Revista Iberoamericana de las Ciencias Sociales y Humanísticas

RICSH

ISSN: 2395 - 7972

La implementación del proceso penal acusatorio en Guerrero, México

The implementation of the accustive criminal process in Guerrero, México

A implementação do processo criminoso acusatório em Guerrero, no México

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Resumen

Las presiones internacionales del Plan Mérida (1990), el Consenso de Washington (1994) y las sentencias de la Comisión Interamericana de Derechos Humanos (2009) criticaron la ineficacia, colusión de autoridades y la responsabilidad del Estado mexicano por ser omisa ante actos de particulares o de autoridades que afectaron los derechos humanos y la dignidad de las personas, principalmente en asuntos de aplicación de la justicia penal, y que obligaron al Estado mexicano a cambiar su sistema procesal penal.

Se considera que el cambio hacia una justicia penal más garantista se postergó por mucho tiempo debido a la característica autoritaria de nuestro régimen político. Los abusos policiales, la corrupción e ineficacia de nuestras instituciones de procuración y administración de justicia penal no son nada nuevo y estas prácticas indeseables deben terminar; pero la violencia y la inseguridad no será superada solo cambiando los sistemas procesales de justicia.

Palabras clave: sistema acusatorio, proceso penal.

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Abstract

The international pressures of the Mérida Plan (1990), the Washington Consensus (1994) and the Judgments of the Inter-American Commission on Human Rights (2009) criticized the inefficiency, collusion of authorities and responsibility of the Mexican State for being omitted in the face of acts of individuals or authorities, which affected human rights and dignity of the people, mainly in matters of application of criminal justice, and which forced the Mexican State to change its criminal procedure system.

It is considered that the change towards a more guarantee criminal justice was postponed for a long time due to the authoritarian characteristic of our political regime. The police abuses, corruption and inefficiency of our criminal justice administration and administration institutions are nothing new and these undesirable practices must end; but violence and insecurity will not be overcome only by changing procedural systems of justice.

Keywords: accusatory system, criminal process

Resumo

As pressões internacionais do Plano de Mérida (1990), o Consenso de Washington (1994) e os julgamentos da Comissão Interamericana de Direitos Humanos (2009) criticaram a ineficácia, a colusão das autoridades e a responsabilidade do Estado mexicano por serem omitidas diante de atos de indivíduos ou de autoridades que afetaram os direitos humanos e a dignidade das pessoas, principalmente em questões de aplicação da justiça penal, e que forçou o Estado mexicano a mudar seu sistema de processo criminal.

Considera-se que a mudança para uma justiça penal mais garantida foi adiada por muito tempo devido à característica autoritária de nosso regime político. Os abusos policiais, a corrupção e a ineficácia das nossas instituições de administração e administração de justiça criminal não são nada novos e essas práticas indesejáveis devem terminar; mas a violência e a insegurança não serão superadas apenas pela mudança dos sistemas processuais de justiça.

Palavras-chave: sistema acusatório, processo criminal.

Revista Iberoamericana de las Ciencias Sociales y Humanísticas

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ISSN: 2395 - 7972

Fecha Recepción: Julio 2017 **Fecha Aceptación:** Diciembre 2017

Introduction

The present study is a consequence of the analysis of the results of the criminal accusatory process in force in Mexico as of June 2016, particularly of the results in the state of Guerrero. To this end, the task of investigating and presenting the implementation process in a constitutional reform was carried out with a vacatio legis of eight years prior to its operation and, where appropriate, to explain which are the causes for which it has not borne fruit as expected by the political actors and institutions of the Mexican State.

It was found that the hope put in the accusatory system is that it will be able to eliminate the vices of corruption and concentration of powers in the Public Prosecutor's Office and the judges, who were awarded the origin of all the consequent evils, such as the escalation of violence, the high impact crimes, the loss of legitimacy of the institutions, as well as the credibility of a future with probable growth for society.

The reform of articles 17, 18, 19, 20, 21, 73 and 123 of the Federal Constitution on June 18, 2008, allowed the changes to the penal legislation and as a consequence of this the transit according to Elías Polanco. (POLANCO, 2015), which abrogates the mixed criminal system, inquisitive-accusatory, to implement the adversarial accusatory system, effective as of June 18, 2016.

In addition to the above, the constitutional amendment to Article 1 of the Federal Constitution of Mexico, carried out on June 10, 2011, expanded the concept of human rights and their guarantees (eliminating the concept of individual guarantees), adding the principle of homine and the obligation of diffuse control of constitutionality for all judges, according to conventionality criteria.

Faced with the failure of the states to have their secondary orders, in accordance with the constitutional reform, the federation implemented the National Code of Criminal Procedures on March 5, 2014, and, as a result, it now has a new procedural system , with new paradigms, principles and procedural mechanisms.

Background

For several decades, the Mexican State contracted obligations due to international treaties that impelled it to modernize its legislation, among them the one related to criminal justice, human rights and public security, the fight against corruption, as well as some mechanisms of State responsibility; recommendations that he stopped applying because it affected his inner scope.

This failure to act promptly and protect political interests led to areas of impunity, which, in turn, generated more than a decade of Mexican society is immersed in a maelstrom of blood and fighting between criminal groups (now challenge the authorities and subject them to their interests in many regions). In this regard, Edgardo Buscaglia, visiting professor and coordinator of the International Program of Justice and Development of the Autonomous Technological Institute of Mexico (ITAM), commented that "the war began late, the narco already controls territories, promotes and finances candidates for mayors and deputies and It keeps the municipal structure of the country hostage. (BUSCAGLIA, 2010).

On August 30, the Municipal Development Commission of the Chamber of Senators presented an x-ray on drug trafficking in Mexico. In their conclusions, the legislators establish, for example, that the drug lords control large territorial extensions in which the State can no longer govern through its institutions. In addition, the study provides a revealing data: the drug trafficking networks keep 71% of the national territory under their control (*ibidem*).

The perception of society is that the criminal justice system is infected by corruption, impunity and inequality, as reported in the report on the quality of citizenship in Guerrero, prepared by the International Institute of Advanced Political Studies "Ignacio Manuel Altamirano "For the Electoral Institute and Citizen Participation, from 3016 samples in the seven regions of the state (UAGro-IEPA, 2017).

The mixed criminal system, consequently, was already unsustainable due to the international pressure of the Mérida Plan, the Washington Consensus and the judgments of the Inter-American Commission on Human Rights (CIDH), as well as international criticism derived from errors in investigation and prosecution. , such as the case of Florence Cassez, the release of Rafael Caro Quintero, the escape of El Chapo Guzmán, the disappearance of 43 Ayotzinapa students, among others; for that reason the society demanded a change in the operation of the institutions of justice and control of the operators of the system to recover the social peace and to stop the violence in all the states of the country.

Thus, the Mexican State, faced with the critical attack of international tribunals, especially those from the IACHR, which condemned the violation of the fundamental rights of the governed, as in the emblematic case of Rosendo Radilla for the disappearance of a person, file 65 / 2005 of the IACHR (2009), as well as the cases of Inés Fernández and Valentina Rosendo (IACHR, 2002), Rodolfo Montiel and Teodoro Cabrera (CIDH, 2009), and other cases, all in the state of Guerrero; plus what is derived from the Washington Consensus, as a residual effect of the globalization process (Serrano, 2000) and the demand of trade consortiums, mainly those of the United States, which in their acculturation process had been demanding for time homogenization in Ibero-America of a judicial process that was analogous among all these states of Latin speech and that could be compatible with the North American criminal process; First of all, the Mexican State was part of the constitutional reform process in America to modify the justice system, in its procedural part, mainly, which includes all matters of civil justice, and specifically in the criminal area.

Analysis of the need to change the penal system

In the year of 1917, an authoritarian criminal system was established in Mexico, with the mixed system. To appoint a general attorney general (now the attorney general) in this system, the Executive proposed a shortlist of candidates for Congress (Constitution, 2017) and his proposal was voted by the legislature, where the agreements between the parliamentary factions dictated the choice of one of them. This official directed the Public Ministry in charge of the investigations to sanction the crimes committed by the persons in accordance with the assumptions of the Penal Code and the National Code of Criminal Procedures.

The function of the investigation corresponded to the investigative ministerial police, which was in charge of a general director, appointed directly by the Executive.

In the administration of justice, magistrates and judges did not arrive at the post for their judicial career, but rather by proposal of the Executive to the legislature and their final election was determined by vote. The Judicial Power of origin lacks independence and was subject to a concentration of vertical power, leaving the principle of separation of powers and functions non-existent.

The foregoing established in practice the paradigms of our mixed criminal justice system; since, in the investigation phase, the concentration of investigative powers was exercised with secrecy and monopoly of the exercise of criminal action in the hands of the Public Prosecutor's Office, to then take the detainee before a judge who, in its constitutional term , invariably subjected to preventive detention.

The constitutional term was the stage in which the legal status of the detainee was resolved, which could be dictated by three types of proceedings:

a) freedom due to lack of elements to process,
b) subject to trial, with formal preventive detention and
c) subject to trial with provisional release under bail.

The term of the investigation and trial, during which his guilt or innocence in sentence was determined, was of a term of four months (if he was confessed) or of 10 months (ordinary way), after which a final judgment was issued, which it could be acquittal or condemnatory, impugnable by appeal and later by direct amparo in function of cassation.

Of course, this mixed criminal proceeding was essentially inequitable, since the Public Ministry had no term to initiate and complete its investigation, was not subject to any legality control and its interest consisted in proving the body of the crime and the presumed responsibility; This is how, when the Public Prosecutor's Office consigned, the accused arrested had the presumption of guilt.

The detainee, at the preparatory hearing, was made aware of his rights and was notified of the criminal case, the name of his accuser, who deposited against him. Furthermore, when he was

arrested, he was unable to defend himself unless he had good legal assistance; But if he had a lawyer by trade, he limited himself to signing the minutes and leaving the matter for the corresponding instruction.

During the investigation there was no possibility of eliminating the procedure until sentencing, except in the crimes of complaint. Most of the crimes were classified as crimes that could be prosecuted ex officio and almost invariably as serious, which prevented the origin of means of early termination of the process, such as; the forgiveness of the offended, the withdrawal of the ministerial authority or the dismissal of the case.

Coupled with the above, the behavior of Mexican police officers, accustomed to torture, extortion, solitary confinement and many other vices claimed in federal courts, was difficult to prove, due to the system's own flaws, as Miguel Carbonell reports:

> There is impunity in relation to some persons responsible for arbitrary detentions, many control mechanisms do not enjoy sufficient independence, being hierarchically subordinated to the administrative authority [...]. A large number of people are brought before the courts, having been arbitrarily detained [...] without having had access to a judge [...]. A considerable percentage of detainees claim to have been beaten or injured by the police [...]: when the detention is carried out by the preventive police by 21%, and by 35% when the arrest is made by the judicial police (CARBONELL, 2010).

The scandals derived from these practices forced the Mexican State to allow the application of the Istanbul Protocol (as in the case of Norma Mendoza López, victim imputed by illegal means of torture), which establishes, among several things, the protection of witnesses, the use of interpreters, the physical examination of detainees (skin, thorax-abdomen, musculoskeletal system, genito-urinary, central and peripheral nervous system) in search of blows, suspension, electric shock, dental torture, asphyxia or sexual torture, through a medical evaluation , psychological or psychiatric (Attorney General of the Republic [PGR] 932 /, 2011).

In this way it can be established that when the investigation of an act considered a crime is vitiated by a bad practice of a public police officer, of any kind, in the exercise of its functions, it

damages the process and affects the principle of justice in the criminal system, so the judge is forced to dismiss the procedure, without solving the merits.

It must be remembered that, in the mixed system, the guarantee protections in reality became evidentiary burdens for the presumed responsible, which had to show its innocence with tests classified as private (usually witnesses and documents), whose assessed value was indicative that it had to be linked with other tests in order to be able to combat the ministerial full circumstantial evidence.

Also, the way to obtain the declaration of a witness, with the vices of origin to obtain it, did not matter, because they could not be corrected in the guarantee phase of the process: if there was a first declaration, it eliminated validity to all subsequent or the clarifications that could be made. The above generated vices and corruption, when always the performance of the ministerial authority should have been, as Daniel Montero Zendejas says:

> The Public Prosecutor's Office [...] is auxiliary to the criminal procedure and the monopoly of the preliminary investigation is an element of the past [...] the principles of presumption of innocence, direct imputation and additional considerations imply a new stage in the public prosecutor's office (Montero, 2012).

As a result, severe criticism was raised in the international order in which the Mexican State was condemned as the author of aberrant acts against citizens, or at least by omission of its duty to provide public security and guarantee access to justice. All this forced Mexico to make its justice system more transparent, in addition to adapting it to the parameters of conventionality, as a requirement to continue being considered within the countries that respect the fundamental rights of the people.

The combination of all these antecedents, both the pressure of the international courts and the policy of modernizing the State, reducing violence and crimes in impunity, had as one of its consequences the change of the criminal process. That is, to move from the mixed system to the accusatory system through the mechanism of a constitutional reform, so that, as a result, the regulatory laws could be applied to operate the system.

The accusatory system, solution to the conflictive delinquency?

To combat the phenomenon of delinquency, the early exit that the State found was to implement the accusatory system. From the integration of the Council for the Implementation of the New Criminal Justice System the creation of the National Code of Criminal Procedures was achieved.

The models of Chile and Colombia were taken as models to design a new model of criminal procedure applying the principles of orality, adversariality, publicity and procedural immediacy. And for this it was necessary to establish a transition term of eight years, counting from June 2008 to June 2016, to adapt the personnel and infrastructure for an appropriate functioning of the system.

In order to change the system, the first thing to be established were the operation mechanisms, which are listed below.

a) Move from a system that privileges legal security to another one of pro-homine justice.

b) Move from a system of presumption of guilt to another of presumption of innocence.

c) Move from one system of records to another of public hearings with oral mechanisms.

d) To pass from means of investigation in secrecy to another of means of adversariality in the face-to-face hearing of the parties.

e) To move from a preliminary investigation to a folder of evidence under equal circumstances and under judicial supervision, in which the evidence is equal and what determines the degree of judicial conviction is the technical demonstration and not a legislative criterion.

f) Eliminate the monopoly of authority and criminal action of the Public Prosecutor's Office and make it a part and a social representative.

g) Modernize the attention spaces to the processes with adequate buildings and technology to digitalize the means of access to justice and monitoring of the processes, to guarantee transparency, efficiency and eliminate doubts about the corruption of the system.

h) And fundamentally, establish a control of legality and constitutionality during the investigation-sanction-execution by those who are responsible for attending the process and not deferral to the federal judicial body.

This was achieved by establishing a National Code of Criminal Procedures on March 5, 2014, with a final reform in June 2016, which was the mechanism that finally allowed Mexicans to find the application form to the constitutional reform of articles 16. , 17, 18, 19, 20, 21, 22, 73, 115 and 123 of the Political Constitution of the United Mexican States (Carbonel, 2010).

The implementation of the accusatory model turned out to be quite complex. Whenever a first instance is established in a process that is divided into three phases, a second instance and a means of constitutional control and, finally, the phase of execution of sanctions with special procedures, being the listed below some of their main elements.

a) Investigation: (preliminary-complementary) with detention control, formulation of imputation, preserving an anachronistic system of pre-instruction called linking to process, and application of precautionary measures and precautionary measures, as well as limiting the extension for complementary research.

b) Intermediate: that is made up of the acts of accusation-probatory agreement that purges the accusation, opening or discovery and the purification of probative material and the probatory agreements that, as a self-admission test, announces the probanza that will be relieved in judgment through the car of opening to trial.

c) Trial: allegations of opening-release of evidence; closing-deliberation-failure allegations; sentence-individualization of the sanction.

d) Means of challenge of sentence: appeal for second instance, as a means of control of legality, and direct protection, as a means of control of cassation judgment.

e) System of execution of sanctions: with its mechanisms of benefits for early release.

Therefore we can say that the new criminal procedure system is not the solution to the social conflict, it is just a different way of investigating, of building a case and presenting it with greater

guarantees before the courts, aspiring to reach international parameters, the rest is matter economic, social and crime prevention through public safety mechanisms.

Analysis of the articles modified to the Federal Constitution for the operation of the accusatory system.

In order to modify the criminal process, it was first necessary to modify the constitutional basis and then establish the processing mechanisms in a secondary general law. Hesberth narrates this process in the following way:

Thus, Article 16 of the Constitution received changes in its text related to the arrest warrant, definition of flagrancy, modification of the concept of arraigo, specification of the term organized crime, control of private communications and the establishment of the control judge.

Article 17, added to its text the alternative dispute resolution mechanisms, the public defender.

Article 18 included the penitentiary system, social reintegration and compliance with the penalty in organized crime.

Article 19, the figure of linking to process, the purpose of preventive detention.

Article 20, the characteristics of the accusatory criminal system, the principles of the accusatory system, the rights of the accused, the rights of the victim.

Article 21 regulates the investigation of crimes, the exercise of criminal action, the imposition, modification and duration of punishment, criteria of opportunity, public safety.

Article 22, in its aspects of proportionality of punishment, confiscation, extinction of ownership.

Article 73, the powers of the Congress of the Union.

Article 115, the powers of the states and municipalities.

Article 123, the work regime of public safety (Hesbert, 2012).

Changing a process system requires not only the constitutional reform, but also the adequacy of secondary legislation, such as the National Code of Criminal Procedures, the Law of Organized Crime, the Law of Amparo, the Law of Minors, the Organic Law of the Attorney General's Office, the Operation Manual, the protocols of action and many more. All this implies the deepest of the modifications in the criminal field in the history of Mexico.

At the beginning of the reform the applause was heard everywhere, but they begin to fade before the reality of its results. In Mexico City, more than 10% of those sentenced are released after the disappearance of "serious crimes"; only two out of ten detainees are remanded in custody, by application of precautionary measures (Vela, 2018).

Inquiring was found, that it is not a matter of effectiveness; if we talk about that:

a) The paradigm of the mandatory sentence without benefits of conditional substitution or early release in serious crimes disappears, except as provided by the law of organized crime.

b) Most crimes result in the application of precautionary measures and preventive detention is the last ratio, other means of control are preferable (UNION, 2016)

c) The application of the system requires new infrastructure, because now the accusatory system to be able to implement requires adequate and different facilities.

What we do see as a matter that makes the procedure ineffective is that the authority failed to establish the appropriate scenario for the operation of the system in the area of infrastructure, since the authority must have the following facilities;

a) the hearing room for hearings, where the judge is located in the center (or court in case of trial) and its sides the defense and its lawyer, the victim, its legal counsel and agents of the Public Ministry, and in front seats with access to the public to said acts.

b) The facilities require areas for the submission of evidence, opening or closing arguments and sentencing.

c) Work rooms for witness interviews, separation of witnesses and other intervenors, security areas for accused persons.

However, for further study, the basic provisions for the operation of the orality rooms, regardless of type, must have the following elements:

- The three important areas: public, litigation and judge area. The latter must be in front of the room and in turn serves as the perfect setting for observation.
- The witness will be in sight of the accused, the ombudsman, the victim and the judge, with the exception of the protected witnesses.
- Both the victim's place and the accused's place must not be found for any reason.
- The existence of windows in the rooms is prohibited.
- To divide the public area from the litigation area, there must be a railing that covers the end of the room.
- Must have exclusive access to the judge
- Must have exclusive access for the accused.
- Must have exclusive access to the other participants in the litigation (victim, witnesses, agents of the Public Prosecutor's Office, police officers and experts).
- Two visible accesses must exist in the judge's area.
- The existence of national symbols (national flag) visible in front of the room is mandatory.

Orality rooms, regardless of type, must have the following security measures:

- Videorecording system in closed circuit.
- There must be a minimum of six fixed cameras (regardless of the brand), placed with a view to the accesses, to the public and most of the time they will be placed focusing on the areas of the accused or the defense, the victim or the prosecutor's office, of statements, the judge's clerk.
- The judge or judges (depending on the case) should be located at the back of the room in order to observe everything that happens inside the orality room.
- In the middle of the area the secretary of the judge is located, at one end of the room and in front of him, at the other end is the platform for the participants who ratified his statement.
- At the end of the litigation area, near the railing, the desks of the accused and the victim are located.
- The accused or the victim and their legal representatives must be located at the desk.

In a punctual review of the conditions that our orality rooms have in the state of Guerrero, it was found that there are only three judicial cities: Iguala, Chilpancingo and Acapulco; they have all the required requirements. While in other three districts oral rooms were set up: Tlapa, Zihuatanejo and Tecpan.

So, by making a count, for 18 judicial districts, there are only six attention centers for the accusatory criminal system. Twelve judicial districts will have to transfer the detainees through several municipalities until they find the nearest orality room where each and every one of the hearings that the system orders to be released under penalty of nullity can be developed.

However, what is most alarming is that half of the properties where the courts work are not owned by the Judicial Power of Guerrero, but by individuals who are landlords of said properties.

If to the above it is added that the operation of the system was not adequately prepared for those who had to operate the basis of the accusatory procedure, that is to say: the police officers were not adequately prepared and were unaware of the security protocols, preservation of the place of events and chain of custody; the experts have to travel many kilometers from the capital to other centers, because only in three, Iguala, Chilpancingo and Acapulco, there are trained personnel; Regarding the agents of the Public Prosecutor's Office, only those who are in oral courts (six) were trained, while in 12 judicial districts they are waiting for the infrastructure to reach them; public defenders and private attorneys are mostly unaware of the system; for all the above, it is logical to state that the accusatory criminal procedure system has not worked properly.

Conclusions

Although there is a social predisposition to dismiss as inefficient the accusatory system, mainly because of the short period of time it takes the detainees to get out of prison, because now there are precautionary measures (bonds, mortgages, foreclosures, immobilization of accounts, warning of not leaving the locality, subject to supervision of the authority, location rings, etc.), and only in the crimes of informal preventive detention are left in a detention center; However, this perception is only a reflection of the paradigms that had and have now changed. The bulk of the population understood that justice consisted of the alleged offender being in jail and with that he

was satisfied; now the paradigm is different. Although the alleged innocent, at the time of being presented before the supervisory judge has the right to face his trial at liberty whenever he satisfies the reparation of the damage or is subject to precautionary measure, it is not a sign of injustice but a different mechanism of access to Justice.

For many years, little was invested in the justice system. There are less prepared and poorly paid policemen, a high-handed and corrupt Public Ministry, stubborn judges under the protection of courts where justice is negotiated quietly, an opaque and very manageable procedure, depressing facilities that are often leased and not own, so it is necessary to invest in the acquisition of infrastructure to function in a dignified manner.

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