U.S. FOREIGN CRIMINAL JUSTICE ASSISTANCE
Police and Prosecutor Training
LOOKING TO THE FUTURE

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Introduction

In a prior writing,[1] the Author documented the relative failure of U.S. criminal justice assistance in Colombia against the amount of money spent toward the same; as the same bears on such assistance elsewhere in the world. He described the systemic defects and how the U.S. assistance failed to substantially overcome the same over a period of approximately 25 years. However, he did not adequately explain the nature of that assistance as it relates to that failure.

U.S assistance largely takes the form of functionary training. The purpose of the present writing is to show how that training—though appropriate within the U.S. system and otherwise offered in good faith to Colombia and other countries of similar systems—fails to account for the significant difference between those foreign systems and that of the U.S. and, in so doing, fails in its purpose of substantially improving the former. The scenario could be appropriately described as ***putting a square peg into a round hole***.

The current document limits its address to police and prosecutor training and describes the corresponding U.S. regimens according to and to the extent of the Author's personal, firsthand experience.

The writing begins with a synopsis of the defective Colombian system in order to give immediate context to the foreign training regimens as they bear on and are affected by such systemic defects. The synopsis consists of two parts: (1) a primer on Colombia's system as contrasted with the accusatory form; and (2) a statement of the 16 primary points that distinguish the Colombian mixed/inquisitorial system from its accusatory counterpart.[2] Any redundancy as between the two components is justified pedagogically by virtue of the primer yielding the 16 points in more pointed analysis against which the U.S. police and prosecutor training regimens can more precisely be measured. Again, the analysis as to Colombia is essentially that of the majority of Latin American countries, as well as others worldwide.

[1] *U.S. Criminal Justice Reform Assistance in Colombia—The Policy of Spend and Pretend*, dated October 14, 2017
[2] The latter supported by a PowerPoint presentation for teaching purposes.

The Systemic Defects

A Primer on Colombia's Failed System

This comparative law synthesis will be made by means of five conceptual criteria, distinguishing successively in the process between the accusatory and inquisitorial forms.[3] A general solution to the procedural dilemma posed by each criteria will then be posed.

It must be stressed that the shortcomings represented by the five criteria result from fundamental defects in the present criminal procedure code itself, not in the mismanagement of a code that otherwise possesses accusatory mechanisms.[4] Although it can be said that the present code corresponding to Law 906, in contrast with that of Law 600, takes steps toward the accusatory form, those steps remain conceptual and illusory by virtue of the fundamental retention of the inquisitorial form. The accusatory mechanisms are simply not allowed to exists in practicality. The code masquerades as accusatory, but with the same inquisitorial reality.

1. The Inability to Prioritize and Filter Out Reported Crimes

The Accusatory Form

With the report or detection otherwise of a crime, the accusatory form investigates first before formally receiving the report or detection as an official case; and without legal obligation to formally or officially receive the matter as a case. ***Ultimately, a case may be formally and officially acknowledged, but only <u>after</u> the investigation is completed and by means of the accusation by the accuser before a judge.*** This formal, official and judicial recognition of a case by the system is referred to as the exercise of of the penal action. In the accusatory system, the post-investigation accusation constitutes the exercise of the penal action.[5]

This chronology allows for two fundamental and necessary filtering mechanisms that prevent the unnecessary congestion of cases in favor of alternative conflict resolution. First, by preceding official case recognition with investigation the system is able to detect those cases that either do not constitute crimes or that have insufficient evidence to accuse a crime. Second, even with the investigation revealing a crime with sufficient evidence to accuse, by not having recognized the case officially yet the system can implement policy priorities in determining what cases it can reasonably accommodate given its inevitably limited resources.

Thus, policy prioritization can occur both at the investigative as well as accusation junctures. For example, 100 cases are received for investigative consideration. The investigative entity, given its limited resources and in policy prioritization, declines investigation of 50. Of the 50 cases investigated, 25 are filtered out either because they do not constitute a crime or because

[3] The five analytical criteria mirror those employed in the Author's most recent book in analyzing an actual, prominent case in Colombia. The five criteria are presented by different pedagogical methodology in the Author's other books.
[4] Again, in a separate and more detailed scholarly address of this phenomenon, the Author identifies 16 primary and fundamental impediments to the Colombian system achieving its supposed accusatory quest. Without individually identifying them, the five criteria addressed herein touch upon the overall impact of the same, but in a more consolidated fashion.
[5] In cases in *flagrancia,* the circumstances of *flagrancia* constitute, if you will, the completed investigation.

there is insufficient evidence to accuse. Of the 25 presented for accusation and prosecution, 10 are declined in prioritization at the judicial level for similar resource considerations. Of the 15 that are accused, 10 are resolved short of trial by plea bargaining. Only five to to trial. The 85 cases filtered out over the course of the process must seek alternative resolution.

Of course, the figures are hypothetical and vary depending on the investigative and prosecutorial resources available. The key is that, by not officially recognizing the case until after the investigation, the system can achieve appropriate filtration in preventing the congestion of cases and in appropriately putting the onus on other social institutions (family, community, school, church, and business enterprises) in resolution of conflict. This allows the criminal justice system to achieve its real and limited social purpose; that is, of addressing only those few conflicts that elude the handling by those institutions more responsible for the same. It also helps discourage unnecessary or unwarranted complaint and criminal litigation.

The Colombian Inquisitorial Form

With the report or detection otherwise of a crime, the inquisitorial system formally receives and acknowledges the report or detection as an official case prior to any investigation. That is, the inquisitorial form exercises the penal action upon receipt of the report or detection otherwise of the crime.[6]

This contrasting chronology ***does not permit any filtering mechanisms*** that would otherwise prevent the unnecessary congestion of cases in favor of other social conflict resolution measures. Together with the excessive penalization of conduct, it puts the criminal justice system forward as ***the*** solution to all social ills.

This has procedurally fatal consequences. First, by following official case recognition with investigation the system is not able to detect initially those cases that either do not constitute crimes or have insufficient evidence to proceed with the investigation. Second, even with the subsequent investigation revealing a crime with sufficient evidence to accuse, by having already recognized the case officially the system cannot implement policy priorities in determining what cases it can reasonably accommodate given its same inevitably limited resources without neglecting a significant portion of those cases. There can be no policy prioritization, whether at the investigative or prosecution junctures. Of 100 cases reported or detected, all 100 have to be formally and officially received and attended to by the system. The unavoidable result is the impossible congestion of cases. The key is that, by officially recognizing the case upon receipt of report or detection and prior to any investigation, the system cannot achieve appropriate filtration in preventing the congestion of cases.[7]

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[6] In cases in *flagrancia,* the circumstances of *flagrancia* constitute the detection as well as the completed investigation that is not otherwise required prior to officially receiving and recognizing the case.

[7] In a frustrated attempt at filtration, the inquisitorial system has instituted different procedures for removing a case from official status, the most prominent of which is collectively called *oportunidad* (or opportunity, meaning the opportunity to relieve the system of the burden related to the case prior to the full application of process). Unfortunately, because they participate in the same formal procedural bureaucracy already instituted with the exercise of the penal action, the procedures—if applied at all—do little to ameliorate the congestion. Their application is further thwarted by the very inquisitorial practice of *prevaricato*, which is the penalization of erroneous decisions made by functionaries. Given such in fear of *prevaricato*, those functionaries normally prefer putting the case through the entire

The Solution

The solution to this problem is extremely simple: Move the exercise of the penal action—the formal, official and judicial recognition of a case—from the moment of report or detection of the crime to the accusation following investigation, thereby allowing for the appropriate investigative and prosecutorial filtration mechanisms.

2. The Misapplication of Functionary Roles

The Accusatory Form

In the accusatory system, the police investigate the crimes and the prosecutors accuse and litigate the results in definitive resolution of cases. The investigation is the exclusive province of the police, during which they can avail themselves of the legal counsel of the prosecutor. Upon accusation, the related prosecution is the exclusive province of the prosecutor, who is counseled regarding the facts by the police investigator. Each is trained fully in their respective responsibilities. Ideally, the two work as a team of equal professionals in horizontal fashion and in oral communication from the beginning of the investigation through trial.

In determining by investigation filtration if a crime actually exists or if the detectable evidence is sufficient to charge a crime, the police investigator and prosecutor utilize a legal mechanism that can be called the *Blueprint;* or "*Dibujo de Ejecución*" in Spanish.[8] Just as the construction of a building requires a blueprint, so, too, does the construction of a criminal case require a blueprint. The *Dibujo* consists of the legal elements which make up a particular crime as it exists in a criminal code, each of which must be sustained factually. For example, murder in the first degree consists of the following legal elements: (1) Whoever (identity of the perpetrator) (2) intentionally (3) kills (4) another person (5) with malice aforethought and (6) with premeditation, is guilty of murder in the first degree. If the 6th element is not met by the facts, it is murder in the second degree. If neither the 5th or 6th elements are met by the facts, it is manslaughter. If addition, if any one of the other 4 elements is not sustained by the facts, there is no crime of homicide. With these elements as a guide for both police investigator and accusing prosecutor, a homicide investigation can quickly, efficiently and efficaciously determine if there is a crime or not and to what degree.

By virtue of the precise definition and distinction of roles and respective professional training, the oral-based teamwork between the two, and the utilization of the *Dibujo* in determining the crime—all within the procedural context of the exercise of the penal action upon accusation following the investigation—the process is extremely agile, efficient and efficacious in finding the truth.

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process rather than making a decision subject to criminal prosecution. (One prosecutor told the Author: "In the morning I am the accuser; in the afternoon I am the accused."

[8] The descriptive term "Blueprint" does not originate with the Author. Rather, it was used by the late Irving Younger—litigant, judge, scholar and commentator—to describe the mechanism required to construct any criminal case. The Author translated and established the same in unique pedagogical methodology as the "*Dibujo de Ejecución.*" In spite of the English text, the term *Dibujo de Ejecución* (or *Dibujo* for short) is used herein in conformity with the term and teaching methodology as established by the Author.

The Colombian Inquisitorial Form

In the inquisitorial system, the prosecutor investigates the crimes, as well as accuses and litigates (in theory) the results. Indeed, the investigation is the exclusive province of the prosecutor, with the police playing a subservient, almost administrative role. Moreover, the investigation is ***the*** primary focus of the criminal process. The prosecutor determines operationally all investigative steps, assuming many, if not all, of them by himself or herself and leaving to the police the performance of the more ministerial tasks. The policeman is simply the prosecutor's assistant.

Because the prosecutor is trained professionally as a lawyer, he or she is poorly prepared to investigate. Even when the prosecutor has gained practical experience investigating over time, he or she tends to focus on that function and neglect the litigation or case resolution demands of the case. When multiple prosecutors are assigned administratively in order to cover the two tasks, procedural efficiency and efficacy are lost.

By virtue of the fact that the police are relegated to a subservient and relatively menial role in relation to the prosecutor, their training is either neglected or, even with the finest preparation, is otherwise not given the opportunity to manifest itself. However well trained, the police investigator is forced to await the bureaucratic arrival of the written "work order" (*orden de trabajo*) from the prosecutor, which order details the tasks to be performed by the police investigator. Because the police must perform the prescribed tasks scrupulously, they must do so in a mechanical way and in non-creative compliance. Otherwise, they are subject to administrative discipline and even criminal prosecution.[9] The compliance with the order must be in writing and subject to the same bureaucratic impediments as the original order. This results in two types of police investigators: the lazy ones that simply wait and comply and no more, and the frustrated ones who know that they should be pressing forward with investigative autonomy.

Any "teamwork" between the two is a vertical one of professional inequality, dominated and dictated, as noted, by obligatory written communications between the two. It is the very antipathy of the dynamic, horizontal, oral relationship between autonomous police investigator and litigating prosecutor of the accusatory form. As a result, it is a significant contributor to case congestion.

There is no determination by investigation filtration if a crime actually exists or if the detectable evidence is sufficient to charge a crime. Neither the prosecutor nor the police subaltern utilize any legal mechanism that even resembles or can be called the accusatory *Dibujo* as described above.[10] Rather, the functionaries think imprecisely in terms of general legal theories or factual hypotheses in investigating and prosecuting a crime. "Is there a homicide?" or "What do

[9] The same *prevaricato* to which the prosecutors are subject.

[10] In 1995, the Author introduced in Colombia the concept and mechanism of the *Blueprint* as the *Dibujo de Ejecución*. It was received initially with great enthusiasm. However, in spite of the Author's pleading and warning that it not be codified and thus relegated to bureaucratic obscurity, that is precisely what happened. Article 207 of the current Law 906 criminal procedure code, known as the *Programa Metodológico*, is the substitute for the *Dibujo de Ejecución* and, as such, warps and dilutes the *Blueprint* beyond meaningful recognition or practical application. It is simply another useless piece of bureaucratic paper to be found in the official case file. The *Blueprint* is addressed in more detail below in relation to the fourth evaluation criteria.

we think happened?" is the essential extent of the evaluation; as opposed to: "Do we have significant proof as to every legal element of the crime we are investigating?" The belief and practice are that the process of continuous investigation by all functionaries—judge, prosecutor and defense attorney alike—will ultimately reveal what needs to be known, without more. Again, there is no specific reference to the legal elements of the particular crime. Without such as a guide for both police investigator, prosecutor and judge, the process cannot quickly, efficiently and efficaciously determine whether or not there is a crime, or to what degree. The process becomes an interminable and formal bureaucratic exercise.

Because of the absence of a precise definition and distinction of roles and respective professional training, the writing-based communication between the two, and the lack of utilization of the *Dibujo* in determining the crime—all within the procedural context of the exercise of the penal action prior to the investigation—the process is extremely cumbersome, bureaucratic, inefficient and inefficacious in finding the truth. As already referenced, this only adds to case congestion.

The Solution

Correct the roles of the functionaries, particularly those of the police investigator and prosecutor, to conform to accusatory principles. Promote horizontal, oral teamwork between the professionals based on the utilization of the *Dibujo.*

3. The Premature, Imprecise and Unjust Charging of Crimes

The Accusatory Form

In the accusatory system, the mechanism of binding the suspect to the process—the obligation to participate—is the accusation and associated arrest warrant or summons, ***which follow the investigation***. The accusatory form investigates first and accuses and arrests afterwards. This makes the accusation not only the mechanism of notice of the charges but also the mechanism of binding the accused to the process or obligating him or her to participate. This, in turn, allows a judge to determine the sufficiency of the accusation—by means of the same legal *Dibujo*—with the benefit of a completed investigation. The completed investigation also permits the judge to address with the same factual basis and benefit the issues of how to guarantee the ongoing presence and participation of the accused by means of either preliminary incarceration or terms and conditions of release pending trial. With the accusation based on the precision of the *Dibujo*, the accused has adequate notice of the charges and the corresponding ability to evaluate and defend against the same, together with the revelation by the prosecutor to the defense of the results of the investigation (the *discovery*).

With the accusation constituting the mechanism of binding of the accused to the process, the attorney for the defense does not formally intervene until the time of accusation. This frees the investigation from further procedural formality (motions and hearings) and publicity that otherwise arise with the intervention of the defense attorney. That investigative freedom and related secrecy are required in order to permit a thorough and protected investigation so that the prosecution can comply with its heavy and exclusive burdens of proof at trial. Exclusion of the defense is

ameliorated by the strict requirement of factual discovery by the prosecution to the defense upon accusation.

Because the accusation also constitutes the exercise of the penal action, with the investigation free of that formality and that of the procedural intervention of the subject of the investigation, the accused is brought into the process presumed innocent. From that fundamental presumption of innocence, the accused is endowed with the right to remain silent and, from that, the right to impose upon the prosecutor as the accuser the exclusive responsibilities of (1) presenting evidence at trial and (2) proving the accused guilt beyond a reasonable doubt as to each of the legal elements of the particular crime charged. If the prosecutor fails in either of those exclusive responsibilities or burdens of proof, the accused must be either absolved of the accusation or acquitted outright.

The Colombian Inquisitorial Form

In the inquisitorial system, the mechanism of binding or obligating the suspect to the process is the *imputación*, ***preceded*** by the associated arrest warrant (without possibility of summons), all of which occurs early in the formalized investigation with only some factual indication of the author of the crime required. The inquisitorial form arrests and binds first on minimal and incomplete evidence in order to complete the investigation afterwards; ***it arrests in order to investigate***.

The *imputación* then becomes the deficient mechanism of notice of the charges as well as the mechanism of binding the accused to process or obligating him or her to participate; all based on an incomplete investigation and its factual dearth. This, in turn, effectively deprives the judge to whom the *imputación* is presented of the facts associated with a completed investigation in determining the sufficiency of the charging mechanism. Moreover, neither the prosecutor nor the judge utilizes any notion of a *Blueprint* in legal and factual precision of the charges. The procedural application at this juncture is simply the acknowledgement that a crime is charged and which should be further investigated.

The incomplete investigation also denies the judge the ability to address preliminary incarceration or terms and conditions of release pending trial with any reasonable degree of factual basis and benefit. Without the accusation based on the precision of a *Dibujo*, the *imputado* has woefully inadequate notice of the charges and the corresponding inability to evaluate and defend against the same. Accordingly, there is no discovery to the *imputado* of a completed investigation. Indeed, this is the very purpose of the *imputacón,* namely, force the *imputado* to prove his or her innocence as ***the*** means of investigating further. Thus, the *imputado* is presumed guilty with an expectation that he or she prove his or her innocence, with no obligation that the prosecutor assume any exclusive responsibility of proving guilt. The prosecutor has no exclusive burdens of proof.

With the *imputación* constituting the mechanism of binding of the investigated to the process, the attorney for the defense formally intervenes early in the already formal investigation. This intervention serves only to further increase and escalate the procedural formality with all the related paperwork, hearings and audiences associated therewith. This increased procedural formality bogs the process down immeasurably and turns investigations that should take days into

those that take months and years. Moreover, all investigative secrecy is lost at the accusatory expense of the prosecutors and police, but is replaced with the inquisitorial notion that the best way to investigate is to arrest the subject and have him or her prove their innocence. Thus, the system frees the prosecution of any exclusive burden of proof, and shifts the same to the defense. Even the Colombian "discovery" prior to trial confirms the same, with that revelation being required of the defense as well as the prosecution.

To be sure, because the *imputación* follows the exercise of and is subject to the formality of the penal action, the *imputado* is brought into the process presumed guilty. From that fundamental presumption of guilt, the *imputado* is burdened with the obligation to prove his or her innocence, with no corresponding right to obligate the prosecutor to assume any exclusive responsibility as to either (1) presenting evidence at trial and (2) proving the accused guilt beyond a reasonable doubt as to each of the legal elements of the particular crime charged. The prosecutor only has the responsibility of showing guilt, while the *imputado* still has to prove innocence.

The Colombian *fiscalía* acknowledges on its official website that it takes over 1,000 days on average to move a case through the system, if it gets moved at all. In this regard, they continue to arrest as the primary means of investigating in hopes of getting a confession. In the process, the prosecutors are evaluated in terms of the number of written work orders (*ordenes de trabajo)* submitted to the police, as well as the number of *imputaciones*; while police investigators are evaluated in terms of the number of arrests. No one is measured in terms of quality of work. The focus is on statistics as to arrests and *imputaciones,* and not on cases resolved.

The Solution

Eliminate the *imputación* in favor of the accusation as the mechanism of charging and of binding the suspect to the case.[11]

4. The Inability to Detect and Remove Deficient Cases

The Accusatory Form

The accusatory system has multiple opportunities by means of which the process is compelled to detect and remove any legally or factually deficient case. This faculty is based upon the fundamental nature, purpose and constant use of the *Dibujo.* Those procedural opportunities are as follows: (1) In receiving the report of a crime, or in detecting the same, the police officer immediately applies the indicated *Dibujo* in making an initial evaluation and possible filtration of the case. (2) During the ensuing investigation the same application and evaluation are made constantly by police investigator and prosecutor alike in constant vigil of the sufficiency of the case. (3) In determining whether or not the investigation should result in a formal charge or accusation, the police investigator and the prosecutor—together with their superiors in many cases—make a definitive decision of sufficiency: Is there competent evidence as to every legal

[11] The irony here is that the Colombian code also contains the mechanism of the accusation—part of its artificial effort to adopt accusatory principles. However, in the presence of the *imputación* as the true mechanism of suspect binding, the accusation loses such a faculty and is, accordingly and inquisitorially, converted into a preliminary finding of guilt in absolute prejudice to the trial judge.

element of the crime (the *Dibujo*) that will permit not only an accusation but success at trial? (4) The accusation must be presented to a judge (or grand jury) for a preliminary judicial determination of legal and factual sufficiency, all based upon the *Dibujo.* (5) Subsequent to the acceptance of the accusation by the judge as legally sufficient (according to the *Dibujo*), the defense can challenge the adequacy of the accusation in terms of the *Dibujo* before the superior trial judge. (6) At trial and at the conclusion of the prosecution's presentation of evidence, the defense can challenge and the trial judge must evaluate, by means of the *Dibujo,* whether or not the prosecution has fulfilled its exclusive responsibilities of proof of (a) presenting evidence at trial and (b) proving the accused guilt beyond a reasonable doubt as to each of the legal elements of the particular crime charged. (7) Whether or not the defense presents evidence of innocence at trial, at the end of the presentation of evidence the defense can once again challenge and trial judge (or trial jury) must evaluate whether or not the prosecution has proven each and every legal element of the crime charged beyond a reasonable doubt.

This process of scrutiny as to precision and sufficiency of charging guarantees the filtration of unworthy cases in the efficiency, efficacy and justice of the accusatory system, thus ensuring the charging and bringing to trial of only worthy cases. It also ensures a higher degree of professional work product by police investigator and prosecutor alike.

The Colombian Inquisitorial Form

The Colombian inquisitorial system lacks such multiple opportunities by means of which the process is compelled to detect and remove any legally or factually deficient case. There is no fundamental purpose and constant use of the *Dibujo* in any of the seven accusatory manifestations or otherwise.[12] (1) In receiving the report of a crime, or in detecting the same, the prosecutor applies no indicated *Dibujo* in making an initial evaluation and possible filtration of the case. (2) During the ensuing investigation there is no application and evaluation made by any police investigator or prosecutor in constant vigil of the sufficiency of the case. (3) In determining whether or not the investigation should result in an "accusation" (whether *imputación* or subsequent "accusation), there is no determination by police investigator and the prosecutor—or with their superiors—as to whether or not there is competent evidence as to every legal element of the crime (the *Dibujo*) that will permit not only a charging but also success at trial. Indeed, that is the supposed purpose of the inquisitorial trial. (4) Neither the *imputación* nor subsequent "accusation" is presented to a judge for a preliminary judicial determination of legal and factual sufficiency, whether based upon the *Dibujo* or not. The charging is a mere investigative formality. (5) The defense cannot subsequently challenge the adequacy of the accusation in terms of the *Dibujo* before the superior trial judge. (6) At trial and at the conclusion of the prosecution's evidence, the defense cannot challenge and the trial judge does not evaluate, by means of the *Dibujo,* whether or not the prosecution has fulfilled any exclusive responsibilities or burdens of proof of (1) presenting evidence at trial and (2) proving the accused guilt beyond a reasonable doubt as to each of the legal elements of the particular crime charged. As we shall see, such

[12] The Colombian and mixed/inquisitorial mechanism that in theory serves as mechanism of factual filtration is known as the "theory or hypothesis of the case," and, as such, is just that—pure theory without practical results. Rather than relying upon precise factual filtration criteria as does the *Dibujo*, it relies upon general abstract philosophical principles that are fine for discussion in the classroom but are of no value in identifying relevant facts in investigation, charging and judging.

exclusive responsibilities do not exist with the prosecution at trial. Rather, upon the conclusion of the prosecution's evidence of guilt, the judge turns to the defense for its evidence of innocence. (7) Given such, at the conclusion of all the evidence, there is no additional determination by the judge as to whether or not the prosecution has proven each legal element of crime charged beyond a reasonable doubt. Rather, the judge simply decides between the prosecution and the defense as to who has the strongest case.

There is no process of scrutiny as to precision and sufficiency of charging that guarantees the filtration of unworthy cases in the efficiency, efficacy and justice of an accusatory system. Rather, there is the process of perpetual investigation from report of crime to trial founded on general theory and hypothesis in total inefficiency, inefficaciousness and injustice. Thus, not only is it common practice for weak and deficient cases to be brought to trial, the prosecution has no incentive to investigate with precision. The procedural theme is: Everything to be determined later.

The Solution

Alter the code so as to provide for the seven moments of scrutiny based upon the *Dibujo,* but without codifying the latter into bureaucratic oblivion; applying the *Dibujo* as a practical tool that must be applied with the dexterity of informality.

5. The Absence of Due Process in Trial

The Accusatory Form

As referenced earlier, in the accusatory trial the prosecutor has the exclusive burdens of proof of (1) presenting evidence at trial and (2) proving the accused guilt beyond a reasonable doubt as to each of the legal elements of the particular crime charged. The accused has no obligation regarding presenting evidence or proving innocence at trial. Once again, these Due Process rights stem from the presumption of innocence and the corresponding right to remain silent. The accused may present evidence of innocence, but is not required to; and only does so after the court scrutinizes the prosecutor's evidence as admitted in determining whether or not the prosecution has presented significant evidence as to every legal element of the particular crime or crimes charged (the *Dibujo*; and the sixth opportunity for scrutiny referenced above).

The accusatory trial is oral in the primary sense of the oral testimony of witnesses through confrontation by means of the direct and cross examination by the lawyers. The argumentation of the lawyers is complementary and secondary. This immediacy of witnesses (*inmediación*) reflects the system's abhorrence for hearsay, whether in oral or written form. It is characterized by the refrain that a document or an absent person cannot be confronted or cross-examined. There is no official case file of written reports and expert witness findings. The authors of the reports or findings and those referenced by them as witnesses are the in-person focus of the trial.

The legal elements of the particular crime charged, or *Dibujo,* are the guiding and controlling mechanism throughout the trial in determining relevancy and, therefore, admissibility of evidence. The determination of admissibility is an integral part of the confrontation or the immediacy of witnesses as ***the only*** legally justifiable source of information and therefore cannot

take place prior to trial by means of hearsay debate among lawyers. To be admissible, a testimony or physical object as testified to must have some tendency in logic to prove one or more of the legal elements of the crime charged. If not, it is excluded as irrelevant. Therefore, the *Dibujo* guides and dictates every aspect of direct and cross examination and related objections and lawyer arguments or presentations otherwise. Guilt or innocence is determined in terms of whether or not the prosecution has proved beyond a reasonable doubt every single legal element of the crime charged, regardless of the absence or presence of evidence of innocence by the defense. Any such evidence is simply an aspect of the *Dibujo* evaluation. If just one legal element goes lacking in this regard, there must be an acquittal.

The impartiality of the trial judge is paramount in the accusatory trial, in order to avoid bias or prejudice. For this reason, the trial judge's only access to the evidence is by means of the witnesses or possibly factual stipulation between the parties. The judge has no access to any investigative report prior to trial, and the only judicial contact at trial is by virtue of possible disputed reference to the same in witness testimony.

The Colombian Inquisitorial Form

In the Colombian inquisitorial system, there are no exclusive burdens of proof in the prosecutor at trial. The prosecutor has the responsibility of proving guilt and the accused has the responsibility of proving innocence, with the judge deciding between the two as if in a subjectively judged athletic competition. Once again, this absence of Due Process rights stems from the presumption of guilt and the corresponding obligation to prove innocence resulting from the *imputación* early in the investigation. This duality of proof responsibility first manifests itself in what is called the *audiencia preparatoria* (preparatory audience) prior to trial, where the judge requires the prosecution to announce its evidence of guilt and the defense its evidence of innocence.

The inquisitorial trial is oral in the primary sense of the oral argument of the lawyers founded in the written reports and other documents of the official case file, with the testimony of some witnesses being complimentary and secondary in clarification. This de-emphasis of the immediacy of witnesses (*inmediación*) reflects the system's extreme reliance on hearsay, as a direct result of its primary reliance on written reports and documents. It violates directly the maxim that a document or an absent person cannot be confronted or cross-examined. Once again, this is because the system founds itself primarily on the official case file of written reports and expert witness findings. The reports and not the authors thereof remain the primary focus of the Colombian trial, with witnesses serving only to clarify or confirm the same in very limited fashion. Given such, witnesses in the Colombian trial are more for oral show than for procedural substance.[13]

[13] A related resource as to this reality is the Author's PowerPoint presentation entitled *Accusatory Trial Techniques and the Mixed/Inquisitorial System—from the prosecutor's perspective: A Square Peg in a Round Hole.* The presentation explains how the accusatory trial techniques taught in Colombia by the USDOJ over the past two decades—and with the associated expense of millions of dollars—are largely inapplicable to that inquisitorial system given their nature as the exclusive product of an accusatory system. It is another aspect of classic *Spend and Pretend.*

As is the case previously in the process, there is no emphasis whatsoever on the legal elements of the particular crime charged, or *Dibujo,* any guiding and controlling mechanism throughout the trial in determining relevancy and, therefore, admissibility of evidence. Rather, relevancy and admissibility of evidence are determined prior to trial in the preparatory audience and as the result of the hearsay representation of evidence by the lawyers. Thus, the determination of admissibility of evidence is ***not*** an integral part of the confrontation or the immediacy of witnesses as ***the only*** legally and accusatorily justifiable source of information. Instead, the inquisitorial form violates directly and fundamentally the accusatory form by dictating the determination of admissibility of evidence prior to trial by means of hearsay debate among lawyers.

To be admissible, a testimony or physical object as represented by the lawyers in pre-trial hearing must simply be determined to have some general nexus with the case according to equally general legal theories and factual hypotheses. There is no requirement that a testimony or physical object must have some tendency in logic to prove one or more of the legal elements of the crime charged. Therefore, the *Dibujo* plays no role in guiding or dictating any direct or cross examination. As a direct result, such examinations tend to ramble endlessly and involve as much or more irrelevant information as they do relevant, given the pre-trial determination of general source admissibility by the lawyers. Guilt or innocence is determined in terms of who presented the most persuasive evidence as between the prosecution and the defense, and has absolutely nothing to do with whether or not the prosecution has proved beyond a reasonable doubt every single legal element of the crime charged.

The Colombian inquisitorial form ignores completely the accusatory principle of impartiality of the trial judge in avoidance of bias or prejudice. Indeed, judicial partiality and bias and prejudice are the order of the day in the Colombian trial. Even before the trial the trial judge has complete access to the the official investigative file at the preparatory audience. Therefore, if and when a witness testifies at trial, that testimony is truly supplementary and secondary to the judge's pre-existing knowledge of the facts. When to this is added the extensive novel-like written accusation setting forth in detail all the findings of the investigation and to which the judge has equal access, the Colombian judge enters the trial inevitably given to at least a preliminary finding of guilt, and possibly having succumbed to those biases and prejudices generated by the same. The Colombian accused is most definitely presumed guilty not only at the moment of *imputación,* but upon accusation and trial.

The Solution

The Colombian preparatory audience must be abolished; the exclusive burdens of proof must be duly allocated to the prosecution as the accuser. The accusatory rule against hearsay must be observed at trial with a discontinuance of the use of the investigative file at trial and with due and exclusive emphasis of the testimony and confrontation of witnesses and the impartiality and neutrality of the trial judge. The *Dibujo* must control all aspects of the trial in the due determination of relevance and admissibility of evidence.

The 16 Points of Distinction Between the Mixed/Inquisitorial and Accusatory Forms

"Justice" in the criminal law context requires the efficient and efficacious resolution of cases generated within that system. The antithesis of this verity is case congestion, which, by definition, constitutes the lack of Justice.

According to informal statistics, Colombia currently suffers from an impunity rate of about 97%; that is, 97 of 100 cases brought in the system are not resolved; and many—if not most—of those not even addressed after case initiation. These figures are corroborated by the numerous criminal justice functionaries with whom the Author has had contact. In 2017, the Attorney General of Colombia even proclaimed publically that the Colombian criminal justice system is "in virtual collapse;" and this by virtue of the system's inability to process and resolve cases. His pronouncement is also confirmed directly by his subalterns in relation to the real work of real cases. Indeed, a Colombian prosecutor was recently filmed in open court proclaiming emotionally his inability to properly cope with his work. The Author is constantly audience to many of his colleagues who express similar sentiments. Informal statistics show a huge percentage of the criminal system functionaries in mental health care. And when the Author speaks to members of the community at large, there is uniform expression of a complete lack of confidence in the system. Moreover, the Author's experience in other countries is very similar. There is no doubt that the Colombian system is in monumental crisis; as well as many other systems.

Why? What are the principal causes of such abject systemic failure?

The Author identifies 16 causes in total, with myriad sub-components otherwise addressed in his books and other writings.

1. Excessive penalization of conduct

As a product of their cultural and legal legacies, mixed/inquisitorial systems tend to criminalize a broad range of conduct not otherwise penalized in other cultures. This reflects a philosophy of the criminal justice system constituting the primary civil response to all social ills; as opposed to the idea that other social institutions (family, religion, school, etc.) bear the primary responsibility for such ills, with the criminal justice system there to deal with the minimal residue not otherwise successfully addressed by those institutions. Examples are mere negligence as a crime as opposed to gross or criminal negligence; and, as we shall see with another point, even penal responsibility by criminal justice functionaries for procedural errors.

The obvious and inevitable result is an immense universe of potential crimes set to descend upon the criminal justice system, regardless of its resource limitations. This threat is exacerbated by the equally philosophical urging of the system itself to the citizenry that they denounce every possible crime as their inherent right and responsibility. The inevitability is then enlarged to include public deception as to the inability of the system to adequately respond in spite of its ironic and misleading urgings.

2. No filtration of cases in relation to resources

Unlike the accusatory system wherein a denouncement or discovery of evidence of the commission of a crime represents an investigative opportunity otherwise subject to system resources and potential rejection in light of such, in the mixed/inquisitorial system the denouncement—or crime commission indication otherwise—is received as an official case, with absolute procedural obligation to apply the full system to it. There is no consideration of case filtration in light of limited resources or prioritization of cases. Spitting on the sidewalk is considered as important as homicide. Such limitations and prioritizations are ignored in philosophical favor of the criminal justice utopia for all social ills.

The result is obvious and immediate—congestion of cases and the inherent inability of the system to respond; with the associated public deception and lack of confidence. Sincere and honest functionaries themselves participate in the same misgivings.

3. Excessive procedural formalism

The excessive number of officially obligated cases is further burdened by a system that codifies and formalizes every procedural aspect, from the denouncement through the investigation to the supposed "trial." Nothing is immune from the bureaucratic formalisms. As for the initial denouncement, the written format is more important than getting the initial facts correct and complete. Codified investigative techniques are more concerned with procedural compliance than with factual discovery. And the hearings and legal proceedings otherwise deal more in philosophy, academics and form than they do in justice and fact-finding substance.

And, of course, as with any bureaucracy, paper formality is the requisite focus and manifestation of all procedural activities. Given such, compliance with protocol and the written formalization of the same are more important than the activity as a truth-generating or confirming event. Finding truth is, therefore, subjugated to the formal process. Stated differently, the focus of the system is not as much on the identification and development of witnesses and physical evidence as fact and truth sources as on the formalized, written process associated with those sources. For example, the interview as a creative, dynamic, oral, fact-generating technique and event is stifled by written interview forms restricted to standardized questions and questioning formalities. The overall investigative process consisting of creative, fact-finding techniques is paralyzed by the need for written orders that mechanically and thoughtlessly list standardized tasks that often have little relevant application to the case at hand. Charging documents are formalized and standardized academic novels that fail to portray with precision the relevant law and facts. Moreover, every administrative aspect of the process has to be formalized in writing.

Thus, the inevitability of case congestion and impunity is compounded by procedural, written bureaucracy and its inherent inefficiency and inefficacy in finding and judging facts.

4. Functionary role confusion

The accusatory form distinguishes clearly the functionary roles of police and prosecutor. It has the police investigating and the lawyer/prosecutor litigating in resolution of the case. The distinction lends itself well to efficient and efficacious proceedings

In contrast and in conformity with the ancient instruction judge, the mixed/inquisitorial form has the lawyer/prosecutor investigating, charging and—at least in theory—litigating. The policeman is subjugated to an inferior, virtually administrative, support role to the prosecutor as the superior and central figure of the system. Even with investigative skill development, the police investigator is not given the opportunity to rise to the autonomous investigative occasion, functioning always in the shadow and under the direction of the prosecutor. At the same time and ironically, the lawyer/prosecutor is ill-formed for the investigative task. His or her formation is that of lawyer, not investigator. Even having gained some investigative knowledge, the litigation aspect and the associated resolution of cases are inevitably neglected in favor of the procedural emphasis on the formalized investigation. This lack of role distinction or confusion means procedural inefficiency and inefficacy in finding and charging truth, thereby compounding case congestion and impunity.

5. Functionary relationship Confusion

The accusatory relationship between police investigator and lawyer/prosecutor is that of peers—different but equal in their functions. The policeman investigates and the prosecutor charges and litigates case resolution prior to or at trial. Moreover, the relationship is oral in nature, with the prosecutor mentoring the police investigator as to legal matters during the investigation and the police investigator mentoring the prosecutor as to factual matters after charging.

In contrast, and once again the result of the inquisitorial legacy, the prosecutor/investigator is essentially a one functionary show, with the policeman playing a support role. The relationship is vertical in inequality of functions, as opposed to horizontal in peer equality. Moreover, given the formalized, bureaucratic nature of the system, the relationship between the two is written. The police investigator may technically do nothing without the written authorization and instruction of the prosecutor. Once again, efficiency and efficacy in the search for truth are retarded, compounding case congestion and impunity.

6. Defective mechanism of fact filtration

Given its philosophical and academic background and its emphasis on theory more than practical fact, the mixed/inquisitorial system lacks an effective mechanism of fact filtration—of distinguished relevant from irrelevant evidence. It functions in terms of hypothesis or intellectual speculation steeped in academic dogma; great for law school classroom discussion but ill-suited for practical fact discovery, charging and judgment; and this also by virtue of a system dominated by lawyers. The Author's personal experience with numerous cases only confirms this reality—official files full of paperwork that does little to achieve factual precision by virtue of the absence of a mechanism that allows accurate factual filtration. This only increases case congestion and impunity.

On the other hand, the accusatory form is founded fundamentally in the filtration mechanism consisting of the elements or criteria of the particular crime as the same is found in a criminal code or related jurisprudence or legislation. As referenced previously, the Author has termed this mechanism the *Dibujo de Ejecución* (or "Blueprint"). By measuring the universe of facts in any given case against the individual elements of the particular crime involved, the relevant facts are separated from the irrelevant; the relevant facts being those that have a tendency in logic to prove or disprove any one of the legal elements of the crime involved. The result is a focused investigation that results in a factually precise accusation and case resolution-related litigation prior to or at trial. Investigative and prosecutorial efficiency and efficacy are enhanced in true case resolution.

7. Premature and defective charging

As part of its inquisitorial past, the mixed system seeks suspect confession as an easy means of case resolution, but at the expense of Due Process. Having identified the commission of a crime, the possible suspect is arrested and charged preliminarily (the *imputación*) before the investigation is completed (save in cases of *flagrancia*), for the real but unexpressed purpose of forcing a confession; or at least prompting the suspect to prove innocence. As such, it promotes the presumption of guilt and the requirement to confess or explain, the very vices of the inquisition that the accusatory reform movement is meant to curb.

Moreover, by not having completed the investigation, the arrest and charging are premature and grossly unfair. When coupled with the absence of an adequate fact filtration mechanism and the associated speculation, the charging mechanism fails to give fair notice to the accused of the crime or the related facts. Moreover, it forces the suspect to defend her or himself publically given the formalized nature of the proceeding rather than having his or her day in court as presumed innocent and with the exclusive burdens of proof on the prosecution.

Another vice associated with this practice is the system's artificial measurement of case resolution. Given the inability of the system to otherwise resolve cases in terms of determination of guilt or innocence, it proclaims success in "resolution" with the arrest and charge, however premature and unfinished they uniformly are (except, again, in cases of *flagrancia*).

Because the investigation is incomplete, the judicial determination of suspect release pending the rest of the proceedings is hampered and made artificial as well, as the judges are not given the complete facts that they need in order to make such a determination. They have to guess factually, which often results in the release of the undeserving arrestee. On the other hand, those worthy of release are often held by virtue of the nature of the crime charged alone, in spite of the factual imprecision. This causes judicial as well as civic consternation, particularly in light of the system falsely claiming "resolution" with arrest and charging.

Yet another flaw is the procedural fact that, with arrest and charging and through the rest of the investigation and process otherwise, the formal nature of the proceedings is amplified with the entry of the defense and all the hearings and legal wrangling associated therewith. Procedurally it could be compared to a marathon runner. Given the formalized nature of the proceeding from its

inception, the runner is carrying a 25 lb. pack from the starting line. Now, 2 miles into the race, he or she is shackled with a 100 lb. pack.

In marked distinction, the accusatory investigation is largely free of bureaucratic, procedural form. Moreover, the accusatory form arrests and charges ***after*** the non-official investigation is completed. Here, the marathon runner starts free of any pack and ends the same way. The arrest and charge are made with a clear presumption of innocence, the right to remain silent and the burden of proof practice and persuasion on the prosecution. By virtue of the completed investigation and the use of the elements of the crime in relevant fact filtration, the charge is precise and complete and lends itself to definitive case resolution in plea bargain or trial.

8. Artificial investigative time limits

The arrest and preliminary charging, albeit premature, prompt the system to limit—at least in theory—the time permitted to finish the investigation thereafter. However, the limitations are as artificial as the premature arrest and charging that prompt them. Because of the case congestion otherwise occasioned, the results are generally two-fold: the additional, needed investigation is neglected in favor of the time limitations; or the system turns a blind eye to the limitations in favor of further investigation; both in official confirmation of case congestion and impunity.

The accusatory form avoids this artificiality with the investigation largely freed of procedural formalism, and the statute of limitations alone controlling the time limits of the investigation.

9. Hearings throughout process

As referenced previously, with the premature and artificial arrest and charging comes the intervention of the defense; and with the entry of the defense legal wrangling that of necessity requires judicial hearings and related decisions. Thus, recognizing that the arrest and preliminary charging of the suspect occurs relatively early in the process, virtually the entire process is subject to the inevitable and unavoidable series of hearings occasioned by the defense intervention. Each separate process is potentially subject to dozens of hearings. Moreover, given the formalized, bureaucratic nature of the system, each hearing tends to be a mini-trial, with all the excess of lawyer verbosity and formalism associated therewith. This only further retards the efficiency and efficacy of the system.

The accusatory form avoids this pitfall by freeing the investigation of formalisms and finishing the same ***before*** arrest and charging take place, thereby preventing the need for judicial proceedings during the investigation and until after the accusation when the defense intervenes. In addition, given the precision of the charging document and the speedy trial requirements between accusation and trial and the nature of the trial itself, there is limited need for hearings between those two events. Procedural efficiency and efficacy are maintained.

10. Hearing appeals throughout process

As referenced, every judicial hearing results in a judicial decision. The mixed/inquisitorial form allows for various forms of appeal as to each judicial ruling, thereby delaying the process for the corresponding period of time; which can be for weeks or months. This compounds dramatically the inefficiency and inefficacy of the process in further congestion of cases.

Again, the accusatory form avoids this dilemma altogether by not allowing hearings during the investigation and limiting the same afterwards.

11. Ineffective procedural shortcuts

Even in its bureaucracy, the mixed/inquisitorial form recognizes the case congestion and tries to create ways to alleviate the same. Accordingly, it has invented—at least in theory—certain early exit mechanisms and alternative procedures for the purpose of reducing case congestion. However, the bureaucratic magnet is simply too strong to allow their escape, shackling the early exit mechanisms and alternative procedures with their own bureaucracy that effectively impedes their practical utilization. Moreover, beyond the demands of the procedural bureaucracy, the implementing institutions tend to impose their own administrative bureaucracy, together with demanding qualifying criteria, that makes practical implementation even more difficult. Even when the exit routes are taken or the alternative procedures utilized, the protracted process occasioned by the bureaucracy only lends itself further to the inefficiency and inefficacy of the process. There is little alleviation of case congestion.

Given the non-official investigation, the accusatory form has no need for exits during the investigation. After the accusation, in spite of there being much lesser need for such exits, plea negotiation satisfies even that reduced need and permits accusation of many more cases in efficient and efficacious form.

12. Misdirected administrative management

Beyond early exit mechanisms and alternative procedures, the institutional management of the system by the respective entities is extremely bureaucratic. Police, prosecution and judicial administration of their respective system contributions tends to be very formalistic and bureaucratic, superimposing administrative bureaucracy on procedural bureaucracy. Moreover, in the face of the obvious system deficiency, each attempts to remedy the same by manipulating management as opposed to correcting the procedural defects themselves. “The system is not to blame, but the operators” is the common administrative refrain (made by administrative superiors with no experience in the trenches), with the corresponding, endless adjustment of administration; but with the same ineffective results.

Of course, the institutional operators of the accusatory form have their own administrative bureaucracies that can impede the efficiency and efficacy of the system. However, the relative absence of the procedural bureaucracy softens that threat dramatically. There is little, if any, accusatory discussion regarding any need to adjust the system administration itself, given the absence of the same defects that would otherwise prompt the same.

13. Debilitating criminal liability for procedural error

As referenced with regard to the first point, criminalizing procedural error by the functionary—be it policeman, prosecutor or judge—is a prominent feature of the mixed/inquisitorial system. It is founded in the distrust that is inherent in the inquisitorial legacy; as also explained by the paper bureaucracy. However, rather than promoting obedience, diligence and precision, such punishment only paralyzes the system. The functionaries are simply too afraid to make definitive decisions. As one functionary lamented to the Author: "It doesn't matter what decision I make, someone will denounce me." Another stated: "In the morning I am the accuser; in the afternoon the accused." Moreover, in the wake of error, the functionary faces not only criminal prosecution but disciplinary as well as administrative sanctions. As a result, papers are shuffled in accomplishment disguise, with little if any movement toward meaningful resolution. When this reality is added to an impossible individual caseload of hundreds or thousands of cases, representing at the same time one more case for another functionary, case congestion becomes official.

Although the accusatory form subjects police investigators to civil liability for error, there is no criminal liability for such error as to any functionary. Prosecutors, in particular, are immune from criminal liability as to procedural effort, given the important charging decisions they are required to make. Hence, any reticence on their part to not get the job done is a question of personal laziness and not systemic stifling.

14. Defective and unjust accusation

The mixed/inquisitorial written accusation must technically be made prior to the expiration of the investigative time limits invoked by the *imputación*. Given the *imputación* as the charging mechanism upon which the arrest is based, the mixed system accusation is by and large a mere formality. Although it can reflect charging changes resulting from post-*imputación* investigation, doctrine still criticizes and limits charging variance between *imputación* and accusation. In any event, given the theoretical/academic nature of the system, coupled with the absence of an adequate fact-filtering mechanism, the accusation tends to be a verbose, rambling, disjointed, and legally and factually imprecise novel-like report of legal theory, mingled with investigative results. As such, and in the hands of the trial judge invariably prejudiced thereby, it constitutes a proposed, preliminary finding of guilt rather than a precise but limited notice of charges to the defense.

Worse yet, in the absence of the fundamental application of the elements of the crime charged or *Dibujo*, the accusation, like the *imputación*, does not constitute that critical procedural event whereby the prosecuting authorities are required to demonstrate a required level of legal and factual sufficiency for the charges; and for the judge to detect the absence of the same. As a procedural formality, it is simply the procedural box that must be checked in order for the case to proceed.

On the other hand, the accusatory accusation, necessarily crafted in accordance with the elements of the crime, constitutes that critical moment of validation and detection and does so

while providing precise notice of the crime charged with supporting facts, without prejudicing the trial judge.

15. Defective and unjust preparatory hearing

Prior to this hearing in supposed preparation for trial, the presiding judge—who is frequently the trial judge—receives the official investigative file containing all of the investigative results in written form. Assuming dutiful review by the trial judge, together with the accusation as a detailed, proposed finding of guilt, any semblance of judicial neutrality or impartiality goes out the window. By virtue of this alone, the defendant is presumed guilty.

This presumption and corresponding obligation by the defense to prove innocence continues in the hearing itself. In reference to the official file content and in the complete absence of any witness, both the prosecution and defense attorneys are required to point out the judge the respective factual portions of the file they intend to "present" at trial. This dual proposition of proof confirms the obligation of the defense to prove innocence in response to the guilt proof by the prosecution. The latter has no exclusive responsibility or burden as to either going forward with the factual proof or persuasion otherwise by means of the proof. The defense cannot put the prosecution to its burdens. At trial—as anticipated by the preparatory hearing—each party formally "presents" the respective facts and the judge decides who wins. If the defense is unable or refuses to propose facts of innocence in the preparatory hearing or "present" the same in trial, it runs the risk of the factual scales of "justice" tipping to its determent.

As its name indicates, the purpose of the preparatory hearing is to prepare for the supposed "accusatory" trial. In order to evaluate that hearing and its purpose in preparing for trial, one must understand the basic purpose of the accusatory trial itself.

The fundamental purpose of the accusatory trial is what can be termed "proof immediacy;" that is, to provide the litigating parties (prosecution and defense) and the judging entity direct access to the actual proof or evidence source, as that source reveals specific, precise facts that are deemed relevant to the criminal charge being judged as determined by the *Dibujo* or legal elements of the crime charged. That actual source is the witness who testifies of his or her own personal knowledge of the relevant facts, including as that knowledge might relate to the authentication and relevance of physical evidence. This is also referred to as "witness confrontation." Immediacy or confrontation is achieved by means of direct and cross examination. Hearsay, or the representation by a document or another person as to what the actual witness source might say, is shunned as unreliable and a violation of the fundamental concept of confrontation or immediacy; hence the refrain: "I cannot cross examine a paper." Stipulation between the parties as to specific relevant facts can occur as an exception to the rule of confrontation or immediacy. However, such stipulation is the exception and not the rule, given the fact that the parties seldom forego confrontation in favor of what the witness might or might not say as the same bears on their respective cases. Likewise, judges are loath to rule preliminarily on specific fact relevance, preferring to "hear what the witness [or direct evidence source] has to say;" to get the information "from the horse's mouth." It follows that a fundamental aspect of immediacy or confrontation of the witness as the actual fact source is the determination of specific fact relevance in admissibility by the judging entity; which determination can only occur at trial, and not before.

The preparatory hearing violates all of these precepts. With the dual proposal of facts in the preparatory hearing, the judge then determines which sources of the facts are relevant and admissible and which are not. This is done in the complete absence of witnesses as ***the*** fact sources, the judge relying exclusively on the written file contents and the representations of the lawyers in relation thereto—hearsay in its entirety and most blatant form. This, of course, is explained—though hardly justified—by the formalized, written nature of the antiquated inquisitorial process. Moreover, the representations tend to be general in nature, consistent with the general theory or hypothesis basis for fact determination; rather than as to specific facts as otherwise required by the non-existent *Dibujo* or elements of the crime charged. Even to the extent that the proffer goes to specific facts, hearsay representation as based upon prior investigative declarations by the witness memorialized in reports can never guarantee what the witness might or might not say within the immediacy or confrontation setting of trial, a setting that did not exist at the time of the investigative declaration; hence, the very purpose of the trial as the crucible of truth determination in confrontation.

As it is, given the judge's access to the investigative file and the judge determining the relevance and admissibility of the respective evidence as proposed by the parties, the preparatory hearing constitutes the real "trial" of the facts. When the actual "trial" opens, the facts are largely—though illegitimately—determined and the judge's mind essentially made up.

In contrast, there is no preparatory hearing in the accusatory system. With accusation, the prosecution is simply required to bring its witness and evidence to trial, where relevance and admissibility of specific facts can be determined in the proper context of immediacy and confrontation.

16. Artificial and unjust "trial"

Given the disembowelment of the trial by the preparatory hearing, the former is a mere formality; a show; oral form over fact substance. The witnesses approved as "relevant" in the preparatory hearing "testify," but their "testimony" is already largely known by all, save perhaps some factual clarification here or there. However, evidence not approved in the preparatory hearing cannot be used to refute or support any clarified fact, now matter how compelling it might be shown to bd. In other words, trial as the definitive determination of truth in the crucible of confrontation is completely blunted in favor of the file and the preparatory hearing. Indeed, confrontation in these circumstances largely façade.

As such, the mixed/inquisitorial "trial" is less trial and more final debate; a last opportunity for the lawyers to argue and talk; which they do endlessly. It is an "oral" trial in this sense only, not that of witnesses being verbally confronted in the crucible of direct and cross examinations in determining relevant facts according to the elements of the crime. Indeed, the elements of the crime as charged never enter into the event.

The presumption of guilt continues as well, with the defense having to argue proof of innocence, rather than the failure of the prosecution to meets its burdens of proof and persuasion.

Moreover, given the case congestion otherwise prevalent, trials are more often than not postponed or divided into segments that can be spread out over months and years. It is not uncommon for a relatively simple case to take years in "trial."

In short, the mixed/inquisitorial "trial" is not an accusatory trial at all, but a show put on by and for lawyers at the expense of truth and justice.

The Foreign Training Regimens

With the overall system defects well in mind, we are now in a position to address the training regimen phenomenon as the same relates to said defects; and better answer the question: How is it that the training fails to correct the defects?

Police Training

The police training provided by the United States Government and primarily administered by DOJ's ICITAP—as well as similar training offered by USAID—as experienced by the Author has been and is that of a modern, accusatory regime with regard to commonly recognized professional, investigative techniques and standards. However, those techniques and practices represent only the first of four essential components of the ideal training regimen.

The Ideal Accusatory Police Investigative Training Regimen

1. Fundamental Investigative Techniques. Basic and time-tested investigative techniques—such as interviewing, surveillance, crime scene management, interception of communications, data base research, etc.—are fundamental to the training of any police investigator and must be a primary focus of the same. However, they do not stand alone in the regimen.

2. Legal Compliance. Investigative techniques must of necessity comply with legal requirements and limitations regarding the same. In the accusatory system, codification of such requirements or limitations is extremely limited, with most existing in case-developed jurisprudence. Even this is very limited, investigative techniques being left largely to the common sense applications and professional standards that otherwise control them. The accusatory form thus avoids hindering the investigative process with procedural formalisms in order to better insure the efficiency and efficacy of the same.

3. The Art of Investigating. Beyond the mechanical application of investigative techniques in compliance with applicable legal norms, the professional investigator is ideally taught to identify, develop and perfect attributes that far exceed performing a technically correct interview or surveillance. The art of investigating involves a powerful personal passion to know the truth beyond just engaging in investigative activities; a pervasive creativity that leaves no mental or physical stone unturned regardless of whether or not a particular stone relates to a mechanical investigative technique; an intuition that carries one to queries and quests not otherwise indicated by investigative techniques; of perceptions that detect what others do not detect, that are often ridiculed as extravagant or errant but ultimately prove priceless; of feeling for or about another or something that defies description but that demands consideration. Such are just a few possibilities

among attributes and virtues that are as numerous and varied as professional investigators and factual scenarios are numerous and varied. They carry investigation to a professional level far higher than mechanical activities or techniques and compliance with legal norms.

4. The Mechanism and Context of Relevant Fact Filtration. Without the guiding and structuring influence and power of the proper mechanism and related context of pertinent fact filtration and refinement, the other three investigative components are quite useless. Indeed, it is such mechanism that gives meaning and dimension to legally compliant investigative techniques within the art of investigating. Such mechanism is inherent in the accusatorial system in the form of the elements of the crime as the same is codified in criminal procedure code or addressed in case jurisprudence. The Author has designated such elements or criteria of the crime as the *Dibujo de Ejecución* (or *Blueprint)* of case development, in metaphorical reference to the plan needed in order to properly construct any edifice. Within the legal and procedural structure of the *Dibujo* or elements of the crime, legally compliant investigative techniques and the art of investigating are able to assume their very purpose and function of winnowing pertinent evidence from the universe of non-pertinent evidence. Without such legal and procedural structure of the *Dibujo* or elements of the crime, investigative techniques, however legal and integral to the art of investigating, are mere, hollow gestures at factual relevance. Stated differently, without the professional investigator learning how to utilize the *Dibujo*, the other three components of the regimen constitute mere lip service to professional investigation.

The Inquisitorial or Mixed System Police Investigator Paradigm

As the "round hole" portion of the "square peg in round hole" equation, the inquisitorial police investigator paradigm varies substantially from the ideal police investigative training regimen just described that is directed to it.

In conformity with the *Instruction Judge* legacy, of which the present day prosecutor is the *Instruction Judge* equivalent, the police investigator, in turn, is merely the administrative assistant of the prosecutor/investigator. As such, though the investigator formation incentive might be strong for the individual police investigator, it receives only lip service is institutionally.

As as additional aspect of the legacy of the antiquated *Instruction* form, the *Instruction Judge* investigated by formally practicing or giving official status to the investigated facts in written form and maintaining the same in an official file that constituted, in effect, the "trial" of the matter. Thus, the mixed legal system is inherently and pervasively written in form. Its legal and procedural norms are uniformly and universally codified and the procedural events formalized in writing and maintained in an official file, all in emphasis on legal conformity.

Such codification applies to investigative techniques as a manifestation of the formalized proceeding that includes the investigation, beginning obligatorily with the filing of a denouncement or the discovery of the commission of a crime otherwise. As such, the techniques are less "investigative" in the sense of existing so as to promote the common sense discovery of facts, as they are legal procedures or processes to be strictly complied with; with discovery of pertinent facts given a very distant secondary consideration.

From this it follows that mixed system "training" as to such is less concerned with the investigative "technique" as a fact discovery tool than it is with the compliance of legal norms. Far from the art of investigation, the police investigator is trained to be a legal technocrat as opposed to a professional imbued with fact discovery tools. Investigation is a technical legal process, not a fact discovery profession; and the police investigator is a mere robotic bureaucrat in the process. Investigative techniques as an integral means of pertinent fact filtration and refinement are largely ignored; the art of investigating is an undiscovered culture from an undiscovered world; and the *Dibujo de Ejecución* or elements of the crime as fundamental and practical fact filtration mechanism and context are ignored in favor of academic devices that better reflect the impractical, philosophical nature of the system.

In short, the inquisitorial or mixed system and its related training paradigm are a world away from the accusatory police training regimen referenced previously; which leads us neatly to the next consideration.

Foreign Accusatory Police Investigative Training as to the Mixed System

In spite of being the "square peg" component of the "square peg in round hole" equation, according to the Author's experience, the accusatory police investigative training has historically involved proper and excellent teaching of the fundamental investigative techniques. Results of that instruction can be seen among many mixed/inquisitor system police investigators. However, it is in large measure latent or its potential in practical application far from being fully achieved. A basic knowledge might be there, together with the corresponding talent, but the practical manifestation that should result from the same is still forthcoming. The Author experiences this time and time again. With some pleasant but limited exceptions, the police investigators are extremely capable, with a basic knowledge of investigative techniques at hand, but the modern investigation is otherwise foreign to them. They are simply not functioning at the level they should given so many years of training within their own institutions and at the hands of foreign advisors. Proof of the same is the common absence of concrete results. Investigations are by and large not finalized and resolved, and those that are proceed inefficiently and ineffectively.

The "why" or "how" has to do with the four components of the ideal training regimen referenced. The proper investigative techniques have been taught incessantly (component 1), but without the foreign trainers appreciating the legal codification emphasis on legal conformity of those techniques; the investigative techniques as legal processes and not practical, factual filtration and refinement tools (component 2). The trainers are thinking practical, fact discovery techniques, while the students are thinking compliance with legal process, with little consideration of practical fact discovery; trainers as investigators presenting to students as technocrats; an unwitting and futile reprograming of procedural robots. Moreover, neither one is thinking of investigating as an art form (component 3), and trying to instill or adopt the same as the case might be. That world does not even register on the formalized investigative planet. Finally, and perhaps most fatally, neither trainer nor trainee is even considering the need to address the *Dibujo de Ejecución* or elements of the crime (component 4) to give the necessary structure to the techniques and in correction of the associated monumental mixed system failing, in the face of which all the other components of the ideal training regiment are effectively rendered impotent.

In short, while well-meaning foreign trainers diligently teach investigative techniques and associated standards, they innocently but blindly ignore the bureaucratic, mechanical reality of the mixed system investigator paradigm that not only ignores investigating as an art form, but does not even appreciate the basic, practical fact discovery purpose of the techniques in the first instance; and with everyone oblivious to the overarching and all-encompassing context of the elements of the crime as giving necessary structure to it all.

All of this invokes a very basic teaching/learning verity. The very term "training" is significant in this regard; as it can and should be contrasted with practical "implementation" or "application." In the Author's experience, "training" normally means nothing more than just talk; presenting concepts in an intellectual, classroom setting, with little more than a suggestion as to their implementation or application as practical mechanisms. This is particularly true of concepts related to lawyer litigation, but also bears directly on police investigative work. The exception here might be certain scientific or forensic techniques that can only be taught by application; but they are the exception, and even then have their conceptual counterpart. All other aspects of prosecution and police investigative work are first "taught" conceptually in the classroom.

Suggested and even urged application of concepts as mechanisms in "training" is ***never*** enough. Paradigm domination makes even intellectual comprehension difficult; and autonomous implementation or application virtually impossible. Even where intellectual discussion is sufficient to achieve some degree of comprehension—which is not always the case—such "training" without a specific, complementary implementation component is worth nothing more than the intellectual exercise it represents. The student listens; nods knowingly (though not always sincerely); even participates in discussion in gesture of comprehension; but at the end of the training, saturated in existing paradigm, returns to his or her office, places the training certificate on the wall or in the desk drawer, and continues to do things just as he or she did them before. It is worse than naïve to think the student will leave the classroom with the concept and automatically apply it as a mechanism in the street or tribunal, particularly where the concept is ideologically contrary to his or her paradigm and work context.

"Training" in concept is meaningless without "implementation" of mechanism. Any meaningful change requires both components. Moreover, "implementation" must be more than simulated technique practice, such as with evidence collection, interviewing, cross examination or closing argument. "Implementation" requires mentoring in actual, technique application. Mentored evidence collection must occur at the actual crime scene. At the very least, mentored interviewing must involve actual recording or transcript analysis; as must cross examination and closing argument, if not mentoring in the courtroom itself. Indeed, only with such mentored application does true comprehension or "training" occur and is paradigm domination overcome. The student must leave the classroom with someone holding his or her hand and whispering (or perhaps yelling) in his or her ear in actual application.

Unfortunately, according to the experience of the Author, the U.S. training regimen rarely extends to practical application. It is purely conceptual and academic, at best suggesting practical application, but even this normally in ignorance of the paradigm that dominates the mind of the student; the "planting the seed" mentality. "This is how we do it in our system and, if it works for you in yours, wonderful! Otherwise, it is great to be here in your country."

Again, these shortcomings do not reflect a lack of well meaning or sincerity, but a failure to comprehend the conceptual and practical void that exists between the two systems and how that adversely impacts functionary training.[14]

The Task Force Model

Correction of that lack of comprehension is manifest recently in the form of what has been called the "Investigative Model." The Author resists this title for two reasons. First, it incorrectly suggests that the Model mechanism relates only to the criminal investigation, when in fact it applies to the entire process, including and especially the prosecution. Second, given the fact that in the mixed/inquisitorial system the prosecutor is the principal investigator, the title tends to perpetuate that defect. The Author prefers instead the description of "Task Force Model."

In response to the Latin American inquisitorial system's inability to adequately investigate and resolve cases, the Model reflects a more modern interpretation of the respective criminal procedure codes in applying superior mechanisms that correct (1) the confused roles of police investigator and prosecutor; (2) the errant operative relationship between police investigator and prosecutor; and (3) the defective technique of fact filtration that fails to distinguish pertinent evidence from the irrelevant; and this by means of the *Dibujo*. In addition, in the face of such procedural and operational adjustment, judges can be oriented so as to better accommodate and promote the results of a superior investigation and prosecution in the true resolution of cases. Moreover, civil society can also be educated as to this criminal justice reality so as to learn how to better cooperate with law enforcement in compliance by the latter with appropriate standards of professionalism and achievement.

The Model is implemented by means of a task force mechanism consisting of from one to two prosecutors and from four to six (or more) police investigators, with corresponding administrative support. The unit or task force is initiated by instruction to all functionaries regarding the Model concept. Other police and prosecution functionaries can participate in order to broaden the instruction audience in "priming the overall institutional pump" in anticipation of possible replication of the Model by means of multipliers selected from the the actual unit participants.

Model instruction is followed immediately by application of the concepts as mechanisms to real cases. Concept training becomes real, practical application of concept as mechanism. The police investigators and prosecutors bring their actual case files and each is mentored in their respective and actual application of the Model tools. Each is shown how to proceed in their defined roles and how to work as a team as to real cases. The *Dibujo* is actually applied to the files and cases in real and practical factual filtration. Cases are actually restructured, reoriented, energized and resolved. The Model goes far beyond mere talk. Once again, other functionaries involved in the prior conceptual orientation are welcomed to witness the implementation process in further institutional "pump priming."

[14] As we shall see shortly, the same can be said of prosecutor training.

In the process, police and prosecution administrative personnel are also formed so as to not only better promote the Model application but also in using its features in measuring case resolution success. Moreover, as referenced previously, judges can also be instructed as to the Model in accommodation and promotion of the same in judicial participation in true case resolution. This aspect is particularly important as to the ideal role of the judge in measuring the sufficiency of the prosecutor charging by means of the *Dibujo*.

The Model not only corrects fundamental systemic deficiencies, it corrects the investigative training defects in the process as to both police and prosecutors. While continuing to promote fundamental investigative techniques as practical fact discovery tools among police investigators,[15] the Model stresses the art of investigating while at the same time reforming the police investigator from legal process technocrat to true fact discoverer within the essential fact filtration context of the elements of the crime or *Dibujo de Ejecución*.

The results have been impressive. Every case to which the Model has been applied has enjoyed marked legal and factual clarification and restructuring, with a significant reduction in investigative time involved. Many cases are resolved by application of the Model alone, with a completed investigation in substantiation of immediate charging. Charges are otherwise more precise and fact-based, with the associated hearings more focused as a result. Moreover, the fact filtration process reveals many cases as not warranting further investigation or charges. All of the involved police investigators and prosecutors are more confident and productive in overcoming both systemic and training deficiencies.

When measured against the 16 points of distinction between the mixed/inquisitorial and accusatory systems, and viewing the same as 16 obstacles to achieving the efficiency and efficacy of the accusatory form, the Model bears correctively on most of them. It addressed points 4, 5 and 6 by defining roles and relationships in establishing the *Dibujo* or legal elements of the crime. It also overcomes in large measure obstacles 2, 3, 7, 8, 9, 10, 11 and 14. It avoids official case status long enough for the investigation to be largely completed and the case ready for charging (obstacle 2); it reduces procedural formality in the process (obstacle 3); it neutralizes the negative impact of the *imputación* by putting the case in immediate position to accuse (obstacle 7); it thus eliminates the need for artificial time periods to finish the investigation (obstacle 8); it avoids completely the need for endless hearings during the investigation and afterwards (obstacle 9); its thus also eliminates lengthy appeals of such hearing decisions (obstacle 10); it removes the need for alternative exit mechanisms or procedures by putting the case in immediate condition to negotiate resolution with the defense or more efficiently avail itself of some of those exit mechanisms (obstacle 11); and it allows the accusation to be reformed within the context of the *Dibujo* or elements of the crime.

Moreover, the Model provides substantial guidance in reforming defective administration (point 12) and in avoiding criminal liability for procedural error (point 13). It also can positively influence the preparatory hearing (point 15) and the trial (point 16).

[15] Risheim's proposed 2019 ICITAP PRISMA II police training program—addressed hereafter—emphasizes the fundamental investigative techniques, but does so within the full training context of the Model in correction of the referenced training deficiencies.

By means of the following list, we see that the Model effectively addresses 11 (in bold, italicized print) of the 16 impediments, and influences all of the rest but one, toward an efficient and efficacious criminal justice system.

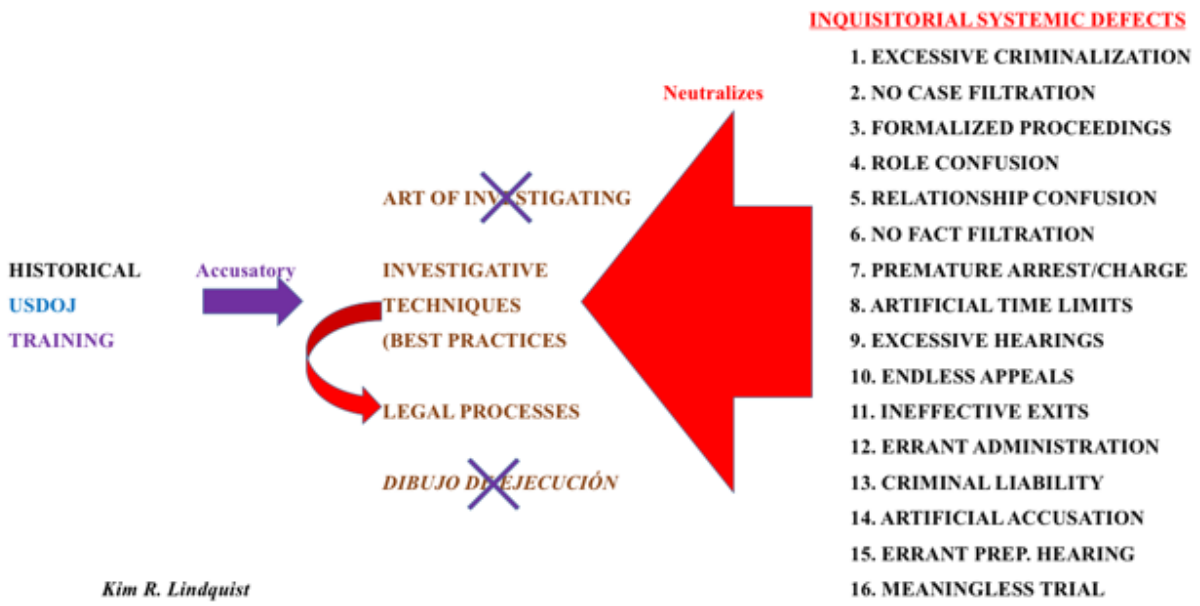
1. Excessive criminalization
2. No filtration of cases in relation to resources
3. Excessive procedural formalism
4. Functionary role confusion
5. Functionary relation confusion
6. Deficient mechanism of factual filtration
7. Premature and defective charging
8. Artificial investigative time limits
9. Bureaucratic hearings throughout process
10. Hearing appeals throughout process
11. Ineffective procedural shortcuts
12. Misdirected administrative management
13. Debilitating criminal liability for procedural error
14. Defective and unjust accusation
15. Defective and unjust preparatory hearing
16. Fictional and unjust "trial"

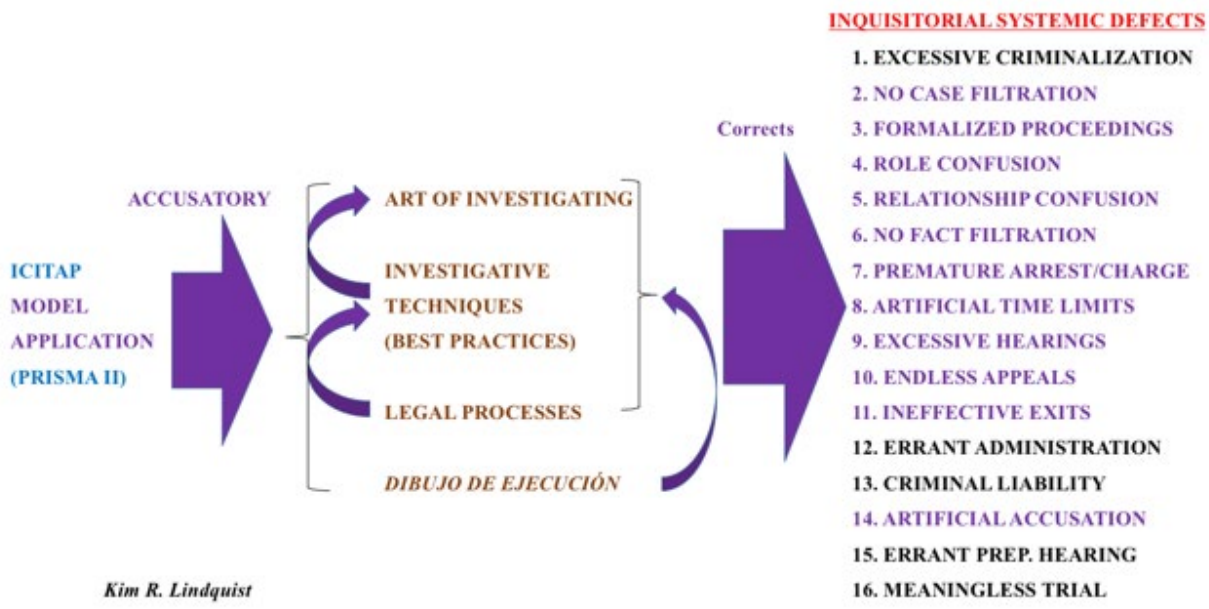
The ICITAP PRISMA II training regimen and the Task Force Model

Under the direction and vision of Carl Risheim, ICITAP/Colombia has developed and is poised to launch in April of 2019 the PRISMA II training regimen for police investigators. As already referenced, the regimen embraces all four components of the ideal accusatory police training, and does so within the context of the Task Fore Model construct; at the same time bridging effectively with the Colombia mixed/inquisitorial system.

Given such, the Task Force Model Units could be utilized as its practical implementation mechanism. PRISMA II could be presented in those regions where Task Force Model units have been established, thereby implementing the training as to real cases by means of those units and involving the prosecutors in the same in furtherance of that Model. Practical training for both police investigators and prosecutors occurs while applying mechanisms to real cases in bringing about real change.

What follows are two diagrams that portray the "before" and "after" of the USDOJ training regimen as reflected in significant part by the Model unit program as the same bears on training objectives and the related systemic defects.


INQUISITORIAL SYSTEMIC DEFECTS
1. EXCESSIVE CRIMINALIZATION
2. NO CASE FILTRATION
3. FORMALIZED PROCEEDINGS
4. ROLE CONFUSION
5. RELATIONSHIP CONFUSION
6. NO FACT FILTRATION
7. PREMATURE ARREST/CHARGE
8. ARTIFICIAL TIME LIMITS
9. EXCESSIVE HEARINGS
10. ENDLESS APPEALS
11. INEFFECTIVE EXITS
12. ERRANT ADMINISTRATION
13. CRIMINAL LIABILITY
14. ARTIFICIAL ACCUSATION
15. ERRANT PREP. HEARING
16. MEANINGLESS TRIAL
Neutralizes
HISTORICAL
USDOJ
TRAINING
Accusatory
ART OF INVESTIGATING
INVESTIGATIVE
TECHNIQUES
(BEST PRACTICES
LEGAL PROCESSES
DIBUJO DE EJECUCIÓN
Kim R. Lindquist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14. ARTIFICIAL ACCUSATION
15. ERRANT PREP. HEARING
16. MEANINGLESS TRIAL
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APPLICATION
(PRISMA II)
ART OF INVESTIGATING
INVESTIGATIVE
TECHNIQUES
(BEST PRACTICES)
LEGAL PROCESSES
DIBUJO DE EJECUCIÓN
Kim R. Lindquist

Prosecutor Training

In spite of his considerable experience, the Author cannot, of course, speak to all aspects of U.S. foreign prosecutor training throughout the world as they have existed historically or as they exist presently. However, as a DOJ/OPDAT resident legal advisor (RLA) in two countries for a combined period of approximately 4 years and by virtue of his contact with prosecutor functionaries in many countries during an additional 20 plus years to the present, he is in a position to address certain prominent aspects of that training.

Recognizing that prosecutor training support can take a myriad of forms according to the circumstances of a particular country, system and culture, a common foreign training practice generally engaged in by the U.S. is that of hiring host country lawyers/academics—many of whom have not worked as prosecutors—as the principal advisors to the U.S training implementers with regard to the system nature and related training needs. This is fundamentally problematic, as the perspective of said advisors more often than not does not extend beyond the system that spawned that perspective.[16] When we couple with this the fact that were it not for some degree of deficiency in the local system there would be no need for foreign assistance, the advisor perspective becomes inherently suspect in its ability to adequately recognize and appreciate the nature and significance of the deficiencies and the related remedies. They know there is something wrong and that perhaps the system needs help, but their remedial sense of the situation more often than not presumes and retains the very paradigm that gave rise to the problems in the first place.[17]

With extreme difficulty can the defective or broken system recognize and appreciate its own defects or broken nature. Its functionaries are a product of the system. They have had it pounded into their heads from the university and have lived with it for so long that they have become part of it; like their parents, grandparents, great grandparents and beyond. Again, although they might be compelled to acknowledge the problems that prompt foreign assistance, they rarely appreciate the genesis and nature of those problems in relation to their correction. They cannot see the sick forest for the trees. Without an alternative perspective foreign to the defective system, the genesis and nature of the problems forever eludes them; hence, the presence of foreign implementers who should help them stand back, take a different look at the trees in understanding why they are sick and giving them concrete solutions; if not hiring them in the first place. However, this requires that those foreign implementers understand both the trees and the sickness. Unfortunately, instead of paying the time and intellectual price required to understand the system and appreciate its challenges, including the local functionary perspectives that perpetuate the problems, too often they errantly hire those very functionaries in the substitute and paradoxical search for solutions. It is a case of "the blind leading the blind."

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[16] The Colombian criminal justice system and its functionaries are a classic example of this phenomenon. Both claim an "accusatory" system, but with that system portraying few accusatory features; yet they are convinced that they have such a system. Their perspective is that their system is accusatory, when in procedural fact it is not. In this regard, the argument that everything is relative and that the system is "accusatory" in Colombian form does not reform or justify the erroneous perspective. Any so-called "fact" can be proclaimed, but without it being so. With only a trace of hair left on his head, the Author could proclaim to the world that he "has hair;" when in fact he is quite "bald." Moreover, accusatory systems can boast of results that the Colombian system simply cannot; the "why" explained by the fact that the Colombian system is not accusatory.

[17] The Author dawns a toupee and proclaims: "See, I have hair." However, the trapping and associated perspective are artificial; so, too, the proclamation of a primarily inquisitorial system as accusatory and the related advisor perspective.

Effective training of the host functionaries must, of absolute necessity, presume and depend upon such expertise on the part of the foreign implementers, without which we continue spending and pretending.

As a specific, instructive illustration of the foregoing, the Author contrasts what he considers to be an ideal overall accusatory prosecutor training regimen with the typical mixed/inquisitorial paradigm context to which the regimen would be applied, and the conceptual and practical incongruence that such application represents.

The Ideal Accusatory Prosecutor Training Regimen

By virtue of his experience as Federal Prosecutor, as well as Defense Attorney for a combined period of almost 40 years, the Author deems the following to constitute the most fundamental components of an ideal training regimen for accusatory prosecutors within accusatory systems:

1. The Mechanism and Context of Pertinent Fact Filtration. The foundational establishment of the *Dibujo* or legal elements of the crime as the basis for all prosecutorial work; as the same bear on the criminal code source and any legislation or jurisprudence that addresses the same. Within this fundamental context of relevant fact filtration and refinement represented by the *Dibujo* or elements of the crime, the ideal accusatory prosecutor training regimen would address certain additional, key areas; namely:

2. Police Investigator Mentoring. The legal mentoring of the police investigator during the investigation as to the elements of the particular crime investigated and/or the legal compliance of investigative techniques;

3. **Charging.** The accurate and precise charging of the legal elements in relation to the relevant facts associated therewith and the related crafting of accusations, indictments and other pleadings;

4. Discovery. Faithful compliance with discovery obligations in compliance with applicable law and administrative directives;

5. Case resolution. All the foregoing in the definitive resolution of cases as the system purpose and end. This would focus on plea bargaining.

6. Trial Advocacy. The effective litigation or trial advocacy skills derived from and associated with skillful charging, consisting of the following themes:

(a) Planning (trial notebook)

(b) Witness/Evidence preparation

(c) Opening statement

(d) Direct Examination

(e) Cross examination

(f) Objections

(g) Motions

(h) Closing argument

The Inquisitorial or Mixed System Prosecutor Paradigm

As the "round hole" portion of the "square peg in round hole" equation, the inquisitorial prosecutor paradigm varies substantially from that of the ideal prosecutor training regimen just described. Once again, as the legacy of the antiquated *Instruction* form, where the *Instruction Judge* performed the function of investigator and prosecutor (as well as judge and even defense attorney), the "modern" mixed system prosecutor functions essentially in the same capacity. His or her first primary responsibility is that of investigator, assisted by the police (or internal investigators) as administrative assistants. The prosecutor's role as litigator is very secondary to that of investigator. This is explained by reference once again to the mixed legal system as inherently and pervasively written in form, its legal and procedural norms being uniformly and universally codified and the procedural events formalized in writing and maintained in an official file that constitutes in large measure the "trial" of the particular case. Indeed, it is by means of the written record in the official file that the judge, in preparatory hearing prior to "trial," is given full knowledge of the investigative results for the express purpose of determining the relevance and admissibility of the facts, with no benefit whatsoever of witness confrontation. Later, in "trial," witnesses are used primarily to give oral façade lip service voice to such prior determinations, with some factual clarification as a very secondary and often unintended result. The factual reality of the "trial" is determined well prior to such oral formality, and in written form.

Given such, the mixed system prosecutor is first and foremost an investigator, in spite of an academic formation exclusively as that of lawyer; with post-law school training necessarily reflecting the same. While the accusatory system sends police investigators to training courses, the mixed system primarily sends prosecutors, with secondary involvement extended to the police investigator. Accordingly, the inquisitorial prosecutor considers herself or himself as investigator, rather than litigator.

In conjunction with the same self-perception, and given the pervasive written context of the mixed system process, the prosecutor is as much if not more a bureaucratic file manager than litigator. "Litigation" is reduced largely to file administration, with "trial" a hollow façade of the official file as the basis for justice administration. Indeed, the predominant feature of any mixed/inquisitorial prosecutor office are the mountains of boxes and papers, with countless prosecutors, assistants and administrative personnel generating, processing and leafing constantly through an endless paper morass.

Any notion of litigation is reduced largely to administrative file management and the associated training that of business administration as opposed to litigation skills. Hearings reflect this as an expression—and this often inept—of the file. Accordingly, if it exists at all, litigation skill development is given a very distant and remote consideration in favor of investigative and file management skills, thereby relegating trial advocacy and associated case resolution to abject neglect; all in favor of investigative activities. At the same time, of course, any concept of prosecutor as legal advisor to autonomous police investigator never materializes.

In all of this, the *Dibujo* or elements of the crime as the fundamental relevant fact filtration mechanism are completely ignored in favor of what is referred to as "the hypothesis or theory of the case." It is what it denotes: speculation or guessing against general, academic and abstract legal criteria that fail miserably in revealing the factual precision necessary to properly investigate, accuse and judge. The results reflect the same: misguided investigations; imprecise and errant charging; and ineffective or non-existent resolution of cases by means of litigation.

In short, the mixed system or inquisitorial paradigm, with its training component, is diametrically opposite that offered by the ideal accusatory training regimen.

Foreign Accusatory Prosecutor Training as to the Mixed System

As the "square peg" component of the "square peg in round hole" equation, the ideal accusatory regimen simply does not take into consideration or orient itself toward the mixed/inquisitorial realty. Any such direct application of training regimen would ultimately require the institutional abandonment of the prosecutor as the file manager/investigator in a written system in favor of a more oral process wherein the police investigator assumes responsibility for the investigation, with the prosecutor concentrating on case resolution litigation. It would require abandonment of the official, written file and the preparatory hearing as the actual "trial" in favor of true litigation and confrontation of witnesses as the real trial. In short, it would require abandonment of the very essence of the inquisitorial form. As it is, the system remains mired in the preparatory hearing as the true "trial" of the case. There the "trial" judge has access to all the investigative materials as contained in the official file. The parties propose their respective proof and, in the absence of witnesses, the same is debated by the lawyers in order for the judge to determine the relevance and related admissibility. Nothing is left for "trial" save a hollow recitation by witnesses of what is largely already known to the judge, together with some final argumentation by the lawyers. The "trial" is nothing more than building facades on a manufactured street on a Hollywood film lot. There is little or no need for accusatory litigation skills.[18]

The direct application of the accusatory training regimen is not only difficult from the perspective of the mixed system functionary, such is not—and never was—the intent of the foreign training. The disconnection is apparent and unyielding.

[18] The Author has talked to prosecutors who believe that "litigation" skill means merely not asking leading questions to the witnesses; and this when the leading question objection is nothing more than a sham given the fact that the judge already knows what the witness is going to say. Otherwise, litigation skill is vastly more comprehensive than leading questions. Moreover, ironically, accusatory jurisprudence has developed an entire field of exceptions to the non-leading question rule on direct that is nowhere reflected in Latin America training results.

The foreign prosecutor training regimen largely ignores the reality of the inquisitorial prosecutor as investigator, ignorantly condemning the system to its role confusion and erroneously assuming the prosecutor as litigant, when in fact he or she is not. Worse yet, it ignores the absence of the *Dibujo* or elements of the crime as ***the*** fundamental mechanism for relevant fact filtration in precision of charging and litigation structure. It teaches in one language while the recipient listens in another. As a result, in spite of teaching true accusatory concepts—and 25 years of such—the emphasis on investigative activities, hearings and associated paperwork remains unchanged; as does the deficient investigation, charging and trial in the absence of the *Dibujo*; with an almost complete absence of meaningful case resolution.

Last but not least, the disconnection includes the same "training/concept" and "implementation/mechanism" dichotomy—without practical application of concept as mechanism, training is quite useless—with the same unfortunate results.

Trial Advocacy Skills in Particular

The training disconnect is seen most vividly with regard to trial advocacy skills as referenced above, which perhaps predominate as far as the orientation and reach of the foreign training regimen. Indeed, the Author himself as OPDAT RLA promoted the same without fully appreciating the cultural/procedural disconnection. However, he has since repented in more diligent self-education.

Said regimen commonly consists of all or part of those themes, repeated here:

1. **PLANNING (Trial Notebook)**
2. **WITNESS/EVIDENCE PREPARATION**
3. **OPENING**
4. **DIRECT EXAMINATION**
5. **CROSS EXAMINATION**
6. **OBJECTIONS**
7. **MOTIONS**
8. **CLOSING**

It is a fundamental and axiomatic concept that the accusatory trial and the associated accusatory trial techniques are the direct and exclusive product of the accusatory process; as the process goes, so goes the trial and the litigation skills required therein. The trial is what precedes it procedurally. It follows from this that an inquisitorial process cannot produce an accusatory trial or its litigation techniques—or the need for them.

From this it can be said that there are 6 basic features of the accusatory process that produce the accusatory trial with its litigation techniques, namely:

1. **An effective mechanism of evidence filtration; that is, the *Dibujo* or elements of crime.**

2. **A non-formalized investigation, with witnesses as the source of proof, not documents *as* witnesses; where investigative reports are not evidence.**

3. **Exclusive burdens of going forward and of proof practice on accuser, with no burden of practicing the proof on the defense.**

4. **A neutral/impartial judge, largely ignorant of facts; with a jury completely ignorant of facts.**

5. **Witnesses as proof source immediacy in determining relevance and admissibility, with a general rule against hearsay evidence.**

6. **A concentrated proceeding with no case congestion, as a result of prior filtration of cases.**

The 8 accusatory trial themes or techniques previously referenced presume and depend for their nature and application upon the 6 fundamental procedural features of the accusatory form; that produce the accusatory trial.

The mixed, inquisitorial system ***does not*** provide or result in the 6 fundamental accusatory features ***or*** the accusatory trial that the 8 accusatory trial techniques presume and depend upon. That is, the mixed system simply does not and cannot accommodate, account for or otherwise generate those advocacy skill needs. Rather, in procedural contrast, the mixed/inquisitorial system consists of the following, contrary features:

1. **No effective mechanism of evidence filtration; theory/hypothesis instead of *Dibujo* or elements of the crime.**

2. **A formalized investigation, with written statements as evidence.**

3. **No exclusive burdens of proof on accuser; dual burden with accused.**

4. **No neutral/impartial judge; knows facts completely before trial.**

5. **No proof source immediacy in witnesses in determining relevance and admissibility; determined before trial among lawyers according to the the written statements in official file.**

6. **No concentrated proceeding; case congestion; no effective filtration of cases.**

Thus, within the mixed/inquisitorial "trial" setting or context, accusatory trial techniques and skill development have little, if any, application. As such, the techniques presented to said system truly constitute the insertion of a square accusatory peg in a round inquisitorial hole; or,

perhaps in metaphoric comparison, two ships passing in the night. Confirmation of the same is seen by measuring each accusatory trial technique against the 6 predominant features of the mixed/inquisitorial system.

1. PLANNING (Trial Notebook)

1. The theory/hypothesis mechanism is too general and abstract to allow for effective fact filtration in effective planning.

2. The official file, in all its disorganized and unstructured bureaucratic glory constitutes the extent of planning; the *ineffectual* "trial notebook."

3. Without exclusive burdens of proof practice, there is no major incentive to plan on the part of the prosecutor in fulfillment of those burdens. Rather: "Here is what the file shows as to our proof."

4. The judge already knows the case as a result of the official file and preparatory hearing. There is no need to plan.

5. The official file and the preparatory hearing are the exclusive proof source "immediacy" in determining relevance/admissibility; hence, no need to plan for trial.

6. With the inevitable postponement of the trial hearing by virtue of case congestion, there is no incentive to plan. Moreover, the prosecutor assigned to the trial likely has no prior knowledge and is often poorly prepared; the antithesis of planning.

In doctrine and practice, there is little, if any, pre-trial planning because there is no need or basis for, or incentive to, plan.

2. WITNESS/EVIDENCE PREPARATION

1. The theory/hypothesis mechanism of fact filtration is too general to permit adequate witness or evidence preparation. Without the elements of the crime of *Dibujo*, there is no basis for precise witness or evidence preparation.

2. The official file/written statements constitute *the* primary "witnesses" in relation to any physical evidence; hence, there is no need to prepare witnesses, who serve only limited clarification with limited need for preparation.

3. Without burdens of proof, there is no incentive for the prosecutor to prepare witnesses; just present them within the context of the official file, let the defense do the same and the judge will decide.

4. The judge already knows the "witnesses" as a result of the official file and the preparatory hearing among lawyers. There is no incentive to prepare.

5. The official file and documents constitute the "immediacy" of proof source in determining relevance and admissibility, with no need to prepare witnesses beyond limited clarification of file statements.

6. With the inevitable postponement of the trial hearing, there is no incentive to prepare.

In doctrine and practice, there is little, if any, witness preparation because there is no crime element basis for the same; the official file statements require no preparation; the actual need of witness clarification is limited as to a hearing whose actual realization can never be guaranteed; hence, there is no incentive or need to prepare witnesses.

3. OPENING

1. Without reference to the crime elements or *Dibujo*, the opening is imprecise, theoretical and excessive, with no structural basis to make it meaningful.

2. With written statements as "witnesses," the official file is its own "opening."

3. With no burdens of proof on accuser, the opening is a mere formality in the dual proof responsibility with accused.

4. With the judge completely informed of facts as a result of the official file and preparatory hearing, the opening is completely unnecessary.

5. With relevance and admissibility already determined in the preparatory hearing, the opening serves no orienting purpose, but is a mere meaningless formality.

6. With case congestion and lack of concentrated proceedings, the need for an opening is uncertain at best and without motivation to prepare.

In doctrine and practice, there is no need for any opening because the facts are already known by the judge, and it otherwise has no meaningful basis and serves no significant purpose.

4. DIRECT EXAMINATION

1. Without using the elements of the crime, direct lacks the necessary, fundamental structure to make it legally and factually meaningful.

2. With written statements largely as witnesses, direct is a mere formality with little significance beyond limited clarification of written statements.

3. With no exclusive burdens of proof with the prosecutor, direct exam loses it fundamental purpose of the satisfaction by the prosecutor of those burdens. This also removes the purpose of defense cross examination in refuting the prosecution burdens.

4. With the judge completely knowledgeable of facts, direct is a largely meaningless formality.

5. With relevance and admissibility already determined in the preparatory hearing, direct is largely a rote formality, with minimal clarification need and limited to cosmetic conformity to rules of evidence admissibility and objections reduced to "suggestive," "argumentative" or "asked/answered".

6. With congestion and inevitable postponement, the incentive and need for preparation is lost.

In doctrine and practice, direct examination is nothing more than a ritualistic, cosmetic, "oral" formality, with minimal necessity of factual clarification.

5. CROSS EXAMINATION

1. Without the *Dibujo*, cross also lacks the necessary, meaningful structure. It also presumes erroneously that the exclusive burdens on the prosecutor have been met and that the defense illegally waives its presumption of innocence.

2. With written statements largely as witnesses, cross is a mere formality with little meaning.

3. With no exclusive burdens of proof in the prosecutor, cross exam loses it basic purpose for the defense in refuting satisfaction of the burdens and the prosecution in satisfying the same.

4. With the judge completely knowledgeable of the facts prior to trial, cross has little meaning beyond minimal factual clarification.

5. With relevance and admissibility already determined in preparatory hearing, cross is largely a rote formality with minimal factual clarification need and limited to cosmetic conformity as to objection to questions (not argumentative or asked and answered).

6. With congestion and inevitable postponement, incentive and need for effective cross are lost.

In doctrine and practice, cross examination is nothing more than a ritualistic, cosmetic, "oral" formality, with minimal utility in factual clarification or purpose in addressing compliance with burdens of proof.

6. OBJECTIONS

1. Without the elements of the crime, the basis for the core objection of relevance is non-existent. The objection is otherwise non-existent anyway, given the prior ruling of relevance in the preparatory hearing.

2. With written statements largely as witnesses, objections are meaningless.

3. With no exclusive burdens of proof in the prosecution, objections lose their basic purpose for defense in refuting satisfaction of the burdens and the prosecution in satisfying the same.

4. With the judge completely knowledgeable of facts prior to trial, objections are a superfluous formality.

5. With relevance and admissibility already determined in preparatory hearing, objections are largely a cosmetic formality.

6. With congestion and inevitable postponement, incentive and need are lost.

In doctrine and practice, objections are nothing more than a ritualistic, "oral" formality, limited to cosmetic corrections.

7. MOTIONS

1. Without the *Dibujo* or elements of the crime, motions lack the basic context for their assertion; particularly the "Rule 29" Motion, which does not exist anyway. (See point 3.)

2. With written statements as prior witness "testimony," there is no factual basis for motions at trial.

3. With no exclusive burdens of proof in the prosecution and some jurisprudence, motions have no basis in law, particularly "Rule 29" motion[19] where the defense can refute prosecution compliance with the burdens of proof.

4. With the judge completely knowledgeable of facts, motions are made moot.

5. With relevance and admissibility, together with other legal considerations already determined in preparatory hearing pursuant to dual proposition of facts and law by lawyers, pre-trial and trial motions are meaningless.

6. With congestion and inevitable postponement, there is no motivation for anticipation of such motions.

In doctrine and practice, legal motions are generally rendered moot. "Rule 29" motion does not and could not exist.

[19] In the accusatory system, given the exclusive burdens in the prosecution to practice and prove the charges without the defense having to prove facts to the contrary, following the factual practice by the prosecution at trial the defense has the absolute right to challenge the prosecution's satisfaction of the burdens by means of what is referred to as a "Rule 29 motion." The essence of the Rule 29 motion is that the prosecution has failed to prove substantial evidence in support of each legal element of the crime charged.

8. CLOSING ARGUMENT

1. Without elements of the crime, closing is imprecise/theoretical, with no structural basis.

2. With written statements as prior "testimony," official file is its own closing.

3. With no exclusive burdens of proof on accuser, closing is nothing more than an argument of who won and not whether or not the prosecution met its burdens.

4. With judge previously informed of facts before trial, closing is superfluous.

5. With relevance and admissibility already determined in preparatory hearing pursuant to the dual presentation of facts, closing is a mere formality.

6. With case congestion and inevitable postponement, there is no motivation for preparation.

In doctrine and practice, closing is a meaningless ritual, because the case has already been primarily determined prior to trial.

In summary, accusatory trial techniques have little, if any, application to the mixed/inquisitorial system; and this because they are not a product of the mixed/inquisitorial system; they are truly foreign and artificial to the same.

1. **Planning.** *In doctrine and practice, there is little, if any, pre-trial planning because there is no need or basis for, or incentive to, plan.*

2. **Witness preparation.** *In doctrine and practice, there is little, if any, witness preparation because there is no crime element basis; the official file statements require no preparation; the actual need of witness clarification is limited; and there is no incentive.*

3. **Opening.** *In doctrine and practice, there is no need for any opening because the facts are already known by the judge, and it otherwise has no meaningful basis and serves no meaningful purpose.*

4. **Direct Examination.** *In doctrine and practice, direct examination is nothing more than a ritualistic, cosmetic, "oral" formality, with minimal utility in factual clarification.*

5. **Cross Examination.** *In doctrine and practice, cross examination is nothing more than a ritualistic, cosmetic, "oral" formality, with minimal utility in factual clarification or purpose in addressing burdens of proof.*

6. **Objections.** *In doctrine and practice, objections are nothing more than a ritualistic "oral" formality, limited to cosmetic corrections.*

7. **Motions.** *In doctrine and practice, legal motions generally rendered moot. "Rule 29" motion does not and could not exist.*

8. **Closing Argument.** *In doctrine and practice, closing a meaningless ritual, because the case has already been primarily determined prior to trial.*

Thus, it can be said with authority that, ***in doctrine***, teaching accusatory trial techniques outside the context of the accusatory procedure and trial is an exercise in futility and/or naivté. ***In practice***, after more than 2 decades of teaching accusatory trial techniques—as well as other accusatory concepts—to mixed/inquisitorial systems, no true accusatory trial has been produced. Moreover, no improvement of case resolution has occurred. Both of these desired results should otherwise be the paramount goals of such instruction. As it is, we have over 2 decades of inserting the square accusatorial peg in the round inquisitorial hole with corresponding results.

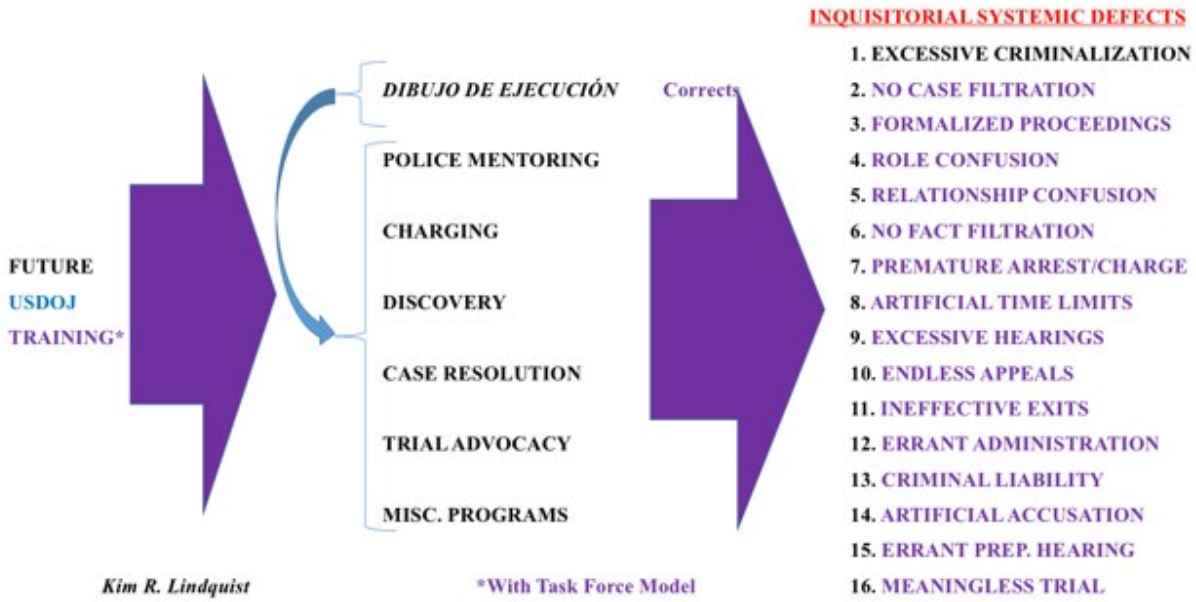
The Model

This side of major system reform, the Task Force Model is perhaps the best way to correct what can be corrected and, in so doing, hopefully bridge to that more substantial reform.

The Model as presently composed and applied already addresses meaningfully 4 of the 6 attributes of an ideal training regimen. Recognizing that the Model is applied to units composed of police investigators and prosecutors, the mechanism of the *Dibujo* (attribute 1) is received and applied by both functionaries in their respective capacities. Within the context of the *Dibujo*, police investigator legal mentoring by the prosecutor (attribute 2) is specifically addressed and promoted, as is the charging responsibility of the prosecutor (attribute 3). The prosecutor's case resolution responsibility (attribute 6) is also taught, stressed and applied as an integral aspect of the prosecutor's redefined role as litigator. Only discovery (attribute 4) and trial advocacy (attribute 5) are not addressed. However, the Model regimen can be easily expanded to include the same as they more specifically and meaningfully relate to the mixed/inquisitorial context—and also bridging to a more accusatory reform. Indeed, there is no aspect of the prosecutorial role that could not be addressed by the Model.

The following diagrams illustrate the foregoing prosecution training scenario:


INQUISITORIAL SYSTEMIC DEFECTS
1. EXCESSIVE CRIMINALIZATION
2. NO CASE FILTRATION
3. FORMALIZED PROCEEDINGS
4. ROLE CONFUSION
5. RELATIONSHIP CONFUSION
6. NO FACT FILTRATION
7. PREMATURE ARREST/CHARGE
8. ARTIFICIAL TIME LIMITS
9. EXCESSIVE HEARINGS
10. ENDLESS APPEALS
11. INEFFECTIVE EXITS
12. ERRANT ADMINISTRATION
13. CRIMINAL LIABILITY
14. ARTIFICIAL ACCUSATION
15. ERRANT PREP. HEARING
16. MEANINGLESS TRIAL
Neutralizes
DIBUJO DE EJECUCIÓN
POLICE MENTORING
CHARGING
DISCOVERY
CASE RESOLUTION
TRIAL ADVOCACY
MISC. PROGRAMS
Accusatory
HISTORICAL
USDOJ
TRAINING
Kim R. Lindquist


INQUISITORIAL SYSTEMIC DEFECTS
1. EXCESSIVE CRIMINALIZATION
2. NO CASE FILTRATION
3. FORMALIZED PROCEEDINGS
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9. EXCESSIVE HEARINGS
10. ENDLESS APPEALS
11. INEFFECTIVE EXITS
12. ERRANT ADMINISTRATION
13. CRIMINAL LIABILITY
14. ARTIFICIAL ACCUSATION
15. ERRANT PREP. HEARING
16. MEANINGLESS TRIAL
Corrects
DIBUJO DE EJECUCIÓN
POLICE MENTORING
CHARGING
DISCOVERY
CASE RESOLUTION
TRIAL ADVOCACY
MISC. PROGRAMS
FUTURE
USDOJ
TRAINING*
Kim R. Lindquist
*With Task Force Model

Summary

The Author's previous writing documented the absence of legal reform results in Colombia as the same bears on other countries of Latin America and the world generally, in relation to the large amounts of monies spent in pursuit of the same. The present writing attempts to explain, at least in significant part, the lack of reform in terms of U.S. foreign training efforts as to police and prosecutors as the same relate to the systemic defects. In this regard, it is probably accurate to say that reform efforts from the U.S. perspective are synonymous with the training efforts; and that the large amount of monies spent is primarily that of training. Thus, the expensive but failed reform efforts are explained in large measure by the well-meaning but unartful application of a training regimen to systems that are not in a position to implement the same; the result of trying to insert a square accusatory training peg into a round inquisitorial procedure hole.

As far as solutions are concerned, with regard to police investigator training to mixed/inquisitorial systems, legally compliant investigative technique instruction must be dutifully expanded and elevated beyond and above legal process compliance in the legitimate establishment of the art of investigating and supplemented fundamentally by application of the *Dibujo de Ejecución*.

The Task Force Model addresses these needs precisely.

As for prosecutor training, the solution is a bit more demanding but readily achievable. Every effort must be made to encourage and promote significant reform of the mixed/inquisitorial systems toward the very accusatory form they seek. Achieving such, training from foreign accusatory sources as to such reformed systems could approximate the internal training of an accusatory system itself, as if there were no foreign assistance. In the meantime, blind reliance on host system functionaries as advisors, or otherwise foisting accusatory concepts, particularly trial techniques, on the inquisitorial system without major revision of the training regimen in harmony with the local reality will only perpetuate the square peg in the round hole phenomenon.

The Task Force Model is significant in this regard as well.

Kim R. Lindquist