicia de las Americas, *Reformas procesales penales en América Latina: Resultados del proyecto de fortalecimiento* (CEJA 2005), 217 and following (translation is ours).

9 Centro de Estudios de Justicia de las Americas, *Reformas procesales penales en América Latina: Resultados del proyecto de fortalecimiento. Volumen 4* (CEJA 2007), at 30 – 31.

problems noted by CEJA in 2005 persisted. The 2010 research highlighted that many hearings did not take place and were suspended while debate continued concerning the deficient number of trials hearings.[10] Another problem occurred as a result of the Peruvian reform which saw some jurisdictions establish the practice of splitting the public trial into countless sessions, transgressing the concentration principle, making it impossible for the judge to accurately assess the evidence.[11] The study that highlighted this issue in Peru showed that in more than 50 % of the cases making it to trial, the trial was suspended for reasons not stipulated in the Peruvian Criminal Procedure Code.[12]

26 Despite the two specific examples cited above, there is scarce empirical evidence that shows to what extent the introduction of public trials in different Latin American countries has produced problematic results. However, it must be also stressed that there have been other more positive experiences, many of which have arisen from Chile's reform process.[13]

2. The successful case of Chile's public trials

27 On a regular basis, Chile's courthouses got to know hundreds of public trials nationwide. More importantly, after 20 years of Chile reforming its criminal procedure, it is possible to conclude that an actual change in the legal culture has taken place, particularly regarding the functions of the various actors (Prosecution, defence and judges) involved. Indeed, a recent empirical study provided some evidence that shows complete adherence by the main legal actors to the goals and regulations introduced through the reform regarding procedure at public trials.[14]

28 Chile has, like many other Latin American countries, established the concentration principle as a cardinal feature of the public trial, i.e. that the trial should be conducted in as few scheduled close -by sessions as possible,

10 Guillermo Zepeda Leucona, *Informe General de seguimiento del proceso de implementación de la reforma penal en México* (CEJA 2011), at 60 and following.

11 Pedro Franco Apaza, 'La Fragmentación del juicio oral y la vulneración de los principios del nuevo proceso penal en Tacna 2018', (2019) 1 (1) Revista de Investigación de la Academia de la Magistratura, at 227 (translation is ours).

12 Apaza, *supra* note 7, at 231.

13 Langer, *supra note* 1, at 656.

14 Claudio Fuentes' doctoral dissertation involved field research for two years (2018–2020) in Santiago's criminal trial courts. The research included trial observations and semi-structured interviews with trial court judges, prosecutors, and public defenders.

in which all the evidence is to be presented in a single and continuous moment (a hearing) to the tribunal, demanding its exclusive attention. However, while many other countries have found the enforcement of this principle difficult (see above, Peru), this has not been the case with Chile, a success that is at least partially attributable to the concerted institutional response by judges, court staff, court administrators, prosecutors and public defenders to ensure this happens.

When asked about this by the second author, all the interviewed legal 29
actors agreed that if a public trial could not end on the day it was scheduled, it would continue the next business day. Likewise, when they were asked if this changed when a trial extended beyond its initial deadline to conclude, the answer was negative, and proceedings would continue on the next business day.

To achieve this goal, the judges stated that they would coordinate with 30
the parties to extend the trial scheduled and talk to those involved in the subsequently scheduled trial to let them know that they will have to wait until the current trial is over. Moreover, the interviewed judges stated that nobody questions the need to keep a trial going until it has reached a satisfactory conclusion, even if at times this means that they will have to stay in court after normal business hours.

Successfully rescheduling proceedings requires coordination with the 31
court's staff and its administrators to block the use of the courtroom to other proceedings so the current trial can go on. This coordination is also required to ensure that the court administrator knows that certain court staff members will be unavailable for other duties until the now-extended trial has concluded. Court administrators acknowledge that this has a disruptive impact on the court's calendar but that it is not an obstacle that prevents a trial's continuation beyond its originally scheduled timeslot.

Another example related to the enforcement of the concentration prin- 32
ciple can be found in the way the criminal courts handle so-called megacases. Such cases involve extraordinarily complex litigation because there is a significant amount of evidence of different types, the events under consideration are numerous and varied and the number of parties involved is often far more than average. Consequently, the time these cases need for resolution can be significant, often stretching to months, with proceedings taking place every day of the work week and presided over by the same panel of judges. Despite the mental and physical strains such cases place on the actors involved, there has been no instance reported in Chile of the principle of concentration being subsumed to other needs.

33 The second example of this cultural change can be observed in the notion of *tabula rasa.* In other criminal procedure reform experiences, the judges have developed an active and protagonist role in the public trial. A necessary part of assuming this role involves the judges learning in advance about the case they hear, examining the previous stages of the procedure and reviewing the evidence the parties are going to present. This undermines the *tabula rasa* ideal. Despite the amount of time Chile has been reforming its criminal procedures, Chilean judges still have not developed such practices and, consequently, they remain mostly passive umpires.

34 Interviews with judges were illustrative regarding this issue, in which none of them saw any benefit in preparing for the trial beforehand and all of them expressed a preference for arriving at the public trial with an open mind and no preformed opinion. Their attitude showed that they were not concerned with pursuing their own lines of reasoning or questioning but were concerned with focusing purely on what the parties presented to them, an approach that they felt helped them to maintain their impartiality.

35 As can be seen from the foregoing, the primary goals of Chile's criminal justice reforms in terms of the roles of the key actors in trials have been successfully achieved. Indeed, beyond the new actors that were created, the new and different roles originally established by the reformed proceedings in the 20 years since their initial implementation are still being strictly adhered to. As mentioned, hundreds of trials occur uneventfully every day in the country, and the distance between law in the books and law in action remains close enough.

3. The reasons behind Chile's successful experience

36 Given that Chile's introduction of the public trial was a part of a bigger criminal procedure reform movement in most Latin American countries, what reasons explain why Chile's experience was so successful in terms of properly implementing public trials and changing its legal culture?

37 First, the Chilean reform that began in the early 2000s benefited from previous reform experiences in Latin America as these were valuable sources of knowledge for the experts designing and implementing it. Drawing on the experiences of others allowed these experts to define with more precision the features that certain legal institutions should have in the

general context of oral procedures, ensuring that they perform in a manner that would avoid the problems that arose in other countries.

In this regard, Riego stated that this knowledge led to a change in the original regulation of the public trial and it led to 'the accentuation of the adversarial nature of the trial.'[15] Seeking to make trials more adversarial meant introducing specific pieces of law designed to prevent the excessive use of written case records, a pitfall which other Latin American reform processes fell into that ended up transforming their trial systems into 'little more than acting' and largely replacing in-person appearances of witnesses with written testimonials. When deciding how to circumvent this issue, Chile's *Código Procesal Penal* or Code of Criminal Procedure's (hereinafter "CPP") regulation on trial procedure was heavily influenced by Anglo-Saxon ideas regarding aspects such as the presentation of evidence, the introduction of examining and cross-examining witnesses, strict standards regarding the use of out-of-court testimony and substantial limitations regarding any evidentiary powers by the judges. 38

Another excellent example of these specific measures can be seen in the previously-mentioned concentration principle. Furthermore, the specific regulations put in place regarding this principle serve as a touchstone to highlight why Chile's reform process has been such a success. For example, Rule 282 of the CPP not only mentions that the concentration principle needs to be fulfilled, but it also explicitly defines the expression 'successive sessions' as those that must take place on the courts' next business day. This definition leaves no space for interpretation about the law's mandate and, in practical terms, has operated in the same fashion as a legal deadline. Likewise, the CPP established a regulation that limits the suspension of public trials, setting a strict upper limit of ten days, after which the trial would be declared void *ipso iure*. Additionally, it sets a 24-hour deadline for issuing the verdict once the proceedings have concluded and a five-day limit to render the written decision. A violation of either time limit would also result in the public trial being declared void *ipso iure*. 39

Other countermeasures were also put in place to avoid the problems and shortcomings that plagued oral trials implemented by other countries' reforms. For example, the Chilean reform instituted a division regarding public trials and created a two-tier system. Indeed, criminal courts only 40

15 Cristian Riego, 'Oral procedures and case management: the innovations of Chile's reform' (2008) 14 Southwestern Journal of law & trade in the Americas 339, at 345.

deal with cases involving crimes where the penalties are over 540 days in prison as these are considered to be medium to serious crimes under Chilean criminal law. At the same time, the *juzgados de garantía,* or pretrial judges, handle almost all the other types of hearings, such as bail hearings, interlocutory hearings and those at the pretrial stage. This court structure division has allowed the creation of specialised judges whose sole task is to preside over trials and thus avoid any time division in judges' agenda regarding the space that the trial could occupy in their regular schedule. This specialisation ensures that the judges have the time to focus exclusively on the trial at hand, having only one decision to make: if the defendant in the present trial is guilty or not.

41 Another distinctive feature of Chile's criminal courts is the possibility of reaching a negotiated settlement, which opens the door to various opportunities regarding criminal justice. The Chilean CPP establishes the possibility to engage in different forms of a negotiated settlement, such as plea bargaining and other simplified procedures. These options provide flexibility to the system but come with one important legal limitation, namely that they can, in general, only take place up to and including the pretrial stage with the *juez de garantía*. After that, the parties cannot attempt to reach a negotiated settlement as a trial must occur to resolve the matter. Given that negotiation is not an option at the trial stage, this tool and the temptation to use it is not available to trial judges.

42 The third reason behind Chile's success in implementing its reform is that since the beginning of the CPP, the unequivocal role of the trial was impressed upon the relevant legal actors, linking the role of the public trial with the case selection process so all understood that most cases would not reach the trial stage. The inclusion of this prerequisite pre-trial stage was part of an in-depth and widespread discussion regarding the principle of mandatory prosecution, which dominated the former inquisitorial system.

43 The CPP approached this subject from the opposite perspective, accepting the case selection process and trying to regulate the cases which go through to the trial stage. Part of this discussion was the general acceptance of the fact that resources are limited and no criminal justice system in the world can prosecute every case, especially if each case has to go to trial, making case selection for trial a necessity.

44 In the context of this discussion a somewhat contradictory situation takes place concerning the role of the public trial. Although in theory every defendant is entitled to a trial, the CPP was designed on the assumption that less than 3 % of the cases would reach the trial stage. That is the

rationale behind creating negotiated alternatives that introduced a series of incentives for defendants to forego their right to a trial.

The fourth factor that helped with Chile's success and later became 45
widely known in the region was the development of management tools that secured the appropriate management of personnel, infrastructure, and financial resources for oral processes and the CPP. These management tools allowed a new approach to be taken when organising and structuring the courts that accompanied the introduction of trials.

In particular, this entailed significant changes to the administrative as- 46
pects of the court system, completely separating administrative tasks from judicial work as well as removing any power and responsibility from judges regarding managing finances, other resources, the courts' calendar, workload and court staff, all of which was transferred to a new type of legal actor, court administrators. These administrators were drawn from sources external to the judicial system, often individuals with a background in engineering, business, or administration, who introduced a professional management perspective to the new court structure.

The creation of the court administrator and a shared judicial office was 47
based on the notion that the courts' former internal structure was understood to be inconsistent with what oral proceedings needed and aimed to ensure the proper implementation of the new procedural model. Thus, based on previous Latin American experiences, there was concern among Chilean reformers that if the courts' internal structure did not change, the judges' retention of administrative powers and control over court staff would lead to ongoing practices and problems. Therefore, the delegation of functions practice could survive, and eventually, the judges could delegate their participation at the hearings to judicial officials or ordered them to write the cases' rulings. This behind-the-scenes development, coupled with the separation of roles between the *juzgados de garantías* and the trial judges, ensured that the public trial would have all the necessary human and material resources to operate correctly.

Finally, a key element was the implementation process of the CPP (see 48
table I above). Since the public prosecutors, public defenders and judges were all appointed long before the reform entered into force, this allowed them to be part of a well-planned training process under the auspices of an inter-institutional programme.

Thus, said training programme allowed the key legal actors to share 49
a common space and interact regarding the new methodology for the

procedural actions, motions and hearings they would be involved in once the reformed procedure started working, including the public trial. The foregoing 'provided an opportunity, as a general rehearsal, for the legal actors to practice the main procedural interactions before the reform started working, as well as to facilitate a basic understanding that will enable those involved to act coherently among themselves.'[16] This programme focused, as mentioned, on litigation methods taken from Anglo-Saxon countries, to facilitate 'a degree of certainty so that the change of the model at the legal level would also lead to the adoption of new practices in the trials that were held in Chile.'[17]

50 In the light of the above discussion, Chile' successful implementation of the public trial can be summarised as a product of the combination of the introduction of different tools that go far beyond simply changing the law, highlighting the importance of taking a holistic approach that seeks to make proper use of effective management tools, innovative court system structure and training for the relevant legal actors.

IV. Trial by jury in Latin America: The Argentinean case from a comparative perspective

1. A regional overview

51 Contrary to popular belief, trial by jury has a long history and tradition in Latin America. However, unlike oral proceedings, the idea of implementing different forms of a jury system was not part of the basic programme of the criminal justice reform process in the region with only two exceptions, Venezuela and Bolivia. In Venezuela, the regulation (1998) established a jury of nine members to hear and decide on serious offences, particularly those with penalties exceeding sixteen years imprisonment. Also, an *escabinado* or mixed jury, was established for offences with penalties between four and sixteen years imprisonment. In 2001, a reform eliminated the nine-member jury and confirmed the lack of conditions for its application

16 Mauricio Duce, Alejandra Mera and Cristian Riego, 'La capacitación interinstitucional en la reforma a la justicia criminal de chile' (2005) 1 *Revista Sistemas Judiciales* 84 (translation by the present authors).

17 Riego, *supra* note 11, at 347.

while *escabinados* continued to be used until 2012.[18] In Bolivia, the procedural legislation (1999) established the participation of citizens in mixed juries that were composed of two professional judges and three citizens. That body decided criminal cases on offences carrying penalties of more than four years imprisonment. However, this system was repealed in 2014 due to intense criticism and controversy surrounding its operation.[19] Other than these two cases, the reform did not entail the installation of juries in the region.

Having a regional overview of this issue requires understanding the 52
current status of trial by jury in Latin America. To this end, the Inter-American Court of Human Rights, when resolving the case of *V.R.P, V.P.C. and others v. Nicaragua* (March 8, 2018, par. 223), established that 21 out of 35 Member States of the Organization of American States enshrined in law a jury system in some form, with most countries employing a classic jury. However, the significant number of States employing this type of jury is due to the English-speaking Caribbean countries.[20] If one reduces the focus to just Latin America, court systems there are still dominated by their sole use of professional judges. More precisely, research has shown that only six (Argentina, Cuba, Brazil, El Salvador, Nicaragua, and Panama) of the nineteen countries in Latin America now use any form of a jury to resolve criminal cases, although in these six countries professional judges would still resolve the most significant number of cases.[21]

Beyond the contingent situation, as we have previously pointed out, the 53
use of juries in the region was once more widespread and dates back to the birth of the republics in the first decades of the 19th century. Indeed, many of the first constitutional texts in the region included trial by jury in some form, thus following the liberal ideas prevailing at the time.[22]

18 Amietta, Santiago, 'Participación ciudadana en contexto: tendencias y modelos de juicios con jurados en clave sociojurídica' (2017) 22 Via Iuris 149, 159; Bergoglio, María Inés, 'Consolidación de reformas judiciales: Análisis de experiencias en juicio por jurado' 1 (2020) Revista Latinoamericana de Sociología Jurídica 278, 286.

19 Amietta, *supra* note 14, at 160; Bergoglio, *supra* note 14, at 286

20 Andrés Harfuch and Cristian Penna, 'El juicio por jurados en el continente de América' (2018) 21 Revista Sistemas Judiciales 112, at 113.

21 Rafael Blanco, Leonel Postigo and Fernando Guzmán, *Juicios por jurados en Chile. Un debate pendiente para la consolidación del sistema penal acusatorio-adversarial y su legitimidad ciudadana* (CEJA 2020), at 12–13.

22 Bergoglio, *supra* note 14, at 284; Harfuch and Penna, *supra* note 16, at 112–113; Langer, *supra* note 1.

2. The expansion of trial by jury in Latin America: a brief analysis of the Argentinean case

54 Nowadays, the paradigmatic case in Latin America for installing jury systems is that of Argentina. The movement in favour of trial by jury in that country sustains its arguments on various grounds, but it keeps strong links with the criminal justice reform process and efforts to improve the accusatory system operating in Argentina. Furthermore, this movement has begun to have a growing influence throughout Latin America and could become a key actor in the broad agenda to improve accusatory systems in the region in the medium term. As such, it seems appropriate to specifically review Argentinian developments within the broader context of employing juries in Latin America.

55 Like other countries in the region, and as part of the intellectual movement reflected in the constitutional texts of independence, the Argentine National Constitution of 1853, which is still in force, included three provisions that refer to trial by jury (Articles 24, 75 and 118 of the current version).[23]

56 Despite these references in the Constitution, the use of juries in Argentina has been implemented in a somewhat disjointed manner, namely only in the Province of Córdoba in 2005. This is because Argentina is a federal State divided into 23 provinces plus the independent jurisdiction of the Autonomous City of Buenos Aires (hereinafter "CABA"), besides the federal criminal justice system. The regulation of the criminal procedural system is a provincial competence and currently, only ten provinces, plus CABA, have a trial by jury system.[24] The new, but not yet in force, Code of Criminal Procedure of the Nation (which regulates federal jurisdictions) also includes trial by jury, even though it does not regulate its development, which is left to enact a later law.[25]

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23 Andrés Harfuch, '*El juicio por jurado en Argentina ¿A qué se debe su éxito?*' (Agenda Estado de Derecho, 17 November 2021) <https://agendaestadodederecho.com/el-juicio-por-jurados-en-la-argentina/> accessed 20 January 2022; Schiavo, Nicolás, 'El juicio por jurados. La Experiencia de Buenos Aires y Neuquén, Argentina' (2019) 25 (2) Revista Ius et Praxis 223, at 224.

24 These include the provinces of Buenos Aires, Catamarca, Chubut, Córdoba, Del Chaco, Entre Ríos, Mendoza, Neuquén, Río Negro and San Juan. Chubut, San Juan, and CABA did not record any lawsuits carried out as of the date of this research.

25 Information obtained from the website of the Argentine Jury Trial Association, available at: http://www.juicioporjurados.org/p/legislacion.html (last visited on

While there exist a few differences in each province's regulations, the vast majority have implemented a classic jury model made up of 12 members. An interesting element is that they have all included rules to ensure equal integration of men and women. The only exception is the Province of Córdoba, which implemented an *escabinado,* or mixed jury system, consisting of 8 regular jurors (plus four substitutes) and three professional judges where, nevertheless, the equal integration rules are still applicable. It must be noted that the Cordovan model's approach to the classic jury system was based on a judgment of the Superior Court of Justice of the Province (Decision No. 260 of 8 May 2017) which established, among other issues, that the judges' deliberation had to be done without the presence of professionals. 57

There are also variations throughout the provinces regarding the cases in which a trial by jury should be used. In all the provinces, the jury system is reserved to resolve only serious cases, the classification of which is usually based on the penalty established by law for the crime under consideration. As such, several provinces have mandatory trials by jury in cases where the penalty is incarceration for 20 years or more (CABA, Catamarca, Entre Ríos and San Juan), some set the minimum benchmark at 15 years (Buenos Aires and Neuquén) or 12 years (Río Negro) while other provinces use a different means of assessment (for example, in Mendoza any case involving aggravated homicide). A positive factor in facilitating their implementation process is that these restrictions have contributed significantly to keeping the percentage of cases that use trial by jury small. This is reflected in the statistics from, for example, the Province of Buenos Aires in 2017 where juries were used in just 0.57 % of trials and in Neuquén where the figure from the same year is 1.29 %.[26] 58

The way juries make decisions throughout Argentina also has a few differences. The prevailing model, observed in five (CABA, Catamarca, Del Chaco, Entre Ríos, and Mendoza) of the eleven jurisdictions using juries, seems to require a unanimous decision, as is typical of the jury system in the United States. As an intermediate approach, some provinces (Chubut and Río Negro) established unanimity as a rule but then allowed qualified majorities of ten votes in cases when such unanimity could not be achieved 59

December 7, 2021). From now on, the information on different aspects of the jury configuration in Argentina has been obtained from the information available on this page, which contains reference to the laws of all these provinces.

26 Schiavo, *supra* note 19, at 231–232.

after a debate of a certain length. In contrast, the Province of Buenos Aires requires unanimity only in cases where the sentence would impose a life sentence, in other cases a ten-vote majority suffices if unanimity cannot be reached. Conversely, several provinces have abandoned the unanimity rule altogether and opted for various majority based decisions. For example, in San Juan, ten votes are required to impose life sentences while eight suffices for any other sentences; in Neuquén, only eight votes, and in Córdoba, a simple majority of 7 is enough for life sentences.

60 To date, several empirical studies have evaluated the results obtained from Argentina's overall engagement with the jury process.[27] The research analysed several indicators drawn from sources around the country that shows a certain level of success in the use of juries that helps to explain the speed at which this form of trial is being embraced. To begin with, the analysis has shown that the first challenge that the creation of trial by jury imposed on the criminal justice system was successfully overcome, namely that the system had the capacity to successfully implement these trials. For example, as of 31 May 2021, a total of 1,154 trials by jury have been conducted in Argentina, with the provinces of Cordoba and Buenos Aires having conducted the most, 665 and 400 respectively.[28] Furthermore, those who participated as jurors have provided good evaluations of the experience which resulted in them having a more positive assessment of the judicial system than before and a willingness to engage in public issues after their jury service. Moreover, the key actors in the criminal justice system have provided positive assessments and voiced positive opinions on jury decisions.

61 As noted above, the emergence and expansion of the use of trial by jury in Argentina are due to the confluence of different forces and factors,

27 *See* María Inés Bergoglio, María Eugenia Gastiazoro and Sebastián Viqueira, '*En el Estrado: La consolidación de las estrategias participativas en la justicia* penal' (Advocatus: 2019); *See* Sidonie Porterie and Aldana Romano, *El poder del jurado, descubriendo el Juicio por Jurados en la provincia de Buenos Aires* (INECIP 2018), for the study of the province of Buenos Aires. *See* Sidonie Porterie, Aldana Romano and Valerie Hans, *El Jurado neuquino. El comienzo del Jurado clásico en la Argentina* (INECIP 2021), for the study involving the province of Neuquén. *See* Schiavo, *supra* note 19, for a joint study involving the provinces of Buenos Aires and Neuquén.

28 Javier Drovetto, 'Los ciudadanos y ciudadanas revolucionan la justicia: hasta los jueces, fiscales y abogados elegirían ser juzgados por personas comunes' (Infobae, 16 June 2021) <https://www.infobae.com/america/soluciones/2021/06/16/los-ciudadanos-y-ciudadanas-revolucionan-la-justicia-hasta-los-jueces-fiscales-y-abogados-elegirian-ser-juzgados-por-personas-comunes/> last accessed 20 January 2022.

including efforts to improve public perception and confidence in the criminal justice system. However, it is important at this point to also highlight trial by jury's link with the process of installing new accusatory systems in Argentina.

62 Following the regional trend, most of the provinces have progressed in the last 25 years in the implementation of new accusatory systems that replaced various modalities of the old inquisitorial systems. However, as we already mentioned, in many Latin American countries the available evidence has identified serious difficulties for its proper functioning and to allow trials to be carried out as originally intended. For example, problems such as the fragmentation of trials hearings over long periods, the substitution of the witnesses and experts' in-person appearance with the introduction of written records produced in the investigation, poor quality and poor preparation of trial lawyers in litigation, the lack of prior filters of evidence, among others.

63 In this context, the installation of juries has also been part of an agenda to strengthen trials and accusatory systems with a view to also eventually changing some dimensions of the country's legal culture.[29] In this regard, expert assessments on this matter show how important the contribution of trials by jury are to bring about improvement and address several of the systems known deficiencies. For example, trial by jury has forced the litigants to be better prepared for the trial, led to more intensive efforts to filter the evidence being presented in the admissibility discussion, forced witnesses and experts to appear in-person the courtroom as well as contributing to trials being conducted in shorter, non-segmented timeframes.[30] Thus, the obvious question is whether Argentina's innovative adoption of trial by jury could be embraced by other countries in the region to address similar problems they are experiencing in implementing new forms of criminal trials.

64 Argentina's experience with juries is positive and is now beginning to play a notable part in the debate on the subject. This is likely to have a ripple effect throughout the region and lead to other countries more seriously discussing trial by jury as a central element of their respective reform programmes. Criminal justice in the region has for decades experienced practical and procedural problems that have served to create consternation from a legitimacy and public trust perspective. In this regard, the incorpo-

29 Harfuch, *supra* note 19.
30 Harfuch, *supra* note 19.

ration of citizens into judicial procedure via juries may go a long way in helping to deal with these issues.

V. Conclusion

65 The process of transforming Latin Americas' criminal justice systems has been a consequence of an important political and technical effort aimed at the introduction of more democratically based and efficient criminal procedure models throughout the region. Critical and central to this process has been the implementation of public oral trials.

66 In the 25 years since the first procedural reforms were implemented, it is possible to see how different obstacles still prevent the consolidation of the new procedural structure. The gap between the law in the books and the law in action is still considerable in many areas, the implementation of the public trial being a paradigmatic example of this troublesome process. Notwithstanding this, it is clear that there have been some positive experiences and successes that show pathways do exist that will allow for the effective implementation of public trials as a central feature of the new systems now being introduced. In this matter, the Chilean case shows the importance of accompanying legislative change with an organisational and administrative reform regarding the court system's internal structure. Chile's example also highlights that this needs to be done in partnership with an implementation process that acknowledges the complexities of transforming the legal culture, highlighting the need for proper planning and the re-training of all the key legal actors involved. The Argentinean case, while differing in detail from Chile, has some similar positive impacts in that it highlights a viable new approach to aspects of criminal procedure reform, especially concerning ways to address the critical lack of public confidence in the judiciary and the justice system while simultaneously improving the system. At the same time, Argentina's efforts show the importance of managing the implementation process that must inevitably follow the legal design stage.

67 From all the above, it can be clearly seen that Latin America's ongoing reform process to its criminal justice system has had both successes and failures. However, what is arguably the main point to keep in mind, is that the reform is ongoing. Indeed, it seems more appropriate to consider it as at the beginning of the transformative process and many of the missteps that have arisen to date as early-stage teething problems. When it will finally end and to where will it lead is something that remains to be seen. In

the meantime, all those involved, citizens, academics, external experts and the legal actors directly involved in criminal justice, need to continue to provide input and evidence to allow accurate assessments of the impacts of the reforms and their effectiveness in producing the real changes and improvements that the process is ultimately striving towards.

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