



# Latin American Criminal Justice Reform: Evaluating the evaluators

Linn Hammergren - World Bank\*

*Sr. Public Sector Management Specialist Poverty Reduction and Economic Management Unit Latin America and the Caribbean Region,*  
lhammergren@worldbank.org



En este comentario al Informe Comparativo del estudio «Seguimiento de los Procesos de Reforma Judicial en América Latina», la autora identifica los que -en su opinión- son algunos de los problemas que enfrentan los evaluadores. A saber: el *timing* (¿demasiado pronto para medir resultados?); cierta ambigüedad, compartida con los reformadores, en cuanto al modelo que se implanta (sistema acusatorio estadounidense, europeo o algo nuevo); y la falta de obvios indicadores de progreso. Según la autora, hay demasiado énfasis puesto en el juicio oral y haría falta saber (y así recoger datos sobre) lo que pasa con los casos que no llegan a esa instancia. La oralidad, dice, es un medio; el objetivo es hacer el proceso más eficiente, eficaz, y humano. Sugiere, de este modo, que estos nuevos valores se tienen que introducir y medir en cada etapa del proceso, y no sólo en la minoría de casos que va a juicio oral.

When Latin America began its current criminal justice reforms the process was informed by far too many axiomatic principles and far too little interest in testing anything. For someone who like myself, grew up hearing about the shortcomings of the accusatory process, it was always amazing to see it lauded as automatically more respectful of due process rights, more effective in bringing the guilty to justice, less costly, more transparent, and more timely. Perhaps, as compared to what transpired in most Latin American countries, it was -but the U.S. and other countries following the accusatory system have their fair share of horror stories to recount.

In any case, I long ago gave up trying to argue the merits of the accusatory or inquisitorial systems in the context of real reforms. Criminal justice did require reform in Latin America. If a faith in the accusatory system could leverage necessary change, than it would have been counterproductive to contest it. (Similarly, whatever doubts one may have as to the impact of judicial reform on economic growth, if that belief is what motivates a country to improve its courts, questioning it is foolhardy.<sup>1</sup>) Still, on a practical basis, there remained the concern that a blind faith in the superiority of certain structural choices might divert attention from the need for resolving problems with other causes -inadequate funding, politicization, corruption, social prejudices and so on-. I think to some extent those oversights did occur, but because the underlying interest was in improving criminal justice, they can still be remedied. Whether correctly placed or not, the faith in the accusatorial system got the reforms started, and that same faith is pushing the reformers to fix the other problems as well. The recent series of evaluations sponsored by CEJA and INECIP<sup>2</sup> is a good start in that direction.

\* The views expressed here are those of the author and do not in any way reflect World Bank positions or policy.

<sup>1</sup> Still, after years of accepting the mantra that "a well functioning judicial system is a necessary condition for the development of a market economy", a number of researchers are now suggesting otherwise, or at least casting doubts on the validity of the usual evidence. See for example Hewko (2002).

<sup>2</sup> See Baytelman (2002), Coppola (2002), Rivas (2002), and Riego (2002).

## THE ROLE OF EVALUATION

Contrarian to the end, while overjoyed to see evaluation finally getting the attention it deserves, I would also caution about the difficulties of its task. Like many other reform elements (law writing, training, and automation, for example), evaluation is easy to do, but hard to do well. Good evaluation requires an ability to analyze its subject within the broadest possible context. Evaluators are not expected just to bring another viewpoint to the table. They should understand what the implementers are trying to accomplish and enrich that understanding with lessons drawn from their own and others experience.

Their task is not simply to identify problems, but to prioritize them, detect their root causes, and suggest realistic remedies. An evaluation's ultimate objective is to improve performance, not simply grade it. In the context of the current criminal justice reforms, there are numerous obstacles to realizing that goal.

One immediate problem is the question of the timing. ¿Is it fair to look at Chile only nine months into the process? ¿What can one really say about resolution rates, durations, or other obvious measures so soon after the new proceedings have been introduced? It may not be too early to detect problems. It is far too soon to talk about results, and the efforts to do so risk misrepresenting what is going on. The misrepresentation does not always place the new system in a bad light. Premature evaluation will understate the number of cases completed. It will also understate the time to disposition, as by definition any disposed case must have been concluded within the evaluation period. This is one reason why the older systems show longer median times to disposition. (The other reason, as in Costa Rica, is that they are clearly dealing with cases initiated before the changeover.<sup>3</sup>)

Early evaluations can lead to misguided recommendations. The evaluators are right that most of the human resources assigned to the new courts and other organizations are underutilized, but we can hardly take the current demand as an indication of eventual needs. Before reassigning staff, it might be well to see what happens over the longer run. Otherwise the reformers will be in the situation of the Colombians who in the early years of their criminal code reforms reassigned the apparently underutilized criminal judges to civil courts. A year or two later, once the Fiscalía got up to speed, criminal court judges were again in short supply and creating new bottlenecks. The current experience might be better used to phase in the human resources in the next reforms or next stages of the on-going ones. Chile now knows that trial court judges will be needed later rather than sooner and thus can fill those positions more slowly than it did in the first provinces. While the early results seem to indicate an overabundance of *jueces de garantía*, here too real needs may not yet be apparent.<sup>4</sup>

A second obstacle, even in reforms (Córdoba, Paraguay, and Costa Rica) with a longer track record is the continuing lack of clarity as to the model being adopted - what kind of accusatorial system each country wants to implement-. Concerns about the underutilization of staff or their inadequate performance, which hardly are limited to Chile, cannot be satisfactorily addressed without further attention to this question. The evaluators can play an important role in encouraging the necessary discussions, but only if they recognize the persisting lack of definition.

There is no space here for a detailed comparison of the models, but only to note that the accusatorial system, like all other major legal traditions, takes a variety of forms. Its operation in the U.S or Great Britain, or in its modified form, in Germany, and Spain is hardly uniform.<sup>5</sup> The U.S. version stands alone in its use of highly adversarial oral trials for a minority of cases (2 to 10 percent) and its reliance on plea bargaining for the vast majority. The system has been criticized for its costs, lack of transparency and relative unpredictability,<sup>6</sup>

<sup>3</sup> I say this because the maximum and some "average" durations for certain stages are well over four years.

<sup>4</sup> Still I find it hard to believe they could not handle several times the caseload of a trial judge - and the current distribution instead approximates a one-to-one ratio. This seems excessive, but the real question is what it is they are expected to do. It is not always clear whether or not they handle abbreviated processes. If they do, then of course their real workload is much greater.

<sup>5</sup> For comparative discussions see Jacob et al. (1996), Fennell (1995), Fionda (1995), Kagan (2001), and Strier (1995). Blankenburg (1996), p. 289 discusses judicial activism in Germany.

<sup>6</sup> This is due not only to the emphasis on lawyer skills, but also to the vagaries of jury decisions. See Kagan (2001). While writing on civil juries, Sunstein et al. (2002) is one of the definitive treatments.

and lauded for its ability to produce occasional David vs. Goliath victories. The European transition to more accusatorial proceedings still retains many inquisitorial elements, as does the traditional English version – a more proactive judge, reliance on prosecutorial investigation, which may or may not reach the judge as a written case file, far more frequent, but shorter and less adversarial oral trials, and the prosecution's ability to negotiate a lesser penalty with the offender, albeit not one involving a confession or judicial acquiescence.<sup>7</sup> One could treat the different approaches as a question of degree, but the basic issue is more radical than that. It appears to require a fundamental choice on the part of the Latin American reformers.<sup>8</sup>

The lingering ambiguities only increase a traditional evaluation dilemma -whether to assess a project on its own terms or against some external standards-. The best evaluators do both, and ironically, the hardest part may be defining the project-specific criteria –what it is the reform designers are attempting and how they envision achieving it-. The two sets of standards should allow the evaluators to tell the local reformers how they are doing on their own terms, and also to suggest where those terms might be improved. This typically requires two sets of evaluation criteria, one tailored to the local preferences and the other drawn from a broader vision of the task. This is an extraordinarily difficult challenge. It is not evident that the evaluations done to date have mastered either side of the equation. The evaluation teams appear to share a common vision, but one that neither captures the potential variation among the systems studied, nor reflects an adequate understanding of the feasible alternatives. In short, the evaluators, much like the local reformers, are still struggling with the question of what an improved system will do and how it will do it.

For example, during the Río meetings on the reform achievements,<sup>9</sup> the amount of evidence presented by the prosecution and defense was one point of evaluation. In the U.S. version of the accusatory process, one would not expect the defense to provide as much evidence *because the defense shouldn't have to prove anything*. The role of the defense is to cast doubts on the prosecution's arguments -and that alone should be enough to win its case-. This difference in the burden of proof is what helps the defense compensate for an almost inevitable lesser quantity of resources. No country provides its public defenders with as many resources as it gives the prosecution; and except for a few very wealthy clients (the O.J. Simpsons) most private defendants are also at a financial disadvantage. The accusatory system does give the defendant an independent spokesperson; it never appears to give him equal funding. (This is still more true in the European version because of the reliance on a more neutral prosecution office to establish the facts of the case and on the judge's greater involvement in the court-room arguments and even in pressing for further investigation.)

Another example is the emphasis on number of oral trials and time taken for judgments. These are important descriptive statistics, but it is unclear what further inferences should be drawn from them. The only obvious conclusion is that judges are underutilized. That tells us that the system is inefficient, not whether it is ineffective. The lower than anticipated (by the evaluators) use of abbreviated proceedings and mediated remedies is another case in point. It may indicate actors' lack of experience, or it may arise in their different assessments of the value of these mechanisms. Evidently, some participants believe an abbreviated proceeding violates the defendant's due process rights and thus would avoid using it no matter how well trained in the techniques. The more general point is that one can't evaluate the parts absent an understanding of the whole, and that the prevailing lack of agreement on what that whole looks like makes it difficult to select indicators or to assess their significance. One cannot avoid the impression that the very lengthy evaluations are counting many things that have no apparent relevance to the immediate project.<sup>10</sup> The host of descriptive statistics may have greater value as baseline data once the process is better understood. In the meantime, they are just so much noise.

<sup>7</sup> See Fionda (1995) for a comparative treatment of prosecutorial powers. Fennell et al. (1995), Jacob (1996), and Kagan (2001) are also useful.

<sup>8</sup> In discussing the possible convergence of the two systems, Jörg et al. (1995, p. 41) reach a similar conclusion, holding "that there is a critical limit at which each system would start to risk disintegration." Damaska (1997) offers an excellent discussion of the differences as well as caveats on the dangers of eclectic borrowing from each.

<sup>9</sup> Sponsored by CEJA and INECIP, April 3 and 4, 2002.

<sup>10</sup> Gender and socioeconomic identity of the defendants are one example. Perhaps these will have some significance later on, but at present they receive no further attention in the analysis.

A third obstacle, a result both of timing and the conceptual ambiguities, is the lack of overall performance indicators. As one of the evaluators notes,<sup>11</sup> the multiple objectives attached to the reforms complicate efforts to set outcome goals. Nonetheless, just as it is difficult to assess the parts without defining the whole, it will be hard to measure progress without some notion of the cumulative changes in outputs. Over the short run, evaluators might focus on a few summary statistics that define performance in its broadest sense. The most obvious choice, conspicuous by its virtual absence, is disposition rate (versus initial complaints) and type (how cases are closed). While omitting many important details, this is arguably the statistic of choice for telling us how the system is doing. The fact that it is for the most part ignored raises important questions as to what the evaluators believe they are trying to detect.

A few further refinements might also be required. One of these covers the types of cases being resolved. The final objective of any criminal justice system is to identify the guilty and bring them to justice, while lessening (eliminating) any burden on the innocent. As in most instances, there are just too many reported crimes to handle, the system should work best for the cases accorded the highest priority (which generally, but not always, are the most serious crimes). The more detailed evaluation of the Chilean reforms<sup>12</sup> indicates that disposed cases are predominantly those involving minor offenses (largely related to alcohol). This is a logical but not terribly positive development, and an area where remedial actions are surely indicated.

This composite statistic can be further divided by the various stages of the process and types of outcomes: percentage of reported crimes investigated, percentage of suspects identified, percentage of suspects processed and given some sort of resolution, percentage of convictions or sentences (which may be negotiated, etc). Its utility would be enhanced if the evaluators developed a single means of presentation, perhaps a graphic pyramid or flow-chart showing the fate of complaints as they move through the system. With each exit from the pyramid (cases which do not move on), form of disposition might be shown in an accompanying graph. This kind of composite would of course lose much of the rich detail afforded by the individual measures, but it would help situate them and highlight their own significance and explanatory value. Still, issues of quality might be better addressed within this framework -for example by the analysis of a random sample of closures and verdicts to test for values like equity, fairness, bias, and so on-.

To put some further order to this section, I focus the remaining discussion on three questions:

- ¿What are we evaluating?
- ¿How and against what are we evaluating?
- ¿To what end are we evaluating?

## ¿WHAT ARE WE EVALUATING?

It should first be evident that we are not evaluating the superiority of the accusatorial system on any of a number of dimensions. This is primarily because there is no such generic entity, and even if there is, the Latin American variations do not necessarily correspond to it. A second, and still more ignored consideration, is that the reforms are also putting more funds and efforts into making criminal justice work -the same funds and efforts put into an inquisitorial system might have had the same or better results-.

The immediate task is a different one: to evaluate the success of a given country in implanting a new criminal justice proceeding with certain specified ends. These ends ultimately refer to impacts, but for the moment we will just assume they mean the efficacy of predetermined structural and functional changes -what the reformers proposed to alter in how the system works-.<sup>13</sup>

<sup>11</sup> Riego (2002), p. 3.

<sup>12</sup> Baytelman (2002). However, one positive sign is that as opposed to the prior year, they represent a lower proportion of cases resolved.

<sup>13</sup> Baytelman (p.5) appears to be adopting this approach.

The evaluation thus should focus on behaviors and short-term results -what the system does differently and with what immediate consequences-. Because behaviors (changes in what is done) are affected first, they will naturally be emphasized in early evaluations, and they must be evaluated at every stage in the process. We thus need to know how and what the police are doing, and have to answer the same questions for the prosecutor, defense counsel, judge, and if we really want to be complete, the prison authorities as well. Unfortunately, the fascination with the oral trial has precluded this level of detail in most of the evaluations. Obviously, oral trials are more accessible to the evaluators, but so far as how the system works, they are a small part of the story. In fact, it is entirely possible to have perfect oral trials in an otherwise ineffectual system. With all due respect for the evaluators' fascination with the oral trial, the real question is what is happening to the other 95 percent of the cases that never got that far -not how many questions the judge posed or what kind of evidence was presented in the oral hearing-.

The emphasis on the oral trial suggests another problem, that of deciding which procedural elements warrant emphasis. We (or the implementers) may have chosen the wrong processes, so that over time they will not achieve the desired impacts. The history of reforms, within and outside the justice sector, is full of such examples. Mexico in 1996 made changes to its summary debt collection proceedings to increase their efficiency. However, the Mexicans had not analyzed the proceedings sufficiently and thus chose to intervene at points that had little impact on their objective.<sup>14</sup> The RAND analysis of the civil justice reforms implemented in the United States in the 1990s also illustrates a reform plan that was implemented, but failed to produce the promised results, probably because it never understood the problem adequately.

The way to diminish this risk is to start tapping outcomes as soon as possible -via the kind of summary performance measures discussed above-. This must be done carefully, because what a system can produce over ten years, may not be revealed in its first year of existence. Over the short run, we will have to accept the reform design as valid and only assess whether it has been put into place; over the medium to longer run we pay more attention to outcomes, and thus begin to evaluate the reform design itself. If the outcomes have not occurred as predicted, we have one of two interpretations: either the design was not adequately implemented or it was in error.

The only exception to this general rule is our ability to evaluate design on the basis of past experience. If experience tells us that certain remedies are not effective, we don't need to test them for an nth time. We can simply identify them and suggest substitutions -or we can look to the predicted signs of inefficacy earlier on, because we already know how they will occur-. Thus, because the use of *defensores de oficio* (lawyers appointed to defend indigent clients, and operating outside any sort of national organization) is not very effective, we can look for the usual signs of inefficacy -tendency to devote time to non-indigent, paying clients, low caseloads, tendency to show up only at the final oral trial, and so on- to suggest this case is no exception.

## ¿HOW ARE WE EVALUATING AND AGAINST WHAT?

Evaluation is not done in a vacuum. It requires standards and, ideally, a control or comparative baseline. Here the focus shifts from the categories of analysis to the criteria for assessing the findings. For the most part, the evaluations fall short in this regard. In many cases, there are no criteria, and statistics are presented without analysis. In others, the evaluators' subjective, or inter-subjective, appreciation plays a major role.

There are more objective ways to establish evaluation criteria. One obvious choice is international comparison -using data from more developed systems as a means of assessing those collected from the target countries-. This would at the very least counter what appears to be a strong dose of intuitive interpretation -the evaluators' sense that certain times and frequencies are inappropriate-. Of course, international data are at

<sup>14</sup> Hammergren, et al. (2002).

best referential. One cannot assume that the length of pre-trial investigation or frequency of oral trials in Germany, the U.S. or Great Britain sets the standard for Latin America. As noted, in the US, few cases go to oral trial (and contrary to the evaluations' holdings, these are equally distributed between jury and bench trials<sup>15</sup>). The French inquisitorial system does a far better job here. If oral trials were the determining factor, the French inquisitorial system might win hands down, and the US system would soon fall behind any Latin American accusatorial version. How many cases get to oral trial may thus be less a measure of system quality, than an indication of the type of system and how it logically disposes of its cases. Until the Latin Americans answer the latter questions, they cannot determine the significance of the changes they produce.

A second problem is the scarcity of comparative data. The available research on trial durations is far from systematic. It does indicate considerable variation between and within systems and also appears determined by the choice of model. Even as a very limited reference, it might enlighten the Latin American discussions. It is worth noting, for example, that for major crimes, even "concentrated" hearings usually take place over days. Thus, one U.S. study from the 1980s found a median duration of 14 hours, spread over four days, for jury trials of felony cases (excluding death penalty cases). In Oakland, California, homicide trials averaged 44 hours, and roughly two weeks, before jury deliberations.<sup>16</sup> In contrast, research on German felony trials from 1989-90 indicated an average length of 2.8 days for the most serious and 2.4 for lesser crimes. Unfortunately, the Latin American concern about deliberation times does not appear to be shared by other researchers, and thus there is nothing to offer here.

A still more logical source of criteria is past, pre-reform performance. If the codes were supposed to alter behaviors and outcomes, than the reasonable question is whether they have. Here too, selecting categories for individual or comparative evaluation is tricky, and will vary depending on whether we are trying to assess progress in introducing change or in improving performance. If oral trials and abbreviated processes did not exist before, the fact that they are now being held is significant. However, it only indicates that some change has occurred, not whether it represents a reasonable return on the efforts invested, or an improved set of outcomes. Before-and-after or cross-system comparisons may be more easily conducted for procedural stages (police investigation, pre-trial preparation of the case) which have remained more or less constant under the old and new proceedings. (That is not to say that they retain the same content, but only that they are still necessary steps.) Here a comparison of percentage of cases completing each stage and average duration makes sense, as does the duration of the total proceedings from start to verdict. As discussed below, there are some further complications, however, owing to the simultaneous introduction of new policies for selecting or discarding cases.

Because the reforms were supposed to be money saving, costs might also be a category -although again one must be careful what one is comparing-. Mere changes in output costs (how much for case processed) are really not the issue because of concerns about quality and cumulative impact. Likewise, total investment and operating costs are worth noting, but in themselves tell us relatively little. In any event, the ideal measures, focusing on both qualitative and quantitative change and improvement will continue to be impeded by a series of factors.

First, in many countries (but perhaps less in Colombia, Costa Rica, and Chile) judicial statistics have been more poetic than scientific. Current efforts to increase their accuracy can thus over or understate recent accomplishments. Second, the enormous quantity of unreported crime, and of that reported which cannot be investigated is problematic. To the extent new procedures screen out the garbage cases and focus on those assigned a higher priority or just more likely to be resolved, they may look to be doing less -fewer investigations and fewer cases brought to trial- although they may actually be more effective. Third, a shift to performance monitoring will encourage "cherry picking" (selection of cases on the basis of ease of resolution) or even manipulation of statistics. In the New York police reforms of the 1990s, it took an experienced ex-prosecutor

<sup>15</sup> Jacob (1996), p. 42.

<sup>16</sup> Cited in Kagan, p. 82.

like Mayor Rudolph Giuliani to keep the police from cooking their data. Finally, on the logical assumption that different organizations and organizational actors will improve at varying rates, looking only at final outcomes may not capture much of that partial or intermediate improvement. Although final outcomes are our ultimate concern, evaluations have to capture the contributions of the parts.

In the evaluations done, with the exception of that in Chile, comparisons of current with past performance are not provided. In some cases, that may be because statistics are not available, but one suspects that for at least for Córdoba and Costa Rica, they are, and thus their absence is still more puzzling. However, even if compared with past performance, one would have to consider the CEJA/INECIP effort a process more than an impact evaluation. This may be most appropriate, and the only thing feasible at the moment, but it does pose risks. If the procedural elements assessed are not the critical ones, then the evaluation may divert attention to the less important aspects of the change. Evaluation is a potent tool, but if misapplied that potency can hinder rather than aid in making future improvements. Thus, while the initial effort is valuable, I would suggest far more discussion and debate over both the common and nation-specific variables that will be tracked. The current efforts are an enormous improvement over past measures of *entradas* and *salidas*, but further adjustments would enormously increase their value.

The evaluations also offer extensive qualitative observations as well as the authors' own explanations of the reasons for apparent failures and successes. My only caveat is that most of these are based on the evaluators' preconceptions of how things ought to work, and thus neither capture the participants' aims nor draw on an adequate understanding of how the criminal justice process works elsewhere. The evaluators have their own model in mind, but there is no telling whether it is a model that would work, even if perfectly implemented. This does not detract from the value of their observations; it is a caution as regards their status as the final word on what is wrong and how things might be improved.

The basic challenge is to find ways to measure changes in both quantity and quality, or at least to select quantitative values that most closely capture qualitative change. A reform which simultaneously strives to alter output and content, efficiency and efficacy, is the most difficult to evaluate. It can do more by doing less, or less by doing more, and the evaluators must be sensitive to both possibilities. The challenge is further complicated by the very ambiguity of the goals pursued and of the path envisioned for their achievement. The evaluators seem to recognize the difficulties, but have not found a way to overcome them. In this situation, they cannot simply arrive and measure, but will have to engage in constant discussions with the implementers to help the latter define and refine their own objectives. Without this discussion and without their willingness to consider their own task as a work in progress, the evaluators represent simply one more set of views as to what is occurring, and one with no greater authority than that of the other participants.

## ¿TO WHAT END ARE WE EVALUATING?

As I am sure the evaluators would agree, their objective is to understand what has been achieved so as to raise the likelihood of making more progress both in the countries assessed and on a regional basis. This is the expected role of evaluation, but one often ignored in favor of documenting problems. This would be a particularly unfortunate choice in the context of the criminal procedures reform. The multiple uncertainties and ambiguities of the reform process itself not only complicate the evaluators' task, but also recommend a more interactive role than usual. Evaluation will have to make an iterative contribution to the task of defining the reform strategy and objectives. It cannot simply judge, but must also engage in and encourage further debate.

An evaluator who appears saying he is only there to help is about as credible as a tax collector arriving with the same message. Here a certain measure of humility may help. It would be presumptuous to suppose that the evaluators, any more than the participants, know where the reforms should be going, or what in fact are the immediate indications of success or failure. The evaluators are also working on guesses and hunches, and should be prepared to discuss (less than defend) their choice of indicators, both before and after the fact. In the

best of circumstances they will be more like participant observers than neutral judges, and at least over the short run, will be part of the on-going strategy building effort. They will provide invaluable information, but not necessarily the last word on what has really been achieved. Given the desirability of publicizing their findings and inviting criticisms, this will be a hard role to maintain. In the interests of producing real improvements, it is nonetheless a necessary one. 

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