

CODE OF CRIMINAL PROCEDURE

RATIONALE BEHIND THE CODE

The horizon of ethical thought in our time is framed by human rights, and therefore the yardstick for measuring a legal text is its consistency with the declarations, conventions and agreements signed by the country on the recognition, proclamation and guarantee of the inherent rights of human beings, all of which are protected by Article 50 of the Constitution.

Venezuela belongs to the family of nations that recognize in the dignity of human beings an essential value that should serve as the foundation for the creation, interpretation and application of positive law. It is an ethical value which, like the North Star, should guide the work of legislators, bureaucrats and judges.

The Venezuelan Republic is signatory to the following basic international instruments: the Universal Declaration of Human Rights (1948), the American Declaration of the Rights and Duties of Man (1948), the International Covenant on Civil and Political Rights (Official Gazette of Venezuela of 28 January 1978) and the American Convention on Human Rights (Pact of San Jose, Costa Rica) (Official Gazette of Venezuela of 14 June 1977). On signing these instruments, the country assumes obligations not just toward with other states in the international community but, chiefly, toward the individuals who live under its jurisdiction. The common denominator of these obligations is the recognition of and respect for the rights that are protected by declarations and conventions, i.e. proclaiming them and guaranteeing them. These instrument, to which Title III on Duties, Rights and Guarantees of the Venezuelan Constitution should be added, as well as the direct and indirect means of protecting human rights (appeals and ordinary proceedings) constitute the block of human rights, an internationally-recognized model of legitimacy that should govern the evaluation of our legal texts.

What do the assurance that have been given in the name of the Republic oblige us to do? These international obligations imply respect for the minimum guarantees that are entailed in the concept of due legal process: to be told the nature of the charges; to be given time to prepare a defence; to be tried without undue delay; the right to defend oneself directly or through a defence counsel of one's choice, remunerated or not; the right not to incriminate oneself; to question prosecution witnesses and to call witnesses for the defence; to be heard by an independent and impartial magistrate, established in advance by law, in a public, oral trial; and the right to appeal a guilty verdict.

Can the code of criminal procedure that has governed us, pass the human rights test? The answer is a categorical and ringing "no". Our code of criminal procedure, examined from the standpoints of legality and effectiveness violates the basic procedural principles that we are called upon to guarantee.

Venezuela's criminal procedure, mixed in its origin, was gradually perverted (from investigation by the courts to investigation by the police and the possibility of admitting information acquired in the preliminary proceedings as evidence) to become an almost purely inquisitorial process. The preliminary proceeding, which was a preparatory stage for the full trial, became the principal stage, where the police prepare the case, arrest the 'alleged' author of the crime and, to cap it all, in violation of express legal requirements, condemn the person publicly through the media. The ordinary trial, deprived of all substantial content, has been turned into a meaningless ritual. As things stand today, criminal trials end, materially, with the arrest warrant.

If there is one urgent task that can be undertaken to restore democratic meaning to the criminal justice system, it is to remove these powers of case preparation from the hands of the police who, owing to a degeneration of the criminal proceeding, have become the main player. The magistrates simply carry out their designs, which has led Raúl Eugenio Zaffaroni to write that the situation “downgrades the country’s judicial branch to the status of a mere accessory of the executive branch” represented by the police. Judges in Venezuela have clearly become assistants to the police.

In addition, we practise “paper justice”, where the human being to be judged is buried under a mountain of bureaucratic files.

The judge’s eye sees no further than the papers on the file; he does not know the face of the accused; he has never seen the gestures or heard the voice of a witness or an expert. He only reads the reports prepared by police officers, who moderate the statements of the accused and witnesses through their own training and vocabulary. The sentence handed down by the same judge who is in charge of overseeing the investigation and who, in that capacity, issued the arrest warrant, is and cannot be anything more than a gloss on police proceedings, with brief references to the defence and the charges laid by the public prosecutor, with defence and prosecution being no more than bit players in the inquisitorial scenario, where the police and the magistrates share the limelight. Appeals are a second reading of the file, even further away from the human being being tried - a reading often done by the same judge who confirmed the arrest warrant. The higher court, which returns the judgement bristling with formalisms, never examines the substance of the case so that it can impart justice; it merely follows procedure. This whole criminal process leads to the imposition of a sentence the serving of which turns into a nightmare, where the abysmal distance separating the intention behind the penitentiary system from reality is very clear.

In a democratic society, the criminal process should not be a simple tool for repression. It should be a series of rules which, preserving procedural guarantees, permits the magistrate to learn the truth of the events and apply the rules called for by law and by justice. As Horst Schönbohm and Norbert Lösing state, the just procedure is to find the path between the need for an investigation to carry out material criminal law and the protection of the rights of the accused. This is the mission of criminal procedural law.

Criminal procedure is not a purely technical device (Cappelletti), a journey to arrive at a decision. It is also a “barometer of the authoritarian and corporate elements in the Constitution” (Goldschmidt); “a seismograph of the Constitution” (Roxin); the “touchstone of civility” (Carnelutti); “an indicator of the legal and political culture of a people” (Hassemer); “applied constitutional law” (H. Henkel). Therefore, and since a State-sanctioned sentence is the maximum interference by the State in the individual sphere, human beings over history have erected a barrier against arbitrariness in the imposition of a penalty, a barrier that is none other than the law and due process. The government cannot punish without the ruling of the natural judge (Maier). Rules are devised to mediate in the historical antithesis between power and freedom (Bobbio), between the State’s right to punish, to protect the community from crime, and the right to freedom of the individual (Leone).

Consideration of this situation makes it necessary to update Venezuela’s trial legislation, replacing a system of judgement that is called ‘mixed’, but which is fundamentally inquisitorial (a system that is typical of absolute States), with one in which the parties are equal and the judge acts as an impartial third party.

The change proposed in criminal procedure reflects the intent of the houses of the legislature to promote a sweeping transformation of the Venezuelan justice system, which has been expressed in the studies and discussions of the Legislative Committee, that led it to approve the draft code of criminal procedure.

The draft code of criminal procedure approved by the Legislative Committee is not a mere transcription of any of the codes, statutes or criminal procedural laws of other countries that currently follow the adversarial and oral system. Nonetheless, it forms part of the cultural context of the West.

The sources of the reform stem from the tradition of the family of Roman-Canon Law, to which we have belonged since the first independent legal expressions of our Republic. The philosophy of the Enlightenment, the ideas of Montesquieu (1748), Rousseau (1762), Beccaria (1764), the Declaration of the Good People of Virginia (Virginia Declaration, 1776), the Declaration of the Rights of Man and of the Citizen (1789), constituted the ideological endowment of the Republic and disembarked with Francisco de Miranda on the shores of Venezuela, where they spread and flourished throughout the Americas.

Accordingly, the Declaration on the “Rights of the People”, passed by Venezuela’s Congress on 1 July 1811, recognizes the rights of man in society to include the presumption of innocence (Art. 15 “All citizens shall be presumed innocent until found guilty. If it is indispensable to keep a citizen in custody, the law shall prohibit any unnecessary harshness”); the right to be heard, the principle of the legality and non-retroactivity of the law (Art. 16 “No one shall be judged or punished until they have been legally heard, under a law that was promulgated prior to the crime. A law that punishes crimes committed before it existed is tyrannical. Making a law retroactive is a crime”); the principle of need, proportionality and utility of punishments (Art. 17. “The law shall only decree very necessary penalties and they shall be proportionate to the crime and useful for society”).

In turn, Chapter VIII, Title Two, of the First Constitution of the Republic (1811), which was the first in Latin America, recognized as “Rights of Man in Society” the presumption of innocence (Art. 159); the right to be heard, to be told the charges against him, the right to meet his accusers and prosecution witnesses face-to-face, the right to present witnesses and evidence on his behalf, the right to have defence counsel of his choice, the right not to be compelled to incriminate himself or his family (Art. 160); the inherent right to a trial by jury (“Congress, as quickly as possible, shall establish in a detailed law, the right to trial by jury for the criminal and civil cases in which it is commonly used in other countries, with all the forms that are typical of this procedure ...”) (Art. 161); the non-retroactivity of the law (Art. 170); the proportionality of surety and penalties, the prohibition of cruel, demeaning or unusual punishment (Art. 171); and the prohibition of torture (Art. 173).

This line of thought, which is our birth certificate as a nation, also bathed the shores of Europe. The trial laws of the French Revolution (1791), moderated in the French Code of Criminal Procedure (1808) that made a legal and political synthesis of monarchical legislation (the Criminal Statute of Louis XIV - 1670), the inquisitorial process (preliminary proceedings), revolutionary legislation and the adversarial process (full trial). This mix of procedures formed the basic nucleus of contemporary legislation: Austria (1873), Germany (1877), Spain (1882), Italy (1913).

A synthesis of this entire procedural evolution can be found in the Model Code of Criminal Procedure for Iberoamerica (1988), a work by prominent Latin American and Spanish jurists, including Julio Maier, Alberto Binder and Ada Pellegrini, whose contributions were fundamental for the birth of the text. Jurists Alfredo Vélez Mariconde and Jorge Clariá were asked to produce the ‘bases’ for the model code by the Fourth Meeting of the Iberoamerican Institute of Procedural Law, held in Valencia, Venezuela, in 1967. They presented the Bases for a Model Code at the Sixth Meeting also held in the city of Valencia, in 1978. This masterwork, in turn, owes a debt to the Code of Criminal Procedure of the Province of Cordoba, Argentina, (1939), apart from its debt to the legal tradition already referred to.

This evolution has been summarized in the so-called Mallorca Rules (1992), which are the minimal rules for criminal procedure announced by the United Nations, one of whose drafters was

Professor Eberhard Strüensee, who also helped to define the guidelines for the draft code presented here.

The historical product of this evolution is the oral and public trial (as practised by the Athenians, Rome during the Republic and the ancient Germans), with its principles (guarantees) of an oral process (*oralidad*), direct communication between judge and parties (*inmediación*), closeness in time (*concentración*) and publicness (*publicidad*), based on the pillars of equality, refutation and defence.

In short, down through history, the Roman-Cannon Law family produces a scenario in which the 'drama procese' (Calamandrei) develops, through the need for proof (from the adversarial hypothesis), the possibility of refutation (defence) and a reasoned judgement; a drama that consists of an historical reconstruction of a matter of life (Beling), under the parameters of a truth obtained through judicial avenues.

The process should be a guarantee of truth and justice (Ferrajoli), because its ethos is truth in the establishment of the events and justice in the application of law (Schmidt).

The State has the duty of guaranteeing the right to justice of all the inhabitants of the Republic. To do so, it must erect a structure of bodies that serve justice as well as a procedure, a process, that permits, with respect for the rights of individuals, a judicial decision to be reached that is just and based on the truth.

The criminal process is the method through which jurisdictional guardianship materializes in the action of criminal law; penalties are determined by the State and can only be applied by an independent and impartial criminal court, through a process without undue delays.

The effectiveness of criminal law depends largely, not on the harshness of the penalty established, but on citizen perception of the certainty that it will be applied and the speed with which it is executed, as Cesare Beccaria, ideological founder of criminal science said when he noted: "The certainty of a punishment, even if it is a moderate punishment, will always make a greater impression than the fear of a harsher one accompanied by the hope of impunity, since the certainty that evil will befall always makes a greater impression on the human soul ...". And the great Italian thinker goes on to add that the method of judging must be "regular and expeditious".

Beccaria's precept can only be achieved through an adversarial, oral and public trial, which is the guiding light of the reform of Venezuela's criminal procedure.

The objective is to offer the citizenry, in each case, beginning with the criminal area, a concrete and certain response, based on rapid justice handed down with equity as well as a major contribution to combating crime and strengthening the desired legal security. In the effort to achieve this, account has always been taken of the special organization that Venezuelan legislators established for the judicial branch, with regard to independence and the distribution of responsibilities among the judicial organs envisaged in the country's Constitution, and the national judicial tradition.

As the doctrine observes, the problem to be solved in organizing criminal procedure focuses on the need to reconcile the interest of the accused, which is to be protected through adequate guarantees for the accused's defence, avoiding wrongful convictions, and the interest of society in obtaining certain and rapid repression of crime. The predominance of one or the other of these interests determines the appearance of two different systems - the adversarial and the inquisitorial.

In the adversarial system, the judge is excused from taking the initiative in criminal prosecution and, therefore, unlike the inquisitorial investigating judge, does not propose the subject matter of

the trial himself. On the contrary, the subject matter is presented to him in the form of charges that are postulated and argued by a person other than the judge. The accuser and the accused meet before the judge with equal rights and obligations and the accused is generally allowed to remain free until the sentence is handed down.

However, as procedural doctrine has also clarified, the adversarial system does not really exist in an entirely pure form. The procedural rules can be predominantly inquisitorial, as in the existing Code of Criminal Procedure, or predominantly adversarial, as in the proposed new code.

Why is the proposed law called a “basic” law (*ley orgánica*)?

Article 163 of the Venezuelan Constitution establishes that: “*Leyes orgánicas* are those thus called in this Constitution and those invested with that nature by an absolute majority of the members of each House, when the proposed legislation is tabled.”

Doctrine states that when they established the term “*ley orgánica*”, what the framers of the Constitution intended was to “prevent special laws from revoking provisions that refer to the organization of certain branches of government or the formalities that certain laws must comply with.”

Another doctrinal sector maintains that, based on Article 163 of the Constitution, four interpretations have arisen, which elucidate the scope and purpose of the article. The first interpretation states that “the Constitution establishes a supercategory of formal laws by enshrining the figure of *leyes orgánicas* (...) Special laws are not entitled to preference in application over other laws, and *leyes orgánicas* have the power to override them”; a second interpretation is that “the Constitution has limited itself to establishing a rule for legislative policy, ordering the legislator when he has to legislate on matters governed by *leyes orgánicas*, to subject those matters to the general provisions established therein, and to their spirit and intent”; the third interpretation, which refers to rank rather than the content of the law and is closely linked to the first interpretation, maintains that “*leyes orgánicas* do constitute a supercategory of laws and, accordingly, special laws must be subject to them, but only in the matters dealt with in the *ley orgánica*”; the fourth and last interpretation “identifies *leyes orgánicas* with fundamental laws, and considers that they are applied preferentially over special laws in all matters in them that constitute the development of express constitutional rules, such as rules relating to the guarantees established in the constitution and the rules of organization for the essential structures of the State”.

Our Constitution, unlike other constitutional systems, establishes a formal criterion in Article 163 for determining the nature, hierarchy or rank of legislation, based on the need for a law to be defined as ‘*orgánica*’ by a majority of the members of each house when the bill is tabled in them. However, it is possible to determine indirectly from other constitutional provisions that *leyes orgánicas* have the purpose of regulating certain public institutions established in the Constitution, for example in Article 204 which, when referring to the organization of the Judicial Branch, establishes that “Judicial Power is exercised by the Supreme Court and by the other tribunals determined in the *ley orgánica*”.

Given that the implementation of the proposed system of criminal procedure, as envisaged in the final book of the draft code, supposes a necessary modification in the organization of criminal justice (and in the *Ministerio Público*, which is also governed by a *ley orgánica*) and this matter, in accordance with Article 204 of the Constitution, must be regulated in a *ley orgánica*, it must necessarily be concluded that only a *ley orgánica* can establish modifications to that organization.

I. GUIDING PRINCIPLES

There are various principles that determine the nature of the proposed process. It is highly important to reflect on them, since, as Victoria Berzosa notes, the expression “principles of the process” refers to the basic ideas behind given sets of rules that are deduced from the law itself, although they are not expressly formulated in it. These ideas or criteria constitute the substrate of the different types of processes, permeate their structure and are apparent in their construction or legal regulation.

As the author cited says: “The analysis of procedural principles is highly interesting, even when performed from an historical perspective, since it helps to explain, to some degree, the whys and wherefores of the possibilities, duties and rights of persons subject to trial; in other words, the reason or basis of the different historical structures in the process. But aside from this concrete aspect, the examination of procedural principles has an undoubted theoretical and practical value that is apparent in three aspects. First, it is an auxiliary element in interpretation. It is also, in the event there are gaps in the law, a datum or factor that can be used as an analogy. Last, it provides a theoretical framework for discussions of *lege ferenda*. It is of undeniable pedagogical interest for the study of the principles behind the process, since it facilitates a summary, but comprehensive view of the procedural system.”

1. Duality of parties

For a true trial to take place, two parties in contrary positions must exist - the accuser and the accused. This principle is introduced in the system proposed in the draft code of criminal procedure, with the judge acting as an impartial third party in a forum established to settle the conflict between the accuser and the accused. However, the judge is empowered to include information in the trial obtained from his questioning of experts (Art. 355), witnesses (Art. 357) and may order the admission of new evidence (Art. 360), without his impartiality being compromised.

The system developed in the draft code cannot be called a pure ‘trial of parties’, which is typical of adversarial systems, such as the Anglo-Saxon system, where the judge is an arbiter. This model, “originally taken from England, was developed by extending [the role] of the prosecutor as a professional accusatory authority. On the one hand, the accuser and, on the other, the accused and his defence counsel, carry out the procedure as parties confronting each other, but with equal rights, until the court, which is required to decide on the charges, which until this point continues to be formed by the jury, participates as a spectator in the debate and finally hands down a verdict of guilt or innocence in function of what it has seen. In this so-called adversary system, the evidence depends on the parties, who undertake to present witnesses and take their statements; supervision is the responsibility of the professional judge (the bench), but he does not participate personally in the decision regarding guilt. In the event that a guilty verdict is reached by the jury, the judge is required to determine the sentence” (Schünemann).

The design of the process is governed by the principle or maxim of investigation, which requires the judge to seek the truth and therefore he does not have to accept the arguments of the prosecution and defence if what they say is not sufficient to convince him. In the draft code, the judge is not a passive subject, a mere arbiter, but an active player, although without exorbitant powers that would call his impartiality into question. He follows the rules of a fair trial, respecting them and demanding respect for them and for the truth of the events.

2. The hearing (audiatur et altera pars)

According to this fundamental principle, no one can be found guilty without being heard. The principle is related directly and indirectly to the principle of defence, disregard of which invalidates a trial. This does not mean that only the accused has the right to be heard. The formulation of this

principle, referring only to the accused, obeys the consideration that the accuser will also have the opportunity to be heard, when he reads the charge or when he petitions for a decision by the court. The draft code provides for numerous institutions to ensure defence through the effective fulfilment of the principle *audiatur et altera pars*. As we will see, allowing the taking of unrepeatabe evidence in the pre-trial period (Art. 316), the decision on whether to hold a trial (Art. 334) and debate in an oral trial (Art. 347 and ff) are manifestations of full acceptance of this principle.

3. Equality

This is an exigency of the two principles mentioned. The principle of equality assumes that the parties have the same rights, opportunities and obligations for defending their interests. The duality of parties and the right to a hearing would make no sense if the parties did not have identical procedural possibilities for maintaining and arguing the merits of what each one deems appropriate.

The draft code has provided for formal defence to begin at the time when a person is charged, i.e. when a person is accused of being the author of or participant in a punishable offence through a procedural action by the authorities named in the code as having responsibility for criminal prosecution.

II. PRINCIPLES THAT DETERMINE THE SPECIFIC NATURE OF SOME OF THE INSTITUTIONS IN THE PROCESS

1. Officiality

The principle of officiality predominates and is inherent in trials in which the collective interest is at play.

Application of the principle of officiality has the advantage, from the standpoint of the public interest, of controlling criminal prosecution through State organs, which are naturally different, one being responsible for prosecution and the other for trials (Roxin). With this division, the State places a self-limitation on its power to impose penalties for the commission of offences.

2. Expediency and legality

The principle of expediency contrasts with the principle of legality. According to the latter, the *Ministerio Público* is required to take action with respect to all events that have the nature of a crime, provided that the investigation obtains sufficient evidence to maintain the accusation.

The principle of expediency is an exception to the principle of legality and an apt mechanism for channelling the spontaneous selectivity of all penal systems. It implies the possibility of not prosecuting certain criminal behaviour or of suspending a proceeding under way, with or without conditions, in response to different factors contained in a concrete criminal policy in effect at a given time and place. The principle of expediency has recently been introduced into different European legislation (Portugal, Italy, Spain). The German system has regulated this principle in greatest detail.

In Anglo-Saxon law, the principle of expediency is the rule and translates into the figures of the guilty plea, confession to avoid a trial, and plea bargaining, which is a negotiation between the

prosecutor and the accused to agree on the full extent of the charges, thereby reducing the seriousness of the crime or fine, as appropriate (Asencio Mellado).

The introduction of this arrangement into the Venezuelan system chiefly responds to the need to simplify and streamline the administration of criminal justice, clearing the courts of the backlog of petty crime and misdemeanours and, as a counterpart, avoiding the criminalizing effects of short sentences, encouraging prompt reparation for the victim and providing the delinquent with another opportunity to become a member of society.

The draft code allows the prosecutor, in application in certain circumstances of the principle of expediency, to dispense completely or partly with laying criminal charges or limiting prosecution to some of the people involved in the event, always with the approval of the overseeing magistrate.

Other alternatives to prosecution include agreements on reparation and suspended sentences. The first can be used when the punishable event has to do with disposable property or offences that have not caused death or affected the physical integrity of an individual permanently and seriously. The second can be used when a suspended sentence is appropriate and the accused has admitted the charges against him. This second institution comes from Anglo-Saxon procedural systems that allow for probation.

In general, these measures, which confer broad authority on the *Ministerio Público*, are an innovation in our criminal trial system, are based on criteria of economy in proceedings and constitute an alternative to long and costly trials.

Starting at the moment when the overseeing magistrate orders that a trial be held, the case is remitted to the competent court for a hearing. The idea is to ensure the impartiality of the trial judge, since he is not involved in weighing the evidence that led the prosecution to petition for a trial, with a view to the role that justice should play as a guarantor of the freedom and rights of every person.

3. Weighing the evidence: Judicial discretion

As is known, the old Code of Criminal Procedure is based on the system of legal evidence. The new code provides that evidence will be weighed by the court according to its discretion, following the rules of logic, scientific knowledge and the lessons learned from experience and rejecting arbitrary evaluation of the evidence, since the court is called upon to make a free, but reasoned, judgement, logically weighing each of the items of evidence. This principle is closely linked to the principle of direct communication between judge and parties, since only the judge who has heard the evidence in a public hearing will be in a position to freely make up his mind and weigh the evidence properly.

The draft code starts from the consideration that a court sentence can be based on any item of evidence that is not prohibited by law. Evidence obtained through mechanisms that could alter the psychic state of a person, influencing his freedom of self-determination, his capacity to recall or assess events, or through means that fail to provide due respect for human dignity is prohibited.

A judgement cannot be based on evidence that is not scientifically recognized as reliable.

4. Prohibition of reformatio in peius

Another feature of the adversarial system is the impossibility of a higher court aggravating the situation of the appellant. This feature is included in the draft code as one of the general provisions in the book that deals with appeals (Art. 435).

III. PRINCIPLES RELATING TO PROCEDURES LINKED TO THE ADVERSARIAL NATURE OF THE TRIAL

The principles linked to the adversarial nature of the trial - oral proceedings, direct communication between judge and parties, closeness in time and publicness - as Professor Fairén Guillén states, are the components of a policy that calls for the prompt effectiveness of the process, access by persons who are economically disadvantaged, and the principles of “adequacy” and “practicability” that Klein summarized as “the social utility of the process”. The draft code is based on them.

1. Oral proceedings

The principle of oral proceedings supposes that the judicial decision is based on evidence provided orally. More than a principle, oral proceedings are one way of conducting a trial, that goes hand-in-hand with other principles: direct communication between judge and parties, closeness in time and publicness.

With regard to the requirement for oral proceedings, the draft code allows for the preliminary hearing and the trial to be oral and to include questioning of witnesses and experts. The magistrate hands down his finding based on oral acts and not on written acts describing the results of the investigation, which means that the procedure for evidence during the debate depends on the principle of oral proceedings.

2. Direct communication between judge and parties

This principle postulates that the judge hearing the case has been present during the presentation of evidence and bases his decision on it. This means that he has been in direct contact with the parties, experts, witnesses and with the objects of the case. Accordingly, the judge who hears the evidence and the judge who hands down the sentence must be one and the same person.

The direct impressions obtained by the parties who participate in the trial facilitate arriving at the truth and the possibility of defence.

3. Closeness in time

Under the principle of closeness in time, which is the main external characteristic in oral trials, the evidence should be presented at a single sitting or in successive sittings, so that when the time comes to hand down a decision, the judges will be able to remember what has been presented. “The law is interested in obtaining a fresh, direct impression, rather than one from dusty papers, and to have the possibility of participating at any time and receiving the unfettered cooperation of the people participating in the process. All this can produce the desired result if the time between the different parts of the debate is not excessively long” (Baumann).

Holding consecutive sittings is so important that interruptions of more than 10 days are sanctioned, and the hearings are required to by law resume (Arts. 337 and 339).

4. Publicness

Criminal matters are too important to be dealt with secretly and therefore the trial, with the exceptions provided by law, must be held in public. This is a guarantee of the legality and justice of the verdict and brings the common citizen closer to the justice system, strengthening his confidence in it, which, in turn, represents a democratic control over judicial action. By protecting the parties from justice that escapes public control, one of the aspects of due process is guaranteed.

The only exceptions to public trials are expressly regulated in the draft code (Art. 336).

IV. CITIZEN PARTICIPATION

This institution, which will deepen our political democracy, will contribute to the formation of collective responsibility or civic awareness and is a necessity given the absence of contact between the body of criminal judges and the source of their power - the people - in other words, with the organ from which their authority issues and over which they exercise it. This distancing from the source of their authority under the current system can be explained by the fact that magistrates are not elected through direct representation, which means that the judicial branch is the least democratic of the public powers. The Constitution (Art. 217) states that it is the responsibility of the Judiciary Council to “ensure the independence, effectiveness, discipline and decorum of the Courts” and, in developing this postulate, the Law governing the Judiciary Council gives the council primary responsibility for appointing judges.

It is often affirmed that criminal justice today is ‘divorced’ from social reality, and many advocate ‘deprofessionalizing’ it. In the words of Hulsman and Bernat, it is “almost impossible for a legitimate sentence to come out of the criminal system, if we consider how it functions”, since it operates in accordance with “its own logic that has nothing to do with the lives or the problems of people”. This is particularly clear in the use of writing, where the activity of the judge is limited to reading the pages of a file and “when it comes to the real events he only - sometimes - knows what the accused looks like” (Cavallero and Hendler). As these authors aver - and this has been our guide in including citizen participation - today’s challenge consists of finding mechanisms that reduce the dual isolation of criminal justice, bringing it close to the source of sovereignty and trying to ensure that the decisions of the courts respect the real needs for social justice, which will lend the judicial branch the democratic legitimacy it lacks today.

It should be recalled that, as Montesquieu said in this theory on the division of powers: “The judiciary power ought not to be given to a standing senate; it should be exercised by persons taken from the body of the people at certain times of the year, and consistently with a form and manner prescribed by law, in order to erect a tribunal that should last only so long as necessity requires. ... By this method the judicial power, so terrible to mankind, not being annexed to any particular state or profession, becomes, as it were, invisible.”

In an attempt to end this isolation between justice and the people, the draft code includes citizen participation as a right and duty. The right of all citizens to be judged by their peers - a clause that was already present in John Lackland’s Magna Carta of 1215, an instrument which is considered to be the historical and legal foundation of the jury - and the duty of participating in the administration of justice. This public participation is established in the draft code through two formulas: a tribunal in which citizens decide jointly with professional judges (*jurado escabinado*, which has been called a “mixed tribunal” in the draft) and a tribunal composed of citizens who are not legal professionals, who act under the eye of a professional judge (the Anglo-Saxon jury).

The draft code establishes that the mixed tribunal will have functions similar to those of a professional judge and will deliberate together with him on the court’s decisions. This means that

they will decide together with the professional judge on guilt and punishment. This model, which has been considered a “remodelling and enrichment” of the classical jury, is applied in France, Italy, Germany and Switzerland, among other countries.

The Anglo-Saxon jury has been defined by Escriche as the “meeting of a certain number of citizens who are not public magistrates and are chosen by lot and called before the court or judge to declare on their conscience whether an event has been proven or not, to enable the judge to hand down a verdict of innocence or guilt and, in the latter case, to determine the penalty under the law.”

For his part, López-Muñoz and Larraz has noted that: “A jury trial consists of a meeting, in a public, oral trial, presided over by a professional judge, of a number of non-jurist citizens, with the right to vote, literate, contributing their different cultures, mindsets and origins; contributing the experience of their different professions, work and trades; hearing for the first time, dispassionately, with close attention, the events and evidence taken or reproduced in their presence, in relation to the behaviour of the accused; listening with the same interest and impartiality to the arguments of the prosecution and defence; withdrawing after hearing the non-binding summation made by the professional judge, to deliberate alone, deeply, trying to forge unanimity out of the fire of the contradiction of their different ideas; finally coming up with a verdict of innocence or guilt. Afterwards, the professional judge hands down the sentence, based on the verdict, absolving the accused or, if he is found guilty, applying the penalties and individualizing the punishment.

In the United States, the constitutions of virtually every state of the union establish the right to trial by jury, confirming trials with public participation based on the classical model of the English jury.

This institution is not foreign to the Venezuelan or the Latin American legal system. The Venezuelan Declaration of the Rights of the People of July 1811 provides for juries in criminal and civil cases. This provision is repeated in the 1819, 1821, 1830 and 1858 Constitutions, after which the tradition ends. Almost every Venezuelan code of criminal procedure up to the early 20th century refers to trial by jury in one form or another.

Revisiting this tradition, the draft code provides for a tribunal presided over by a professional judge and composed of a nine-member jury. The jury, not schooled in law, will only give its opinion of the truth of the events, with the professional judge applying the punishment. Therefore, this mode of public participation is limited, as in the classical tradition, to pronouncing a verdict on whether or not events took place, but without any power to apply the law.

STRUCTURE OF THE DRAFT CODE

The draft code of criminal procedure consists of a preliminary title, five books and a final book. The preliminary title covers the general principles that are called on to regulate the exercise of criminal justice. The subject matter covered by the code's five books is divided as follows: book one deals in general with criminal procedure and all matters relating to the regime of criminal action and civil action; book two refers to ordinary procedure; book three refers to special procedure; book four deals with appeals; and book five with execution of sentences. The final book deals with the transitory procedural regime, the organization of the courts, the prosecuting authority (*Ministerio Público*) and public defence, for action in criminal proceedings.

1. Preliminary title

The principles that will govern criminal procedure are placed in the preliminary title in order to provide an overview of the proposed procedural system. The draft code is simply the

development of those principles, which will be implemented to a greater or lesser degree in each of the stages in the process. Therefore, as already mentioned, they will be an auxiliary element in the interpretation, aside from their clear value from the educational standpoint in bringing about the change in culture in the administration of justice (Binder) that is implied in this reform.

The first of the provisions in the preliminary title establishes the right to a preliminary hearing and to due process. This rule is simply a ratification of the principles established in the Constitution and in the international agreements ratified by Venezuela. It is established in Art. 1 of the draft, since it encompasses all the other principles on which the criminal procedure rests and, as Molina Anubla affirms, due legal process in the trial and sentencing of a person demands that the procedural rite, which was established before the conduct was engaged in, be followed with strict legality.

The principle of a preliminary hearing is linked to the legality of the process, whereby every one has the right to be judged under a law that not only establishes the crime and the punishment, but also establishes the procedure to be followed.

As aspects of due process, the code reiterates the need for an impartial judge, i.e. who is deaf to any other interest except for the administration of justice, and for the trial to take place without undue delay. The draft code ensures the impartiality of the judge, by separating the functions of investigation and decision and by prohibiting undue delay, through rigorous regulation of the duration of the investigation to be performed by the *Ministerio Público* (Art. 321) and the reasons for which a trial can be adjourned (Art. 337).

The second article regulates the exercise of jurisdiction.

Jurisdiction is defined as “the power or authority that a person has to govern and enforce the law; and particularly, the power granted to judges to administer justice, in other words to hear civil or criminal matters or both and decide them or rule on them in accordance with the law ...” (Escriche).

If the people have delegated the power to administer justice to judges and tribunals, the latter have jurisdiction not just to proclaim justice in their decisions, but also to enforce their judgements and cause them to be enforced. In this way, the State, through the organs of justice maintains the objective legal order which has been altered by the perpetration of crime, and guarantees the effectiveness of the *ius puniendi*. The legal rule in question is provided for at present in Article 18 of the existing Code of Criminal Procedure.

Article three enshrines the principle of citizen participation.

As mentioned earlier, by including the citizenry in the tribunals responsible for judging crimes, the idea is to combat the bureaucratic and routine practices that mark the current state of the administration of justice.

As Cavallero and Hendler suggest, the participative ingredient becomes highly important in the administration of justice, since harmonious interaction between the community and the justice system largely depends on it. These authors cite the Report of the European Committee on the Problem of Crime of 1989, which devoted one of its studies to the subject of public opinion, pointing out that the indispensable requisite for the dynamic and smooth functioning of the dialectical process between the people and the law is an agreement between them that “they should not be very close nor very far apart, and should be able to communicate with each other”.

Article four establishes the autonomy and independence of the judges.

The draft code virtually repeats the content of Article 205 of the Constitution, referring to the classical independence of judges, based on the principle of the separation of the branches of government (external independence). It incorporates as the main aspect, the internal independence of the judicial branch, i.e. from the other judicial organs (the Supreme Court) and administrative organs (Judiciary Council) that also form part of it.

It reflects one of the aspects included in the Basic Principles on the Independence of the Judiciary approved at the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders held in Milan in 1985, which establishes that: "It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law...".

By making judges subject to legality (*ley*) and to the principles of justice (*derecho*), the positivist paradigm that wrongly assimilated the two is surmounted. As García Pascual states, this makes it possible to describe the courts as organs of judicial production which are not limited to reproducing legal texts, and whose jurisprudence is part of the legal order. This creative function, since it is subject to the principles of justice, is discretionary and not arbitrary. To maintain that judges create law does not mean postulating a new judicial function hitherto unknown in the judicial world. Instead it recognizes a normal and inevitable practice (Hart). For years, the theory of legitimacy has been influenced by formal-legalistic doctrines which, based on the fullness of the legal order, reduced justice to law and the judge to a person who merely applied the law.

Article five of the preliminary title refers to the authority of the judge.

This rule comes from Article 21 of the Code of Civil Procedure and reiterates the principle of cooperation between the public powers recognized in the constitution. A concrete example of the principle of the judge's authority appears in Article 358 of the draft, which empowers the judge to make use of the public forces to compel experts or witnesses who have been duly summoned to appear before the court. Article 6 of the Law governing the Judicial Branch is similar.

Article six refers to the obligation to reach a decision.

Since judges have the power to administer justice, they are required to reach a decision, to the point where criminal penalties (Art. 207 of the Criminal Code) are imposed on public officials who omit or refuse to carry out any act that forms part of their mandate.

Article seven recognizes the principle of the 'natural judge'

Under this provision, only a judge already appointed by law can legitimately judge, thereby prohibiting the judgement of certain crimes by special tribunals created after the crimes were committed.

Article eight establishes the presumption of innocence.

This principle has its origin in the ideas of the Enlightenment. The Declaration of the Rights of Man and the Citizen of the French Revolution recognized that all men are presumed innocent until found guilty. The principle is also included in the United Nations Universal Declaration of Human Rights, in the American Convention on Human Rights (Pact of San Jose, Costa Rica) and the International Covenant on Civil and Political Rights.

Article nine deals with the principle of the affirmation of personal liberty.

The principle of personal liberty is strengthened as a general rule by treating preventive custody as an exception, which also complies with the commitments made by Venezuela in this area.

Article 10 enshrines respect for human dignity as another of the principles of this reform, thereby recognizing one of the human rights that is most impaired during a criminal trial. Transgression of the criminal legal order by the accused does not mean that he loses his rights as a human being.

Article 11 deals with the bodies responsible for bringing criminal action.

This article enshrines the principle that public criminal action is brought by the *Ministerio Público*, which is responsible for directing the preliminary investigation to determine whether a crime has been committed and discover the identity of the author, which means that the investigative police organs function under its direction.

Article 12 establishes the principles of defence and equality between the parties.

In the criminal process, the claims of the accuser and the accused are dialectically opposed - claims that should be placed on an equal footing. This does not mean that criminal justice is transferred to the private sphere, given that the State continues to reserve a monopoly over the imposition of penalties for itself. However, this equality of aims that marks the Anglo-Saxon adversarial system, in addition to being linked to the right to defence and a fair trial, is the expression of the recognition of equality as a fundamental guarantee recognized in Article 61 of the Constitution.

One manifestation of the principle of defence is the provision contained in Article 352 of the draft code, whereby the judge is required to inform the accused about the possibility that the court may classify the crime in a different category that was not considered by the parties, so that this can be taken into account.

Article 13 consecrates the purpose of the trial.

Under this rule, the purpose of the trial is to establish the truth of the events, which means that the court is required to discover the historical truth, which may or may not be the same as argued by the parties. Although the court may not introduce events that are different from those announced in the charges, for the purposes of certainty or obtaining sufficient evidence for a conviction, the judge is empowered to order, on his own motion, that evidence be submitted (Art. 360) and may question experts (Art. 355) and witnesses (Art. 357).

Nonetheless, the truth cannot be obtained at any cost. It is always necessary to safeguard respect for the dignity of the human being.

Articles 14, 15, 16 and 17 consecrate, respectively, the principles of the proposed procedure, i.e., oral trials, publicness, direct communication between judge and parties and closeness in time, which have already been discussed.

Article 18 deals with the principle of refutation. This principle, which is closely linked to the principle of publicness and is a necessary consequence of the involvement of two parties, assumes that the actors in the trial have the power to present and request evidence, examine the evidence, be present when it is taken, object to evidence and challenge decisions that deny the taking of evidence. This right to dispute evidence is one of the aspects of due process and, in consequence, placing limitations on that right invalidates the evidence.

The mention of monitoring constitutionality made in Article 19 of the principles is intended to include the dogmatic part of the constitution as one of the direct sources of procedural legality.

Article 20 establishes that a person can only be tried once for the same crime (*ne bis in idem*). This principle postulates that no one can be tried more than once for the same events. However, the possibility of a new prosecution is left open in two particular cases.

Article 21 regulates the *res judicata*. As a guarantee of legal security, the accused has the right to be judged and condemned only once for the same events and therefore dead cases cannot be reopened, with the exception of reviews.

Article 22 regulates the system of weighing evidence. The judge has the obligation of weighing it using his absolute discretion, following the rules of logic, scientific knowledge and the lessons of experience.

2. Book one

Book one has nine titles: Title I refers to the exercise of criminal action and consists of four chapters, i.e., on its exercise, on the obstacles to its exercise, on the alternatives to prosecution and on the extinction of action. Title II is on civil action. Title III consists of six chapters: chapter I contains general provisions on the criminal jurisdiction, judicial organization and prejudicial hypotheses. Chapters II, III and IV deal with fundamental criteria regarding the competence of the court - territory, subject matter and connection, respectively. Chapter V regulates the modes of determining jurisdiction and chapter VI regulates challenges to a court's competence and disqualification. With regard to these last assumptions, which have an impact on objective jurisdiction, the draft broadens the traditional grounds which until now have been restrictive, to include the possibility of making challenges or calling for disqualification on grounds other than those listed in Article 83, when based on serious arguments regarding the impartiality of the judge.

Title IV deals with the subjects of a trial and their auxiliaries. This title is divided into seven chapters: chapter I contains preliminary provisions, chapter II refers to the court, III to the *Ministerio Público*, IV to the organs of the criminal investigation police, V to the victim and the complainant, VI to the accused, and VII to the auxiliaries of the parties.

The chapter on the courts provides for courts of the first instance that are composed of a single professional judge, or mixed courts or jury courts, depending on the punishment for the offence. The courts of the second instance - appeal courts - are composed solely of professional judges.

The chapter on the *Ministerio Público* stresses its autonomy and independence, as recognized by the Constitution, and its role as initiator of criminal action, to which end it has many powers.

The next chapter regulates matters concerning the victim, who is generally forgotten by criminal science. The idea is to protect the victim and prevent re-victimization, as occurs under the present system. The possibility is established for victims to lay a complaint, to guarantee their legitimate standing in the case, although the institution of public action for the trial of offences against the public interest is removed and, as a novelty in our system, victims are given a series of rights they can exercise during the trial (Art. 117), even if they do not have standing as complainants.

With regard to the organs of the criminal investigation police, stress is placed on the fact that they are auxiliaries of the *Ministerio Público* in their investigations to substantiate prosecution charges. During the investigation phase, prosecutors may request the assistance of anyone who belongs to any part of the public administration or the justice administration, but functionally, they carry out their investigative activities under the direction of the *Ministerio Público*.

Chapter VI defines an accused as anyone who is charged with being the author of or participant in an event that is punishable, under charges laid by the authorities established in the code. The code stresses the constitutional guarantee entitling the accused to a defence, and the accused may not renounce that right, so much so that his statement is not valid unless it is made in the presence of his defence counsel.

As for the defence, the handicaps under which it operates in the current system are removed and counsel may intervene from the outset of the proceeding. If the accused does not select an attorney of his own, the court is required to assign him a public defender. The provision of expert counsel does not undermine the right to self-defence that the draft code grants to the accused.

As for private accusations, they are allowed for crimes that can only be prosecuted when a complaint is laid by a private party. As for crimes against the public order that can only be prosecuted by the government, the victim is granted standing, and may file as an independent complainant or join the suit brought by the prosecution.

Title V regulates citizen participation - a principle established in the Preliminary Title - establishing that participation in the administration of justice is a right and a duty. Chapter I of this title, contains general provisions on the obligations, requisites, incompatibilities, impediments, exemptions, notifications and instructions, draws, payment, employer obligations and sanctions that can be imposed on members of mixed tribunals (*escabinos*) or juries, with an *escabino* defined as a citizen who is not an attorney who sits together with a professional judge on a court to try offences punishable with a prison term of more than four years but less than 16 years (mixed tribunal) and a 'juror' defined as each of the nine citizens who are not attorneys who sit on a court presided over by a professional judge, responsible for trying offences punishable with a prison term of over 16 years. Chapter II regulates the organization and functioning of mixed tribunals and juries, respectively.

Title VI contains rules regulating the regime of procedural activities, i.e. proceedings and nullity. The draft code departs from the formalistic connotations that are closely linked to the inquisitorial and written system which, today, results in declarations of nullity for deficiencies that can easily be corrected.

Chapter I of this title which refers to proceedings, contains three sections. The first describes general provisions, such as official language, validity requirements and the content of acts, the obligation to appear when called as a witness, expert or interpreter, the system for the examination of the deaf and mute, and regulation of working days. The second section deals with decisions, requiring them to be classified in the record, and sentences, and both - except for mere proceedings for substantiation and the jury's verdict - must be reasoned, on penalty of nullity. They must be signed by the judge who hands them down. Sentences are to be pronounced at a public hearing and sentences or acts may not be altered by the court that handed them down, without prejudice to appeals to the court requesting that it reverse its own decision and the correction of material errors. Section three regulates the time limits and forms of notification and citation.

Chapter II deals with nullity. The draft code calls for the immediate correction of nullity through avenues for the correction of defects or convalidation and, as a final alternative to throwing out the defective act, a declaration of nullity.

Title VII deals with the system of evidence and consists of two chapters, the first containing general provisions, which enshrine the freedom to produce evidence in a criminal proceeding, the legality of evidence and, in consequence, the inadmissibility of evidence obtained through means that alter or could alter the psychic state of individuals or deprive them of their freedom or capacity. Evidence that has been obtained in violation of the law is also declared inadmissible. Last, this chapter regulates the system of weighing evidence, and represents a substantial change, replacing the system in effect at present that uses a predetermined scale to determine the weight of evidence with the system based on the judge's absolute discretion, following the rules of logic, scientific knowledge and the lessons of experience, mentioned earlier.

Chapter II regulates the requirements for obtaining evidence and consists of five parts: the first deals with inspections, the second with searches, the third with verifying events in special cases, the fourth with the interception of correspondence and communications and the fifth with

testimony. As can be seen, the provisions regarding confessional evidence and circumstantial evidence and presumptions, which are typical of systems based on predetermined scales or valuations, have been removed.

Title VIII deals with restraint. The conflict that arises between individual liberty and the security that the State is required to guarantee its citizens is a matter of criminal policy. This means that measures of personal restraint, fundamentally deprivation of freedom, must be regulated on the basis of rational criteria, while also offering the public guarantees. The draft code establishes that all measures involving personal restraint must be based on the principles of exceptionality and proportionality, which obviously constitutes a limitation on the powers of intervention of State agencies.

Exceptionality assumes that a person can only be deprived of his freedom - a measure that can only be ordered by the overseeing magistrate - when the other means of restraint would be insufficient to guarantee the purposes of the procedure. Therefore, to protect this principle, the notions 'risk of flight' and 'risk of obstruction' are defined, which are the only grounds on which deprivation of freedom during a trial can be justified. Otherwise, preventive custody could be used as a punishment applied in advance. A list of measures that can replace custody is given, and the obligation is established of reviewing and examining measures of personal restraint every three months.

It is also established that the measure decreed should be proportionate to the seriousness of the offence, the circumstances under which it was committed and the probable penalty and, in no event, may it exceed the minimum penalty established for the crime in question or exceed the term of two years (principle of proportionality).

The draft code establishes 30 days as the maximum period allowed to the *Ministerio Público* for proposing charges, closing the file on the case or requesting a dismissal - 30 days counting from the date on which the overseeing tribunal decrees preventive custody.

Under the current system, once an arrest warrant has been ordered, the person can be detained indefinitely until the final sentence is handed down (with the limits established in the Law governing Release on Bail), while under the system envisaged in the draft code, once a decision is issued ordering the arrest of a person, the *Ministerio Público* is required to present the charges, request a dismissal or close the file on the case within a period that can never exceed 30 days, because if it does not act within that deadline, the judge will order the person in detention to be released. The judge may order a substitute measure which will last until the final sentence is handed down.

This same title also regulates the arrest of persons caught in a flagrant offence, defines 'flagrant offence' and establishes that one of the special procedures described in book three will be applied.

Title IX deals with the economic effects of the trial, a subject that has been extremely neglected in criminal practice, despite the fact that the Criminal Code calls for payment of the trial costs as an accessory penalty to every principal penalty. The cost recovery system is therefore regulated. Another innovation is included, which is compensation for an accused who is absolved pursuant to a review of the sentence and for an accused who was held in jail during the proceeding, when it is found that the event did not occur, was not criminal in nature, or his participation is not proven.

3. Book two

The second book of the draft code of criminal procedure regulates ordinary proceedings. The study of ordinary proceedings is particularly important since the Legislative Committee intends to establish a single procedure for judging criminal matters and to replace the host of special procedures introduced under different laws, which it will revoke. Once the draft code has been passed into law, everyone accused of a crime will be judged by the ordinary courts, in accordance with the provisions of book two of the new code of criminal procedure. When the code comes into effect, special criminal jurisdictions will disappear.

As already mentioned, the changes to current ordinary proceedings involve replacing the pre-trial proceedings carried out by the trial judge and the police, proposing a preliminary investigation by the *Ministerio Público*; the introduction of an intermediate stage involving a preliminary hearing; and subsequently bringing the case to trial before a court that is not the court involved in the investigation phase. The idea is to protect the impartiality of the judges called upon to rule in the case, avoiding the concentration of functions (investigation, charges and ruling) in a single public official.

Book two consists of three titles, the first on the preliminary stage, the second on the intermediate stage and the third on the oral trial.

Title I consists of four chapters, with the first containing general rules. The second deals with the start of the process and consists of four parts: the first on the official investigation, the second on the denunciation (*denuncia*), the third on the complaint (*querrela*) and the fourth contains general provisions governing these three modes of proceeding. Chapter III covers the development of the investigation, stressing the need to keep the investigation confidential from third parties, and the need for the *Ministerio Público* to conclude its investigation with the diligence demanded by the case. Six months after a suspect has been identified, he may petition the overseeing magistrate to establish a prudential period for the *Ministerio Público* to conclude its investigation, whereupon it must file charges or petition to have the proceedings stayed within the following 30 days.

The purpose of this phase is to carry out the necessary investigations to determine whether or not there are grounds for charging a person and petition for a trial or to have the proceedings stayed.

The most important measure that can exist during this preliminary stage is the preventive judicial deprivation of freedom of the accused. Other measures that can also affect constitutional guarantees are searches, seizure of property, interception of communications and correspondence and therefore an order must be obtained from the overseeing magistrate.

Chapter IV regulates the ways in which an investigation by the *Ministerio Público* can conclude: closing the file on a case, petitioning to have the proceedings stayed, or proposing charges. The ministry can close the file on a case when it believes that the results of the investigation are not sufficient to file charges, without detriment to the right of the victim to petition to have the case reopened.

When the prosecutor believes he has sufficient evidence to ask for the case to be brought to trial, he will propose the charges, otherwise he may petition to have the proceeding stayed, a petition that is basically made for traditional reasons, particularly the possibility that the events under investigation are not illegal or are not punishable and the accused is not guilty.

Title II regulates the intermediate phase, whose main action is holding the preliminary hearing, after which the overseeing court will totally or partially admit the charges laid by the *Ministerio Público* or the victim and order the trial, in which case it will remand the file to the trial court. If it rejects the charges the case must be stayed. It is also possible for the court at this time to order formal defects in the charges to be corrected, decide on any exceptions requested, standardize petitions for reparation, ratify, revoke, substitute or impose a cautionary measure, order that evidence be heard in advance, or hand down a sentence if the accused confesses to the crime.

Title III on oral trials consists of two chapters. This is the key phase, the most important in the entire criminal proceeding, in which a judicial decision ends the social conflict that led to the trial.

The first of the chapters in this title contains the general rules that govern this phase: oral proceedings, direct communication between judge and parties, publicness, closeness in time and continuity, and only allows for special suspensions that are precisely determined. The second chapter deals with the trial of the case and contains three parts. The first is on preparation of the debate and in this stage the composition of the court is verified, depending on whether the offence should be judged by a single-person court, a mixed court or by judge and jury, and the court is established. Section two regulates the development of the debate, which is the phase where the principles of oral proceedings, direct communication between judge and parties, publicness and closeness in time are put into practice and where the presentation of evidence will be governed by the principles of refutation and equality. Accordingly, the only evidence that the court will consider is evidence offered during the oral trial, which is immediate and allows for refutation, except in the exceptional case of evidence taken beforehand that can be read into the record.

Section three deals with the deliberations and sentence. Here, writing the sentence immediately after the deliberation is important, and the possibility of delay is rejected.

4. Book three

Book three refers to special procedures and is composed of 10 titles. The first contains a preliminary provision establishing that the rules of ordinary procedure will be used in the event that the regulations on special procedures are silent. The second deals with the short procedure, which is applied for flagrant crimes and petty crimes (crimes that are sanctioned with prison terms of not more than a maximum of four years), provided an agreement has been reached between the accused and the *Ministerio Público* to apply this procedure, and in the event that security measures and administrative sanctions involving imprisonment are involved. In these cases, either owing to the petty nature of the event or to overwhelming evidence against the accused (as in the case of flagrant offences) most of the matters can be solved and the more onerous costs of a full procedure can be avoided.

Section III regulates the procedure of confessing to the crime - an institution whose roots go back to the United States guilty plea and the Spanish *conformidad* (acceptance) despite the marked differences between the two. As Alcalá-Zamora affirms, the legal nature of *conformidad* is that of submission to a legal decision, since it requires an act expressing willingness by the accuser, an order of confirmation by the court to the effect that the legal requisites have been complied with, and a sentence related to the acceptance of guilt, provided the offence does not entail a prison term of more than six years. These limitations on the powers of the tribunal do not apply to the guilty plea, since a statement of guilt in the English criminal proceeding leads immediately to imposition of the penalty.

This procedure is applicable when the accused consents and admits to the events. In these cases, the trial can be dispensed with and the overseeing court will hand down a sentence immediately. This is the only case in which the overseeing magistrate acts as sentencing judge, rather than being limited to exercising oversight and security functions.

Since not holding an oral trial affects the basic guarantees, this special procedure can only be applied when the consent of the accused has been given with complete freedom, to which end a judicial control is established to prevent consent from being distorted by undue pressure. As a benefit for the accused who agrees to this procedure, the penalty applicable to the offence will be reduced from between one third to one half, account taken of all the circumstances, the legal good affected and the social injury caused.

Title IV deals with the procedure to be followed in trials involving the country's president and other senior government officials, which considerably simplifies the existing system, based on the provisions contained in the Constitution.

Title V regulates trials in absentia for offences against the public good. It defines which persons are considered to be in absentia and regulates the procedures to be followed once it is determined that a trial should be held. The preliminary hearing is held in the presence of a defence counsel, and the ordinary rules of procedure are followed.

Title VI regulates the procedure for misconduct (*faltas*), adapting to the new judicial organization that is proposed, and simplifying the process of reaching a decision.

Title VII develops the procedure for extradition, adapting it to the provisions of the international instruments ratified by Venezuela.

Title VIII establishes the procedure to be followed in trying offences that the criminal legislation classifies as private, i.e. offences in which charges must be laid by the victim or his legal representative. For all intents and purposes, this procedure begins with the oral hearing in which the ordinary rules of procedure will apply, although there may be a prior stage in which the victim can request judicial assistance in preparing the charges.

When a person who has committed a crime is unindictable, a penalty cannot be applied, although the imposition of a security measure may be called for if the charges are proven. Title IX spells out the procedure to be followed, adapting the rules to the special circumstances of the accused.

Title X regulates the procedure to be followed for reparation of damages and compensation for injury, establishing that the court sentence will operate as an execution paper, in other words, a monitoring procedure is established that simplifies the common procedure, without detriment to the principles of defence and equality of the parties in the process.

5. Book four

Given the nature of an oral trial, if we want the decision to respect the principle of direct communication between judge and parties, control over it [in an appeal] cannot be given to a tribunal that has not witnessed the evidence or the debate. Doing so would be to denature the oral trial. It would not be a court of second instance, but a second court of the first instance (Binding). To repeat the oral trial, apart from the cost entailed, works against the principle of celerity (right to be tried without undue delay). It would also involve giving the last word to a tribunal that is farther removed in time from the events.

This made it necessary to reform the entire system of appeals to base it on the principles of an oral trial. Accordingly book four on appeals contains five titles. The first contains general provisions to be considered in the stage of challenging the verdict (legitimacy, whether a challenge is allowable, effects, prohibition of *reformatio in peius*).

By expressly including a ban on *reformatio in peius* (Art. 435) in favour of the accused and never in favour of the accusers, the intent is to strengthen the right to defence recognized in the constitution.

Title II deals with revocation, which is only allowed against mere orders to proceed.

Title III deals with appeals and introduces significant modifications into the current system, since it makes it compulsory to argue the grounds for appeal, otherwise appeals will be denied. It provides - which justifies the suppression of the automatic appeal - for filing the appeal with the

court that handed down the original decision, which is required to call the parties to answer the arguments and to offer evidence, if pertinent, and then to remand the case to the court of appeal for a decision.

It also draws a distinction between an appeal of decisions issued in the preliminary, intermediate and execution stages and appeals of the final sentence handed down by the court. With regard to the latter, appeals are admissible where there has been a violation of the rules governing oral proceedings, direct communication between judge and parties, concentration and publicness of trial; breach, contradiction or lack of logic in the written grounds for the sentence, or when the sentence is based on evidence that was obtained illegally or admitted in violation of the principles of the oral trial; disregard or omission of substantive formalities in acts that leave the defendant unprotected; violation of the law for failure to observe a legal rule or for having applied it wrongly. This system is intended to control the legitimacy of the sentence and is generally related to strict compliance with legal rights and guarantees.

Although appeals have been regulated as petitions for nullity (*nulidad*), which will ease the workload of the Supreme Court, Title IV deals with appeals to the highest court for reversal on the grounds that the lower-court decision failed to apply or wrongfully applied a legal precept; or no grounds or illogical grounds are given for the sentence; or the sentence is based on events for which no evidence was produced, or on evidence obtained in violation of constitutional precepts or through means not authorized in the law.

Appeals are simplified and their substantiation is made less dependent on formalities. The principle of oral proceedings can be seen in the requirement for a public, oral hearing of the debate.

Appeals for review may be filed directly with the highest court against sentences handed down in trials by jury.

As a novelty, appeals to the highest court *per saltum* (Art. 455) have been included, i.e. granting the possibility of filing with the supreme court rather than an appeal court, when the sentence contains no grounds or illogical grounds; the sentence was based on evidence obtained illegally or included in violation of the principles of oral trials; or when it fails to apply or wrongfully applies a legal precept. It also institutionalizes the principle of economy in proceedings.

Title V deals with review (*revisión*), which is the only appeal possible against a final sentence and which is basically allowed on traditional grounds.

6. Book five

Book five is devoted to execution of the sentence. This book establishes the figure of the judge in charge of sentence execution and security measures - known in other legislation as the 'sentence overseeing magistrate' - who is responsible for taking cognisance of all the consequences of the sentences of the trial court. Control over execution of the sentence is no longer an administrative process but becomes a jurisdictional one. By including this measure, it is expected that the external control the judge will exercise over the penitentiary system will make a significant contribution to its humanization.

This book contains four chapters. The first establishes general provisions regarding the serving of sentences and security measures. The second deals with the execution of sentences; the third with parole, which is granted today by the Ministry of Justice; and the fourth with the application of security measures. Recognition of the right to defence and the principles of direct communication between judge and parties and oral proceedings have been incorporated into this phase when decisions are made that affect serving the sentence.

7. Final book

Since the simple approval of a new procedure is not sufficient to transform the administration of criminal justice, it is necessary to reform some other legal texts related to the proposed system (*Ministerio Público*, police, judicial branch) and to regulate institutions for the purposes of incorporating them (citizen participation) or adjusting them to the principles of the new system (public defence, penitentiary regime). The final book therefore concerns the date of entry into force, the transitory procedural regime and the organization of the courts, the *Ministerio Público* and public defenders to act in the criminal proceeding, which are fundamental rules since they regulate the transition from the existing system to the system established in the draft code.

The final book contains four titles. Title I deals with the date of entry into effect of the code and the transitory regime. It contains two chapters: the first regulates the entry into force and application of the code. It also regulates the early entry into force, i.e. prior to 1 January 1999, of the rules relating to reparation of damages and the procedure for confessing to a crime, with the special features described therein.

Chapter II develops the transitory regime and regulates the treatment of cases that are under way at the time the code enters into force, distinguishing between whether they are in the preliminary or trial stage under the current system, for the purposes of remitting them to the *Ministerio Público*, holding the trial, or setting the date for sentencing. Special divisions are created in the Supreme Court to hear outstanding appeals for review.

Title II regulates the organization of the courts, the *Ministerio Público*, and the public defenders for their activities in criminal trials. Chapter I regulates the criminal jurisdictional organs, creating at least one jurisdictional and administrative organization in each judicial circumscription composed of criminal judges with the same territorial jurisdiction, which will be known as a criminal judicial circuit and which will be presided over by a judge designated by the Judiciary Council. This circuit will be composed of a court of appeal with at least one three-magistrate bench and a court of the first instance. The lower court judges will perform the functions of oversight, judgement and sentence execution in rotation.

For the purposes of ensuring that the judicial organization proposed will not lead to the creation of three types of courts as closed compartments, and that a professional judge can act in a single-person court, or as a member of a mixed tribunal or with a jury, the jurisdictional functions are spelled out.

It is established that the administrative services of the criminal judicial circuit will be divided into judicial services and general services and that each court will have a permanent court clerk. The bailiff will report to the circuit and not to each court, as at present.

Chapter II refers to the *Ministerio Público*, and makes the respective modifications to the law governing that institution to adjust it to the new functions it will exercise under the proposed system.

As noted, one of the novelties of the draft code is the change in the concept of the *Ministerio Público*, which will be responsible for bringing criminal action. This makes it necessary to transform the institution so that it can fully carry out its new role. A senior prosecutor is created for each judicial circuit, to be appointed by the Prosecutor General. The idea is to do away with the centralism of the *Ministerio Público*, without harming the principle of unity, by deconcentrating its actions so as to streamline decisions in a process marked by celerity.

Another very important aspect is the establishment of a career path in the *Ministerio Público*, with the purpose of regulating the conditions of admission, employment and discharge of its officials and employees.

As a requirement under the new system and with a view to strengthening the public defence system, chapter III regulates the institution of public defence, ordering the creation of an autonomous service that reports to the Ministry of Justice. It would be useful for the efficient delivery of this service if the institution were to enter into agreements with colleges of attorneys, universities, nongovernmental organizations or private lawyers.

Given the need to establish the courts prior to the entry into force of the code, title III provides for the organization of citizen participation and regulates the appointment of jurors and *escabinos* who will form part of those courts. It also provides for the establishment by the Judiciary Council of a national office that will take charge of organizing citizen participation and carry out an information campaign in this regard.

For the purposes of information, training in the new criminal procedure, and adjustments in the way its functions are organized, the operators of the system of administration of criminal justice will have to establish technical training units. The Judiciary Council, the *Ministerio Público* and the colleges of attorneys will prepare national training plans for their officials and members. Obviously, an increase in the budget for each of the agencies responsible for applying the code will be necessary to cover the requirements of the new system.

Since the fines envisaged in the draft code are calculated on the basis of the equivalent value in bolivares of a tax unit, it will be necessary to remit to the legislation that governs this matter, which is done in Art. 538, title IV, on complementary rules.

This same title also establishes that the penitentiary system must adapt to the new system of criminal procedure and orders that the enabling regulations of the laws governing the system and inmates be adapted prior to the entry into force of the code. This adjustment in the regulations is pertinent, given the creation of the judge responsible for the enforcement of sentences and security measures, who has been assigned functions in the code that are performed today by administrative employees.

As for the military jurisdiction, application of the review procedure established in book four, title V, of the draft code will be applied in the case of the review procedure established in Art. 158 of the Military Code of Justice. The provisions of the new code of criminal procedure will also apply complementarily to the military code, until such time as that code is reformed.

VI. BUDGETARY IMPACT OF THE NEW CRIMINAL PROCEDURE

The Legislative Committee, from the start of the debate on the new criminal procedure, in addition to giving consideration to the new rules, also took account of the impact that its introduction would have on the judicial organs directly responsible for applying it and on the educational institutions involved in teaching criminal law and on the structure of the judicial branch and Venezuelan society as a whole. From the standpoint of the budgetary impact that implementation of the new code of criminal procedure could have, account has been taken of the need to provide criminal justice with buildings containing the spaces required (courtrooms) to hold trials under the new procedural system, and the financing that is necessary to set them up and for their proper functioning.

A distinction should be drawn - with respect to budget allocations for 1998 and the following years - between spending for immediate implementation of the system, mostly involving rehabilitation and construction of premises for criminal courts, with special courtrooms and their equipment, and spending that will be required in any case in the coming years even if there were no reform of the criminal justice system, such as higher salaries for judges and judicial staff and strengthening of the organization for more efficient performance. Prior to the formal start of the debate on the new code of criminal procedure, a loan agreement between the government and the World Bank

began to be implemented in 1994, which includes, among other programs, rehabilitation of existing buildings and the construction of courthouses, which will be totally financed by Venezuela, and whose programs can partly be used in implementing the new criminal trial system.

However, since the proceeds of the loan will not be sufficient to provide all the criminal judicial circuits with the space they need to hold trials and organize the service, the government will have to include additional funds in the budget it submits to congress for 1998, which are necessary to complete the financing for all the works. To facilitate the necessary decisions and arrangements, studies have been conducted and reports have been submitted to the corresponding executive and legislative authorities.

The loan agreement, whose initial objective was only to improve the functioning of the courts and the Judiciary Council in its capacity as administrator of the courts as a whole, includes another three programs in addition to the program to rehabilitate the existing buildings and construct new premises for the courts. Those three programs are intended to: strengthen budget planning, formulation and management and the administrative capacity of the Judiciary Council, including the design and start-up of an information system to provide performance indicators; improve the productivity and efficiency of the courts through their reorganization and the rationalization of their administration, including automation of the caseload; and strengthen the administrative capacity and legal knowledge of court employees through support for the School of the Judiciary in designing and offering that training.

Execution of the engineering works envisaged in the loan is indispensable to ensure that the new code of criminal procedure can come into force on 1 January 1999 as planned, with the object of eradicating the flaws and shortcomings in criminal justice that mean that most inmates are people awaiting a decision by a criminal court. It will be necessary to have available during the course of the *vacatio legis*, in 1998, the resources needed to train and recruit, where necessary, the judicial and administrative staff needed to duly organize the criminal courts, the *Ministerio Público*, the public defence agency and the police forces to adapt to the proposed changes.

Although the proceeds from the loan are not sufficient to cover all of the requirements that stem from implementation of the new code of criminal procedure, they make a significant contribution that needs to be complemented in accordance with the analyses presented to the agencies with responsibilities in this area, which have reasonably established the additional sums that need to be included in the 1998 budget.

As an additional expression of the Legislative Committee's interest in this matter, two final comments are called for. The first refers to the efforts made to determine - through numerous events held with the directors of the main agencies involved in this change in the work to be done by each of the agencies - the persons responsible for managing the changes and the probable cost of their implementation, which should lead to plans for the different agencies. Those plans are currently being prepared and will come up with possibilities for more efficient and effective use of the funds earmarked to finance the criminal justice system. The second refers to the proposals to the senate and house of deputies on the matters included in the report of the Legislative Committee on the draft code of criminal procedures that has been discussed and approved by the committee and, it is hoped, will be passed by the two chambers meeting in joint session. What needs to be done, on the one hand, is to ask the standing committees on finance of the senate and the chamber of deputies to include in the budget for 1998 all the funds needed to start up and operate the new system of criminal procedure and stage one of the legislative program to transform Venezuelan justice, relating to penal reform. On the other, channels need to be established for coordination between the executive and judicial branches to ensure the start-up and operation of the system and execution of the program to transform Venezuelan justice.

