REFORMS IN CRIMINAL MATTER IN LATIN AMERICA: A SOCIOLOGICAL APPROACH THE OPPORTUNITY OF CITIZEN SCRUTINY IN THE WAY OF IMPARTING JUSTICE

Reformas en materia penal en América Latina: la oportunidad del escrutinio ciudadano en la forma de impartir justicia

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RESUMEN

El siguiente artículo muestra las experiencias de las reformas en materia penal en algunos países de América Latina como Argentina, Brasil, Colombia y México para describir la relación e importancia de las instituciones de impartición y administración de justicia en la construcción de las emergentes democracias, la ciudadanía y el desarrollo del Estado de Derecho desde el concepto de Elías Díaz. Se realizó una comparación de investigaciones realizadas en estos países definiendo indicadores comunes. El texto muestra cómo la justicia alternativa ayuda a fortalecer la relación entre la justicia y la ciudadanía pues inaugura la participación de la víctima y el imputado para llegar a un acuerdo reparatorio. De igual manera, se señalan las experiencias positivas de estos países como los mecanismos alternos de solución de conflicto en México, Brasil y Colombia y los juicios por jurado en Argentina, así como las deficiencias que deben subsanarse para lograr un pleno Estado social y democrático de Derecho.

PALABRAS CLAVE: reformas en materia penal, ciudadanía, estado de Derecho, democracia, justicia

ABSTRACT

The following article shows the experiences of reform in criminal matter in some countries of Latin America such as Argentina, Brazil, Colombia, and Mexico, in order to describe the relation between and importance of the justice administration institutions within the construction of the emerging democracies, their citizenship and Elías Díaz's concept of the development of the Rule of Law rule of law. A comparison of the research done in these countries was made, defining common indicators. The text shows how alternative justice helps to strengthen the relation between justice and citizenship, for it allows the participation of the victim and accused parties in order to reach a damage reparation agreement. In the same way, the positive experiences in these countries are highlighted, such as the conflict resolution alternative mechanisms in Mexico, Brazil and Colombia, the trials by jury in Argentina, as well as the deficiencies that must be repaired in order to achieve a social and democratic Rule of Law in full.

KEY WORDS: reforms in criminal matter, citizen, rule of Law, democracy, justice

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INTRODUCTION

Justice in Latin America is a central topic to understand and explain the deficiencies and obstacles that young democracies in many countries have presented. The mistrust in institutions, mainly in the ones in charge of imparting justice, is one of the reasons why different countries decided to carry out reforms in criminal matter to provide justice with a new sense and to change the perception that people hold around it. A democratic state cannot function with tainted, corrupted institutions which do not respect the fundamental rights of citizens.

In the present article is a comparative work between the experiences of Argentina, Brazil, Colombia and Mexico in order to observe how these countries have moved towards an oral criminal-accusatory system to consolidate a social democratic Rule of Law. It is worth mentioning that it is based on an empirical investigation carried out in Mexico about the transition to a new criminal justice system, counting on direct observation and interviews to the juridical operators. The data and findings of this investigation were used in the present work. Additionally, the experiences of Argentina, Brazil and Colombia are described based on secondary sources such as articles and texts of authors specialized in the subjects of criminal reforms in these countries. Moreover, statistical data from ECLAC, *Latinobarometro*, Freedom House, Transparency International and International Security Organization of the OAS are included in order to make a comparative analysis.

These countries share characteristics such as the funding by the United States Agency for International Development (USAID)[2], the search for strengthening institutions' credibility, the diminishing of violence indexes and the incorporation of alternative mechanisms. In this sense, it is highlighted that these new justice models are founded on the guaranty of rights, due process and democratic participation of the citizenship, that is to say, a paradigmatic change in the way of making justice.

Based on the concepts of Rule of Law, democracy and citizenship, the processes of reform in criminal matter in the countries of Argentina, Brazil, Colombia, and Mexico are analysed to highlight how the transformation of their criminal justice system is inserted in the regional context of the development and construction of the Rule of Law. This analysis intends to answer the following questions: What is the current situation of the Rule of Law in Argentina, Brazil, Colombia and Mexico, specifically the situation of the justice administration institutions? What similarities and differences do the reform experiences in these countries share and what is their relation with the citizens' scrutiny?

In order to answer these questions we start from the Italian professor Vincenzo Ferrari´s proposal of studying law:

> [...] as a modality of social action which means to inquiry into the human actions which are inspired in it. It embraces their sense and

2.- The USAID is a United States body in charge of promoting countries with scarce resources. It attends to different areas such as extreme poverty, climate change, democracy strengthening and economic development. Particularly in Latin America and the Caribbean, the USAID centers its support in: "In LAC, USAID helps to make the United States and the Western Hemisphere more peaceful, secure, and prosperous by strengthening the capacity of governments and private entities to combat crime, improve governance, address climate change, and create an economic environment in which the private sector can flourish and create jobs." Available in: https://www.usaid.gov/where-we-work/latin-american-and-caribbean Consulted in December of 2017.

> verifies whether, and to what extent, this is socially shared. To describe them in their time course, to identify their concrete effects and to redirect such investigations to a theoretical conjoint vision that gives account of the position that law embraces in the field of the social relations, seen both in the whole and in their parts (Ferrari, 2006, p. 18).

In this way, the transformations of juridical reality are analysed within the social context, that is to say, not only regarding their exclusively juridical and normative transformation, but also their implications in the social, economic and political structures.

In the first place, the concept of social and democratic Rule of Law is developed to highlight its connection with democratic political models and social justice models. After that, the reform processes in criminal matter experienced in the Latin American region are described, making emphasis on the cases of Argentina, Brazil, Colombia, and Mexico to highlight two important elements for the consolidation of the citizens' scrutiny and participation: the principle of publicity and alternative justice. Lastly, as a final reflection, a comparative analysis of these countries and their development and implementation of the social and democratic Rule of Law is done, following the characteristic that Spanish jurist Elías Díaz proposes. Also, the similarities and differences of the experiences, starting from the reforms in criminal matter of these Latin American countries, are analysed in order to give account of the democratic inertia that exists in these countries at institutional and citizenship levels stemming from international institutions' indicators such as ECLAC, OAS, Transparency International and others. Among these indicators are: democratic progress, perception of democracy, perception of corruption, reform implementation in criminal matter, perception of the judiciary performance, overcrowding rate in prisons, principle of publicity and alternative mechanisms.

1. RULE OF LAW, DEMOCRACY AND CITIZENSHIP

The concept of Rule of Law is a constant discussion in the social sciences. For the author Lucas Verdú, this category is a civilizing project that is made of an economic, political and social model beginning at the end of the 18th century in Western societies, having as milestone the historical *Declaration of the Rights of Man and of the Citizen* as a political statement of the French Revolution of 1789 (Verdú, 1955).

On the other hand, the Spanish professor of Philosophy of Law Elías Díaz, considers that not every Rule can be defined as a Rule of Law, but the socio-juridical concept of rule of law is closely linked to the ideals of liberalism and political-democratic models. Following the different works by this author, among which his classical piece *Estado de derecho y sociedad democrática* (1998) stands out, and his most recent texts*: Curso de Filosofía del Derecho* (1998) and *El derecho y el poder: realismo crítico y filosofía del derecho* (2013), it is considered that this juridical and political model must take into account at least four principal elements:

a) Empire of the law, that must come from the general will

b) Separation of powers: legislative, executive and judiciary

c) Legality of the government administration: legality auditing and judicial control of the state

d) Fundamental rights and liberties: juridical, formal, substantial, and effective guaranty of human rights (Díaz, 1998, p. 44).

The presence of these characteristics, the author remarks, is necessary for the proper functioning and development of a Rule of Law[3]. These characteristics pinpointed by Díaz are not liable to observe empirically the way they are stated. To make possible an empirical observation, we searched for indicators made by Freedom House, ECLAC, Transparency International and the International Security Observatory of the OAS. In this way, the following characteristics were used:

• The transition to more democratic and politically plural models.

• The indicators made were the index of democratic progress, and the index of perception of democracy.

• The strengthening of the constitutions aiming at establishing norms to harmonize social living which guarantee the fundamental rights of citizens.

• The indicators show the implementation of reforms in criminal matter and the index of overcrowding in prisons.

• The modernization and proper performance of the institutions and their state agents, such as the administration of justice.

• The indicators were the indexes of perception of corruption and judiciary performance.

• The construction of juridical mechanisms that make possible the opportunity of public scrutiny for the invigilation of justice administration.

• The indicators were the principle of publicity and alternative mechanisms.

Democracy is a political and juridical system, since it is a procedural and formal model for the institution of political power, which at the same time contains a subtantial foundation of social and ethical development; it allows a way of social living. The construction of citizenship is the central axis of the existing relationship between Rule of Law and democracy; in it, the positive and negative aspects which the State has in its institutions and authorities can be analysed and observed.

For Thomas H. Marshall (Marshall and Bottmore, 1992), English sociologist pioneer of the reflection upon citizenship, there are three dimensions of this aspect:

1. The civil one, linked to the fundamental rights for individual freedom and justice;

2. The political one, related to the participation in political and social power distribution and;

3. The social one, anchored to the rights of economical welfare and of safety.

Italian jurist Luigi Ferrajoli analyses these dimensions and their relation with democracy as *autonomy rights*, whose function is to regulate and legalize the way in which political agents take their decisions; and as *expectation rights*, which seek to give account of democracy and its results from the everyday individuals' experiences. (Ferrajoli, 2004, 104)

3.- These four characteristics mentioned by Díaz can be analyzed from the sociology of law. The most recent works by this author maintain the four pillars of the construction of a social and democratic Rule of Law making emphasis on the relation between law and power. A harmony between rights, sovereignty and juridical exercise is maintained.

In this context, citizenship is linked to the rights which, at the same time, bestow obligations, that is to say, it is a concrete concept, and it is not solely exercised by one subject in particular but by an organized society within a state framework under different understandings of justice. In this sense, the idea of citizenship is not an abstract model, but its development is referred to the economic, social, and political contexts of each society.

1.1. Rule of law in Latin America

In the case of the Latin American region, it can be observed that after the authoritarianism and totalitarianism of the military dictatorships that prevailed at the beginning and throughout the first half of the 20th century in many countries, the transition towards the democratization of the political systems and of the social living has tried to develop what Díaz labels as *democratic and social rule of law*. This juridical and political model is founded on the social rights[4] and on the realization of social justice, in face of the formal and normative character of democracy. What this model pretends is to highlight the substantial character of democratization's benefits and objectives by making the citizen part of the economical, material and symbolic achievements of the nation's development.

With this logic, the emerging Latin American democracies have undertaken transformations –some in the practice and others only in the discourse, a search for the development of a democratic and social Rule of Law, focused on the economical development, the social benefits and the human rights guaranty. However, most Latin American countries have found difficulties to thoroughly develop a democratic model, since it has focused exclusively on the normative changes and the constitutional reforms, without going further into the economical, political and social inequalities structurally and historically rooted, which have an influence on the social living of these countries.

In this aspect, constitutions have played a role which appeals to the availability or dismissal of certain norms according to the requirements of the moment.

> Constitutions are called upon in moments of crisis procuring to eliminate the difference between the stated values and the real behaviour, notwithstanding that its principles have a practical relevance. And when it is considered that it is not convenient to reiterate the invocation of the same text, the Constitution is reformed as an expression of a strong political will apparently willing to modify the reality. (Garzón, 2002, p. 228).

This normativist vision does not consider the importance that the institutions and their agents have for social change. In this sense, the constitutional reforms must be accompanied by a tranformation of the agents' practices which constitute the social institutions. Some of the elements that can be mentioned for the functioning of a democratic legal system are, in the first place, the adoption of an internal democratic point of view, that is to say, to link the norms in an ethical and juridical

4.- The social rights are presented as symbolic attributions that the State produces, signifies and distributes within the diverse groups and sectors that integrate society. These rights acquire a social character in as much they have a juridical and/or constitutional foundation, as well as a foundation for the development of social living.

sense and not only follow them in an instrumental way. The second one is the construction of a less unequal society where each one of the individuals can satisfy their basic needs and exercise their rights in full, that is to say, the importance dwells in the acknowledgement of equality and justice. The inertia of these political projects of nation-making in the Latin American region is not homogenous but counts on particular elements, such as the following:

1. The transition to more democratic and politically plural models.

2. The strengthening of constitutions aiming at establishing norms to harmonize with social living and which guarantee the citizens' fundamental rights.

3. The modernization and proper functioning of the institutions and their state agents, as the administration of justice.

4. The construction of juridical mechanisms that allow for the opportunity of public scrutiny of justice administration.

These points coincide with the essential features of a democratic and social Rule of Law, they are the objectives that the Latin American countries have set for themselves.

The return to democracy in some of these countries started in the 1980's and found some obstacles for its correct development. For Gerardo Pisarello (Pisarello, 2002), these obstacles can be classified in external and internal factors. The external factors are the position of periphery and subordination the region has regarding the international and political order. This position has augmented after the incorporation of a neoliberal economical model which has transformed the nation state's functions and has substituted politics for the market as regulator of social living.

The internal factors are: the deficit of the bureaucratic apparatuses that have weakened juridical efficacy, the lack of legitimacy of and respect for the constitutions as the maximum representation of law, the lack of independence of the judiciary in respect of the executive, the considerable increase of violence and the crisis of the fundamental rights guaranty. Pisarello explains this in the following:

> On one side, the legal and representative façade, the symbolic dimension that the Constitution and the law exalt as true political myths; on the other side, the noisy legitimating proclaims sent out by the power sphere: a clandestine State equipped with its own codes and tributes, organized in centres of hidden power set aside for the private appropriation of the public and secretly journeyed by recurrent subversive temptations. (Pisarello 2002, p. 284).

In this aspect, the search for the social Rule of Law in Latin America has been positioned as the "legitimate utopia" to solve the structural inequalities in the region, to modernize the institutions that govern social living and to guaranty the effectiveness of human rights in these societies.

The emerging Latin American democracies have initiated a series of reforms regarding the administration and imparting of justice to provide with tools that help to guaranty the rule of law. The modernization of the new penal justice system seeks to accelerate and make more efficient the way or imparting justice as well as guarantee the human rights of the victim and accused parties. This new way of imparting justice proposes a system that promotes the participation of the citizenship.

2. THE REFORMS IN CRIMINAL MATTER: ARGENTINA, BRAZIL, COLOMBIA AND MEXICO

The main reasons for which the criminal justice system was reformed in some countries of Latin America were to modify the inquisitorial system and to give a dramatic turn with the idea of respect for the fundamental rights. Among other things, it aims at setting up the respect for due process, the presumption of innocence, reasonable due dates and decreasing criminality's high indexes, which are the cases of Colombia and Mexico. The former system did not guarantee the protection of the basic rights, transparency, or the actors' participation in the penal process. There were also high costs for the processes and due to these reasons, the rights of the victim and the offender became vulnerable (Gilles, 2010, p. 64).

As Luis Pásara shows, the transformation of the Latin American criminal justice system was incorporated in the public agenda thanks to the initiative of two main actors:

a) Corporate leaders and international organizations of economical and diplomatic cooperation in the context of globalization that emphasized the direct connection between economical development and democracy of quality.

b) Academic groups and human rights organizations denouncing cases of violation of these fundamental guarantees which proposed the transition towards a more effective type of justice. (Pásara, 2002, pp. 367-368).

The different criminal justice reform projects, as the author indicates, were promoted by distinct international instances, such as USAID[5], the Inter-American Development Bank, the World Bank and the *Cooperación Española* (Spanish Cooperation), who sponsored and nurtured the oral-accusatory justice model in countries such as Argentina, Chile, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Paraguay, Peru, the Dominican Republic, Venezuela and Mexico.

After some countries integrated the principles of reform in their constitutions in some countries, it was observed the adoption of criminal and procedural codes, that is to say, orality in Latin America was established as an essential element for due process, transparency and respect for the fundamental guaranties, all of which accelerate the processes. (Gilles, 2010, p. 73).

The constitutional reforms helped to move from an inquisitorial system to an oral-accusatory model founded on the guaranteeing quality that, according to Luigi Ferrajoli's proposal, is a main feature for the development of any Democratic Rule of Law.

The guaranteeing model of criminal law is founded on:

> the strict legality, materiality and harmfulness of the crimes, the personal responsibility, the oral trial and opposition between the parties, as well as the presumption of innocence (...) These

5.- The USAID is the United States Agency for International Development in charge of reinforcing American foreign policies by sponsoring specific areas such as economy, agriculture, politics and justice in the developing countries. Until 1999, it set aside 300 million dollars for the systems of justice and security in 19 countries from Latin America, from which 50 million dollars were focused on the criminal justice system. (Pásara, 2002, p. 370).

> guaranteeing principles are put together, before anything else, as an epistemological scheme of identification of criminal deviation aimed at assuring, in respect of the other criminal law models historically conceived and realized, the maximum degree of rationality and reliability of the trial, and therefore, the delimitation of the punitive power (*iuspuniendi*) and of the protection of the person against arbitrariness. (Ferrajoli, 2000, pp. 33-34).

Effectiveness is the principle by which the norms and the penal process must be regulated, regarding the design and application for safeguarding the due process. The goal is to provide justice that is efficient, agile and effective for the citizens. In the following lines are presented four cases from Latin America on experiences in criminal reforms, construction of democracy and citizenship, which help to observe and identify the advances and/or setbacks of the justice systems.

Argentina

In the Argentine case, the transformation of the criminal justice system starts in a symbolic manner with the trial by the judiciary upon the agents that committed crimes during the military dictatorship in the 1980s. Along with the transition that took place with the ascent of the first democratic government in 1983, a series of reform projects to the Nation's Criminal Procedural Code was presented, (NCPC) which sought to modernize, speed up and augment the indexes of credibility and trust in the new criminal justice system[6].

It is in 1992 when the criminal project is approved by jurist Ricardo Levene[7], called "The Levene Code", which presented the application of a mixed system constituted by an initial stage, based on the building-up of a written file and a second stage, characterized by the presence oral and public hearings with the participation of non-expert agents as part of the jury.

The transition process to the new accusatory criminal proceedings system model in Argentina started slowly and gradually, since the justice administration system is regulated by a federal structure that provides each province with their own judiciary power. In this aspect, the implementation did not take place homogenously, that is to say, there was not a total change in the justice system.

The accusatory system, as the NCPC points out, is ruled under the following principles: equality between the parties, orality, publicity, contradiction, concentration, mediation, simplicity, rapidity, and *de*formalisation. It also highlights that hearings must be developed orally and publicly.

6.- In the discussions referred to the Criminal Code, two main proposals stand out: the first one is the incorporation of the Statute of Rome that established as criminal acts the ones classified as crimes against humanity, which helped to process the cases occurred in the period known as "the long knight" of Videla'smilitar dictatorship. The second one are the discussions around the so called Blumberg laws, which were approved in 2004 to implement more severe punishments for crimes with weapons that resulted in the death of the victims. These modifications to the Argentine Criminal Code took place due to the stimulus of demonstrations that demanded the hardening of the punishments related to crimes that had the death of the victims as consequence.

7.-Ricardo Levene was president of Argentina's Supreme Court of Justice in 1990 during the government of Carlos Menen. He encouraged the modification to the criminal process by proposing a juridical means of evidence production, pleas and sentence reading for their realization orally and publicly.

This process is made of three stages: the first one, called Preliminary Criminal Investigation, is where the Public Prosecutor is in charge of the investigation to verify the criminal acts under the vigilant observation of a control judge. The second one is an intermediate stage or trial preparation, where the debate and evidentiary materials are refined to proceed to the oral trial hearing or, in case of not having enough elements or that the case is to be solved via alternative justice, to be referred to the corresponding instances. The third one is a debate or trial hearing, where the evidentiary materials are presented by the parties for the formulation of a sentence dictated by a Collegiate Court.

The most significant advancements regarding the functioning of the new criminal justice system have taken place in the region of Cordoba. In this sense, authors like Carlos Ferrer and Celia Grundy recorded the successes that some practices of the criminal process have had to strengthen the democratic bonds between the citizenship and the justice system. These authors describe the strengths of the experiences that the trials by popular jury have presented in the province of Cordoba. Nearly 200 trials by jury have been made. The authors observe:

> Among other things worth mentioning is that the non-experts assumed their responsibility, committed with the delicate mission, being called upon, getting on with seriousness, maturity, impartiality and with good criterion, independently deciding between the speculations of the media. This undermined the prejudice of many stating that the "common" people are easily influenced and not "prepared" to perform as jurors (Ferrer and Grundy, 2003).

Even though these authors point out that the trials by jury still present problems in their procedure, mainly the lack of objectivity in the sentencing, they see in them a real possibility of empowering citizens to strengthen the justice system. In her text *Participación ciudadana en la justicia y legitimidad judicial: sobre las consecuencias del juicio por jurados* (Citizens Participation in Justice and Legal Legitimacy: on the Consequences of the Trial by Jury) María Inés Bergoglio (Bergoglio, 2014) mentions that a democratic success of these models of trials at a judicial level is the opportunity for the citizens to take decisions which are legally acknowledged.

It can be said that in the regions with more experiences with the new criminal justice system like Cordoba, Buenos Aires and La Paz, there are practices that make the citizens participation possible and along with it, the development of a more democratic model and the establishment of the Social Rule of Law. As Julieta Mira (2017) points out, (Mira it can be concluded that in these provinces a symbolic transformation of the participation of victims and suspects is being experienced, as well as the way of making justice collectively.

Brazil

In the Brazilian case, as Brazilian sociologist Rodrigo Ghiringhelli de Acevedo (2017) describes it, the impulse for the new justice system was due to the failure of the Federal Constitution of 1988 and the inefficiency of the criminal and fight-against-drugs policy which resulted in the increase of the violence and insecurity indexes, the loss of trust in the institutions of justice and state legitimacy.

In this context, the Law of Prevention of Criminal Procedure Reform was made with the intention of creating alternatives for control mechanisms and in that way reducing the abuse of punitive power derived from the criminal policies establish in the National Plan of Security in 2000. In

the same way, in 2008, the Criminal Proceedings Code was reformed to move to a modern, agile and efficient oral-accusatory system. With this reform, the Law 12.403/2011 was created and some of its main dispositions are the presumption of innocence guaranty, the requirement of evidence presentation before a hearing and the utilization of pre-trial detention, only in the cases where there is not the possibility of other custody measures. These dispositions have the purpose of making the penal process more effective and transparent, respecting the guarantees of accused and victim parties and prevent relapse.

For Abrahão Costa and Tavares Neto (2017), the change of the criminal justice system and mainly the special procedures such as mediation, allow to establish a closer relationship between justice and society. In this sense, the mediation is applied to the crimes denominated as *minor offense potential,* which have a maximum two-year imprisonment sentence. Mediation enables damage reparation for the victim and social reintegration for the offender. For these authors, the incorporation of the oral-accusatory criminal justice system helps to strengthen the institutions and promote transparency and accountability of these. This process called *institutional accountability* makes the justice administration operators and court houses responsible for promoting the watchfulness of their juridical actions, the strengthening of the public scrutiny and the citizens' participation. (Miguel, 2005)

For its part, the special procedures have achieved a more responsible application of justice by promoting a reflective law, where citizens can participate based on their experiences and cultural habits to solve their conflicts in a practical way. These procedures are born as initiatives to repair and regain the trust in the justice system. They also make the citizens responsible for the resolution of their conflicts. The transformation in the way of making justice requires a double commitment: on one side, it needs a radical transformation in the instruction and education of the juridical community, that is to say, in the way the juridical operators are taught; on the other, the making of a citizenship which is responsible and attentive to the juridical activities and participates in the ways of decision and application of law (Gonçalves, Rodrigues and Soares, 2017).

In the case of this country it can be said that the democratic process disrupted the justice system, which politicized the judiciary in order to solve matters of political order. This influences the process of accountability by the justice operators by looking for a more transparent system by means of audits to political actors. However, there are hurdles due to the juridical instruction that some justice operators still have rooted in the former system. Added to this, there is the context of political crisis and mistrust in the institutions that reached its highest level in 2011.

Colombia

In Colombian the transformation of the justice system started with a new constitutional order and the creation of the Nation's General Prosecution's Office, which looked for the implementation of a political and democratic system and the development of the Rule of Law.

Later on in April 2002, the Nation's General Prosecution's Office, aiming at studying the problems in the criminal system and proposing some solutions, made a call for an Inter-institutional Technical Commission that resulted in a project to reform the Constitution. This looks for the implementation

of an accusatory system in order to guarantee and make the process efficient. The second one is the strengthening for the integral protection of the victims. In 2003, two bills are presented in order to adopt the new justice system which contained five main elements:

> 1) The Criminal Procedures Code;
>
> 2) The independence of the Nation's General Prosecution's Office from the executive;
>
> 3) The monopoly of the investigation and accusation functions in the hands of the Nation's General Prosecution's Office and its agents;
>
> 4) The establishment of a unique procedure for the investigation and judgement of crimes and;
>
> 5) The equality of conditions between the accusatory and accused parties throughout the stages of the process. The principles and procedural values of the new Colombian justice system are: publicity, concentration, contradiction, impartiality, mediation, equality, loyalty, good faith and human dignity.

In the study carried out by Diana Bayona Aristizabal, Alejandro Gómez Jaramillo, Mateo Mejía Gallego and Víctor Ospina Vargas the following transformations of the new model were observed:

> The overcoming of the author's criminal law is substituted by an act's criminal law just like it can be taken from the term "punitive conduct" expressed in article 9 of the current Colombian criminal code and not "punitive act", (1980's Criminal Code) since it corresponds to a causalistic vision of the crime, according to which it is equated with a natural phenomenon, defined as such from the mechanistic vision of cause and effect (Bayona and others, 2017, pp. 72-73).

They also highlighted that the guarantees are hindered by the main role that the judge has, since this one is present during the two stages of the trial (investigation and judgement) reason for which he/she is affected at the moment of emitting a sentence contradicting the principle of impartiality. On the other hand, democracy in the new system, which seeks to make the involved parties participant by restorative justice, is affected by the lack of promotion and applicability of alternative mechanisms of conflict resolution. The authors remark that the Colombian accusatory system fell to a criminal populism[8], since it minimized the social claims and the demand for social justice moving to the oral-accusatory system.

Having said that, the new Colombian criminal justice system has not developed thoroughly the principles of democracy and participatory citizenship to strenghten the objectives of guarantees and efficiency of this new way of imparting justice. The citizens' participation which makes restorative justice possible is still a pending task in the Colombian criminal model.

8.- Criminal populism assumes that "the taking of public decisions shall be a function without the mediation of popular wishes, preferences, sensations or sentiments" (Martí 2009, p. 134). This penal tendency, as Martí points out, is in risk of giving in the construction of law and the laws to the opinion of the majority, diminishing the work of the juridical agents. That is to say, a criminal system of law is changed by a system of moral credibility.

Mexico

Based on the constitutional reform in criminal matter that was consolidated between 2006 and 2012 emitted by the executive power, in 2008 the transition from the inquisitorial system to the oral-accusatory system began. This transition was motivated by the increase of violence, the distrust in the institutions, and the impunity and corruption on behalf of the juridical agents, which resulted in the violation of the fundamental rights of the victim and accused parties.

The former system was carried out based on the written files and administrative paperwork with a long resolution period. The reform considered guaranteeing due process by modifying the agents' practices and decreasing the procedural times with the implementation of alternative mechanisms of conflict resolution. This was to channel the non-felony cases to the Centre of Alternative Justice, that is to say, cases that are considered negligent in the state penal codes and which do not exceed five years of imprisonment and in that way, to be able to unclog the workload of the public attorney's office.

According to the National Code of Criminal Proceedings (NCCP), the oral-accusatory system is guaranteeing and has as its foundation the presumption of innocence. This one is based on the following principles: mediation, publicity, orality, contradiction, concentration and continuity. Likewise, the constitutional reform modified the following articles: 16, 18, 19, 20, 21, 22, 73, 115 and 123[9].

The implementation process was not homogeneous, it has had a gradual transition marked by two key moments: the first one happens with the implementation of the CRCM, since its publication in the Federation's Official Journal in 2008 which set June 18, 2016 as the deadline for its implementation at a national level. Likewise, the Technical Secretariat of the Coordination Board for the Implementation of the New Criminal Justice System was established as an institution in charge of coordinating and supporting federal and local authorities in the implementation and homologation of the criminal justice system, which is an institution sponsored by the USAID. The second moment occurs with the incorporation of the NCCP and the implementation of the same in the National Law of Alternative Mechanisms for Controversy Solution in Criminal Matter in 2014.

The states of Oaxaca, Chihuahua, and Morelos were pioneers in the implementation of the new system. At the beginning, they developed a mixed system, since they still worked out cases with the former system and, after the CRCM cases were initiated with the new justice system. For the rest of the states of the country, the implementation took place rather gradually throughout the eight-year period that was established. For this reason, the results between one state and another have varied: while some of them have six or eight years with the new system, others barely have one year. Therefore, to do a general evaluation of the new Mexican justice system can be complex, since it was not implemented in the 32 country states at the same time. However, some practices of the pioneer states can be particularly observed and analysed.

9.- For further depth around the modifications to the articles and the principles foundations of the new criminal justice system, the first chapter of the text *Los juicios orales en el estado de Morelos. Las nuevas prácticas* (Cuéllar, 2017) can be consulted.

3. THE IMPLEMENTATION OF THE NEW CRIMINAL JUSTICE MODEL

The social and democratic Rule of Law is the fundamental objective of the emerging Latin American democracies. In this section, it is described how the countries mentioned above have propelled a series of reforms in their main institutions, namely, that of the administration and procurement of justice. Citizens' participation has been the objective of these reforms in order to make the benefits of democracy effective in social living, that is to say, to make the citizenship participant in the state's public activities.

Observing the four characteristics of the social and democratic Rule of Law model that Elías Díaz establishes, a comparative analysis of the countries mentioned about the advancement of the implementation of this political and social form can be done.

One first element that the author highlights is the relation between Rule of Law and democratic model. According to the world organization *Freedom House*, the democracy indexes in the countries mentioned were stable from 2006 and 2013. This organization, by means of its programme Nations in Transit, presents studies carried out by renowned academics to evaluate the democratic transit of developing countries, among which Argentina, Brazil, Colombia and Mexico. This evaluation assesses the following issues: national democratic governability (independence, effectiveness and responsibility of the Executive, Legislative and Judiciary powers), electoral processes, civil society growth, (nongovernmental organizations), legal framework and independence (protection and guaranty of the human rights) and corruption. A scale from 1 to 7 is built with these indicators, where 1 represents the highest level and 7 the lowest level of democratic progress. As shown in the following table (Table 1), in the cases of Argentina and Brazil the index remained in a score of 2 from 2006 to 2013, whereas in the case of Mexico it reaches a score of 3 and Brazil 3.5. What this indicates is that the former two countries have advanced in the implementation of democratic models more effective, whereas the latter ones still find difficulties in areas of governability and human rights' protection.

Table 1.- Index of Democratic Progress								
Country / Year	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**
Argentina	2.0	2.0	2.0	2.0	2.0	2.0	2.0	2.0
Brazil	2.0	2.0	2.0	2.0	2.0	2.0	2.0	2.0
Colombia	3.0	3.0	3.5	3.5	3.5	3.5	3.5	3.5
Mexico	2.5	2.5	2.5	2.5	3.0	3.0	3.0	3.0
Source: *Freedom House.*								

In its statistical publication, the Economic Commission for Latin America and the Caribbean (CEPAL) shows that the scale of citizens' perception of democracy level (from 1 to 10, where 1 represents the lowest level and 10 the highest level) of these countries varied from 2006 to 2013. In 2013 Argentina scored 6.3, Brazil 5.2, Colombia 5.8 and Mexico 5. It is important to point out that in the Brazilian case, this index decreased from 7.2 in 2010, the last year of Luiz Inácio da Silva, to 5.2 in 2013. In that year, the president was Dilma Roussef, who arrived to the presidency in 2011. This change in the Brazilian presidency marked a decline of democracy perception in the Brazilian citizenship. In Colombia, the years with higher democracy perception were from 2008 to 2012, being above 6 points. However, in 2013 this score droppew d to 5.8. This country, the same as Brazil, remains above the average. The highest level of Mexico is between 2009 and 2011 with a 5.9 score. Out of the four countries analysed, Mexico is found in the last place in terms of democracy perception and Argentina is in the first place since it maintained a score above 6 for most years. The years with higher democracy perception were 2011 and 2012 with 6.8 each year. This reveals that, within this scale, Argentina can be positively qualified as a democratic country from the citizenship's perception (Table 2).

Table 2.- Index of Democratic Perception									
Country / Year	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**
Argentina	5.5	6.0	6.0	5.8	6.3	6.5	6.8	6.8	6.3
Brazil	5.3	5.9	5.9	6.0	6.8	7.2	6.4	6.3	5.2
Colombia	5.9	5.9	5.9	6.1	6.8	6.5	6.4	6.4	5.8
Mexico	5.2	5.6	5.4	5.0	5.9	5.7	5.9	5.5	5.0
Source: *CEPAL /CEPALSTAT.*									

Another relevant indicator to evaluate the functioning of a social and democratic Rule of Law is the corruption level existing in its government orders. To give an account of this, the independent organization *Transparency International* has established since 1995 the index of corruption perception, which by means of surveys carried out to experts and public servants, evaluates the transparency index of a country in a scale of 1 to 10 , where 1 means highly corrupt and 10 highly transparent. As it is shown in the following table, Mexico had a score of 3, Argentina 3, Colombia 3.4 and Brazil 3.8 in 2011 (Table 3). It can be observed a slight increase in transparency from 2006 to 2011 in the cases of Argentina and Brazil. However, in Colombia and Mexico it has decreased considerably. By observing the global context of corruption in these countries, it can be noticed that they are in a disadvantageous position when compared to other countries.

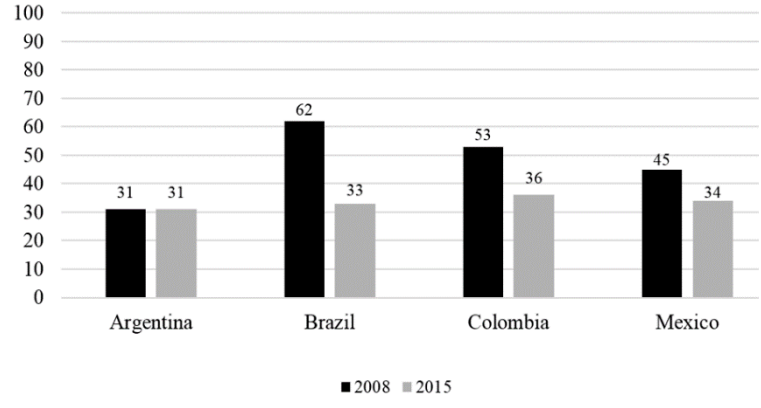
Table 3.- Index of Corruption Perception

Country / Year	2006	2007	2008	2009	2010	2011
Argentina	2.9	2.9	2.9	2.9	2.9	3.0
Brazil	3.3	3.5	3.5	3.7	3.7	3.8
Colombia	3.9	3.8	3.8	3.7	3.5	3.4
Mexico	3.3	3.5	3.6	3.3	3.1	3.0

Source: *Transparency International*.

Regarding the institutions of justice procurement and administration it is relevant to highlight the level of trust and credibility that citizens acknowledge to those institutions. In 2015, the population's percentage that considered the judiciary's performance good was 31% for Argentina, 33% for Brazil, 36% for Colombia and 34% for Mexico. It is important to point out that between 2008 and 2015 the percentage of credibility decreased to 29% in Brazil, 17% in Colombia, and 11% in Mexico. Only Argentina maintained its percentage of credibility during this period of seven years. However, the perception of the judiciary's performance is below the former countries (Graph 1).

Graph 1. Percentage of people who think the Judiciary has performed well in Argentina, Brazil, Colombia and Mexico in 2008 and 2015



Source: *CEPAL/CEPALSTAT.*

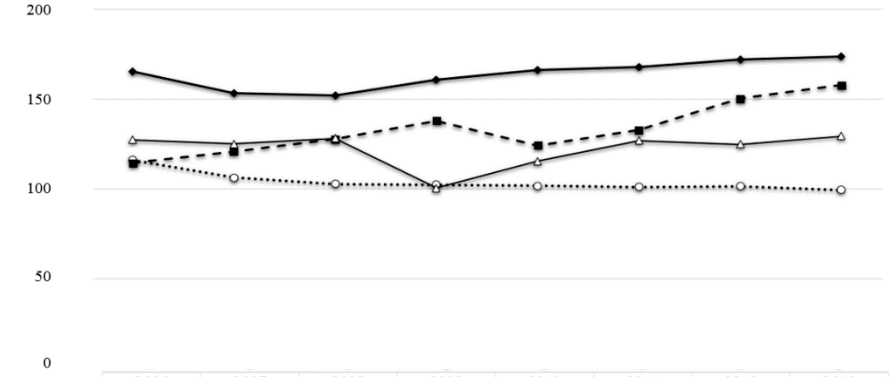
This reveals that even with the reforms in criminal matter, the performance of the justice institutions and the juridical agents is still being negatively perceived. One possible explanation of this phenomenon can be the uneven implementation process of the new system and the training deficiencies of agents. Although the oral-accusatory system presents itself theoretically as a guaranteeing, transparent, and practical system of imparting justice many of the concrete and everyday experiences reveal that the juridical operators still haven't incorporated the knowledge and the skills to meet the system's objectives. In the case of Mexico this can be observed in the work *The Oral Trials in the State of Morelos: the New Practices.* (Cuéllar, 2017) and in the case of Brazil, in the article by Rodrigo Ghiringhelli de Azevedo *Criminal Justice Reform in Brazil: the Uncompleted Democratization*. (2017)

The guarantees state is one of the foundations of the new criminal justice system in Latin America and of the democratic model of the Rule of Law. An indicator that shows the development of the guarantees state in the justice system is the number of condemnatory sentences and the rate of overpopulation in prisons. The International Security Observatory, part of the Organization of American States (OAS), shows the rate of overpopulation in prisons measured by the total percentage of inmates contrasted with the official capacity. The data obtained between 2006 and 2013 showed that Brazil, Colombia and Mexico increased their prisoners' population. As it is shown in the following graph, the situation in Brazil around this issue is worrying because the rate of overpopulation reached 173.65 % in 2013.

In the case of Mexico, 2009 was the year when its prisoners' population was reduced to 100.67 %. Contrasted with Mexico, the lowest prisoners' population in Colombia was in 2006, reaching 114.51%. During this period of seven years it did not reduce its prisoners' population to 100%. In Argentina, a considerable reduction in the priso-

ners' population is observed, reaching 99.52% in 2013, contrasted with 116.28% in 2006 (Graph 2).

Graph 2. Overpopulation rate in prisons of Argentina, Brazil, Colombia and Mexico from 2006 to 2013



	2006	2007	2008	2009	2010	2011	2012	2013
Argentina	116.28%	106.36%	102.82%	102.47%	101.75%	101.11%	101.58%	99.53%
Brasil	165.60%	153.56%	152.22%	160.72%	166.37%	167.89%	171.93%	173.65%
Colombia	114.51%	121.02%	127.75%	138.06%	124.25%	132.84%	150.39%	157.80%
México	127.41%	125.22%	128.18%	100.67%	115.49%	126.99%	124.99%	129.61%

Source: *International Security Observatory* of the OAS.

In the data above it can be observed that Argentina is above Brazil, Colombia and Mexico in the democracy indexes, the judiciary's credibility and the decrease of prisons' overpopulation. Brazil reflects a complicated situation, since it shows a fall from 2008 to 2015 in the issues of prisons' overpopulation, judiciary's credibility and democratic model. This is mostly due to the political situation experienced in the country resulting in the social discontent which was reflected in a political crisis in 2011. In Colombia, the indexes of democracy perception vary from one year to another, that is to say, the democratic model has been unstable. This can be observed in the index of democratic progress, where Colombia is located in the last place of the countries analyzed.

To sum up, the indexes of credibility in the judiciary and their juridical agents in Mexico decreased since the implementation of the CRCM in 2008. Compared with Brazil and Colombia, the credibility percentage was reduced to a lesser extent. On the other hand, the prisons' overpopulation index has had considerable ups and downs. It was until 2011 that a relative stability can be observed. However, the maximum capacity in prisons' population does not decrease. This can demonstrate that the change of the justice system does not necessarily bring about social change, but it must be accompanied by economic, political and cultural changes.

The experiences in the countries described in this work share some similarities and differences in the developments of a justice system at a micro level, which allows democracy and citizen participation. Among the similarities regarding the reforms' motivations are the mistrust in the justice institutions and the application of a due process. Another similarity is the reform project financed by international organisms, mainly the USAID, which

sponsored and promoted the oral-accusatory justice model in different countries of Latin America. Lastly, these countries introduced alternative mechanisms for the resolution of conflicts that allow the citizen participation to give an integral, practical and effective solution to their conflicts.

The differences that were observed in these countries dwell in the implementation process of the new criminal justice system and the initiatives that have sought to reduce vices, old practices and corruption inherited from the former system, which had rather poor results. In this context, it can be observed that in Colombia, the search for judiciary independence in respect of the executive, has found difficulties due to the structure of the juridical field. An example of this has been the lack of professionalism of judges and the absence of procedures that make the crimes investigation efficient and eliminate corruption and impunity practices during this stage.

As it is presented in the investigation *Diagnóstico del sistema penal acusatorio en Colombia* (Diagnostic of the Accusatory Penal System in Colombia) (Bayona, Gómez, Mejía & Ospina, 2017), the Prosecutor's Office is one of the institutions that has more deficiencies when it comes to the application of due process, since the guaranty of the fundamental rights of the victim and accused parties falls in it.

In the Brazilian case, the control mechanisms are aimed at the process of institutional accountability, that is to say, the transparency of the juridical institutions activities that has had an impact on the new justice system operators. This has generated an extreme politicization of justice in this country, which has as a consequence the judicialization of the social living.

In Argentina, the implementation process was different because the justice system is divided in provinces and this makes a homogenous implementation difficult and also impedes to appreciate the benefits of this new system at a national level. An important element in the Argentine case is the development of trials by jury in certain provinces that have led to a new way of constructing the juridical truth, which is not concentrated in the sole knowledge of judges, but in the community's deliberation by the participation of non-experts.

The Mexican case experienced a long period of implementation, which provoked different results among the country's states, given the fact that in the new justice system there are pioneer states and others that do not meet enough conditions for its proper functioning. It is important to highlight that the new justice model and the mechanisms that seek to combat the deficiencies in the justice administration process have not found consolidation in the dispositions of the juridical agents or the public opinion, since there are opinions for and against it.

Facing this panorama of diverse experiences and results, it is considered an important element for the transition to the new criminal justice systems in Latin America the incorporation and strengthening of alternative mechanisms in the construction of the citizens' participation and scrutiny. Although countries such as Colombia, Brazil and Mexico have a short time applying this alternative way of imparting justice, we can observe some elements that can help to promote a more democratic model of social living. Following Boaventura de Sousa (2003) it can be said that the mechanisms of alternative justice help to reinvent democracy, that is to say, rethink democracy as a closer relationship of mutual respect between the State and society.

The experiences and results of the new criminal justice system in these Latin American countries are diverse. In the cases of Argentina and Colombia they have allowed the strengthening of the institutions of justice, whereas in Brazil and Mexico, there have not been results of improvement in the democracy levels, which has generated strong criticism to the oral-accusatory model. Therefore, these countries must work in training their agents and spreading the benefits of this new justice model in order to achieve the objectives set in the reform of criminal matter. The interchange of results, practices and experiences among the countries that have adopted the new system will allow to consolidate the goals of the new model of Latin American justice.

4. CHALLENGES TO STRENGTHEN CITIZEN PARTICIPATION, THE WATCHFULNESS OF AUTHORITIES AND THE SOCIAL AND DEMOCRATIC RULE OF LAW

The current experience of the new oral-accusatory model in the countries analyzed allows to observe elements that enable a democratic participation and a relation between citizenship and justice administration.

At least two factors that permit to observe this change can be pointed at: the first one is referred to the *principle of publicity* that enables to make trial hearings transparent, in that way making possible the construction of public opinion from the citizens' scrutiny over the justice agents to augment the levels of trust in the justice system. The second one are the alternative mechanisms of conflict resolution as an option to unclog the workload of the Public Prosecutor and to provide an opportunity for an integral and peaceful solution that makes the involved parties responsible, that is to say, a justice that provides the citizenship with efficient and agile means to solve their penal conflicts without starting a juridical process aiming at repairing the damage done to the victim and reintegrating the offender in society.

The objective of the principle of publicity is to have free access to and knowledge of the criminal proceedings for the community. For Jorge Witker and Carlos Natarén, this principle is one of the foundations of due process and a central element of the Rule of Law. In the liberal enlightened thought, the principle of publicity has two aspects: the first one is to protect both parties (victim and accused) from possible injustice alien to public scrutiny and; the second one is to strengthen the trust of society in the court houses. (Witker and Natarén 2010, p. 44).

In the contemporary conception of Jürgen Haberman, the principle of publicity in democratic regimes is linked to the constitution of a public opinion; unlike the secret policies of the authoritarian models of government, it is procured that the citizens are participatory of the public matters and of the political and relevant decisions, that is to say, to generate a citizenship informed about the acts of the State and participatory of the political order decisions (Habermas, 2004).

For Roberto Gargarella (Gargarella, 2008), the impulse of the alternative mechanisms in the criminal justice systems is a step to develop democracy and with it, participation of the citizenship around juridical matters. This author defines deliberating democracy, (following Carlos Nino's conception) as the political mechanism that allows for the par-

ticipation of everyone interested in the discussion and decision of public political matters. This idea is linked with the popular will of every democratic model, which is a characteristic of Elías Diaz's social and democratic Rule of Law. The principle of publicity and the mechanisms of conflict resolution have an important role in the new model's implementation process in Argentina, Brazil, Colombia and Mexico. The presence of these two elements gives way to the construction of mechanisms that make possible the opportunity public scrutiny for the watchfulness and administration of justice.

The following table (Table 4) shows the characteristics that Argentina, Brazil, Colombia and Mexico have regarding the social and democratic Rule of Law and their relation with the indicators that were previously analyzed. This table lets us observe the similarities and differences in the four countries regarding the implementation of the new justice model and the search of a social and democratic Rule of Law. It also shows which indicators governments and authorities must pay more attention to in order to build up the opportunity of citizen scrutiny and in that way to generate more democratic models that adhere to the protection and respect of the individual's fundamental rights.

Table 4.- Relation between citizenship, democracy and Rule of Law

Characteristics of the Rule of Law	Indicators	Argentina	Brazil	Colombia	Mexico
The transit to more democratic models and political pluralism. →	T1	✓	✓	✗	✓
The transit to more democratic models and political pluralism. →	T2	✓	✓	✓	✗
The strengthening of the constitutions, aiming at establishing norms to harmonize with social living which guarantee the fundamental rights of citizens. →	R	✓	✓	✓	✓
The modernization and proper functioning of the institutions and their state actors, such as justice administration. →	T3	✗	✓	✓	✓
The modernization and proper functioning of the institutions and their state actors, such as justice administration. →	G1	✓	✗	✗	✗
The construction of juridical mechanisms that allow the opportunity of public scrutiny in the watchfulness of justice administration. →	G2	✓	✗	✗	✓
The construction of juridical mechanisms that allow the opportunity of public scrutiny in the watchfulness of justice administration. →	PP AM	✓	✓	✓	✓

Annotations:

T1 = Index of democratic progress
T2 = Index of democratic perception
T3 = Index of corruption perception
R = Reforms in criminal matter
G1 = Perception of the Judiciary's functioning
G2 = Overpopulation rate in prisons
PP AM = Principle of publicity and alternative mechanisms

Source: Own elaboration with statistical data from *Freedom House*, *CEPAL/CEPALSTAT*, *Transparency International* and *International Security Observatory of the OAS*.

To conclude, this work made visible the differences and similarities in four Latin American countries from the scopes of various authors that define the characteristics to strengthen the relation between citizenship, democracy and rule of law. The analysis was focused on the implementation of the reforms in criminal matter that modified the way of procuring justice, moving from an inquisitorial system to an oral-accusatory system. It was observed that, even though these countries promoted the reforms at a constitutional level, the process of application and internalization of the new model by the agents and society did not take place automatically. In other words, although the norms were already established, society's perception and juridical agents' practices were transformed gradually. This is a factor that obstructs the strengthening of the constitutions whose aim is to establish norms that harmonize social life and guarantee the fundamental rights of citizens.

For all this, it is necessary to make possible the construction of a participative citizenship that is attentive to the public issues in order to achieve the proper functioning of the social institutions, such as justice administration, for it is the citizenship that must be the protagonist in the invigilation and development of the new justice model. In the case of Argentina, the trials by jury must be strengthened as a new way of constructing juridical truth that takes into account the participation of society. For the cases of Brazil, Colombia and Mexico, they must promote citizen participation in alternative justice as a mechanism to solve routine conflicts and foster citizen scrutiny in the oral trial hearings in order to observe the performance of the justice operators.

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