ABSENCES THAT TALK: LESSONS FROM THE LACK OF A CODE OF EVIDENCE IN THE REFORMED CRIMINAL JUSTICE SYSTEM IN THE PROVINCE OF SANTA FE IN ARGENTINA

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Abstract

Many Latin American criminal justice systems have been reformed over the last decades. These reforms involved the transition from inquisitorial to accusatorial criminal justice systems. The Province of Santa Fe in Argentina faced the same process in 2014 and has had a criminal accusatorial system since then. This article analyzes the traits that were left out of the transformation to an accusatorial criminal justice system, rather than those that were included. The reform of the criminal justice system in Santa Fe did not include a Code of Evidence. This omission is not rare since we have witnessed this vacancy in the vast majority of the recently reformed criminal justice systems in Latin America. This absence is counter-intuitive because it goes against these countries' civil law legal roots and their tradition of relying heavily on positive law. The article explores three stages in Santa Fe's reform process to find answers to this absence. The first covers the political discussions and struggles during the formal design of the new system. Second, the dynamics that the criminal justice systems have displayed since its implementation. Lastly, the counter-reforms that have occurred since last year. The article proposes analytical categories to explain the different postures regarding evidentiary rules. Despite not having a Code, it is possible to find scattered and anarchic rules of evidence

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in a system with professional judging as the santafesino. This situation can be explained as a diluted codification process. The article proposes this category to explain how the rules of evidence are added to criminal justice systems as part of wider transformations and not as the result of autonomous initiatives. Finally, this article examines the relationship between evidentiary rules and jury trials. It is a starting point to disentangle a complex process that shares a structural absence with many similar criminal justice systems reform processes, especially in the Global South.

I. INTRODUCTION

There is no doubt that the inquisitorial criminal justice system is antique, contradictory, and, in most cases, unfair. The accusatorial system is easier to reconcile with democratic values and constitutional rights. There is a widespread agreement that it is better than the inquisitorial system in almost every regard, especially in aspects such as judicial actors' accountability, publicity and transparency. These assumptions may lead us to believe that the 2014 reform of the Criminal Procedure Code in Santa Fe was an effort to update the system and harmonize the state's use of violence against its own citizens to conform to the limits of democratic regimes. There is much more to say about that transition, especially from its silence.

The reform in Santa Fe has an absence that speaks loudly: a Code of Evidence. Latin America is widely known as a region with a strong civil law tradition that has led the countries of these regions to rely densely on written codes. Positive law is central to the legal system since it is the instrument judges traditionally use to solve any controversy. In contrast, in common law countries, the legal decisions made by judges create and modify law. These differences affect legal practices and influence how legal changes occur over time.

The reform processes that have played out in Santa Fe, and in many other Latin American countries that have instituted similar reforms,[1] have produced unexpected results that contradict the lessons of history and legal traditions. Any person who should guess in which system we can find a Code of Evidence and in which these rules are still, apparently at least, constructed by the judges will likely miss the mark. That is because the scenario regarding the Code of Evidence does not respond to the rules of logic. The United States, a country with a long-standing tradition in common law, has a codified law of evidence, the Federal Rules of Evidence. Santa Fe, a state within a country with a legal system deeply-rooted in continental law, does not.

To explore that absence, I must talk with silence. This article examines a characteristic the system does not have instead of one it does. When I dialogued with the judicial actors and reformers about why they did not behave in a particular way, their responses were vague. The actors' interest was to share what they did, not what they avoided or failed to accomplish.

1. *See* Maximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617, 659-60 (2007) (According to this author fourteen (14) Latin American countries have reformed their criminal procedures codes since the beginning of the 1990, as well as an even bigger number of Latin American provinces and states. None of these processes have incorporated a Code of Evidence. Some of them, although, have included rules of evidence through a diluted codification process.).

Although, there is no other choice. To understand why a State with a tendency to solve the vast majority of its legal, and even non-legal, problems through positive law decided not to include an Evidence Code, I must enter the territory of the no-actions and examine what the actors did not do, even if they would prefer to talk about what they did.

Because of that epistemological challenge, some of the sections of this article are based on concrete information, while opinions and inferences shape others. The sections of the second group, particularly those related to the current dynamics of the criminal justice system in Santa Fe, are included for two important reasons. First, my goal is to insist on assessing an accusatorial criminal justice system from how it works and not in comparison with inquisitorial flaws supposedly avoided by its mere existence. Second, they pretend to provide analytical categories to explain some dynamics within the system related to the lack of clear and systematic evidentiary rules. They are not, and neither are expected to be, total explanations of how the santafesino legal system works. The limited scope and number of interviews require us to be cautious. Even more so considering the thunderous silence that has governed this field until now.

Every judicial reform is unique because it involves specific actors and dynamics. However, criminal justice reforms in Latin America share commonalities,[2] such as the absence of an Evidence Code. This article primarily focuses on the criminal justice reform in Santa Fe, Argentina, but it examines a characteristic shared by many other countries and states throughout Latin America.[3] The article suggests new categories that could be used to explain similar processes in other recently reformed criminal justice systems without losing sight of their unique aspects. The presence of evidentiary rules not included in a Code can be understood as a diluted codification. At the same time, differing opinions can be classified under the categories of legality and certainty defenders. Even if the transformations vary in content or intensity from one region to another, similar heuristic strategies can apprehend many of their traits.

This article covers over forty years of ups and downs and involves the efforts of many actors to implement a new criminal justice system or prevent it. I will analyze the reform process in Santa Fe from different perspectives. All of them, nevertheless, will share the common theme of exploring an objective effect rather than the vision of the system that existed in the

2. *Id.*

3. *See* Pierre G. Belanger, *Algunos Apuntes Sobre las Razones de la Reforma del Procedimiento Penal en América Latina,* [Some Notes on the Reasons for the Reform of Criminal Procedure in Latin America], DERECHOS Y VALORES [RIGHTS AND VALUES] 59, 61 (2010).

reformers' imaginations. By explaining how the current system was forged and functioning, I will answer why a Code of Evidence was not included in the reformed Code or any of its numerous amendments.

In this article, I will explore three stages of the reform process and how they interact and overlap. The first wave of reform has as a starting point the democratic return after the last Argentinian dictatorship in 1983. However, the study began with the approval of the Criminal Procedure Code in 2007 after years of legal debate and advocacy for reform needs because that is when all the previous efforts were finally translated into positive law.[4] This phase concluded with the implementation of the new criminal procedure system in Santa Fe in 2014.[5]

The second stage is the period from 2014 to 2023. The analysis is focused on how the criminal justice system functioned after it was reformed. The reform's impact has shaped the system's procedures and the dynamics of investigation and prosecution in the past decade. The expected reforms have found resistance and obstacles, especially since all the key actors of the inquisitorial system—judges, prosecutors, and public defenders—remained in the new system.[6] Concrete practices have altered the attitudes and opinions of the judicial actors regarding evidence rules since many of the expectations and ideas failed. This article will also include how the subsequent counter-reforms reverted many initial manifest functions and increased the political control over the criminal justice system.

The third part explains the second wave of reforms proposed by the governor, who assumed office in 2023, and such reforms are currently underway in Santa Fe. The proximity of these events offers an opportunity to investigate how the political sphere manipulates criminal procedure to align it with its interests. The political decision to include jury trials presented in this second wave proves that the accusatorial practices of the last ten years have produced profound transformation within the criminal justice system and its actors. The resistance against jury trials of judicial actors who successfully prevented its inclusion since the creation of the province of Santa Fe was beaten. I will explain the reasons why this long-awaited transformation was finally possible.

An examination of every one of these stages provides elements to explain why there is still no Evidence Code in Santa Fe, as well as in many other countries and states that have reformed their criminal justice systems

4. *Id.* at 73.

5. *Tras el golpe del caso Fraticelli* [*After the blow of the Fraticelli case*], LA CAPITAL [THE CAPITAL] (Feb. 9, 2014), https://www.lacapital.com.ar/edicion-impresa/tras-el-golpe-del-caso-fraticelli-n637739.html.

6. *See* Belanger, *supra* note 3, at 73.

in recent decades. The main reason is that almost all of them keep professional judging systems. There is an intimate relationship between evidentiary rules and jury trials. The decision to maintain the criminal judges at the center of criminal justice widely affected the possibility of including evidentiary rules during the design of the new systems. Moreover, the discussion regarding evidentiary rules is a technical discussion that can only be propelled by decision-makers interested in improving the functioning of the criminal justice system. The intention of the politicians has been more centered on instrumentalizing the criminal justice system according to their agenda than improving the system's performance.

The reforms the criminal justice system faced in the last decade respond to the logic of penal populism. A process in which expert opinions and advice are abandoned in the pursuit of immediate political gains.[7] Since politicians started to use the criminal justice system as an instrument to try to share the disquietude produced by the public safety claims, technical and complex issues such as an Evidence Code were disregarded.[8] As Bombini[9] has shown, many authors have studied the effects of this subordination. Penal populism is a frame originally offered by Bottoms[10] to explain a political tendency that has been increasing in the last decades. Following Bombini's proposal, penal populism also implies that the political and legislative initiatives are directed to produce symbolic effects rather than effective solutions.[11] In the penal populism context, politicians propel changes and transformations that pretend to calm the societal claims regarding public safety and adopt a punitive shift to send strong messages that appeal to atavic emotions as revenge.[12] The criminal justice system became an instrument to gain political benefits instead of a mechanism to manage the administration of justice.

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7. *See* JOHN PRATT, PENAL POPULISM (2007); John Pratt & Michelle Miao, *The End? Punishment, Populism, and The Threat to Democratic Order, in* GLOBALIZATION, HUMAN RIGHTS AND POPULISM 171, 187 (Adebowale Akande ed., 2023).

8. *See* Gustavo A. Beade, *El populismo penal y el derecho penal todoterreno en la Argentina* [*Penal Populism and All-Terrain Criminal Law in Argentina*], 31 DERECHO PENAL Y CRIMINOLOGÍA [CRIMINAL LAW AND CRIMINOLOGY] 55-70 (2010).

9. Gabriel Bombini, *Politization de la penalidad y proceso de producción normativo: discursos y prácticas populistas en el escenario local* [*Politicization of punishment and normative production process: populist discourses and practices in the local scenario*], CRITICA PENAL [CRIMINAL CRITICISM] (2014).

10. ANTHONY BOTTOMS, THE POLITICS OF SENTENCING REFORM 39 (Chris Clarkson et al. eds., 1995).

11. *See id.* at 40.

12. *See* GRAEME NEWMAN, THE PUNISHMENT RESPONSE 238 (2nd ed. 2017); John Pratt, *Emotive and Ostentatious Punishment: Its Decline and Resurgence in Modern Society*, PUNISHMENT & SOC'Y 417, 417-439 (2000).

Traditionally, penal populism has been associated with political campaigns and with the pursuit of votes. The recurrent crises in Santa Fe have made this approach stable in interacting between the political and criminal justice systems. Penal populism, as Bombini underlines, erases the differences between the different political parties.[13] The solutions that politicians craft are tainted by this perspective beyond their party affiliations. The politicization of the criminal justice system is noticed in two dimensions. First, in the importance that crime had in the political agendas.[14] Second, in the instrumental usages of the criminal justice systems' reforms that politicians do to send messages to society.[15] The inclusion of technical proposals, such as a Code of Evidence, is not likely in a context where politicians are worried about immediate political benefits and displaced the experts' and judicial actors' opinions in the selection of priorities to change.

The necessity of an Evidence Code is not beyond controversy. There is a wide range of positions that I have grouped into two categories: certainty defenders and flexibility defenders. During the initial discussion, the reformers were mostly aligned with the flexibility ideas. They thought at the time that including an Evidence Code would create excessive rigidity within the borning system. Because of that decision, the judges conserved the power to judge and assess the evidence freely. They could control the process by controlling the evidence used at trial. As soon as the social pressure increased, judges began to have a lenient attitude regarding this control in an attempt to protect themselves and avoid criticism. These actions are facilitated by the trial designed in Santa Fe, in which the judge who admitted the evidence is not the trial judge. The intermediate judges' tendency to accept charge evidence significantly increased the number of appeals. The repetition of petitions and discussion generates what the reformers pretended to avoid: bureaucracy. The appeals started to respond to formalistic actions instead of the dynamism that the accusatorial system is known for.

The fact that the reform did not include a Code of Evidence does not mean that the criminal justice system has no evidentiary rules. However, its incorporation responded to an anarchic process that is not easily harmonized with other legal dispositions and does not always make sense. The evidentiary rules were included through a diluted codification. This form of codification is precarious since it is not the result of an autonomous discussion but part of wider transformations. The diluted codification can be explained by the mechanical translation of 'ought to be' instead as a

13. Bombini, *supra* note 9.

14. *See* David Garland, *What's Wrong with Penal Populism? Politics, the Public, and Criminological Expertise*, 3 ASIAN J. CRIMINOLOGY 257, 259 (2021).

15. *Id.*

conviction of the need for its inclusion. This process ends up in rules that are disconnected from the real functioning of the system. For instance, the criminal justice system in Santa Fe has some rules regarding leading questions but, until recently, not juries.

This article will examine why a system with a strong tendency to codify almost every aspect of its legal frame did not include the Evidence Code in that process. Taking into account this inquiry, this article proposes explanations that attempt to answer it in light of the criminal justice system's historical, political, and judicial evolution in Santa Fe.

Initially, the reformers abandoned the evidentiary reflection partly because they based their expectations on what they believed the system should be, which was fostered by their lack of litigation experience. Criminal judges resisted the changes and fought not to lose more power that was strictly necessary to make the legal system formally viable. Besides keeping the power to decide who is guilty, they succeeded in conserving other powers, such as determining which evidence could be used.

While public safety has become the center of the political agenda, politicians have developed strategies to split the burden of their inefficiency in providing political responses to society. They discovered the criminal justice system was potentially guilty, with limited mechanisms to engage and succeed in the political debate. Politicians started to reform the criminal justice system not to improve it but to build a narrative that allowed them to share responsibilities for the recurrent crises in the public safety realm. The initiatives were focused on the intention of dividing responsibilities, and technical discussions were not considered.

Recently, the decision to incorporate jury trials gives belief that a Code of Evidence may soon be a reality in the province of Santa Fe. As soon as jury trials are included in the criminal justice system, the discussion regarding evidentiary rules cannot be delayed. When a system permits individuals with no legal and litigation expertise to decide other citizens' faith, the information presented before them becomes a fundamental issue. The high risk of popular decisions based on circumstances outside the trials demands that the legal system has mechanisms to avoid it. The limited scope of application of jury trials established by the current legislation in Santa Fe might be an excuse not to encourage this discussion.

On the other hand, the increasing political control over the criminal justice system can impede the incorporation of this type of rule in Santa Fe. When politicians analyze the criminal justice system through the lens of penal populism, technical and complex discussions are easily disregarded. This phenomenon poses a problem in expecting a future agenda centered on improving the system. As long as the politicians pretend to enforce the

narrative of action rather than a real commitment to enhancing the criminal justice system, entering an Evidence Code into the political agenda will be burdensome.

This article is intended as a first contribution to a debate that has just begun. Regardless of the possible reasons for their absence, it is evident that as the adversarial system grows stronger and after ten years since the implementation of the reformed criminal justice system in Santa Fe, there is less margin to continue avoiding the necessary discussion regarding the importance of a codified law of evidence.

II. THE FIRST WAVE OF CRIMINAL PROCEDURE REFORMS: FROM THE INQUISITOR TO THE PROFESSIONAL JUDGE

A. The Function(s) of the Reform

Some observers have defended that the reform in Santa Fe was a valid effort to update the system and harmonize the state's use of violence to democratic principles. This section will evaluate that argument by analyzing the context in which these changes were proposed, and the system designs they adopted.

Focusing on the decisions that the reformers made at the moment of the implementation, as well as those that were not made, will allow us to understand the motives behind the reform and the political disputes that it engendered. Merton[16] has said that social transformations must be studied in the light of two dimensions. First, according to their manifest function, which is related to the actors' discourses and intentions to accomplish some objectives through the selected means; in other words, subjective dispositions that foresee intended and recognized consequences.[17] On the other hand, latent functions happen when intentions become acts, and the objective consequences are produced beyond the discourses and intentions.[18]

Merton's device for exploring social phenomena has not been without critics.[19] Many of the debates on Merton's approach focus on its usage in the sociological framework. Scholars have criticized this approach because it added nothing new to the traditional analysis. These critics argue that the manifest function is nothing more than the actors' intentions, and the latent

16. ROBERT K. MERTON, ON SOCIAL STRUCTURE AND SCIENCE 13 (Piotr Sztompka eds., 1996).

17. *See* PAUL HELM, MANIFEST AND LATENT FUNCTIONS, THE OXFORD J. 51, 51-60 (1971).

18. *Id.* at 52.

19. *See* Colin Campbell, *A Dubious Distinction? An Inquiry Into the Value and Use of Merton's Concepts of Manifest and Latent Function*, AM. SOCIO. REV. 29, 41 (1982).

function is simply the effect of their actions. The intentions of the social actors and the impact of their actions have been a central inquiry for social science studies since the configuration of this field.

There is clearly some validity to these criticisms, but at least in the context of understanding the actions of the state, the Mertonian framework is still relevant.[20] When the State decides to operationalize a transformation, it needs to justify the swiftness and align it with the pretension that is recognized as expected by society. The universe of justification can be explained through the category of manifest function. Thus, all the reasons put forward by the state to make the change appear reasonable in the eyes of the society are located at the level of discourse and need to be separated from the objective effects that the transformation produced.

The Santa Fe reformers promised that implementing the new system of criminal procedure would inaugurate a democratic spring.[21] They also maintained that the reforms were in response to obligations imposed by the federal and state constitutions. They built their expectations around the argument that a new process would repair many of the errors that the inquisitorial systems had made for years.[22]

All these promises were integrated into a discourse that was the platform for building social engagement in the reform process. The necessity for change, pushed and promoted from various directions, was justified at the level of speeches for these ideas rooted in democratic and humanistic advancement. Among the most hackneyed promises included in the discourses of the experts and politicians, there are three that stand out above

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20. *See* Mariano H. Gutierrez, *La urgencia (y los horizontes) de una política criminal humanista* [*The urgency (and horizons) of a humanist criminal policy*] 92 REVISTA BRASILEIRA DE CIÊNCIAS CRIMINAIS [BRAZILIAN JOURNAL OF CRIMINAL SCIENCES] (2011).

21. *See Esto será una visagra para la vida institucional de Santa Fe* [*This will be a hinge for the institutional life of Santa Fe]*, PÁGINA 12 [PAGE 12] (Oct. 26, 2006), https://www.pagina12.com.ar/diario/suplementos/rosario/10-5911-2006-10-26.html [hereinafter *Institutional Life of Santa Fe*].

22. *See Olazábal: "con el nuevo sistema penal que se está tratando, se investigará globalmente"* [Olazábal: with the new criminal justice system being addressed, the investigation will be global], UNO SANTA FE (Apr. 10, 2013), https://www.unosantafe.com.ar/santa-fe/olazabal-con-el-nuevo-sistema-penal-que-se-esta-tratando-se-investigara-globalmente-n2135388.html (Julio De Olazábal was the first attorney in charge of the recently created Prosecution Office in Santa Fe. The former criminal justice system in Santa Fe had received, and still has, qualifications such as archaic and unconstitutional); *see also El gobernador Bonfatti pone en marcha el nuevo sistema de Justicia Penal* [Governor Bonfatti launches the new Criminal Justice System], LA CAPITAL (Nov. 11, 2013), https://www.lacapital.com.ar/politica/el-gobernador-bonfatti-pone-marcha-el-nuevo-sistema-justicia-penal-n428300.html; *see also* Jose Curiotto, *De Fraticelli al MPA: así fue el complejo nacimiento del nuevo sistema penal de Santa Fe* [From Fraticelli to the MPA: this was the complex birth of the new penal system of Santa Fe], AIRE DIGITAL [DIGITAL AIR] (Feb. 10, 2024), https://www.airedesantafe.com.ar/politica/de-fraticelli-al-mpa-asi-fue-el-complejo-nacimiento-del-nuevo-sistema-penal-santa-fe-n567996.

the rest: 1) publicity and transparency, 2) participation of the victim, and 3) timely and efficient resolution of criminal charges.[23]

The manifest functions of the proposed reform also incorporated the enhancement of the defendant's rights threshold, increased victim involvement during the process, and, overall, a democratization of the application of punishment. The creation of a new actor, Ministerio Público de la Acusación, who is in charge of the investigation, was expected to make the administration of the process more fair. Time savings was another promise of the proposal. The reformers said that the new system would be more efficient and effective, and every phase of the process would move more quickly.[24] The proponents also touted publicity and transparency as important values justifying the change. The trial and all the hearings would be public and open to the community instead of behind closed doors, the hallmark of the inquisitive model.[25]

Another central debate concerned the Public Defense. The defense was reduced to a mere symbolic role under the inquisitorial system. Public and private defenders had difficulties accessing and overseeing a process designed to concentrate all power in one person. Thus, a strong Public Defense was considered imperative to enable defendants for the first time to effectively resist the punitive efforts of the state.

If we assume that the discourses of the executive branch and members of the Santa Fe legislature regarding the decision to implement the reform in 2014 is valid and fairly reflects their intentions, we will be mistaken. To avoid that error, exposing the truth behind the curtains is obligatory. Since the beginning, competing forces have existed relating to transforming the criminal justice system.[26] There was a part of the political spectrum that defended progressive ideas, and others insisted on punitive solutions. The manifest functions of the reform suggest that at the time the Code was implemented, the progressive ideas occupied the center. The punitive

23. *See* Marcelo I. Hidalgo et al., *¿Cuáles son las principales características del nuevo Proceso Penal* [*What are the main traits of the New Penal Process?*], Ministerio de Justicia y Derechos Humanos de la Provincia de Santa Fe [MINISTRY OF JUSTICE AND RIGHTS HUMANS OF THE PROVINCE OF SANTA FE] (2010) https://www.santafe.gov.ar/index.php/web/content/download/173741/856111/ (illustrating that this document was prepared by the government in occasion the diffusion of the ideas of the criminal procedure reform in Santa Fe).

24. *See id.* at 4.

25. *Id.* at 2.

26. *See* Pablo Ciocchini, *El rol de los jueces en el marco de la 'lucha contra el delito' en el Sur Global: un análisis comparativo de los casos de la Provincia de Buenos Aires y Metro Manila* [The Role of Judges in the Framework of the 'Fight against Crime' in the Global South: a Comparative Analysis of the Cases of the Province of Buenos Aires and Metro Manila], REVISTA ESTUDIOS SOCIO-JURÍDICOS [SOCIO-LEGAL STUDIES JOURNAL], May 2019.

discourses have been gaining territory in the political landscape since then. The last reforms are aligned with traditional punitive solutions, such as recognizing more power for law enforcement officers. The possibility of separating manifest from latent function precisely allows us to escape from this narrative of winners and losers.

A political action announced as severe and punitive may not have any impact in terms of punishment. In contrast, others sustained in progressive arguments can generate the most populous incarcerated population in the history of Santa Fe, as was the case of the new procedure criminal justice system.[27] It may be advantageous to recognize the clash of discourses because it is an indicator of competing tendencies. Albeit, the concrete effects are which supply the material to comprehend the real reasons behind a particular social, political, or legal dynamic.

Understanding the reform process requires lowering the veil and revealing what it is in reality behind the intentions, rhetoric, and discourses. During the last ten years, the counter-reforms indicate that humanism and democratic values are not at the center of the political agenda. The current discussion about the pretended new transformation of the criminal procedure system in Santa Fe proves that politics regards this field as an arena to realize its own selfish interests, such as deflecting the negative social costs of crime.

To escape from the trap of discourses, it is necessary to shine a light on the consequences of the design and the implementation of the system, which are latent functions. This effort is relevant because it will allow us to evaluate the system according to its true potential and foresee its future possibilities.

The dichotomy between manifest and latent function as an explanatory device will be part of the entire analysis. The main reason is that discourses and promises related to the criminal justice system and its silences change their disguise but can be found in the past, present, and most likely in the future.

B. The Recent History of the Reform

1. "Because They Could"

The criminal justice system was changed in Santa Fe on February 1, 2014.[28] The Code of Criminal Procedure that established the new rules was

27. *See* MINISTERIO DE SEGURIDAD [MINISTRY OF SECURITY], REPORTE DE ACTUALIZACIÓN ANUAL PERSONAS PRIVADAS DE LIBERTAD - PROVINCIA DE SANTA FE PERÍODO 2008-2022 [ANNUAL UPDATE REPORT PERSONS DEPRIVED OF LIBERTY - PROVINCE OF SANTA FE PERIOD 2008-2022] (2023) (The total number of incarcerated individuals in 2014 was 4560 and in 2022, the number escalated to 9350).

28. After the Blow of the Fraticelli Case, *supra* note 5.

sanctioned on the 31st of August 2007, under the law number 12.734.[29] The nearly seven-year gap between approval and implementation may be explained by the investments and adaptations that any structural change demands. However, other circumstances also contributed to the delay in the implementation to the point that some of my informants reported that segments of the legal, academic, and political communities thought the reform would never be implemented.

Even though the 2007 Code of Criminal Procedure approved by the political branches had overwhelming support, it was not the first attempt in Santa Fe to replace the inquisitorial system with a system based on the accusatorial model.[30] Since the return of democracy in Argentina in 1983, these ideas have been part of legal discussions, especially in Santa Fe and Rosario, where the University of Litoral and the University of Rosario are located.

Many students and young lawyers were convinced that the Santa Fe's criminal justice system had to be opened up and democratized and believed that the transition to an accusatorial approach would be an important first step. In the late 1980s, judges and politicians criticized these groups as idealists lacking in practical experience. The judicial establishment dismissed any change and scorned the discussion of reform as an academic exercise, an intellectual debate that cannot be considered relevant for improving the system. That was the era in which the criminal judge was omnipresent and omnipotent.

In 1992, a Commission was created to discuss and propose a new accusatorial code.[31] The Commission was under the direction of a jurist brave enough to defy the constellation of power at the time: Jorge Eduardo Vázquez Rossi, a professor at the University of Litoral.[32] This technical Commission wrote and proposed a new criminal procedure Code in 1993.[33] Politicians and judges refused to discuss it systematically to the point that the Legislature never took it up. The procedural system and the powerful judges who controlled it remained in place until external forces intervened and eliminated the possibility of denying any transformation.

One of the architects of the successful 2007 legislation characterized this failed attempt to reform the system of criminal procedure as an important

29. Code of Criminal Procedure Law 12.734, SANTA FE LEGAL (2007), https://www.santafelegal.com.ar/cods/cpp1.html.

30. *See* After the Blow of the Fraticelli Case, *supra* note 5.

31. Ciocchini, *supra* note 26.

32. *See* JORGE EDUARDO VAZQUEZ ROSSI, DERECHO PROCESAL PENAL: LA REALIZACIÓN PENAL [CRIMINAL PROCEDURE LAW: CRIMINAL PERFORMANCE] 160 (Rubinzal-Culzoni ed., 1995).

33. *Id.* at 178.

milestone in the reform pathway, even though it was not as ambitious as the reforms that were ultimately approved. When asked why judges and politicians closed the door to any change and rejected it without discussion, he answered simply and compellingly: "Because they could."

This comment shows that neither politicians nor judges believed any reform was necessary. They capitalized on the fact that the discussion regarding the design of the criminal process was limited to relatively narrow circles. The demand for the kind of fundamental transformation offered by the new code was not yet a matter of general public.

The inquisitorial model of criminal procedure has as its main component an inquisitor. This figure reflects the concentrated power that the judge who filled this role had over the interior functioning of the system as it operated in the past. This concentration of power in the person of the judge is a legacy of an image that emerged during the Spanish Inquisition of an individual who both conducted the investigation but also made the final determination. The functions of the inquisitor during the Inquisition were often exercised through torture and humiliation in the name of god. Although there is disagreement over how closely this portrait of the mythical inquisitor matches reality,[34] one trait that is undeniable is power.

When we say that the judge in an inquisitorial system resembles an inquisitor, we refer to the extent of the judge's power and control over the process. Other features of the modern process that were characteristic of trials during the Inquisition are secrecy, the absence of any meaningful defense, and the primarily written nature of the process. These components structured a procedure that operated almost entirely out of public view and a model of a judge whose decisions and opinions were often treated as the truth.

The remoteness from society of the criminal process, particularly the judges, caused difficulties when judges were forced to interact with the general public. Judges exercised absolute power in the realm of their courts. However, as will be discussed in the following section, when their legitimacy became linked to the validation of the community, judges began to be confronted with the same challenges that faced the other branches of government, but they had fewer mechanisms to defend themselves from social pressure.

Judges had been promoting themselves as aseptic and neutral for too long. To the moment they tried to change the narrative of their role, these ideas were too deeply rooted. Public demands have turned into pressure that is difficult to handle for professionals who have been making decisions

34. Angus MacKay, *Historia de la Inquisición en España y América* [*History of the Inquisition in Spain and America*], 62 J. MOD. HIST. 411, 411-14 (1990).

according to their beliefs and needs since the creation of their charges. With the implementation of the reforms, judges were invited to participate in a political game they were unprepared to play and did not have the tools to win.

Judges in Santa Fe were reluctant to relinquish their centrality in the criminal process and the power that position gave them. They disputed the narratives regarding the necessity for changes. On the other hand, politicians did not want to create a conflict with other state actors in a context of a reform effort that was isolated and confined within the walls of the universities.

The political branches "could" suspend all efforts to reform the criminal justice system during those years because they considered that the demands for change was confined to a minority, mostly located in law faculties. The voices of the first wave of defenders of these ideas were not loud enough to defy the opinion of the active judges. Politicians seemed unwilling to open a front in a conflict with powerful enemies just because a minority in the legal community maintained that change was mandatory according to the new rules of democracy.

The judges' power was sufficient to overcome all the voices advocating importance of reform. The judges' attitude built a wall that blocked all the previous attempts to change the criminal justice system, which remained governed by a law passed in 1972. The voices of my informants suggested that it would not be possible to open the cracks in the wall of resistance to reform without the pressure being exerted from outside Santa Fe. Moreover, that is exactly what happened. It was only after Santa Fe's system came under criticism from reputable and powerful outsiders that cracks in the wall began to appear. At that point, the politicians could not postpone the debate any further.

2. Outside Pressure: Cracks in the Wall[35]

The criminal justice system designed by law N°6740 passed and enacted in 1972 was inquisitorial.[36] Despite this law being modified several times, the basic nature of the system was not altered until the implementation of the new Code. The 1972 Code continued to govern the criminal process in Santa Fe until 2014, even a new law was approved in 2007.[37]

35. Belanger, *supra* note 3, at 62 (recognizing that external pressures do not mean there is no pressure inside the state for changes; however, the author underlined the influence of external factors as cracks in the systems walls).

36. *Dispone la vigencia del nuevo Codigo Procesal Penal de Santa Fe a partir del 10/02/2014* [The New Crminal Procedure Code of Santa Fe is in Force as of 10/02/2014], Sistema Argentina de Informacion Juridica [ARGENTINA SYSTEM OF JUDICIAL INFORMATION], 2013, http://www.saij.gob.ar/legislacion/decreto-santa_fe-3811-2013-nuevo_codigo_procesal_penal.htm.

37. *Id.*

Over the span of forty-two years, the judges almost entirely controlled the criminal justice system in Santa Fe. Article 25 of the 1972 Code states, "Instruction judges investigate the crimes attributed to an individual older than eighteen years old."[38] Article 27 similarly assigns to a judge—albeit a judge with a different title—the investigation of crimes with a maximum sentence of less than three years.[39] The judge controlling the investigation also determines the appropriate strategy and means to discover the truth. The same judge, afterward, based on the proof gathered according to their decision, determines whether there is sufficient evidence to take the defendant to trial, at which point a different judge adjudicates guilt or innocence.

It strains credulity that the person who exercises power can simultaneously enforce controls on how that power is exercised, but this presumption was central to the operation of the criminal justice system in Santa Fe for more than forty years. In the situation in which an investigation has been deemed complete, the case was elevated to a different judge, a judge of crime, who was charged with assessing proof that was not presented in front of him, and who took it on trust that the evidence was obtained legally and fairly reflected what occurred in the investigation phase. However, the vast majority of the cases were resolved in the early stages of the investigation through a private and secret negotiation where the investigation judge interacted directly with the defendant.

The principal proof in the inquisitorial system was the defendant's confession, which was obtained through various investigative tactics, legal and illegal. It was common for judges to use imprisonment or isolation, or even some illegal methods, such as police beatings, to force a confession.[40] Since the legality of the measures used to obtain a confession was determined by the same judges who encouraged and ordered them, there was no way for a confession to be challenged. The risk inherent in the practice of concentrating in one actor the functions investigating and controlling that investigation should be obvious.

Despite the fact that the evidence was entirely written and not presented in front of the judge in charge of determining whether the defendant was guilty or innocent, the evaluation of the evidence at trial was deemed final. A defendant could challenge a decision to an appellate court only for reasons related to the law or arbitrary interpretation; if the decision was logical under

38. COD. PROC. PEN. [CRIM. PROC. CODE] art. 25 (1981) (Arg.).

39. *Id.* at art. 27.

40. *See* Belanger, s*upra* note 3, at 70.

the rules of "reasoned judgment,"[41] appellate challenges were limited arguments regarding the interpretation of the law. That was the rule for decades until the Supreme Court of Argentina decided the case *Casal*, which ruled against that legal position.[42]

In the case *Casal*, Matías Eugenio y otro s/robo simple en grado de tentativa,[43] the Supreme Court analyzed the appellate arguments in light of the obligation imposed by the Inter-American Convention, which has been part of the Argentine constitutional block since its incorporation in the 1994 constitutional reform. The Court established that according to articles 8.2 of the American Human Rights Convention, Article 14.5 of the International Covenant on Civil and Political Rights (ICCPR), and Article 75, subparagraph 22 of the Constitution of the Republic of Argentina, the scope of appellate review must be as wide as possible within the limits of existing legislation.[44] This clear statement acknowledged a right to appellate review not constrained to issues of arbitrary decision or misinterpretation of the law; rather, the review power of appellate courts encompassed all decisions made by the judge at trial in the superior courts. The review is to include all actions and decisions taken at trial and must be, in the words of the Supreme Court, "integral." The only exception recognized by the Court relates to evidence given orally and not recorded because of the factual impossibility of its reconstruction.[45]

This decision, announced in 2005, profoundly impacted Argentina and Santa Fe. The judges handling criminal cases faced a dilemma. They could assume that their decisions were subject to a comprehensive review by a superior court or could choose not to change their practice and infringe a right that the Supreme Court had deemed fundamental. This opened up another crack in the wall protecting the status quo. Judges were able to resist, maybe because of the marginal role that trial played in the criminal process, but some alarms had begun to filter in through the still modest breaches in the judges' fortification.

A few months before, another Supreme Court decision badly injured the model of the judge that had been portrayed in criminal justice systems in

41. Joel Gonzalez Castillo, *La fundamentación de las sentencias y la sana crítica* [*The Justification of Sentences and Healthy Criticism*] REVISTA SANA CRITICA [HEALTHY CRITICISM MAGAZINE] 93, 102, 103 (2006) (discussing the standard used to assess the motivation judges offer when deciding a case).

42. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 20/8/2005, "Recurso de Hecho Casal, Matías Eugenio y otro s/ robo simple en grado de tentativa," La Ley [L.L.] (2005) (Arg.).

43. *Id.*

44. *Id.* at 4.

45. *See id.* at 37.

Santa Fe. Many interviewees pointed to this moment as the beginning of the recognition of the mandatory nature of the system's transformation. The case was *Llerena*, Horacio Luis s/ abuso de armas y lesiones,[46] and it was also decided in 2005.

In the *Llerena* case, the Argentine Supreme Court solved a controversy regarding whether a judge who issued rulings during the investigatory stage could be deemed impartial in deciding the case in the sentencing stage.[47] This situation occurred frequently in Santa Fe during the inquisitorial era and raised doubts about the double role of investigation and oversight. From this moment, it was no longer possible to deny that decision by an impartial judge was a guaranteed right of the defendant.

The Supreme Court recognized that the judge's impartiality must be understood from two perspectives: objective and subjective.[48] The defendant may invoke the subjective component at any time that exists a reasonable fear of partiality on the part of the judge. The Court also said fear could be inferred from a judge's acts or decisions before the sentence, despite whether personal animosity or bias of the judge can be proven.[49] If judges take investigative actions that create a reasonable objective fear in the defendant, the accused may argue that there is no certainty that the judge will be impartial in any further decision during sentencing or any other stage of the process. Actions during the investigation were deemed to have tainted the judge, who could not thereafter participate in any other part of the process without opening the door to being accused of partiality. Judges could no longer maintain their omnipotence without paying an enormous cost in terms of legitimacy and legality both locally and nationally.

The *Llerena* case was a turning point in the perception of the judge's role in the criminal process. The importance of the issue addressed in the case led to the Supreme Court's issuance in November 2005 of Acordada No. 23.[50]

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46. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 3/5/2017, "*Recurso de Hecho, Llerena, Horacio Luis s/ abuso de armas y lesiones* [*Case Appeal by Llerena, Horacio Luis on abuse of weapons and injuries*]," Fallos (2005-486-36) (Arg.).

47. *Id.* at 70.

48. National Supreme Court of Justice, *supra* note 46, at 9.

49. *See id.* at 48.

50. *See* Corte Suprema de Justicia de la Nación [CJSN] [National Supreme Court of Justice], Acordada No. 23/2005 (Arg.) (It refers to an administrative resolution that the Supreme Court sanctioned, and it binds all the courts in Argentina. This decision clearly depicted how important the position adopted in this matter was since they recognized the risk that the inferior Court avoided using this new holding. It is important to underline that in Argentina, the Supreme Court sentences are not directly applicable as in a common law system, and they can be eluded by inferior judges expressing the reasons for their decision. The jurisprudence of the Supreme Court is not completely

These new procedures mandated by the *Llerena* case also generated practical difficulties. The criminal justice system itself was forced to adapt existing practices and routines to avoid creating causes of action to attack convictions. The process of adapting to the new rules was imperfect and dilatory, indeed, it was often nonexistent. Thus, in 2006, an extraordinary remedy against an appellate court's decision in Venado Tuerto, Santa Fe, was conceded. The case *Dieser*, María Graciela y Fraticelli, Carlos Andrés s/ homicidio calificado por el vínculo y por alevosía (D. 81. XLI) was a clear sign that the system could not continue to operate in the same way it had in the past. The Supreme Court insisted on adherence to the reasoning in *Llerena* and invalidated the court's sentence because two out of the three judges who decided the case had previous contact with the issues and had made decisions on preliminary matters during the investigation phase.[51] Chief of Justice Argibay stated in her opinion that the sentence must be reversed because of a denial of the right to an impartial judge.[52]

In that case, and another in 2008 called *Roggiano*, Julio César y Leonardi, María del Carmen s/ exacción ilegal agravada (R. 974. XLII),[53] the Supreme Court showed the weakness of the criminal justice system in Santa Fe and the high risk of civil liberties violations. These two cases have another trait in common that helped the criticism spread beyond the spaces where it traditionally had been restrained: both suspects were judges. That fact brought media and public attention to the outcome of the trials and the resources filled by the defendant after their convictions.

One of the crimes was mediatic and was followed by the press because it was tragic. Fraticelli, a judge, and his wife were accused of murdering their daughter at their family house; they both insisted since the beginning that their daughter decided to take her own life.[54] Roggiano was also a judge who was being accused of corruption.[55] The high profile of both cases, one before the sanction of the new Code and one after, transferred the criticism and concerns from the academia and minority sectors of the judiciary to the mass

irrelevant, but since its effect is relative and only applies to the case that motivated the holding, its influence is not as significant as in a common law system where it has the status of law).

51. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/8/2006, "Recurso de hecho deducido por la defensa de Dieser, María Graciela y Fraticelli, Carlos Andrés en la causa Dieser, María Graciela y Fraticelli, Carlos Andrés s/ homicidio calificado por el vínculo y por alevosía," Fallos (2008-81-1) (Arg.).

52. National Supreme Court of Justice, *supra* note 46, at 67-71.

53. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 4/8/2008, "Recurso de hecho deducido por la defensa de Julio César Rogiano en la causa Rogiano, Julio César y Leonardi, María del Carmen s/ exacción ilegal agravada," Fallos (2008-974-41) (Arg.).

54. *See also* National Supreme Court of Justice, *supra* note 53.

55. *Id.*

public. At that point, the cracks in the wall allowed us to glance at the other side, and politicians could not deny that the Supreme Court considered that the criminal justice system in Santa Fe had a "deficient procedural organization."[56]

The governmental branches of Santa Fe detected that the necessity for change was not more only part of a loud minority but a duty to conciliate the State system to the mandate of the Constitution.[57] The Governor, Jorge Obeid, was in his second period as Governor of Santa Fe after being elected again in 2003. During this second term, he tried to reform some of the most stagnant structures in the State, such as the state police force.[58] However, when it was the turn of criminal justice, the conservatives' center of power tried to postpone the discussions and changes, as well as its further implementation.[59]

It was identified that there was no more room for delays. Although, as an informant exposed, these initiatives still had to face the challenge of creating a strategy that compelled the transformation without arousing the wrath of powerful enemies: the criminal judges.[60] This can be corroborated by the fact that the Document prompted changes in the judiciary system as a whole, not just the criminal justice system.[61]

Clause 4 of the Agreement created a Commission.[62] This Reform Commission was formed for representatives of different sectors and interests and included the three powers of the State and employees, lawyers, and unions, among others.[63] There was a group that stood out composed of the

56. *See* National Supreme Court of Justice, *supra* note 46, at 9.

57. *See* Acuerdo hacia un plan estratégico del Estado Provincial para la justicia Santafesina [Agreement towards a strategic plan of the Provincial State for Sante Fe Justice], GOBIERNO DE SANTA FE [SANTA FE GOV'T], (May 10, 2006) (Arg.) [hereinafter Acuerdo] (This acknowledgement was reflected in the Agreement signed by the highest authorities of the three branches, executive, legislative, and judicial, in May 10, 2006).

58. *See* Provincial Law No. 12521/2006, Apr. 18, 2006 (Arg.) (This law reformed the entire internal organization of the state police); *see also* Provincial Law 12333/2004, Sept. 2, 2004 (Arg.) (This law created a new Public Safety Institute which replaced the former Police Academy. This new autonomous actor has been in charge of the education of the state police prospect since then); *see also* Eduardo Estevez & Pedro L. Favorito, *Reforma policial en Santa Fe, Argentina: contextos, oscilaciones y desafios del proceso* [*Police reform in Santa Fe, Argentina: contexts, oscillations and challenges of the process*] 6 REVISTA DE ESTUDIOS EN SEGURIDAD INTERNACIONAL [JOURNAL OF INTERNATIONAL SECURITY STUDIES] 139 (2020).

59. *See* Emerio Agretti, *Bassó se resiste a perder poder* [*Bassó resists losing power*], EL LITORAL [THE COASTLINE] (May 6, 2010), https://www.ellitoral.com/politica/basso-resiste-perder-poder_0_3cdeU1SCov.html.

60. *See Institutional Life of Santa Fe*, *supra* note 21.

61. *See* Acuerdo, *supra* note 57.

62. *See id.*

63. *See* Julieta Taboga, Rediseñando el campo de la justicia penal. Una exploración sobre las transformaciones del proceso penal en la provincia de Santa Fe [Redesigning the field of criminal

representatives of the School of Law. Many of them were the idealistic young professionals and students of the previous attempt who kept defending their ideas and finally found a space to change a system they had criticized for more than ten years. They had sufficient technical knowledge, and many were important figures in the criminal justice system at that moment. Their voices were crucial in the craft of the new Code, which was even more ambitious and extended than the one proposed in 1993.

Despite the fact that the framers were now experienced professionals, and the concerns were extended beyond the Universities, some parts of the judicial power still resisted any change. These sectors tried to use their influence to prevent the politicians from passing any law that may reduce their power. The reformers had to carry the burden of being considered naive, inexpert, or even traitors. The weight of the burden at this time, for the reason exposed and the trends, was significantly slighter.

During the interviews with some of the reformers, they expressed that they felt an aggressive and negative attitude towards them from part of the judiciary ecosystem, and from the judges in particular. They remember being careful in their expression and criticism, especially in public, to avoid disconformity. As part of these cautious tactics, they posed their disapproval of the system instead of the actor. They repeated on every occasion that they were asked that what had to be improved was the system rather than the performance of the judicial actors, including the judges.

The part of the judiciary that rejected the reform efforts was still active at the time and conserved a significant power quota. Even in his decision to create the Reform Commission, the Governor had to deal with opposing interests at the time. In that context, he made some decisions that proved he recognized the challenges of the scenario.

Jorge Obeid stated he intended to reform the entire judicial system,[64] not just the criminal one. With that move, he could disguise his intentions and avoid the reaction of the criminal judges. The actualization of the entire system would be better tolerated by the judges, who could feel that this action

justice. An exploration of the transformations of the criminal process in the province of Santa Fe] (Nov. 2021) (M.A. thesis, National University of the Littoral) (on file with the National University of the Littoral) (To learn about the work of the Reform Commission, as well as the legislative debate in this regard).

64. Jorge A. Obeid, *Plan Estratégico del Estado Provincial para la Justicia santafesina* [Provincial State Strategic Plan for the Santa Fe Justice] 44 (2006) (the main objective of the Strategic Plan was "to achieve a modernization of judicial processes" and not only the criminal justice system. The Plan, jointly signed by the Supreme Court of Santa Fe, was not directed to criminal justice reform, even though the reformers said, and the historical context and subsequent events confirmed, it was its main objective. This Governor´s decision indicates the relevance and power that the criminal judges had at the time, and his attempt to carefully skip any political action could be interpreted as a direct criticism of their performance).

was not directed toward the criminal justice system but the whole system. He also could shade the link between the Supreme Court sentences and the purpose of the reform. In the interviews, the reformers recognized this strategy as a valid political move that gave them more freedom to work outside the resistance of the criminal judges.

Despite his strategy, an informant also added, the Governor was still divided. An important part of his cabinet advised him against the reform. The reformers we interviewed highlighted that the status quo had many defenders during those days. The main difference was the external pressure generated by the Supreme Court decision and an 'ambient' of change throughout Latin America.[65] In that context, the Governor also decided to pay attention to the other side of the wall. Those who had been defending these ideas for years finally had the chance to express their concerns and propose the reform of the Code as the solution to many of them. This version won, and the Governor proposed the bill to the Legislature, which approved the proposal and turned it into law on the 31st of August 2007.[66]

Santa Fe, the last province to reform its criminal procedure, finally had a new legal framework. A new set of questions was opened: Is it enough to change the law to change a system? Santa Fe's experience may suggest a strong no. The sanction of a new Code was deemed the end of a longstanding process. History demonstrated that it was, in fact, the beginning of a new process until the reform was applied. The wall collapsed, but the rubble still needed to be removed to be able to construct again.

C. Local Actor Resistance: The Judge's Attitude and Professional Judging

As a result of the events explained, Santa Fe had a new Code that promised to change the criminal justice system permanently. On its face, the reform seemed to suggest that the criminal judges had lost the pulse and accepted to share the stage. Hence, it is important to scrutinize if the modification of the legal structure impacted how the judges perceived themselves and their general attitude regarding the changes and the system in general. Perhaps in this exploration, we can find some elements to explain the seven years of delay from the legal transformation to its effective implementation and the decision not to include an Evidence Code.

When we study the letter of the reformed Code, we find a trait that stands out from the rest and that is not simple to reconcile with the demands of an accusatorial system: professional judging. Criminal judges conserved the power to decide who is guilty or innocent.

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65. *See* Langer, *supra* note 1.

66. See Law No. 12734, Aug. 31, 2007, B.O. (Arg.).

This trait of the pretended reform can be understood as an attempt by the judiciary to remain relevant. The criminal judges relinquished their power to investigate with the demand to preserve the centrality through the judging function. Their roles would be focused according to the new law on judging and controlling, which turns them into key players.

As we described, the idea that outside forces were an indispensable step to reform can be proven. Judges who opposed those changes may have pushed back to avoid losing more power than strictly necessary. The practices we will examine in section III corroborate this premise. Many criminal judges witnessed the transformation from their benches and decided to keep working as if the changes had not happened.

Maintaining professional judging has brought another consequence central to our proposed analysis. Conserving the judges' power to decide would, by definition, refuse the existence of a jury. By denying jury trials, the odds of an Evidence Code were reduced. Moreover, judges were only willing to renounce their investigation power to respond to the legal pressure to change. If the judges have the power to control and accept the evidence for the trials without any normativity constraint, they can maintain indirect control over the investigation.

Even though modernity brought novel dichotomies, the tension between inquisitorial systems and the jury was present in the formation of Argentina as a nation.[67] The proof can be seen in the framers' decision to include jury trials in the first Argentinian Constitution in 1853 is proof of this. Santa Fe passed a law to implement jury trials in 2024, almost 171 years after the creation of the institutional debt from the Argentinian framers.[68]

The presence of powerful judges is an obstacle to the creation of jury trials. Moreover, it generally interferes with the normal function of the accusatorial and adversarial systems. Given the power they have accrued for years, the judges' resistance is a logical hardship in Santa Fe's transformation process and in improving its function by adding legal advances such as a Code of Evidence.

When we talked with some relevant actors in that process, they said the reform was not perfect, but it was the only possible one. Jury trials were perceived as an effort that might awaken powerful resistance. The reformer opponents' position was clear: bring Santa Fe's legal system in line with

67. *See* Alberto M. Binder, *La fuerza de la Inquisición y la debilidad de la República,* Política Criminal Bonaerense [The Strength of the Inquisition and the Weakness of the Republic], Política Criminal Bonaerense [Buenos Aires Criminal Policy], 2 (2003).

68. Andres Harfuch & Juan S. Lloret, *The Dawn of the Civil Jury in Argentina*, CIVIL JURY PROJECT (2020), https://civiljuryproject.law.nyu.edu/the-dawn-of-the-civil-jury-in-argentina/.

constitutional minimum standards without overly altering the power dynamics that governed the criminal judicial system for decades.

Another aspect of the different judging mechanisms can be used to explain the possibility of judges resisting the implementation of jury trials and of politicians accepting that limit. Every judicial decision impacts the community where the conflict that triggers the judicial response arises. Furthermore, the State received the conflict from a member of one of the community's groups,[69] who decided, voluntarily or compulsively, to give it with the expectation that the State's actor would repair their victimized interest. Consequently, every judicial decision has a symbolic effect traditionally related to legitimacy.[70] The person in charge of sentencing in a judicial process has a major impact on the legitimacy of the judicial power and the State.

From the perspective of many historical scholars, the legitimacy of a decision in the context of professional judging is impossible.[71] Montesquieu expressed fiery criticism of the professional judge, whom he considered could easily turn into a despot.[72] As Lettow Lerner wrote, this French author stated: "In republics, the people did the real judging, *and professional judges had very little discretion."*[73] Tocqueville was a defender of the jury trial, especially in criminal cases, and he said that the jurors were, in fact, the real judges.[74] The paradox is that following Professor Lettow Lerner's ideas both authors did not undermine the role of professional judges but created the condition to strengthen their relevance in a republic.[75] By losing the ability to decide the outcome of a trial, judges enhance their power to control the legality of the process and the actions of the other governmental branches.

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69. *See* ZYGMUNT BAUMAN, COMUNIDAD: EN BUSCA DE SEGURIDAD EN UN MUNDO HOSTIL [COMMUNITY: IN SEARCH OF SECURITY IN A HOSTEL WORLD], 19 (2003) (the complexity of modern societies impedes the use of the traditional concept of community, which depicts it as a homogeneous group with common viewpoints and values. It has been said that current communities are composed of many groups in dispute. For the purpose of our explanation, it is enough to say that the individual who renounces their conflict cannot be directly included in a group traditionally referred to as society. We consider that the idea of a multiplicity of communities within a large group is closer to being able to explain the social dynamics of modern communities). *Id.* at 52, 137.

70. James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance,* 23 WILEY LAW & SOC'Y REV. 469, 487-489 (1989).

71. Renee L. Lerner, *The Surprising Views of Montesquieu and Tocqueville about Juries: Juries Empower Judges*, 81 LA. L. REV. 1, 11, 12 (2020).

72. *See* Stephen C. Thaman, Should Criminal Juries Give Reasons for Their Verdicts: *The Spanish Experience and the Implications of the European Court of Human Rights Decision in Taxquet v. Belgium,* 86 CHI. KENT L. REV. 613, 616 (2011).

73. Lerner, *supra* note 71, at 12.

74. *Id.* at 40.

75. *Id.*

When judges accept and encourage jury trials, they can focus on judging legality and upholding liberty. This acceptance, far from reducing their power, makes them a permanent and central power in the State as a political device. The demeanor of the judge in Santa Fe conveyed the impression of a failure to consider those potential benefits while evaluating the possible impacts of the reform.

During the Enlightenment, the Italian school of thought agreed with the ideas of the French Scholars. Authors such as Cesare Becaria, and especially Gaetano Filangieri, were also against professional judges and defended the notion of restricted powers.[76] They shared with their French peers a profound distrust of the judiciary and believed in the importance of designing strict controls. The judges were attached to the letter of the law; neither power nor discretion was necessary for this ideal model of the judge. As Montesquieu famously established, the judges were, ¨the mouth which pronounces the words of the law."[77]

These ideas spread far and wide in Europe during the nineteenth century and developed a model of judges with severe limitations.[78] This increasing distrust destroyed the power of the judge to control the validity and rationality of the legislative power through superior values, traditionally included in natural law. The idea of a wise 'savior' was displaced by the one of a vicious threat who could turn into a dictator if the procedure gave them a chance. The 'mechanistic' approach[79] of the French School created a legitimacy problem: Who will be impartial and generous enough not to be corrupted by the exercise of power? If those who historically had assumed the function of judging were now a danger to the republic, it was mandatory to shift that burden to other shoulders. The answer was logical: those shoulders must be of the citizens who recently had received their freedom. At that moment, jury trials were introduced in Europe, first in France and then in many major countries.[80]

The jury trial is not a long-standing tradition in European countries, as it is in countries of common law, like England and the United States of America. The extension of its usage varies between these two main legal traditions: Roman law and Common law. However, after the Revolution, France included jury trials in 1791, followed by other European countries such as Germany (1871) and Spain (1888).[81] Only two years after adopting

76. *See* Thaman, *supra* note 72, at 613-16.
77. *Id.* at 616.
78. *See* Lerner, *supra* note 71, at 4.
79. *See* Thaman, *supra* note 72, at 616.
80. *Id.* at 615.
81. *Id.* at 616 n.21.

the first ten amendments in the US Constitution, based on Mason's Virginia Declaration of Rights, the Gallic country also incorporated jury trials.[82] Notwithstanding, the jury trial established in the US Sixth Amendment is different in intensity and extension; in Europe, jury trials were, and still are, reserved for particularly heinous crimes, whereas in the US, the text of the Bill of Rights does not make any distinction.

As a common trait, despite the historical and political differences, both countries were concerned about the legality and legitimacy of the judging process. A newborn country claiming its independence and one experiencing its freedom after years of monarchical oppression concurred that jury trial was the best legal instrument to protect and enhance the legitimacy of the judging process.

Hundreds of years later, we will see that expectation remains in politicians' minds, which recurred to reforms of the criminal justice systems to recover public trust and legitimacy. Jury trials are still an idea, not a reality, that professional politicians in Santa Fe have used countless opportunities in the past and today. Politics in Santa Fe uses the criminal justice system to create a culprit for the recurrent crisis in the public safety domain; changes are cosmetic and hysterical and happen at the level of discourses that are not related to true intentions of reform, nor even improvements of the systems. Thus, the difference is that French Revolutionaries and US framers were making decisions to design the structure of their future nations. These processes required deciding how society would convict the individuals accused of committing crimes, while politicians in Santa Fe, as in many other provinces, states and nations, are usually focused on their self-interests.

The first Constitution of Argentina was written in this particular context where important nations were making integral decisions on the judging system that would apply. The sources of this first Constitution have been the subject of heated discussion.[83] For some scholars, it was an adapted copy of the Constitution of the United States; others have expressed that the Constitution reflected the perception and values of some parts of Argentina's society, and the influence of the US Constitution should not lead us to consider it a copy but a legitimate local creation.[84] The European sources are usually deemed minor influences, although the practice and constitutional discussions during the last century have shown that they are also used to

82. *Id.*

83. Juan M. Morocoa, *"Las Fuentes de la Constitución Nacional" como "Fuente" de Disputa (Personal y No) Académica ['The Source of the National Constitution' as a 'Source' of Dispute]*, ACADEMIA: REVISTA SOBRE ENSEÑANZA DEL DERECHO [ACADEMIA: MAGAZINE ON LAW TEACHING], 59 (2014).

84. *Id.* at 67-72.

understand the limits of the Argentinian Constitution.[85] The mandatory character of the jury trial in the first Constitution can be read as a trait imported from the common law. However, there are alternative explanations that also acknowledge European influence.[86]

Beyond any controversy, what was clear was the distrust of the judge expressed in the Constitution and the fact that in the dichotomy between inquisitor and jury, the framers' election was for the last. The term 'jury' was included three times in the original text (art. 12, art. 115, art. 118).[87] Article 24 did not give any room for misunderstandings and states: "Congress shall promote the reform of the existing law in all its branches and shall establish the jury trial."[88]

Santa Fe had previously sanctioned a statute that regulated the primogenial structure of the State in 1819 and a Constitution in 1841.[89] After the first National Constitution, all the states that recognized the nation's existence had to adapt their constitutional texts to the recently created Confederation. This obligation was expressly included in Article 5 of the National Constitution, and Santa Fe fulfilled its duty in 1856.[90] The first Constitution of Santa Fe respected the key values of the latest legal regime, but using the range of discretion that the National Constitution reserved for the States did not include any particular precept related to jury trials. Article 9 of the Constitution of Santa Fe just established that for criminal process, the law shall "tend to institute an oral and public trial;" nine reforms later (1863, 1872, 1883, 1890, 1900, 1907, 1921, 1949, and 1962) the text remains the same.[91]

Following the evolution of Santa Fe's Constitution, we can determine that this State was less open than the national level in recognizing the importance of jury trials. Even though jury trials have become a duty for the Confederation's State since its inclusion in the National Constitution, Santa Fe was reluctant, and still is, to expressly include it in its Constitution. This historical attitude has been a platform judges used to resist change and claim their centrality in the criminal justice system. The binding force of the

85. *Id.* at 69-72.

86. *See* Morocoa, *supra* note 83; *see* Thaman, *supra* note 72, at 615.

87. Arts. 12, 115, 118, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

88. *Id.* at art. 24.

89. Pablo A. Boasso, *La Constitución Santafesina de 1921. Un Conflicto Institucional Olvidado* [The Santafesina Constitution of 1921: A Forgotten Institutional Conflict] 7 IUSHISTORIA INVESTIGACIONES 30, 31 (2010) (The Province of Santa Fe has been one of the most prolific states in Argentina in terms of constitutional texts. By 1856, Santa Fe already had the provisory Statute, adopted in 1819, and the First State Constitution, adopted in 1841).

90. *See id.* at 31.

91. PROVINCE OF SANTA FE [CONSTITUTION], Apr. 14, 1962, art. 9 (Arg.).

National Constitution text has not been enough to alter the dynamics of power in Santa Fe, even more so when the Federal system itself has not been able yet to incorporate jury trials in its procedures.

Despite the frenetic rhythm that Santa Fe experienced during the first years after the creation of the Confederation, it has kept its Constitution the same since 1962. The text of the Constitution of the State, where the first National Constitution and its last Reform (1994) occurred, has stayed the same for the last sixty-two years. In the same period, the neighboring State, Cordoba, which is similar in territory, population, and economy, reformed its Constitution two times in 1987 and 2001.[92] Cordoba also included jury trials since its first constitutional text, Provisory Reglament, in 1821; its existing law established in Article 162 that ¨the law shall determine the cases in which tribunals are also integrated with juries."[93] Cordoba is known in Argentina as the State with the strongest accusatorial tradition and the first to include jury trials in 2004 through law 9182/04.[94]

From this historical analysis, we can conclude that a state's tradition and culture affect transformation processes. The accumulation of power in the criminal judge's hand in Santa Fe found a tradition of disregard for popular participation in judicial procedures that facilitated it. On the contrary, Cordoba had a genetic mark created by the importance that the framers recognized in the origins of the State.[95] The Federal Constitution bound both states since its sanction to implement jury trials, but they translated this mandate differently according to the viewpoints of the local actors. It might be argued that the pressures and resistances within the boundaries of the States are as important as the legal mandate and design at both federal and State levels.

Suppose we accept the veracity of Enlightenment ideas about the professional judge's decision as impossible to deserve legitimacy, and Santa Fe has conserved that system until today. Assuming both premises are truthful would lead us to question why legitimacy was not a social concern for decades. The reasons seem to come from common sense. It is impossible to control and assess a process that has always been strange and distant. Citizens had never been part of the criminal process in Santa Fe, and in the best scenario, only were informed of the advances in procedures that move

92. PROVINCE OF CORDOBA [CONSTITUTION], Sept. 14, 2001, art. 12, 15 (2001) (Arg.).

93. *Id.* at art. 162.

94. Ley No. 9182, 22 Sept. 2004, Gobierno de la Provincia de Córdoba [Gov't of the Province of Cordoba] (Arg.).

95. *See* MATÍAS ROSSO, CODIFICANDO EL DERECHO DESDE LA BASE: EL CÓDIGO PENAL DE LA PROVINCIA DE CÓRDOBA EN LA GÉNESIS DE LA CODIFICACIÓN NACIONAL [CODING THE LAW FROM THE BASE: THE CRIMINAL CODE OF THE PROVINCE OF CORDOBA IN THE GENESIS OF NATIONAL CODIFICATION], (2022).

forward without their participation. The power of the criminal judges increased because of the secrecy and the closeness.

Since the beginning of Santa Fe as a province, criminal procedures had been written and private. The judges used secrecy to expand their discretion. In many cases, their courts were realms in which their owners, the judges, had the power of decision that was difficult to accept in a republic. Montesquieu's concerns could be confirmed in the criminal judges' demeanor for over a century.

As we highlighted previously, even if the Constitution of Santa Fe has demanded since its first text that criminal procedure be public and oral, it was not until recently that those mandates were followed. The culture, practices, and perception regarding the role of the judge in criminal procedures in Santa Fe were born entangled with privacy, secrecy, and the absolute lack of any instance of accountability. This model, which recently started to be disputed for the ideas brought by the reform, has deeper roots in Santa Fe's history. This deep-rooted trajectory partly explains the strength and virulence of the judges' resistance under analysis in this section.

Thus, the judge's attitude was not only the resistance to losing their privileges and power but also a historical defense of this elite group. Judges were able to accumulate power without having to face the claims of the citizens. The shadows were a favorable environment for this process and eschewed social criticism that came from an evaluation of their performances. The lack of accountability was a consequence of the criminal procedure design. All these circumstances played in favor of the judges, who did not have to deal with social pressure because society was not invited to be part of the process.

These presumptions are corroborated in the interviews we conducted. All of the interviewees were profoundly critical of the previous criminal justice system in Santa Fe. Their critique was not only of the systematic violation of civil liberties but also of its evident inefficiency. According to the voice of a former judge in Santa Fe, the inquisitorial system was a 'machinery of impunity.' This characteristic was noticeable for any objective individual with access to the criminal procedure system. Consequently, the fact that until the outside pressure broke the status quo, the inefficiency of the criminal justice system in Santa Fe was not part, or at least as firm as it is today, of the public concerns reveals that citizens had no access to information or to control the criminal process.

The inquisitor mask permitted the judges not to see the citizens in the eyes and created a distance from them. This separation over the years created a perception of a judge without almost any limit within their courts. Moreover, it erased any instances of control and accountability and turned

the public into mere bystanders of procedures solved in the darkness of the judge's chambers. The concern of how legitimate their actions were was outside the center of the judges' interest. They did not sense any social pressure in the outcome of the procedure, which usually took several years, because the citizens were not invited to their realms; social pressure was a dynamic of the traditional politics in which they were not involved.

In the transition to the new formal model, the judges disputed and conserved the ability to judge. Politicians introduced the changes as a result of a negotiation with this perpetual power in the State. The reform adapted the legal structure, but many judges were convinced they would not need to alter their practices and daily interactions. Even if the judges conserved the power related to professional judging, the reform deployed a myriad of modifications that would change how they would interact with the community in the years to come. Inquisitors renounced their masks and had to deal with social pressure for the first time; publicity replaced secrecy and brought the discussion regarding legitimacy. It was the beginning of the end of the total control of the judges over the penal system.

D. Implementing the Code and The Absence of Evidence Code

Even after the new Criminal Procedure Code in Santa Fe was sanctioned, criminal judges and the judiciary branch remained powerful actors in the political field. The sanction of the Code was far from guaranteeing the system's actual change. Therefore, the Code had to be limited and negotiated with them to avoid the complete failure of the reform that had happened in previous attempts. This particularity generated a series of effects, some of which are counterintuitive according to the continental legal tradition of the province. Among the most evident is the absolute absence of a Code of Evidence.

In December 2007, a new governor was elected in Santa Fe.[96] Hermes Binner, the former Mayor of Rosario, assumed the challenge of being governor and the burden of turning the reform into reality. Rapidly, he could confirm that this task would be challenging. He found an active opponent in the General Attorney, designated by Obeid in the last year of his governorship.[97] Agustín Bassó was appointed General Attorney in October

96. *Hermes Binner Sworn in as Governor of Santa Fe*, SOC. INT'L (Dec. 11, 2007), https://www.socialistinternational.org/news/press-releases/hermes-binner-sworn-in-as-governor-of-santa-fe-1253/.

97. *See Binner estuvo en la Casa Rosada y elogió a Kirchner* [Binner was at the Casa Rosada and Praised Kirchner], LA NACION (Sept. 12, 2007), https://www.lanacion.com.ar/politica/binner-estuvo-en-la-casa-rosada-y-elogio-a-kirchner-nid943324/.

2007 after the general elections by the losing party.[98] He was intensely criticized because of his public activism against judicial reforms.[99] He was a judge in the Criminal Court of Appeals in Santa Fe and the President of the Judge Association in Santa Fe. His loyalties were pristine.[100] He tried to minimize these criticisms when he took office, but his conduct during the following years showed the concerns were well-oriented.

This administration developed a plan to implement the reform and adapt the judicial system to the new administration of justice requirements. This plan included three stages and was approved by the Legislature under the law N° 12.734.[101] According to this program, in 2009, the government sent five bills to create new institutions and to regulate the transition. Three of them were unanimously approved by the Legislature.[102] The Prosecution Office and Public Defense appeared in Santa Fe, established by the law N° 13.013 and 13.014, respectively.[103]

The governmental attitude during this period (2007-2014) was unequivocal. Binner's government pushed many bills that were necessary to implement the new criminal justice system.[104] The governor chose Hector Superti to be the Minister of Justice during his mandate.[105] He was a lawyer

98. *See* Falleció Agustín Bassó [Agustin Basso Passed Away], UNO SANTA FE (Mar. 27, 2012), https://www.unosantafe.com.ar/santa-fe/fallecio-agustin-basso-n2146617.html.

99. *See La Corte rechazó un planteo del procurador contra la reforma penal* [The Court Rejected a Claim by Attorney Against the Penal Reform], LA CAPITAL (Aug. 12, 2010), https://www.lacapital.com.ar/edicion-impresa/la-corte-rechazoacute-un-planteo-del-procurador-contra-la-reforma-penal-n749411.html.

100. *See Porque llueven impugnaciones* [*Because it's Raining Challenges*], ROSARIO 12 (Sept. 20, 2007), https://www.pagina12.com.ar/diario/suplementos/rosario/10-10328-2007-09-20.html (When the Bicameral Committee was about to decide Basso´s appointment, a scandal occurred. The Judges Association in Santa Fe, presided by the candidate, organized a party. According to the attendees, in one moment the entire group started to sing ¨Resisteré´, a song that could be interpreted as an ironic demeanor. The attitude of Basso was a provocation and a display of the extent and source of his power).

101. Cradle of the National Constitution, Res. N. 12,734 (2013).

102. *See id.* at 9.

103. Creación de Cargos, Res. N. 13.013, 13014 (2018).

104. *See Superti: "Avanzamos hacia la reforma judicial" en Santa Fe* [Superti: "We are moving towards judicial reform" in Santa Fe], LA CAPITAL (Jan. 30, 2008), https://www.lacapital.com.ar/politica/superti-avanzamos-la-reforma-judicial-santa-fe-n276692.html; *see also Binner, contra el procurador Bassó por trabar la reforma judicial* [Binner, against Attorney General Bassó for blocking judicial reform], ROSARIO 3 (May 6, 2010), https://www.rosario3.com/noticias/Binner-contra-el-procurador-Basso-por-trabar-la-reforma-judicial-20100506-0022.html.

105. *Binner: Estamos Preocupados, los delincuentes nos conocen y nosotros no Podemos identificarlos* [*We are worried, the criminals know us and we cannot identify them*], UNO SANTE FE (Aug. 28, 2015), https://www.unosantafe.com.ar/politica/binner-estamos-preocupados-los-delincuentes-nos-conocen-y-nosotros-no-podemos-identificarlos-n2056469.html.

who had defended many high-profile cases, including the Fraticelli case.[106] He also had discussions and polemics with the General Attorney with public expressions throughout his term as Minister.[107]

This conflict escalated to reach its paroxysm in the General Attorney's decision to attack the recently passed laws because he considered them unconstitutional. In 2010, in a divided decision, the Supreme Court of Santa Fe rejected the petition of the General Attorney.[108] The Chiefs of Justice used legalese and technicalities to avoid expressing their ideas in a manner that would have been hard to avoid being considered political.[109] The two judges from Santa Fe, Chief Gutierrez and Chief Spuler, voted to accept the petition.[110] At the same time, the other four from Rosario, Chief Falistocco, Chief Netri, Chief Erbetta, and Chief Gastaldi, opted for the rejection.[111] One of the interviewees expressed that the perception of the legal community was that the South fought for reform, and the North resisted. The division in this essential dispute appears to match that idea. The composition of the Court remains untouched until today, another demonstration of the parsimonious pace of institutional evolution in Santa Fe.

The legislation survived, and the reform process received the legal support that the context demanded. Basso´s attempt was the most evident, but parallel actions were deployed to undermine the strength and viability of the reform. This resistance is one of the reasons that explains why a Code of Evidence was not part of the original project, even in the context where evidentiary concerns were a lateral issue and even, for most actors involved, not an issue at all. Similar to the situation with jury trials, if proposed, a Code of Evidence might be seen as the political branch trying to gain more power that the judges were willing to concede. The priority was centered on other traits, such as publicity and orality, which were more connected with reshaping investigative powers. The negotiations between all the actors had to deal with the judges who imposed limits with an iron fist. This pressure

106. *See "El caso Natalia Fraticelli", un documental para recordar el difícil camino a la verdad* [*'The Natalia Fraticelli Case.' A Documentary to Remember the Difficult Road to the Truth*], LA CAPITAL (Dec. 29, 2023), https://www.lacapital.com.ar/zoom/el-caso-natalia-fraticelli-un-documental-recordar-el-dificil-camino-la-verdad-n10110176.html.

107. *See Superti cruzó a Bassó por el control de la corrupción policial* [*Superti Crossed Basso for the Control of Police Corruption*], LA CAPITAL (July 14, 2009), https://www.lacapital.com.ar/policiales/superti-cruzoacute-bassoacute-el-control-la-corrupcioacuten-policial-n325034.html.

108. The Court Rejected a Claim by Attorney Against the Reform Penal, *supra* note 99.

109. *See id.*

110. *Id.*

111. *Id.*

was a factor, but we suspect there are other more relevant reasons that are worth analyzing.

1. Contrary to Tradition: The Missing Code

The Congress of the United States enacted the Federal Rules of Evidence on January 2, 1975.[112] It was not until the sixties that Congress began to consider codifying these rules; before that, the development of these rules followed the traditional common law process and was reserved for Courts.[113] Even though the Supreme Court of the United States expressed the first concerns and decided to create an advisory committee to systematize previous rules, Congress approved the Federal Rules of Evidence.[114]

Following Merrit and Simmons' ideas, the legitimacy crisis brought by Watergate was the main reason Congress decided to become more active in an area that traditionally had been deferred to the Courts.[115] After they received the first Draft in 1972, Congress worked for three years until its final enactment and introduced many changes.[116] These rules govern one of the most significant institutions in the US democracy: trials.

The existence of a Code of any type in a legal system rooted in the common law tradition is, a priori, unexpected. A Code is a manifest characteristic of a statutory system, often a philosophical and practical antagonist of the common law. In a schematic form, the differences between these two systems can be summed up with the words of Hodge, who said that in a statutory system, we "interpret(ed) a code to develop the law,"[117] instead in "common law judges develop the law which their predecessors have made."[118] Thus, this basic distinction has an impact in multiple dimensions, such as how the law evolves throughout time and the effect that a judicial decision has. Moreover, and besides the context where it was passed, the Code of Evidence was a *rara avis*, more typical of a statutory system that one vertebrated by common law practices, or expressed differently: "*Federal Rules of Evidence constituted a rather anomalous intervention at the time of their enactment*."[119]

112. FED. R. EVID. (1975).

113. *See* DEBORAH J. MERRITT & RIC. SIMMONS, LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM 21 (5th ed. 2022).

114. *Id.* at 21-22.

115. *Id.* at 21.

116. *Id.*

117. *See* Lord Hodge, *The Scope of Judicial Law-Making in the Common Law Tradition*, RABEL J. COMPAR. INT'L. PRIVATE L. 211, 211 (2020).

118. *Id.*

119. G. Alexander Nunn, *The Living Rules of Evidence,* 170 U. PA. L. REV. 937, 948 (2022).

The rationale behind the US Code of Evidence is, on the contrary, more concordant with the legal institutions and practices found in that country in the recent past. We cannot explain the rules of evidence without pointing out their manifest relation to jury trials.[120] The United States Supreme Court decided to create the committee when Congress had yet to show any particular interest in this regard. Afterward, Congress discovered the developments of the Committee, integrated by prestigious professionals, and decided to intervene.[121] The SCOTUS' previous decision demonstrates a conviction of the need for standardized rules in the US territory and that a set of rules—probably not a Code, perhaps just guidelines—could be a useful instrument for that objective.

Juries have not remained unchanged since their origin as a judging mechanism. Since jurors have been confined to passive evaluative functions, the quality of information and how it is presented to them has become a central concern. Rules of Evidence emerged to guarantee that the jury´s decision relied on a proper and lawful basis.[122] Common law had many developments by the time the Code of Evidence was passed, many of which were included in the text.

However, when we focus on juries from this perspective, there is another level of analysis. Two main values appear at the core of the Code: justice and legitimacy; as a dynamic process, the interaction between these values is complex, and they overlap more than once. In our attempt to assess the rationale behind the Code, we will undertake a schematic approach that will omit aspects but underscore the fundamental purpose. First, the value of justice is protected when the rules determine the information and evidence that can be presented with the pretension that the jurors based their decision on what happened during the trial; this ideal of justice is designed to favor the defendants, who deserved to be judged by the action because they are accused and not because of their entire life or how likable they are as a person. On the other side, legitimacy is worried about protecting the jury as an institution and their decision's effect on the community they represent. The Rules of Evidence shield the juror from irrelevant, unreliable, and prejudicial information[123] and assure and enhance its legitimacy and authoritativeness.[124] Beyond which value the reader may be tempted to

120. *Id.* at 951, 952.

121. *Id.* at 951—57.

122. *See id.* at 952.

123. Christopher Robertson & Michael E. Shammas, The *Jury Trial Reinvented.* 9 TEX. A&M L. REV. 109, 112 (2021).

124. Nunn, *supra* note 119, at 958-59, 990; *compare* Mark Cammack, *The Jurisprudence of Jury Trials: The No Impeachment Rule and the Conditions for Legitimate Legal Decisionmaking*, 64 U. COLO. L. REV. 57 (1993) (The legitimacy of jury trials has been the subject of debate. The

endorse, we arrive at the same conclusion from these two alternative avenues: one of the main objectives of Rules of Evidence is to protect the jury from misleading information.[125]

Argentina, and consequently Santa Fe, has a legal tradition connected with continental law, which is usually regarded as a statutory system. This article does not attempt to distinguish the traits in the Argentinian legal system that may sustain that presumption but emphasizes that Argentina and its states have a well-established tradition in codification processes. The refusal to concede judges' law-making powers demands that legislative authorities create the law that will be used to address the issues presented in front of the judiciary. Also, the effect of the judicial sentences is deemed relative and only applies to the parties in the controversy. These two characteristics are enough to stress the importance of Codes and positive law in Argentina.

The tendency of the Argentinian politicians, and also some scholars and activists, to view law as a transformative process and excessively trust the law's ability to solve complex issues is often criticized. Some legal specialists call this propensity normative fetichism.[126] It is striking that the evidentiary rules have not been affected by this fever in Argentina or Santa Fe. The lack of systematized evidentiary rules deserves our attention because it goes against the hegemonic processes in the field of legal development.

The comparative approach is particularly convenient to understand why this happened. We have a common law system that recurs to a Code of Evidence and a statutory system that refuses positive law. This common anomaly has something to teach us about the codification process, both in common law and continental law countries.

When we scrutinized the texts of the criminal procedures reform in Santa Fe, we noticed two significant absences: jury trials and a code of evidence. To the causes that we proposed to explain this lack, we could add that if jury trials were not part of the reform, the lack of a code of evidence is a consequence of the intimate relationship between both we found in the US scenario. However, that may not be the sole reason in Santa Fe, and we were able to identify other relevant factors to decipher these vacancies.

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discussions are wide and shed light on different aspects of this issue. For instance, the limits of juries' discretionary power and the refusal to accept the impeachment of their decision by means of an evidentiary rule are allocated in this field of discussion. Many aspects must be considered in defending jury trials' decisions' legitimacy, even if we accept that evidentiary rules are valid mechanisms).

125. *See* Robertson, *supra* note 123, at 160.

126. *See* Garzón Buenaventura, *Globalización del derecho, fetichismo legal: El velo de los derechos humanos* [Globalization of Law, Legal Fetishism: The Veil of Human Rights], VERVA IURIS 169, 169-81 (2013).

The Supreme Court of Santa Fe is traditionally a conservative institution. It often confirms its hesitancy to embrace radical swiftness in law interpretation. Its attitude toward jurisprudential change has been moderate, and it usually waits until the Supreme Court of Argentina alters its precedents to subscribe to the new holding passively. Because of that, Santa Fe did not have significant jurisprudential developments regarding evidentiary rules at the moment of the discussion about the new system, and this subject was not part of the criticism that the criminal justice systems received from external powers. The complete silence of the courts in Santa Fe about the rules of evidence exposes this reflection's peripheric position for years. The Supreme Court of Santa Fe´s position leads to an emptiness of precedents. The starter point was quite different from the codification process in the United States during the sixties.

2. Flexibility Defenders v. Legal Certainty Defenders

Another aspect to consider in understanding why an Evidence Code was not part of the criminal justice system reform is whether the evidentiary rules were part of the proponents' ideology. As we described, the proponents can be divided into two spheres of influence: first the legal santafesino experts, who were mostly associated with Law Schools, and then there were the outsider NGOs and experts who had advocated for these reforms in many Latino-American countries since the beginning of the century.[127] During the interviews with representatives of both groups, the answers were ambiguous. In no case was this legal debate solved entirely, and all the interviewees expressed that it still generates an exchange of ideas between those who believe a code is necessary and those who do not. If this controversy is still vivacious today, it is highly unlikely to have been resolved during the discussion on the criminal prosecution system.

In the voices of some of the proponents, evidentiary rules did not garner unanimous support within the group.[128] Other ideas, such as orality or publicity, occupied the center and were defended by the entire group without hesitation.[129] Even those who thought that was relevant seemed not to be against the idea of leaving its inclusion to a second-generation reform.[130] Despite whether it was because they thought evidence rules were unnecessary or could wait, it is evident that they considered the discussion regarding those a cost they willingly paid to make the reform possible.

127. *See* Langer, *supra* note 1 (highlighting the influence of the Southern activist expert network in this process).

128. *See id.* at 663-65.

129. *See id.* at 667.

130. *Id.*

Ironically, in this matter, some reformers agreed with the opponents of the reform, although for different reasons.

The relevant NGOs who advised the reformers and governments during this transition phase have differing views about the importance of the rules of evidence. In dialogue with a representative of one of the most influential organizations, we could acknowledge that different ideas exist even today. They were firm in the idea that the reforms usually include inconclusive aspects and that progress is not a mechanical outcome of the legal transformation. In this line, they defend the reforms from a practical approach. The reform is usually the possible reform and not the ideal, notwithstanding that the imperfection should not taint the advances and the potential of further changes.

These arguments appear on different occasions during our interviews and are still used to assess the modifications happening today in Santa Fe. The sequence can be explained as circular. Politicians have an agenda of concerns that open the door to transformations; those changes boost actions over which they lose control and, eventually, may generate opportunities in the future. The radical modifications are hard to withdraw, and despite the possible setbacks, the starting point for subsequent developments is always more advanced than the position before they occurred. This view better reflects the attitude of some NGOs with vast expertise in the reform processes. On the contrary, local judicial actors tend to be more dramatic and read every politician's attempt to modify the criminal procedure as a catastrophic counter-reform.

This disparity in criteria regarding Codes of Evidence can be traced to today's discussion in Santa Fe. In many interviews, relevant judicial actors recognized the importance of a systemic development of rules as included in the Federal Code of Evidence in the United States. Others were hesitant and insisted on the argument of flexibility.

For analytical purposes, we propose the existence of two groups that reflect these majoritarian trends. First, those who defend the idea of flexibility as an essential characteristic of the accusatorial system and, consequently, reject Codes of Evidence because they picture them as a rigid construction; we will call them the flexibility defenders. On the opposite side of the spectrum are those who consider Codes of Evidence are indispensable because they provide legal certainty. In these actors' minds, a Code of Evidence would solve many of the problems the criminal justice system faces in Santa Fe nowadays; we will define them as legal certainty defenders.

Both groups currently have representatives in Santa Fe and were present at the first discussions before the new Code was sanctioned. The tension

between these two conceptions can reveal more elements to explain why a Code of Evidence was not part of the first reforms' wave in Santa Fe.[131]

The Flexibility Defenders, who seem to be significantly fewer today than when the system was changed, defend the idea of flexibility from the 'ought to be.'[132] They consider that one of the most prominent attributes of an adversarial and accusatorial criminal justice system is its ability to adapt and not to create iron rules. They were afraid to abandon a system where the prosecutors and defenders had a very limited range of action and to enter into a new one that would limit them with rigid rules. This idealistic conception and this fear led them to reject any rules that may be translated rigidly.

In addition, flexibility defenders were experts and scholars whose convictions were forged in dialogue with theory. Most had no previous practical experience as active actors in an accusatorial system. This lack of expertise contributed to the reaction from the 'ought to be' and enforced their certitude in need for a wide range of action for the new actors. They conceive a Code of Evidence as an obstacle in an accusatorial system's natural flow of work, in which, supposedly, the issues must be 'solved at hearings.'

Another clear indicator of this theoretical conception based on the 'ought to be' can be identified in the evidentiary rules included in the Code and its reforms. Those deemed rules often confuse evidentiary rules with litigation guidelines not directly related to the evidence but to the judge. When we talk about regulations to protect the quality of the information, they are related to the evidence we permit to be presented in front of a jury. The litigation rules, such as avoiding overabundance of evidence, when not directed to that objective, do not have reason to exist. The judge should assess when the evidence is sufficient, repetitive, or excessive without being bound by a code if their decision is influenced by factors other than the quality of the information gathered, such as procedural efficiency. At least, this is what is supposed to happen, but it is not always the case, as we will be able to prove in Santa Fe.

The legal certainty Defenders were a minority in the group of reformers. During our interviews, we identified an increasing tendency to highlight the importance of a system of evidentiary rules in the opinion of the actors. This raise is particularly distinctive in public defense, although many prosecutors have started to agree with the relevance of the discussion. The arguments are

131. We must comprehend the system of ideas that sustain both perspectives. The discoveries that we could infer from the interviews are limited but are a first contribution to this challenge; many of the reconstructions provided below will require further explorations to be proven as veridic, being, for now, explanatory hypotheses.

132. *See* Robert S. Summers, "'*Is' and 'Ought' in Legal Philosophy,* CORNELL L. FAC. PUBL'N**.** 157 (1963).

slightly different yet equal in the usage and contribution that the presence of these rules may generate in the system. Public Defenders and Prosecutors concur that a Code of Evidence would elevate the standard of certainty within the system.

Public Defenders who subscribe to the necessity of a Code of Evidence consider it a means to reduce the number of hearings in which they discuss the same issues. If they had clear guidelines, they would focus their arguments and efforts on examining the cases' particularities and not on repeating arguments denied by judges in many cases. Many even argue that a Code of Evidence would be an efficient measure to reduce the judges' range of discretion that, according to their opinions, tends to benefit prosecutorial perspectives. This mechanical repetition of hearings and discussions is a main aspect of the dynamics of the criminal procedures in Santa Fe, the terms of which will be explained in the next section.

Prosecutors' defense of a Code of Evidence is centered on a most traditional validation of this legal instrument. In designing a case theory, being positive about what proof will be accepted is indispensable. If the system does not provide that certainty, then prosecutors' performance may be affected because they have to improvise or assume risk at trial instances. These arguments are the same as those of US scholars and lawyers with trial experience who have been offering to defend the existence of this type of legislation. Legal Certainty is intrinsic to the design of a case theory. Prosecutors' function demands a guarantee that key evidence will be accepted. Otherwise, all the case theories may collapse before being presented to a jury or a professional judge.

During the last ten years, prosecutors have not actively claimed this lack of certainty, perhaps because legal practice shows that almost all the proof offered during an intermediate stage in Santa Fe is accepted.[133] If many case theories had collapsed during the trial due to the rejection of central evidence, their views may have differed.

Many prosecutors defend these ideas from a theoretical perspective. They acknowledge the importance of legal certainty in designing a case

133. See Mauricio Duce Julio, *Acerca de la necesidad de fortalecer el rol de control de admisibilidad probatoria de la audiencia intermedia* [*About the need to strengthen the role of controlling evidentiary admissibility of the intermediate hearing*], CRIM. JUST. NETWORK (Oct. 1, 2018), https://www.criminaljusticenetwork.eu/en/post/acerca-de-la-necesidad-de-fortalecer-el-rol-de-control-de-admisibilidad-probatoria-de-la-audiencia-intermedia?out=print (This assumption is not exclusive of Santa Fe. Many scholars have been waning about the failure of the institutional purposes of intermediate hearing in their role of verifying the admissibility of evidence. The author argues that having specific rules will enable judges to improve their decision-making and provide a legal foundation for excluding certain charge evidence. This perspective highlights the significance of evidentiary rules, even if they do not form a comprehensive code of evidence).

theory, even though they do not usually suffer any mishaps in their strategies due to the lenient judges' attitude. Many others adopt a more practical approach. They also admit to the excessive number of hearings they have to be involved in and deem the Code of Evidence a form to solve the repetitive issues raised by the Defense. The Code of Evidence, different from that of the Defense, would be a valid effort to allow them to concentrate scarce resources in preparing relevant hearings.

We have offered a series of explanations that tried to contribute to answering the question about why Santa Fe, like many other States and Nations that have reformed their criminal justice system in the last decades, has not included a Code of Evidence in its reform process. We included historical, practical, and political reasons aligned with that purpose. We argued that the absence of a Code of Evidence in Santa Fe can be explained because of: 1) the lack of historical tradition in Santa Fe regarding jury trials and the intimate relation between jury trials and rules of evidence, 2) the negotiation process between criminal judges and politicians, and the rejection of criminal judges on losing more power than is strictly necessary in the reforms; 3) and the lack of agreement on the importance of the Codes of Evidence among the reformers and, consequently, the lateral character it had in the reformist ideology.

These proposed causes, notwithstanding the existence of others, are not intended to be a total explanation of the absence of an Evidence Code in Santa Fe. They are still an analytical effort to fill a void in the reflections of the criminal procedures transformation that occurred in the last decades in many countries throughout Latin America. We constructed a system of ideas applied to Santa Fe that pretended to be the first step in discovering why legal systems with profound continental legal traditions have refused to include Codes of Evidence in their reformer processes.

3. Diluted Codification

The transition from an Inquisitorial system to an Accusatorial one did not bring the sanction and implementation of a Code of Evidence in Santa Fe. Nevertheless, that did not imply that no rules of evidence were created and applied since then. The thunderous silence regarding evidentiary rules is not absolute as will be shown when we analyze the text of the Criminal Procedure Code passed in 2007 and its subsequent amendments. Instead of a corpus of law that included a comprehensive system for validating and including relevant evidence during trials, the inclusion of evidentiary rules was through a diluted codification.

Diluted Codification occurs when evidentiary rules are incorporated into a code or statute whose main objective is to regulate the entire criminal

procedure, not the evidentiary subsystem. In that way, the rules of evidence do not create an independent system but are widespread throughout the criminal procedure code's text. This type of codification increases the risk of errors and inconsistencies since it is not the result of an autonomous and systematic study of the problem of evidence in criminal trials.

This process can be detected in Santa Fe, a state that, as we have said, conserved professional judging and rejected jury trials until recently. The original Criminal Procedure Code contains some evidentiary rules and others related to litigation, which leads us to interrogate why they were added if there was no expectation of implementing jury trials. If the rules of evidence were born attached to the concern about the quality of the information that could be presented in front of juries, why would a criminal justice system that did not create this judging system be interested in including evidentiary rules? We can provide some reasons deducted from the interviews and the discourses made during the reform.

First, this diluted attempt can be considered a consequence of the mechanical translation of the accusatorial process's characteristics by local scholars and specialists with no practical experience in trials. The 'ought to be' request that the ´hearings´ as the natural spaces to solve controversies be organized by rules despite their rationality or adaptation to the dynamics of the process in Santa Fe.

The decision to include rules concerning the interrogations of witnesses, experts, and the defendant exemplifies this explanatory proposal. Some reformers seem to have thought that an adversarial criminal justice system must forbid leading and captious questions even if the reasons for their existence are not presented in the proceeding.

That is exactly what Article 325 bis of the Santa Fe Criminal Procedure Code,[134] introduced in a subsequent reform in 2014 before the actual implementation of the new criminal justice system,[135] establishes. This Article expresses:

> In their cross-examination, the parties who have presented a witness or expert may not formulate their questions in such a way as to suggest the answer. During cross-examination, the parties may confront the expert or witness with their own or other versions of the facts presented at trial. In no case shall deceptive questions, those aimed at illegitimately coercing the witness or expert, or those which

134. *See* Law No. 12734, *supra* note 66.

135. This inclusion was after the events concerning the legality of the implementing law for the new criminal justice system. The resistance of the judges, represented by the attitude of the former General Attorney Bassó, was more than clear. The decision to include this article, among other rules, found that political context as a platform. It can be interpreted as another indicator of how much relevance the referred tension had in the Santa Fe reform process.

> were the witness or expert, nor those that are formulated in terms that are unclear to them.[136]

These provisions seem consistent with those included in Rule 611 in the Federal Code of Evidence in the United States.[137] They have, notwithstanding, a major difference. In the U.S., the judge decided an objection considering the possible impact the information may have on the understanding and assessment of the jurors; whereas in Santa Fe, who is intended to be protected from the confusing or improper content of the answer and who evaluate if it is a proper question when challenged by an objection are the same person: the professional judge.

The mere existence of the banned leading question, as the Federal Rules of Evidence teaches us, is related to defending the legitimate source of information, the witnesses, and allowing them to use their voices while giving the judges the general power to control how they are examined.[138] It is clear, then, that the judges are the referees of questions that look for information that does not have them as the recipient of its convincing potential. Jurors are the ones who are trying to be protected by the U.S. Code of Evidence due to their lack of knowledge of litigation techniques and substantive law. Jurors are subject to protection through the actions of the judges, who are the experts and the keepers of the trial's legality.

These assertions lead us to questions regarding these rules to determine how to introduce information to a trial in a system with professional judging. Is it needed or desirable, in professional judging systems, including rules against leading questions? How do these rules work in a context where the expert who defines whether a question is admissible is the same who is sought to be convinced by the expected answer? Are professional judges who decide if a question is leading, captious, or cumulative, considering how it may impact their perception of the events? Are professional judges following these guidelines to protect themselves from the poor quality of information that can be gathered if these types of interrogations are allowed? All these questions underline the inconsistency in including these rules in a system that maintains professional judgment as the mechanism to rule cases, even more so if the tribunal is unipersonal.

It may be said that Article 111 of the Santa Fe Criminal Procedure Code includes a general ban to prevent parties from badgering or confusing a witness independently of who receives the information produced in the trial.[139] Even if this explanation may be plausible, it does not solve our

136. Law No. 12734, *supra* note 66, art. 325.

137. FED. R. EVID. 611.

138. *Id.*

139. *See* MERRITT, *supra* note 113.

underlined structural problems in the design of the question-objection system.

This direct translation of characteristics that some reformers had intuited as identitarian is one of many reasons for the diluted codification. The interviewees expressed two other lines of thought to explain it. Even more, many of them were aware of the incongruences that represent the inclusion of this type of rule in a Criminal Procedure Code.

The reformed Santa Fe Criminal Procedure Code of 2007 includes the word jury five times.[140] Article 4, when establishing the system of judging, expresses: "In appropriate cases, the composition of the jury shall be governed by the rules established by a special law."[141] While Article 44 defines: "when the Trial by Jury is authorized, a law shall determine the form in which the Juries shall be integrated into the College, their characteristics, the requirements for summoning them and the effective date of this form of trial."[142] This inclusion indicates other reasons for this diluted codification, which the interviewees labeled as an incomplete reform. According to this view, including this kind of rule opens doors to revisiting the provision of the Criminal Procedure Code in the future as soon as the new system takes off.

At the time, many reformers thought that the Code was a first step and that the intention to move forward too deep or too far could hurt the viability of the recently born reform. The evidentiary rules and those related to litigation were a future bet, a conquered land that would make it easier to transition to the next expected transformations. Notwithstanding, the following years showed that this optimism was exaggerated, and many of the amendments to the system were regressive instead of progressive. Nevertheless, those dispositions resisted all the changes and are alive in the current Code. In 2024, jury trials will be a reality for some crimes in Santa Fe, and we will have the opportunity to evaluate if those antique pretensions have any degree of rationality or were a sign of reformers' excessive faith in the future.

Lastly, we distinguish another reason not related to the abstract design but to practical concerns for some parts of the reformist spectrum. Some reformers were worried about the attitude and behavior criminal judges would adopt when the system started to operate. This explanation is not only logical but also helpful in explaining the inclusion of some rules that may be deemed as litigation rules rather than evidentiary. We have provided enough analytical elements and examples in this text to demonstrate that their concerns were valid.

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140. Law No. 12734, *supra* note 66.

141. *Id.* at art. 4.

142. *Id.* at art. 44.

The general power to govern the trial conceded to judges in an accusatorial system entails two requirements: 1) profound knowledge about the practices and rules of an accusatorial system, and 2) a high ethical and professional commitment to the core values of the accusatorial and adversarial conflict-solution system. The criminal judges in Santa Fe, who mostly were criminal judges in the system about to be abandoned, lacked both. The reformers appeared to believe that including evidentiary guidelines in the Code, despite its incongruence, would be a strategy to allocate some decisions beyond the discretionary scope of the judges. Including these rules in the Criminal Procedure Code made some of the judges' duties mandatory and did not rely on their good criteria for their application. It was an action that tried to deactivate some of the possible future boycotts, even if its price was to include some rules that were not specific to this type of legal instrument.

In this subsection, we proposed three possible explanations for the diluted codification process in Santa Fe. They are ingrained in a particular constellation of power, although they are a sample of how this phenomenon occurs. The emergence and development of ideas are usually connected with many causes. By analyzing the process of the diluted inclusion of rules of evidence in a system that conserves professional judging, we can assert that incongruences are not different.

III. THE ABSENCE IN PRACTICE: EFFECTS AND OTHER REASONS OF THE LACK OF AN EVIDENTIARY CODE

Until now, we have focused on explaining the arduous process of creating the formal design of the new criminal procedure system in Santa Fe and why it did not incorporate an Evidence Code. This section will focus on how the letter of the Criminal Procedure Code was translated into concrete actions by the judicial actors. Assessing the criminal justice system in Santa Fe from the perspective of the practices and routines of the members that composed it would permit us to eschew the legal discussion and enter into a practical dimension. It will be a valid attempt to settle how far the concrete practices are from the original promise that constitutes the manifest intentions of the reform.

Most studies and explorations concerning the transformation from inquisitorial to accusatorial systems are heavily directed at how their changes occurred from a legal perspective. Much less of them analyze those

processes' impact on the dynamics and interactions within the systems.[143] This part of the exploration pretends to be included in the latest group.

It analyzes the concrete effects of a reformed system's lack of an evidentiary code. The practices create opportunities or barriers for the future. The dynamics within the systems may be the same as the initial ideas and expectations that the reformers had before the changes occurred, although there is a chance that practices do not reflect those expectations. Moreover, it will explore how those practices influenced the judicial actors' attitudes and opinions regarding evidentiary rules. The political control over the criminal justice system has been strengthened since the reform and has lateralized technical initiatives regarding the criminal process, as may be considered the Evidence Rules.

It is worth noting that the analysis of the selected accusatorial dynamics of the criminal procedure in Santa Fe will try to avert, whenever possible, any temptation to compare it with the previous inquisitorial system. I do not challenge to any extent the idea that the accusatorial system is better than the inquisitorial in virtually any regard. Unquestionably, the accusatorial system was an advance, to the same extent that it is certain that it is far from its original promises and has some sonorous debts.

After ten years of implementing the accusatorial system in Santa Fe, it is time to evaluate it on its own merits rather than for the advancements, real or promised, compared with its predecessor. Even more, it is time to stop labelling it as new and start considering it as existing laws that will rule criminal procedure at the state level. From this switch, we will finally be free to discuss the accusatorial system without being compelled to refer to the past. When we stop concentrating our efforts on the abuses and failures of the past, perhaps we will be in a better position to understand and reduce the abuses and failures of the present.

The implementation of a new criminal justice system has some distinguished notes. First, the new system's rules pretend to regulate a field other norms have governed for decades. Second, many of the actors of the abandoned system remain in the reformed. Third, the system operates in dialogue with a society that changes and is influenced by the system transformation and vice versa. All these dimensions should be integrated into

143. *See* Maximo Sozzo & Maialén Somaglia, *Prisión preventiva y reforma de la justicia penal. Una exploración sociológica sobre el caso de la Provincia de Santa Fe* [*Pretrial Detention and Criminal Justice Reform: A Sociological Exploration of the Case of the Province of Santa Fe*], 17 DERECHO Y CIENCIAS SOCIALES [LAW AND SOCIAL SCIENCES] **7,** 7-43 (2017); *see also* Mariano Gutierrez, *Acusatorio y punitivismo: la triste historia de nuestras victorias garantistas (parte 1)* [*Accustary and Puntivism: The Sad Story of Our Guarantee Victories*], 4 RECISTA DE DERECHO PENAL Y CRIMINOLOGÍA [J. CRIM. L. & CRIM.] 70, 70-84 (2014).

any analysis that pretends to comprehend the origins and practice of the dynamics that a reform process mobilizes.

Even though a comprehensive analysis of the reformed system may be deemed necessary, our approach is less ambitious. This section delves into the dynamics that the criminal law system in Santa Fe has developed over the last ten years, which can be explained by the lack of a clear and complete evidentiary subsystem. The selected practices will be understood through that lens: the lack of an evidence code in Santa Fe. Furthermore, it offers explanations about how these practices facilitate or block a future Evidence Code. The system has displayed many other outcomes and mechanics that deserve equal time for study. This proposal pretends to contribute an explanation on a small part of the problems that need others' voices to be even pointed out.

A. Case by Case: Lack of Certainty for the Judicial Actors

Some of the most energetic defenses of the need for an Evidence Code are related to its capacity to provide certainty. This is a logical consequence of the professional design of a case theory. The litigators must know if the evidence they would use will be accepted or rejected for a trial. If no clear rules are available to assess the relevance and legality of evidence when a litigant is designing the case theory, this theory has a structural weakness.

This approach can yield ideas essential to understanding evidentiary reasoning. First, the Code of Evidence is a legal discussion and has several deep practical outcomes. Second, the rules of evidence are intrinsically connected to the trial, even to its initial steps. Consequently, reforming the procedure also implies reforming the evidentiary subsystem and vice versa.

The fates of the criminal procedure and its subsystems, apparently, cannot be separated. But, if that is the case, how is it possible that a criminal justice system that pretends to be accusatorial renounces to create systemic rules related to the evidence that can be used in a trial? Even more, how is it possible that the new criminal justice system does not include any attempt to establish clear and holistic mechanisms to incorporate evidence? Those are aspects that must be addressed to understand any reform process. Moreover, the structural weakness that the lack of evidentiary rules creates in systems significantly impacts the practices of the system's actors.

The existence of previous and clear rules reduces the discretion of those in charge of making decisions regarding evidence. The parties are who proposed the evidence to the judges, and in order to decide what evidence they present they have a wide range of discretion. The evidence proposed by the parties is weighted and admitted by judges, who can decide according to

their own criteria when they are asked.[144] The criminal judges in Santa Fe decide the issues related to evidence in every case on its own merits. There are no objective rules that constrain their power. Because of that, the judges can decide differently in similar situations without further explanations by not being attached to legal standard nor previous judicial decisions.

As I stated to explain other judges' resistances, the judges are powerful actors who try to keep as much power as possible in legal criminal justice systems with professional judging. Unsurprisingly, the criminal judges were not among the defenders of the need for an Evidence Code in Santa Fe in the same manner that they were not regarding jury trials. They were also unwilling to renounce the power to control the evidence that can be used at trial. This intention is one of the reasons for the absence of a systemic approach to evidentiary reflections at the moment of the system's design.

The attitudes of other actors in the criminal justice system are different. Prosecutors and Criminal Defenders are in charge of gathering the evidence presented before the judges. They are the direct victims of the criminal justice system's weakness created by the absence of certainty. As the situations where the judges used—and abused—this power regarding evidence became more frequent; these other actors began to acknowledge the relevance of objective and clear evidentiary rules.

Initially, the framers' lack of litigation experience led to an idea central in the reform: hearings are preferable to rigid rules. The reformers thought that a new system must be dynamic and quick. They believed that rigid evidentiary rules may stiffen the new system as much as the previous one. They assessed that it is more important to foster oral discussions than rules that may set clear limits for the judicial actors' practices. Time has proved that the hearings are not always a symbol of dynamism but of bureaucracy. The repetition of hearings that turned formalistic is an obstacle rather than a mechanism to guarantee the expected promptness.

144. *See* JORDI FERRER BELTRAN, MANUAL DE RAZONAMIENTO PROBATORIO [EVIDENTIAL REASONING MANUAL] (2023) (Arg.) (The judges' discretion regarding the admission of evidence depends on the clarity of the rules they must follow when making their decisions. This discretion is broad when the law does not provide clear standards. The jurisdiction is responsible for admitting evidence, and it has been established that, due to the principle of freedom of evidence, there are few circumstances under which a judge can reject evidence, such as when it is obtained through illegal means. However, the absence of clear rules severely limits the parties' ability to propose evidence, as they cannot determine which evidence will be accepted. In Santa Fe, the criteria for admitting a piece of evidence is that it must be related, either directly or indirectly, to what the party is trying to prove (Article 159, second par., Santa Fe Criminal Procedure Code). There is not a clear concept of relevance in the Code. Whether a piece of evidence is related or not to a fact is highly subjective, even more so without any other rule. As a general rule, greater indeterminacy in evidence law leads to broader judicial discretion and reduced legal certainty for the parties involved).

After a few years, the attitudes and opinions of the parties seem to be different. Many of my informants, especially criminal defenders, are demanding clear rules that can be used to anticipate the judges' decisions during trials. The discretion regarding evidence during trials is a source of instability and potential injustices. The parties at trial cannot be sure what evidence they will be authorized to use. They are forced to face uncertainty and base their strategies on predictions based on the judge's temper or previous decisions that can be changed without further explanation.

In the interviews, the defenders declared the importance and necessity of creating a system that provides predictability. The criminal defenders stated that judges have a clear tendency to accept all the evidence the prosecutors offer. This appears to be subscribed to by the fact that the interviewed prosecutors did not stress the lack of evidence rules as the most relevant issue in the criminal justice system. However, some interviewed prosecutors recognized the need because of the economy of effort, as I will explain below.

There is another aspect of the system that propels the situation that the legal certainty defender criticizes. The design of the system, divided into three stages, generates that the judge who decides the admission of the evidence is not the same as who decides during the trial. The trial in Santa Fe is split into three stages: initial, intermediate, and trial. It is during the intermediate stages that the evidence is offered and admitted. That is why the trial judge, who lately decides the case, has a constrained range of control over the evidence the parties pretend to use.

The judges have been facing increasing social pressure that influences their perception of themselves and how they perform their functions. The change in the criminal justice system shortened the distance from the community, which claims more activity and efficiency. These expectations are related to the increasing tendency to judicial politicization and are usually understood as an excuse for more punitive decisions.

It is in that context that occurs what the defenders almost unanimously denounce. According to their perception, the judge often admitted all the evidence offered by the prosecutors. This may be explained by the pursuit of the judges to reduce the risk of decision-making and the tendency to align their decisions to the punitive expectations of society. At least two reasons permit the judge who acts during the intermediate stage to act this way. First, they consider that admission is different than presentation; in other words, they may argue that admitting a piece of evidence differs from effectively incorporating it since the intermediate stage is a preparation instance, not the trial itself. Secondly, the evidence they admitted would not be directed to a jury but to a professional judge. The judge may argue that they rely on the

ability and legal knowledge of the trial judge to discard evidence that may be improper or overabundant. Through these arguments, they can justify their actions. If we assume that this criticism is true, the purpose of the intermediate would be completely distorted.

In any case, many judicial actors share this perception. This presumption is the argumental base for the certainty defenders who believe that an evidentiary rules system can constrain the judge's power during the intermediate stage. By reducing the judge's discretion regarding evidence, the parties could anticipate the evidence that can be used at trial. The certainty defenders sustain that objective rules are mandatory in a context where the alleged control that the judge must do at the intermediate stage is failing. From their perspective, the evidentiary rules will provide certainty and legality to the process**.**

Some reformers believed that oral hearings are where all the controversies must be solved in an accusatorial system. Following their reasoning, creating an evidentiary subsystem would create an excessive rigidity that should be prevented. The way the Santafesino criminal justice system functioned during the last ten years demonstrates that the latent function was to relax the standards for admitting evidence to the trials. The apparent flexibility that emerged from relying on the intermediate judges to control the evidence and admit only the relevant and necessary proof turned into an excuse for the judge to avoid their responsibility. The intermediate judges often fail to address their duties of control. Their failure can be explained mostly by the separation between intermediate and trial judges and the judges' permeability to external pressure.

Moreover, increasing celerity to judges was deemed one of the manifest functions of the reform. The reformers also believed that solving the issues at hearings would provide more dynamism to the entire system. The improvement in terms of time remains a promise far from being a reality. The usual total admission of the charge evidence put the defenders in the position to appeal that decision. The defenders must challenge the decision of the intermediate judge because, legally, it is during that stage when they must prevent the incorporation of evidence. The appeals delay the trials because a trial cannot begin until the judicial decision regarding the evidence is firm. The intermediate judges' attitude severely impacts the time to solve the minority of cases that actually reach trials.

Certainty defenders strongly believe that evidentiary rules would reduce the intermediate judges' tendency to accept all the charge evidence. Looking at judicial systems with established rules of evidence, we can see the logic in this belief. If parties have procedures to challenge evidence, judges would be required to carefully consider their requests and decide which evidence is

relevant to the trial. Fulfilling their duties in handling evidence could reduce the number of appeals and disputes. In the long term, trial processing time would also be reduced.

The ideas of the certainty defenders are reasonable. The excessive margin of interpretation for the judges again creates more issues than it solves. To the lack of clear and objective evidence rules, a deeper problem must be added: it is not clear who the evidence's admission process is trying to protect. As I highlighted above, the intermediate judges are making decisions for another judge rather than for a jury. In the United States, the decision of the trial judge, who is the same who decides everything regarding evidence, is centered on protecting the jury. This difference is essential. There is no chance to evaluate the evidence in the American trial again before it is presented. The evidence is presented to the jury as soon as the trial judge decides. On the contrary, the decision of an intermediate judge is directed to another judge. There is a second informal chance to assess the evidence by the trial judge.

The opportunity for this second *de facto* assessment and the intermediate judge's lenient attitude affect decisions beyond the trial. The investigation is less profound, and the evidence is weaker when the investigators have as a starting point the presumption that all the charge evidence gathered is highly likely to be admitted. Also, without clear rules, there is the chance that among the evidence admitted, there may be evidence that affects fundamental rights, such as those focused on the defendant's person instead of the investigated event.

The dynamics exposed in this section suggest the usefulness of an evidentiary code in a criminal justice system where the power to judge remains in professional judges. Even more, in those criminal justice systems that separate the intermediate and trial stages, the admittance of evidence is in charge of a judge different from the trial judge. Creating a clear evidentiary subsystem could also reduce the processing time and improve the quality of the investigations. The parties could be in a position to anticipate which evidence would be accepted with a higher level of certainty. Both prosecutors and defenders could focus their discussions on what deserves to be disputed instead of the changeable intermediate judges' opinion. At least until this point in Santa Fe, the flexibility appears to be used by the judges to defend themselves instead of the efficiency of the criminal justice system. Perhaps it is time to provide the certainty that the criminal justice actors have been claiming.

B. Waste of Resources: The Bureaucracy of Repetition

The reformed criminal justice system promised to be less formalistic. The orality in accusatorial systems would foster dynamism and parties' initiative. Prosecutors and defenders could express their position in the hearing and be heard directly by a judge, who could decide at the moment. The manifest function of the reform was to increase the efficiency of the criminal justice system while enhancing the respect for the fundamental rights of the defendants. The reality suggests that the duties of the parties created by their standards forced the systemic repetitions of practices. The repetition of discussions, reviews, and legal challenges, even when the parties know that their petitions will fail, creates a bureaucracy. The slowness of the bureaucracy is the opposite of what the reformers assured the criminal justice system would be.

Oral hearings and trials, even if governed by rules and statutes, are considered vibrant instances of discussions. It is during these that advocacy skills are displayed. Every party plays its cards and exposes its arguments. The oral exchanges and the direct interaction among the different actors seem to prevent bureaucratization. However, according to the interviewees' voices, they perceive an increasing tendency to a formalistic and formulaic repetition of discussions and issues during the hearings and trials. This perception invites us to understand the origin of its existence.

The Public Defense defends most of the criminal defendants in Santa Fe. Thus, the activities of this Office affect how the system functions. The strategies of the public defender are tied to general directives and standards. Trial advocates usually develop their strategy considering their clients' best interests. From a private perspective, the ultimate mandate comes from the interest of the individual the attorney is defending. The only limits private attorneys find are the law and the ethics of the legal profession. The situation becomes more complex for public defenders since they are also part of the state.

The Standards for the Public Defense[145] in Santa Fe constitute a source of duties for public defenders. Usually, they have to act according to these guidelines, even if they do not consider that they are implementing the best legal strategy. The Public Defense Office has a double role in democratic societies. This public institution must conciliate the client's interests with the interests of the society. The Standards tried to guarantee that the public defenders do not set aside this second aspect in designing trial strategies.

145. *See* Cuna de la Constitución Nacional, June 19, 2015, Res, No. 0057 (There are several internal resolutions that establish guidelines and standards).

From a practical analysis, these obligations are translating into a great number of appeals. The public defenders recognize that they appeal decisions even without the conviction that it is necessary. The public defenders attack judge decisions because, in many cases, they are forced to act according to the standards. The cumulative number of appeals creates a docket in the Courts of Appeals, which must intervene in resolving issues that are not only trivial but repetitive.

The requirement to follow rigid standards is the opposite of creative and professional lawyering activity. The mere existence of obligations for public defenders significantly reduced their discretion. If the discretion and freedom to design a legal strategy are decreased, the dynamism that the reformers expected from the oral hearings is blocked. When the judicial actors must apply general directives to solve the cases, that action creates the foundations for further bureaucratization. Bureaucratization appears when the general rule is activated, regardless of the particularities of the case. The irreflexive repetition of practices by the actors generates a system in which the replication of conducts is not directed to obtain different outcomes but to show the act itself. In a formalistic and bureaucratic procedure, what is tried to prove is the existence of the process itself instead of the substance of the investigation. In other words, the mechanics of the reformed process came to change.

The judge's power during the inquisitorial era relegated the position of the prosecutors and defenders.[146] Both prosecutors and defenders had a narrow range of action. The judge exercised monopolistic control over the criminal process.[147] The criminal justice systems' reforms would allegedly change the prosecutors' and defenders' roles. They would pass from a formal role to a more active and determined one. The repetition imposed by the standards and formal obligations blocks these changes. The proneness to bureaucratic activities construct a procedure that reminds the previous in its formalistic performance.

In Santa Fe, the Public Defense Office set its minimal standards according to Resolution N°57/15.[148] Among relevant rules, this legal instrument creates the general strategy for appeals. The resolution establishes that every Public Defender must appeal a judicial decision that "affects the defendants' interest."[149] During the intermediate stage, public defenders can

146. *Id.*

147. *See* Rodrigo de la Barra, *Sistema Inquisitivo versus Adversarial; Cultura Legal y Perspectivas de la Reforma Procesal en Chile* [*Inquisitive versus Adversarial System; Legal Culture and Perspectives of Procedural Reform in Chile*], 5 LUX ET PRAXIS 139 (1999).

148. *See* Sozzo, *supra* note 143.

149. *Id.*

resist the admission of evidence. If the intermediate judge admits the evidence and denies the defense's arguments, the public defenders cannot wait another moment to insist. They must appeal the decision according to the rules included in the Resolution. This trap is a logical consequence of the fact that if defense attorneys challenge the inclusion of evidence, it is because they believe it affects the defendant's interest. If the judge decides its inclusion, the defendant's interest is hurt, and an appeal is due.

There is only one exception to this general rule: the express denial of the defendant to appeal. This opposition rarely happens since the evidentiary analysis is a technical assessment usually performed by the attorney. The general rule turns the appeal into a mechanical spasm. The flexibility, creativity, and dynamism are asphyxiated by the duty to follow a rigid procedure. Public Defenders became what they tried to avoid with the new system. They turn into formal defenders, following procedures just to fulfill obligations.

It is true that there are other stages where the parties can claim a wide range of discretion. The negotiations that lead to plea bargains occur outside the courts. The plea bargain is the mechanism through which most cases are solved. This is not unexpected since it is a phenomenon that can also be found in criminal justice systems with deep accusatorial traditions, such as the United States.[150] According to a report,[151] in 2019, in the state of New York, less than three percent of the criminal cases were solved in trials. That means more than nine out of ten convictions were reached in negotiations that ended in plea bargains. The same tendency exists in Santa Fe. By 2023, plea bargains were the legal instruments used in 91% of criminal cases in that Argentinian state.[152] Beyond the reasons that may explain this commonality, what is evident is that the trial has become an exception in Santa Fe, similar to what happened in the United States.

The exceptionality of the trials in accusatorial systems may indicate that the repetition of practice and its pressure on bureaucratization are marginal issues. However, there is a reason why the prosecutors and the defenders pointed them out, even with their marginal statistical influence: hearings are time-consuming. Both parties agree that repeating pointless hearings affects the time spent on other activities, such as investigating and negotiating. When

150. *See* Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L. L. J., at 1, 1-27 (2004) (discussing plea bargain negotiations).

151. *See* THEA JOHNSON, PLEA BARGAIN TASK FORCE: AMERICAN BAR ASSOCIATION (2019).

152. Maximo Langer & Maximo Sozzo, Plea Bargaining in Latin America, *in* RESEARCH HANDBOOK OF PLEA BARGAINING 1, 48-49 (Maximo Langer ed., 2023).

a party appeals a decision because it is forced to do it, a hearing must take place. In that judicial instance, the party who appeals, the counterpart, and a judge are necessarily involved.

Consequently, as stated, the lack of evidentiary rules gives judges a wide range of discretion. Rigid guidelines force the parties to challenge the excesses even if they are not certain they will succeed or that it is the best legal strategy. These two circumstances push the repetition of parties' actions. Lastly, repetition detached from any legal strategy or advocate creativeness propels the bureaucratization that the parties criticize. Even if not as common as the plea bargains, on every hearing to prepare a trial, even if it is not celebrated, the judge's decision is highly likely to be challenged by a party. That repetition, in part facilitated by the absence of evidentiary rules, consumes a scarce resource: the time of the judicial actors.

Implementing rules of Evidence could save time. Providing clear rules to the parties to assess the judges' decisions can also avoid the repetition of appeals. The judicial actors could avoid wasting time and resources in formalistic instances. Limiting the judges' discretion would significantly reduce the number of appeals. Even with rigid standards, the public defenders would not have to appeal because the decision is sustained in the law and not in the judge's personal assessment. Many discussions that burst on every intermediate hearing would be easily solved by applying the evidentiary law. The parties could focus their efforts on more complex and challenging activities, such as investigating and preparing trials, instead of being in hearings where all the parties can predict the outcome. The presence of an evidentiary subsystem would resolve these unnecessary discussions once and for all. It would be clear and predictable which evidence the parties can use and the trial preparation will be centered on the creative and proactive roles of the attorneys instead of the stubborn discussion regarding peripheric issues forced by rigid standards and legal duties.

C. The Politicization of the Criminal Justice System in Recurrent Contexts of Crisis

As I described in the previous section, the political context is essential to understanding the criminal justice system reform in Santa Fe. In addition to the internal and external pressure to change, the political needs of the moment must be added. Even though the reform had been started before, its

actual implementation occurred amid a political crisis conveyed by the peak number of homicides since the return of democracy.[153]

The criminal justice system had this genetic mark since its implementation. As the criminal judges' power decreased, the politicians' political control over the judicial branch increased. Since the start, the politicians have sent a clear message: the criminal judicial system is a part of ensuring public safety. [154] In that sense, when the societal pressure to resolve this matter grows, politicians often recur to enact bills to change the criminal justice system.

This process has been defined as "penal populism".[155] According to this author, politicians displace the experts' opinions and create solutions in dialogue with what they consider the community expects. Professional politicians craft proposals that profoundly impact criminal justice systems, often without even interacting with the judicial actors. They also prioritize common sense over technical knowledge and make promises with policies that cannot fulfill them.

The criminal phenomenon is a complex subject that requires experts to analyze its causes and particularities. It also requires a comprehensive diagnosis to plan and deploy public policies that allow the state to tackle some of its effects. Politicians are usually not experts in criminology or law; consequently, the solutions they conceive are often spectacular rather than accurate.[156] Regarding crime, political initiatives are generally more focused on sending messages to society than addressing the issue realistically and professionally. When the expert knowledge is disregarded, the pretended solutions are not tailored and create societal expectations that cannot be fulfilled. Law-makers rely on social prejudices and moral panics[157] rather than on a reliable understanding of the sources and dynamics of criminality. Society witnesses the repetition of political actions that dialogue with deep stereotypes and ignite negative emotions. Penal populism, consequently, tends to aggravate the legitimacy crisis instead of alleviating it.

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153. *See* ANNUAL REPORT HOMICIDE: PROVINCE OF SANTA FE 3 (2024) (The total number of homicides in Santa Fe during 2014 was 463. The homicide rate was 13,74. The province of Santa Fe was -and still is- the Argentinian state with the highest homicide rate in Argentina).

154. *See* MARC SCHUILENBURG, THE SECURITIZATION OF SOCIETY 125-30 (George Hall trans., 2015) (The government was traditionally responsible for providing security. During the last decades, an increasing repertoire of new actors have assumed responsibilities related to security. Schuilenburg refers to this dynamic as security assemblage. Politicians forced the criminal justice system to be part of this security assemblage. The urgency of the political context trapped the criminal justice system).

155. *See* PRATT, *supra* note 7; Bombini, *supra* note 9; BOTTOMS, *supra* note 10, at 39.

156. *See* Garland, *supra* note 14, at 258.

157. *See* David Garland, *On the Concept of Moral Panic*, 4 CRIME MEDIA CULTURA 9, 9, 10 (2008).

Reform of the criminal justice system often occurs when politicians try to manage a social demand for immediate solutions for the increase in crime. Santa Fe's reform process was no exception. The instrumentalization of the criminal justice system by politicians, especially legislators, has been present since the beginning. During the years after the implementation, that control increased as the politicians started to realize that they could share the burden of the state's incompetence in managing the public safety crisis. This can be seen in the narrative they constructed about the criminal justice system and the legislative measures they have implemented since then. The counter-reform and transformation that the criminal justice system faced in the last ten years was almost entirely directed by the political attempt to point out the shared responsibility of the criminal justice system actors to control crime. Those efforts have increased the societal pressure on the judicial actors who had to deal with levels of citizen criticism as never before since the democratic return.

The politicization of the criminal justice system has been shaping the system itself and how politicians and judicial actors interact. It has profoundly impacted the attitude of judges, prosecutors, and defenders who face novel challenges in front of society. The politicization and the increased political control it brought have altered the correlation of forces among the different parts of the system. Thus, politicians were able to create new guilties to share the heavy burden of the state's failure to provide satisfactory levels of public safety to society. Judicial actors did not want—or could not—dispute this narrative and tied their legitimacy to accomplish an impossible mandate: reduce crime.

Criminology has proven that crime produces social uneasiness that the state must manage. In modern societies, public safety concerns are central to political agendas. Simon[158] explained this process in the United States during the last decades. Society's claim was at the center of the political agenda and constituted an isomorphism in all state policies.[159] Following these ideas, all state actions would be legitimate if they could improve public safety, at least as a manifest function. That process can be attested in Santa Fe and is the core of the political pretension to act quickly and emphatically to regain the lost legitimacy. For that, the policies regarding public safety must be spectacular and not necessarily efficient. The changes that the politicians' impulse enacted were not related to improving the system. The latent function of their actions was to share the burden of societal disquietude generated by the recurrent public safety crisis.

158. *See* JONATHAN SIMON, GOVERNING THROUGH CRIME 75-76 (2007).

159. *Id.* at 152-54.

The severe counter-reforms in Santa Fe, as well as in many other Latin American regions, were punitive and regressive. Many of the foremost humanitarian manifest functions used to justify the change were abandoned a few years after implementing the reformed criminal justice system. For instance, the public defense was undermined, the defendants' rights were challenged, and the detention times were increased, among other reverting legislative changes.[160] The legislators from Santa Fe passed these laws based on their perception of reality, constructing narratives that were not supported by objective and accurate information.[161] Nevertheless, all of them are connected by the same narrative. The promoters of the changes argued that the criminal justice system should be reformed because it failed to convict enough individuals and did not fulfill its obligations to reduce crime.[162] This narrative is deeply rooted in the common sense of the inhabitants of the state despite being contradicted by statistics showing a sustained growth in the incarcerated population since 2014.[163]

The complete avoidance of legislative efforts to incorporate technical and professional analysis before the sanction of the new statutes is an indisputable hint that the intentions were not to improve the performance of the criminal justice system. The political actors instrumentalize the criminal justice system to lighten the criticism that public safety concerns put over their shoulders. The judicial actors could not resist this advance for two reasons. First, they displayed an evident political clumsiness. There were many judicial actors who were recently incorporated into the criminal justice system. Those who were not new were used to the peacefulness of anonymity

160. *See* Law No. 13746, Dec. 28, 2017, B.O. (Arg.) (This statute is a punitive response to what politicians deemed as increased impunity due to a criminal justice system's lenient attitude. It provides more discretion to prosecutors and reduces defendants' rights by, for instance, extending the detention time without being presented in front of a judge).

161. *See* Maximo Sozzo, *Reforma de la justicia penal en América Latina: promesas, prácticas y efectos. A modo de introducción* [*Criminal justice reform in Latin America: promises, practices and effects. As an introduction*], in REFORMA DE LA JUSTICIA PENAL EN AMERICA LATINA [CRIMINAL JUSTICE REFORM IN LATIN AMERICA] 9 (2020) (This author argues that criminal justice reform processes in Latin America over the last decades were based on 'ought to be' notions rather than practical considerations. He suggests that this approach persists today. The expertise of those who could evaluate the potential success of political initiatives is often disregarded. Instead of relying on technical and objective opinions to guide their actions, politicians tend to favor perceptions and subjective approaches. This is another example of pursuing political benefits instead of systemic improvements).

162. *See* Ivana Fux, *El gobernador Pullaro volvió a solicitar una Justicia "más eficiente y no tan cara"* [*Governor Pullaro Again Requested a 'More Efficient and Less Expensive' Justice System*], EL LITORAL (May 3, 2024), https://www.ellitoral.com/politica/gobernador-maximiliano-pullaro-volvio-solicitar-justicia-eficiente-cara-ahora-hoy-santa-fe_0_Hc61uYjSBy.html.

163. *See* ANNUAL REPORT HOMICIDE: PERSONS DEPRIVED OF LIBERTY 3 (2024) (The incarcerated population was 4560 in 2014. In 2022, the incarcerated population was 9350. The total number of imprisoned individuals was duplicated in less than ten years).

and secrecy. In general, most of them were not trained in the skills that political discussions require. Second, as actors in a new system, they were anxious to prove they could be efficient. They assumed the challenges that the political actors have drawn, even those impossible to accomplish with their mechanism. Their inexperience drove them to tie the legitimacy of the new system to achieve an impossible mandate.

The politicians' actions were directed by the referred intentions and not by the efforts to improve the criminal justice system. Because of that, legal and technical discussions that may impact the system's functioning were not part of the political agenda. The inclusion of rules of evidence constitutes an example of this situation. Reforming the statutes to incorporate rules of evidence will not impact public opinion. Moreover, it is a reform that can only be propelled by judicial actors or experts who have not been part of most of the last transformations. Experts and judicial actors have been unable to influence the political agenda and the political discussion regarding the criminal justice system. While penal populism is the lens through which political actors evaluate the aspects to be reformed, there will be a small margin for discussions such as a Code of Evidence.

It is highly unlikely that society will demand a Code of Evidence. Technical discussions have different channels to be included in the political agenda. A Code of Evidence would be a hard sell if legislators only base their proposals on what society expects from the criminal justice system rather than its real functioning. Until now, the inclusion of evidentiary rules has been diluted in other reforms in the context of this political trend. If penal populism continues to govern legislative activity, creating an evidentiary subsystem remains improbable.

D. The New Criminal Judge's Attitude

Criminal judges are the judicial actors who have suffered the most significant transformations within the criminal justice system in Santa Fe. They passed from being the exclusive owner of a process dependent on their will to a subsidiary role centered on determined guilt. Recently, the Legislature in Santa Fe passed a law that established the unthinkable a few years ago: jury trials.[164] Surprisingly, the reaction of the criminal judges was moderate, and some criminal judges even made public declarations in favor of the initiative. What changed in the last ten years to produce a shift in the criminal judges' attitude? How was the most energetic and powerful obstacle for jury trials in Santa Fe finally overturned? There are multiple tentative answers to these inquiries, but they are still in the realm of hypothesis.

164. *See* Law No. 14253, Apr. 4, 2024, B.O. (Arg.).

Although I will offer some explanations rooted in the mechanics of the criminal justice system in the last ten years, I will defend the idea that the switch in criminal judges' attitudes also opens the door to including evidentiary rules, even a Code of Evidence.

As previously said, the reformed criminal justice system forced criminal judges to face society and its expectations. Those who had been hidden must explain their actions and struggle with the always-changing social mood. Criminal judges abandoned their privileged positions to participate in burdensome political discussions. For the first time since the democratic return, they were part of a machine that depended on legitimacy. As part of the governmental continuum, the judicial branch also started to be assessed by the communities, and it failed the test as the other branches. The judges were invited to the chronic legitimacy crisis[165] that even stresses the basis of modern democracies. Judges could not escape from the demolished effects of the recurrent crises, real or perceived, especially in the public safety arena. Thus, criminal judges in the last ten years experienced social pressure as never before. The response they found to those pressures was to incarcerate more people in less time.

The pursuit of lost legitimacy constitutes the cornerstone of many political initiatives in the analyzed period. Politicians, through policies and statutes; prosecutors, through increasing the number of cases processed; and judges, through more punitive and long sentences, chase the same objective: regain society's approval. Professional politicians are better positioned to structure their actions behind that objective since they gained experience during political campaigns. The judges in countries and states where they are appointed and not elected have limited political margins to maneuver and scarce tools to achieve that goal. The judicial actors in the criminal justice system were trapped by social expectations and unable to express their impossibility of achieving what society expects from them. Even more so when the professional politicians started to push the burden to their shoulders. The politics proposed a new narrative[166] in which the judges and prosecutors were the 'guilties' for the public safety crisis. They saw the opportunity to create the perfect scapegoat for their sins.

All these factors made social pressure intolerable for the judicial actors. The interviewees agreed in pointing out that according to their perceptions being a judge is significantly more difficult today than ten years ago. They

165. *See* Benjamin M. Studebaker, *Legitimacy Crises in Embedded Democracies*, 22 QUEEN'S COLL. (2023).

166. *See, e.g.,* Garland, *supra* note 14, at 258 (Noting that penal populism is foremost a form of political discourse. Through this lens, politicians directly or by implication profess narratives directed to "the people.").

sustained that a bad decision could terminate a long, prestigious judicial career. That kind of pressure is an immanent presence in the judges' minds. That is why when they act as intermediate judges, they accept all the charge evidence, and as trial judges, they are prone to convict rather than absolve. From this angle, the criminal defender's complaints about the judge's tendencies are reasonable. For many judges, absolving an individual is an act of bravery that they are reluctant to execute. However, it can be said that judging has always been an extremely difficult and unpopular profession, which is why some authors and theorists firmly opposed the existence of professional judging systems. In any case, criminal judges are more uncomfortable and afraid in the exercise of their judging powers.

In professional judging systems, judges' fear of furious social reactions can affect the quality of the justice service.[167] The criminal justice system falters if the judge's decision is more concerned about possible outcomes than guaranteeing its legality and justice. On every occasion that politicians increase the judges' burden of responsibility, they also undermine their chance of winning the public's trust. Judges who are afraid have a natural tendency to commit mistakes which may lead to injustices. The oversight of the public in judges' decisions reminded a central democratic principle that was forgotten: the judges are the voice of the State. If the judges are too frightened to speak clearly, their stutters are also the state's. To this trap, there is an escape, as Montesquieu knew, to return the judging power to the community. The judges were forced to arrive at the same conclusion.

Therefore, the shift in the judges' attitude toward juries was less voluntary than logical. In the beginning, the judges resisted juries to protect their power quota. Social pressure undermined their power to the point that they were helpless in front of social expectations. Even though they tried to satisfy society's punitive appetite by incarcerating more citizens than in the previous system, that was not enough. After suffering the corrosive effects of tying their legitimacy to impossible mandates, they did not need to protect any power because the current power is just a shadow compared with what it used to be. In this context, the jury stopped being a threat to their power and became a shelter from the unbearable social pressure. Criminal judges even demand juries as soon as they know they must face the community and pay the high cost of judging other citizens.

After ten years of an accusatory criminal justice system, the judges in Santa Fe relinquished the centrality to pursue the calmness of the periphery. By ceding the power to judge to juries, they can elude the pressure to actively

167. *See* John Pratt & Michelle Miao, *The End of Penal Populism; The Rise of Populist Politics*, 41 ARCHIVE OF CRIMINOLOGY 15 (2019); *see also* Beade, *supra* note 8, at 64.

participate in future crises. They become the guardians of legality[168] but do not carry the burden of the final decision. They do not lose power but resignify it from a more calm and protected position. The current struggle of criminal judges is not to remain powerful but to avoid the wounds inflicted by merciless social criticism of their legitimacy. They are not only willing to share the stages with juries but to yield it in full.

This fresh pretended secondary role may also affect the future of the evidentiary rules. To construct a less powerful image, the judges must be ready to renounce another source of authority, such as control over the evidence. That may create an opportunity to incorporate clear and comprehensive evidentiary rules. The political argument can be that if the judges still claim the power to control the evidence, they will retain control over the trial and its outcome. Even more, the judges could rely on the law instead of their discretion, as is the case today. This opportunity could be another assertion to construct a narrative where judges are the legality's guardians but not the trial's decision-makers.

Furthermore, including the jury institution in Santa Fe will also increase the pressure to include evidentiary rules. There is an intimate relationship between jury trials and evidentiary rules, even limited as in Santa Fe. Even if this bond has not generated an Evidence Code yet, it can be proven by the diluted legislative process. The inclusion of evidentiary rules, even straggly, was present in the first and the second waves of reform. I will look into this aspect in depth in the next section, but diluted codification is a process that demonstrates the closeness between evidence rules and jury trials.

IV. THE EVIDENTIARY RULES IN THE SECOND WAVE OF JUDICIAL PROCEDURE REFORMS IN SANTA FE

A. Neverending Story

Public safety was the axis of the political debate in Santa Fe during the campaigns in 2023. That year ended with a total of 397 homicides,[169] the fourth highest number in the period 2014-2023, only surpassed by the years 2014, 2015, and 2022. The concerns regarding criminal rates did not completely abandon the political debate in the entire period initiated in 2014. During the 2019 campaign, the rates of criminality were a source of promises by the incoming governor.[170] In the elections in 2023, the parties who had

168. *See* Belanger, *supra* note 3, at 75-76.

169. ANNUAL REPORT HOMICIDE: PROVINCE OF SANTA FE, *supra* note 153, at 3.

170. The social pressure to provide rapid solutions to the fear of crime pushes the politicians to propose more punitive solutions with the capability to provide brief benefits. The promises usually

lost in 2019 returned to power, in part because of the failure of the government to guarantee satisfactory levels of public safety.[171]

The politicians read the centrality that societal claims to improve public safety had in the political process.[172] Because of that, they have been trying during the last decade to convince the electorate that they are taking the issue seriously. To do that, they passed many bills focused on the criminal phenomenon; the executive proposed some of the bills, and others were legislative initiatives. Amid these efforts, the reformed criminal justice system and the procedure that it brought became the favorite target. Slowly, politicians instrumentalized the criminal justice system to accomplish their interests instead of improving the judicial service. During this period, the political actors increased their control over the criminal justice system to the point of turning it into their instrument. The pursuit of eluding the political costs of the crises in the public safety arena is the basis for instrumentalizing the criminal procedure.[173]

The reforms within the system that occurred in the lapse of 2014-2023 were recurrent but did not alter its designs. With some exceptions, the reforms mostly have a symbolic impact on the system's operation. They helped sustain the narrative that the criminal justice system and its actors had been failing in the duty to provide satisfactory levels of public safety to society. Every reform pretended to reinforce the idea that the political branches gave all the necessary instruments to the judicial actors to do what

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appeal to emotional responses. The proposal usually includes actions such as police incrementalism or more severe punishment. *See* Bombini, *supra* note 9.

171. *See Santa Fe: El Gobernador Perotti debió retirarse de una marcha por la inseguridad* [*Santa Fe: Governor Perotti had to withdraw from a march due to insecurity*], AMBITO (Oct. 28, 2021), https://www.ambito.com/politica/omar-perotti/santa-fe-el-gobernador-perotti-debio-retirarse-una-marcha-la-inseguridad-n5306825 (Between 2019 and 2023, several crowded riots were organized to demand action from the government about public safety concerns); *see also* Facundo Chaves, *Maximiliano Pullaro: "Metí presos a todos los narcos de Santa Fe y lo voy a volver a hacer*" [*Maximiliano Pullaro: "I imprisoned all the drug traffickers in Santa Fe and I am going to do it again*"], INFOBAE (July 8, 2023), https://www.infobae.com/reportajes/2023/07/09/maximiliano-pullaro-meti-presos-a-todos-los-narcos-de-santa-fe-y-lo-voy-a-volver-a-hacer/ (The winner candidate, Maximiliano Pullaro, made numerous promises regarding public safety during the campaign. He pushed the discourse that he will be tough and firm because of his previous experience as Minister of Security).

172. *See* Neil Hutton, *Beyond Populist Punitiveness?* 7 PUNISHMENT & SOC'Y 254 (2005) (Politicians usually read societal expectations in a simplistic manner. Hutton states that public opinion is much more contradictory than it appears at first glance. What politicians accept as societal expectations is not more than the opinion of a sector of society).

173. *See* John Pratt & Michelle Miao, *Penal Populism: The End of Reason,* 9 NOVA CRIMINIS 71 (2017) (These authors distinguish between 'populist punitiveness' and 'penal populism'. The difference lies in who is in control of the events. In Santa Fe, we can see aspects of both, as public pressure puts public safety concerns at the forefront, and politicians respond with promises and actions to increase punishment).

was expected from them. The fact that the criminal justice system cannot fulfill the expectation to reduce crime rates was irrelevant to them.

According to this narrative, if the criminality rates did not decrease, it is because of the criminal justice system's failures. The politicians have done everything they could. It is the criminal justice system and its members who are not willing to commit to the objective. Consequently, the criminal justice system must be reformed, not the policies. This fallacy had a corrosive effect on the criminal justice system. The manifest functions related to the defendant's fundamental rights were abandoned in the discourses and reverted in the law.[174] The criminal justice system assumed obligations in front of society forced by the politicians that were impossible and tied its legitimacy to them. Professional politicians succeed in creating a new center of power that allocates part of the disquietude that the crimes produce in society. The social pressure was the ultimate clash in the wall of judicial resistance. The judicial actors lost their means to resist the changes because the source of their power became social acceptance. With the wall finally demolished, the final transformation only requires a strong political leader unafraid to dispute the traditional system of power in Santa Fe.

The governor elected in 2023, Maximiliano Pullaro, received more than one million votes.[175] The governor assumed a high degree of legitimacy and with the mandate to provide quick solutions in the public safety area. He began his mandate aware of that and with a historic amount of votes that gave him a proper basis for propelling an agenda of change. This agenda included many reforms to the criminal justice system. The incoming governor had experience in managing public safety crises. He was appointed as the Minister of Security in Santa Fe from 2015 to 2019.[176] During that time, he received strong criticism. It is undoubtedly that his previous experience and insights into the issue were key to designing his strategy. He moved quickly

174. *See* Law No. 13746, *supra* note 160; *see also Se promulgó como Ley Nº 13.746 la adecuación del Código Procesal Penal* [*The adaptation of the Criminal Procedure Code was promulgated as Law No.13,746*], ELPROTAGONISTAWEB, https://elprotagonistaweb.com.ar/noticias/val/12567/se-promulgo-como-ley-n%C2%BA-13746-la-adecuacion-del-codigo-procesal-penal.html (Some of the impellers of this reform expressed clearly that it was as a response to the public safety concerns. Santa Fe Senator Lisandro Enrico declared at the time that the public safety problems 'get out of hand').

175. Tribunal Electoral de la Provincia de Santa Fe [Electoral Tribunal of the Province of Santa Fe], Sistema de Escrutinio Definitivo Elecciones Generales 10 de Septiembre de 2023 [Final Counting System General Elections Sept. 10, 2023] (Arg.), https://www.santafe.gov.ar/tribunalelectoral/wp-content/uploads/2023/09/G.pdf (showing how Maximiliano Pullaro was elected by 1.031.964 votes, representing 55.71% of the total).

176. Constanza Lambertucci, Threats to Governor Put Spotlight on Drug Trafficking Violence in Argentina, (Jan. 18, 2024), https://english.elpais.com/international/2024-01-18/threats-to-a-governor-put-spotlight-on-drug-trafficking-violence-in-argentina.html.

and proposed many bills to reform the criminal justice system in the most profound reform since 2007.[177] At the same time, he deepened the narrative against the judicial branch, which pointed out that it was responsible for the public safety situation in Santa Fe. Even if those actions aligned with the political strategy previously displayed by politicians, the rhythm and intensity of the criticism were increased. Before the judicial branch could even react, almost all the legislative initiatives proposed by this new leader were approved in the first months after he took possession of the office.[178]

The political control over the criminal justice system's actors in Santa Fe has been strengthening since the implementation of the current system. However, the new Governor decided to design a legal mechanism that took this influence to its more blatant manifestation since the democratic return. In Santa Fe, the governor can decide who will be part of the system despite the selection process. The control politics had built until this point was indirect and not recognized by the law. The judicial actors opposed this control. Although, the power to resist this reformistic wave is insignificant. The decree 659/24[179] that reformed the entity in charge to select the judges, prosecutors, and public defenders is the epitome of political control over the judicial branch. It is the consolidation of a process that began with the new system, which eroded the sources of legitimacy of the judicial actors. The judicial branch was invited to a fight and denied weapons even to compete.

Another clear example of instrumentalization of the criminal justice system was the discussion regarding the cases of organized crime, especially those related with drug trafficking. According to the empirical evidence, the higher rates of crimes in Santa Fe, and especially in the city of Rosario, are explained by this criminal phenomenon.[180] The majority of the violent murders that occurred in Santa Fe are related to organized crime. In

177. *See* Luis Rodrigo & Mario Caffaro, *Punto por punto, las nuevas herramientas para la persecución penal en la Justicia de Santa Fe* [*Point by point, the new tools for criminal prosecution in the Santa Fe Justice Department*], EL LITORAL [THE COASTLINE] (Mar. 28, 2024), https://www.ellitoral.com/politica/reforma-nuevas-herramientas-persecucion-penal-justicia-santafe_0_Kr9c0chxtn.html; *see also Reforma al Código Procesal Penal de Santa Fe: un ineficaz regreso al oscurantismo* [Reform to the Criminal Procedure Code of Santa Fe: an ineffective return to obscurantism], INECIP (Dec. 19, 2023), https://inecip.org/prensa/comunicados/reforma-al-codigo-procesal-penal-de-santa-fe-un-ineficaz-regreso-al-oscurantismo/.

178. *See Diputadas y Diputados dio sanción definitiva a la reforma del Código Procesal Penal* [*Deputies gave final sanction to the reform of the Criminal Procedure Code*], CÁMARA DE DIPUTADAS Y DIPUTADOS DE LA PROVINCIA DE SANTA FE [CHAMBER OF DEPUTIES OF THE PROVINCE OF SANTA FE] (Mar. 27, 2024), https://diputadossantafe.gov.ar/web/sesiones/view/181.

179. Cuna de la Constitución Nacional Santa Fe, L. N. º 1223 (2024) (The Decree 659/24 was enacted by Resolution 1223, signed by Governor Pullaro).

180. Cuna de la Constitución Nacional Santa Fe, L. N. º 467 (2013) (According to this document two out of three homicides that occurred in Santa Fe during 2023 were related with organized crime activities).

Argentina, the investigation and prosecution of drug trafficking depend on the federal government. Santa Fe pays the political cost of the inactivity but has a few manners to address this central issue. Thus, the governor decided that the division of roles among the federal and state governments should change.

The law 14.239 'de-federalized' some investigations related to drugs.[181] Since this law was passed, the state has been in charge of misdemeanor and minor offenses related to drug selling and trafficking. During the debate, the politicians enforced the discourses against the judicial actors. The governor said the judicial actors were inefficient, slow, and not satisfying the community's expectations.[182] This is a complex legal issue that is also related to the federalism system in Argentina. It is included here as an example of the new administration's wide and diverse range of actions to create a new narrative regarding its attitude toward public safety.

The executive initiatives are not directed at improving the criminal justice system's functioning. Many of them likely will create more problems than they solve. For instance, de-federalization makes coordination among different levels of government even more difficult. It increases the risk of overlapping and disturbance between state and federal investigations.

So, why did the executive branch propose and approve this transformation so quickly? The answer is that the initiatives allow the government to gain political benefits. First, the government displays an image of activity and decision in a complex and pivotal issue for the community. The new administration showed through these initiatives that it was prepared to address the crisis. Second, the government can reinforce the idea that if the crisis is not solved, it is because of the failure of others. They can build a narrative in which the pursuit of real solutions is irrelevant because the failure will eventually be because of the incapabilities of the judicial branch. Lastly, they won the political dispute against the judicial actors. The executive branch finally beat the last resistance to definitely subordinate the criminal justice system as its instrument. All the tensions and disputes emerging in the last decades among the politics and the criminal justice system were finally terminated by a decided politician who was massively voted for.

Moreover, the new authorities went even further. They succeed in an attempt that many other politicians have failed before. The new

181. Cuna de la Constitución Nacional Santa Fe, L. N. º 14239 (2023).

182. *See Primera conferencia de Pullaro: "Tenemos una Justicia cara e ineficiente"* [*Pullaro's first conference: "We have expensive and inefficient Justice"*], CADENA 3 (Dec. 11, 2023), https://www.cadena3.com/noticia/radioinforme-3-rosario/primera-conferencia-de-pullaro-tenemos-una-justicia-cara-e-ineficiente_376024.

administration could create the jury system in Santa Fe. Until this point, the counter-reforms the criminal justice system had suffered were not structural. The punitive shift and the increasing social and political pressure in the criminal justice system had not altered the judging system that remained in charge of the criminal judges. The inclusion of the jury inaugurated the second wave of reform.

The second wave of reform in Santa Fe has essential differences from the first. The recent reform was built upon a different foundation. The former Governor proposed the Criminal Procedure Code in Santa Fe in the last segment of his mandate. The party of the Governor lost the election the same year the Code was approved. On the opposite side, the new reform includes changes to the Code, but most importantly, a new system of judging. The current Governor propels these changes during the first month of his mandate after being elected by the highest number of voters since the democratic return.[183] The legitimacy levels to challenge the criminal justice judicial actors significantly differ between the two governors. But even if that was not the case, the power of the criminal judges is not what it used to be.

The judges' opinions regarding jury trials today seem quite different, as does the capability to resist its implementation. I propose that this shift is not because they suddenly desire to renounce their judging power; instead, in the context of them seeking means to elude the intolerable social pressure. In the first wave, the criminal judges tried not to relinquish more power than was necessary to turn the criminal justice system legally tolerated. Second, criminal judges are willing to renounce everything necessary not to remain powerful but to survive. The accusatorial procedure produced that the judges need to be popular to remain powerful. Initially, they tried to incarcerate more people, accept the prosecutorial petitions, and diminish the threshold of the defendant's rights. Rapidly, it was clear that their actions did not concede the community's trust. They lost their power because the source of it changed as soon as the secrecy and darkness were eradicated. In this context, jury trials are not a threat to the judges' power but a potential shelter from societal pressure.

Even with the inclusion of the jury trial in the criminal justice system, there is still no Evidence Code or even discussion of including it. This situation clearly indicates the politicians' pretensions regarding the change.

183. *See Maximiliano Pullaro y el récord de ser el más votado en democracia en Santa Fe: superó el millón de sufragios* [*Maximiliano Pullaro and the record of being the most voted in democracy in Santa Fe: he exceeded one million votes*], CLARÍN (Sept. 11, 2023), https://www.clarin.com/politica/maximiliano-pullaro-logro-record-votado-santa-fe-supero-millon-sufragios_0_x8WBKZXMDx.html?srsltid=AfmBOop0FxAxWR-VJBTzoUPPWpExVfPfBsD8UJDJrc26PL3iGaafvMds.

The initiatives are centered on political and not judicial needs. The technical discussions and initiative must have two traits to be allowed in the political debate. First, technical changes must foster the punitive response that the political branches are impulsing. Second, even if technical, the proposed changes must prove they could send a message to the community and be capitalized in the political debate. The transformation in the criminal justice system appears to be permitted only if they respond to the instrumentalization of the politicians.

A code of Evidence would fail in both requirements. The technical discussion needs to be framed with the real expectation of improving the system's functioning. Including a Code of Evidence would provide legality to the system, but it would not necessarily make it quicker and more punitive. Defendants could use the creation of clear and previous rules to resist punitive pretensions. Thus, this legal initiative would not only not produce the immediate political benefits expected but could also affect their intentions by providing new tools to the defendants.

Moreover, a Code of Evidence is a technical initiative that cannot be politically capitalized. The difficult debates that creating a Code implies will have no impact on society. To be acknowledged by the community, a code should be in effect for some time. This bet for the future is not how politicians are reforming the criminal justice system. The politicians in Santa Fe are looking for immediate relief from social pressure, and a Code of Evidence cannot deliver it.

As had already happened in the first wave, the second did not include, until now, a Code of Evidence, which does not mean that any evidentiary rule was enacted. The law 14.253 of jury trial incorporated even more evidentiary rules for this particular mechanism, adding to the scattered rules that the Criminal Procedure Code already established.[184] The existence of evidentiary rules highlights the close relationship with the jury and underscores their significance, even if they are not part of a specific subsystem. When there is no consensus among experts, or their opinions do not influence political actions, some legal discussions find their way into the system, but tehy are often disorganized and anarchic.

Even if the law is relevant for this approach with roots in civil law, the norms related evidence appears not to be to the same extent. In the former system, the outcome depended on the decision of judges who had nothing to prove to anyone other than themselves. The relevance of the evidence was relative since the judges could decide according to their belief and own investigation. Later, the criminal justice system was included as a part of the

184. Cuna de la Constitución Nacional Santa Fe, L. N. º 14253 (2024).

public safety machine. Thus, the responses began to need to be quick instead of fair. In both the previous and current systems, the consideration of evidence has not been at the center of the process, aside from the grand speeches made by politicians and judges. The sparse and nuclear rules regarding evidence did not emerge from an independent process, but rather from a mechanical and unreflective legal translation.

The evidence against a defendant is key when the entire criminal justice system is focused on proving guiltiness before convicting. Producing quality and legal proof takes time. Guaranteeing the accused's fundamental rights during a criminal procedure also consumes time. Neither of the requirements of developing a criminal justice system with the evidence in the center can be fulfilled in times of social panicking and anxiety. Panic claims immediate response, but the State was created to, among other duties, manage social moods to avoid violence becoming the only legitimate response. Politicians today undermined the state when they organized their agendas and actions around social panic and the expectations of violence. Building a criminal justice system that recovers the evidence as the center of it and obligates the judicial actors to act with justice and not anxiety will be a way to eschew penal populism. Fair decisions may take time, but anxiety only brings injustice. Evidence Code can reinstate the importance of proving guilty in front of juries and judges instead of on the streets, the media, or any other scaffold.

B. Juries as an Instrument and More Drops of the Diluted Codification

The jury trial will be implemented during the last part of 2024. However, this judging system will be limited to a range of crimes. The jury trial defenders raised some criticism for this decision, but it was made by the incoming government aligned with its agenda. There are several reasons why the government made this call. Among the most relevant is the cost of jury trials. The government is not unaware of the dimensions of the investment that a criminal judicial system requires. The government probably tried to be strategic in the crimes that they chose to be decided by jurors. Because of that, the government's choice has some messages to send.

According to article 2 of law 14.253,[185] a jury will decide the following cases: homicides, sexual assault followed by murder, aggravated robbery involving the use of deadly force, or death as a result of actions of police and

185. *See* Law No. 14253, *supra* note 164, at art. 2.

penitentiary personnel who acted in situations of confrontation.[186] The only exception is the express renouncement of the defendants.[187]

The main trait that all the selected crimes share is their severity. They are among the most severe crimes that an individual may be accused of committing. They are also the crimes that create more expectations in the community and ignite their more passionate reaction. The inclusion of the deadly use of force by law enforcement officials is based on the presumption that the community tolerates their actions, even those considered excessive by the law. For some critics, that inclusion responds to the government's intention to be more lenient with the police and penitentiary officers. Following the critics' ideas, because the community tolerates the use of violence, the police officers would feel that they are entitled to use it. This eventually may result in more confrontations and, more deaths and abusive uses of force. That concern has not yet been confirmed, but it seems, a priori, reasonable.

The second trait that can be found when the crimes are analyzed is that all of them are highly risky for decision-makers, both politicians and judges. The chance to make a decision—or even a public declaration—that infuriates part of the society is higher than in other cases with more societal tolerance. The government's decision was partly motivated by the pretension to return the opportunity to the community to exorcise its own ghosts. The traditional benefit attached to the jury trial in terms of community involvement could avoid negative reactions against the political and judicial actors.[188] It is now the same community that decides if the accused is guilty. The disconformity is no longer placed in the hands of politicians and judges but is distributed throughout society as a whole.

The potential problem with jury trials is that the jurors decide using common sense and general experiences. In the pursuit of legitimacy, the jury judging system begets many risks. The jurors can be seduced by ideas that are not legally valid. In criminal justice systems with long traditions, the decision-makers and system actors are fully conscious of these threats. For instance, in the United States, jurors need to be protected to avoid deciding on a basis different from what is being presented before them during trials. The defendants have the right to challenge the inclusion of proof that may result in excessively prejudicial or incite the jury's animadversion against them. But, where can the legal instrument to protect the juries be found in an accusatorial system? The answer is in a Code of Evidence.

186. *Id.*

187. *Id.*

188. *See* Pratt & Miao, *supra* note 173, at 26.

The creation of a jury system without an Evidence Code reflects the intentions of the reformers to take advantage of its benefits in terms of legitimacy but without understanding exactly where it comes from.[189] The legitimacy of a jury's decision depends not only on being made by jurors who are part of the same community. That decision must also be fair and based on proper evidence gathered legally. If a government pretends to repair the community's esteem by inviting some of its members to decide in complex and challenging judicial cases, the government also must guarantee that the jurors will have access to quality evidence that respects the fundamental rights of the defendants. To be legitimate a decision needs to be popular, but also just.

Implementing a jury system makes the creation of evidentiary rules mandatory. There is a close relationship between jury trials and the mechanism to include evidence to be presented to them. This is because the jurors are not trained to base their decisions on complex legal reasoning. In jury systems, the jurors arrive at conclusions because of the information the parties expose. If there are no clear rules to introduce, challenge, and present evidence in front of the jurors, the quality of the information they will access and eventually support their decision will not be guaranteed.

The new law of jury trials in Santa Fe appears to recognize this relationship when it includes evidentiary rules in its letter. Although, the real effect that this inclusion had was creating an evidentiary subsystem for the jury trials that cannot be conciliated with the general criminal procedure. The jury trials' law concedes rights not available to the defendant prosecuting the traditional system. Moreover, the decision to maintain the intermediate instances that lead to a different judge than the trial judge decides the evidence's admission conserves the design that creates the issues exposed in the previous section.

Article 22 of the law 14253 builds a subsystem hidden within another subsystem.[190] This distinction strengthens the system's disorganization and sets the platform for unfair decisions. The article includes a definition for pertinency that was not in the Criminal Procedure Code.[191] It is unclear if it can be used to resolve cases through the traditional professional judging

189. *See* Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L., 2003, at 839, 869 (The expectations of legitimacy come from the fantasies and powerful images that jury trials have conveyed. As Miller sustains, the inclusion of this legal institute can be explained by its prestige. Politicians are interested in enhancing their legitimacy by the creation of laws that pursue to be grandiloquent and spectacular instead of efficient. They appeal to the written legal norms as a source of rational authority to send messages to society).

190. *See* Law No. 14253, *supra* note 164, at art. 22.

191. *See id.*

mechanism. Even more, the article contains a list of reasons why pertinent evidence can be deemed inadmissible.[192] There are two reasons related to jury trials: the risk of inclusion of evidence that is unfairly prejudicial and that may confuse jurors. The other two are unrelated to jury trials and would perfectly fit the traditional procedure. Those reasons are: a) improper delay in the procedure, and b) unnecessary cumulative proofs. Its inclusion in this precarious subsystem is a problem because it is unreasonable. If these rules are included in this special law, they are supposed to be applied in jury trials and not in the professional judging system.[193] That may lead us to think that if defendants are prosecuted by traditional procedure, the evidence that is pertinent cannot be deemed inadmissible because of improper delays or being cumulative. If that is the case, the inquiry is why. If it is not, and these reasons already are recognized in the Code in the power conceded to the judge to limit evidence, the question is why include them in this law since the Code of Procedure also applies to jury trials. Similarly, another problematic inclusion in this law is the concept of pertinency in the same article. While it would be more appropriate to use the term "relevance," the definition does not align with the criteria established by the Code for general admissibility.[194] In the professional judging procedure, a judge must assess whether the evidence is related to the fact that is being proven. However, when the evidentiary decision affects a jury trial, the judge must consider whether the evidence makes the fact more probable. These two laws govern the same system and demand the application of different standards to admit evidence.

This article's contradictions and systemic conflicts are pristine examples of the dangers of the diluted codification process. Article 22 of a Santa Fe State Law 14253 is a recent proof of the problems that the inclusion of evidence rules without proper discussion and analysis generates within a legal system. The subsidiary role that evidentiary reflections have had in the last major criminal procedure reforms in Santa Fe proves that the technical and systemic analysis face hardship to be part of the reforming process. The proliferation of subsystems with remarkably technical weaknesses adds complexity to the criminal justice system and moves it away from the chance

192. *See id.*

193. *Id.* at art. 159 (Article 159 establishes that the judge can limit the number of evidence in the case that they are cumulative or impertinent. The article does not concede the power to declare them inadmissible but to reject them due to these motives. The power to exclude evidence is not exactly the same as the power to declare evidence inadmissible. This technical difference also proves the need for an autonomous and systemic study of the evidentiary subsystem that pretends to regulate a criminal justice system. The improper delay, although, is not included in the basis for the exercise of the judges' limitation powers in the traditional procedure).

194. *See id.* at art. 22.

to improve its performance. The referred tensions and difficulties underline the importance of abandoning the diluted evidentiary codification.

The evidentiary rules should reflect the agreement regarding how the Santa Fe community wants to include proof when an individual is accused of committing a crime. Politicians in Santa Fe seem willing to prove all the changes except those connected with the real functioning of the criminal justice system. Thus, the evidentiary reflections are too important and complex to be a slight part of other reforms. To construct an evidentiary subsystem, the evidentiary rules need to stop being codified as diluted drops and must start to be considered as an autonomous space of analysis.

V. CONCLUSION

The article analyzed the criminal justice system in Santa Fe from the perspective of its vacancies and offered possible answers to why its reform did not include an Evidence Code. It has shown that a criminal justice system reforming process is highly complex because it involves several layers of analysis and a plurality of actors. It has also demonstrated the relevance of including a political, legal, or procedural perspective rather than being captured by legal discussions that block the analysis of concrete practices.

The study had to deal with the difficulty of understanding why a decision was not made instead of why it was. The lack of an Evidence Code can be traced to the different stages of the reform. This absence remains a vacancy that has not been directly addressed by the actors yet, but their actions and decisions influence its possibility to exist. Despite not being directly treated, the evidentiary rules found their path to enter the criminal justice system in Santa Fe. The article has demonstrated that the evidentiary rules entered the system diluted in other reforms. They are hidden behind major transformations. The manner in which they were included affected their quality and coherence.

The evidentiary considerations are not yet reflected in an autonomous legislation body. They are not in a coherent subsystem either. They were incorporated during the subsequent reforms and counter-reforms without proper analysis or discussion. First, the reformers questioned the inclusion of evidentiary rules and succumbed to the judge's pressure to make the reform possible. Later, the expert opinions and advice were relegated by politicians as the crime was becoming central to the political agenda. When the experts' views dictated the content and rhythm of the reform, the evidentiary rules did not enjoy unanimous consensus. After implementing the reformed Code, the agreement regarding its utility increased. To that point, the politicians had monopolized the means to produce changes. The changes during the years after the reforms, and still today, abandoned any technical pretensions. They

are structured majorly by political interest and used for electionary purposes. These objectives are far from technical discussion, such as the mechanism through which the evidence must be presented and admitted during trials.

The article demonstrates that anyone who intends to understand a reform process must focus on the practices instead of the law. The law invites misunderstandings and mistakes, while concrete practice offers the chance to renounce discourses and appreciate realities. It was in the concrete practice areas where the article recovered the elements to explain the absence of an Evidence Code.

This article pointed out that politicians, such as the Legislature of Santa Fe, are among the more relevant actors in the reform processes. The politicians instrumentalize the criminal procedure to align it with their political agenda instead of improving the judiciary's functioning. These actions performed by the politicians defied the explanations that transformations were the result of the pretension of satisfying superior standards of legality based on humanitarian and democratic values. Many of the most significant changes happened in the context of political crises. They were mostly used to send a strong message to society. The reforms sought to convince society that they were assuming the seriousness of their claim, generally in the public safety realm. As that political strategy became more popular, the initiatives that pursued improving the system's functioning in justice and fairness became rare.

Politicians propelled the transformation and the creation of new actors, such as the Prosecution Office or juries, seeking to share the responsibilities and criticism that the community posed on the government for failing to guarantee public safety. With that action, politicians could build discourses to transfer part of the heavy load composed by the negativity that the increasing crime rates, real or perceived, had produced. Politicians successfully designed and implemented a new map of power that allowed them to find new 'guilties.'

Judicial actors bite the bait. They were anxious to prove that the new system was more efficient than the previous one. Moreover, the reformed system opened the courts' doors. Judicial actors had to face social pressure and social criticism. Their political ingenuity led them to assume an impossible obligation: influence the crime phenomenon, real or perceived. When they realized that they did not have the means to fulfill those social expectations, it was too late.

The reformed criminal justice system had tied its legitimacy to public acceptance. It adjusts its actions to align with what it believes society expects. These expectations are generally translated as more severe decisions. In the pursuit of social approval, the functioning of the system became more

punitive.[195] The sentences were extended, the power of the police increased, and the judicial control relaxed, but nothing could satisfy the ardent claim of society. The negative assessment of society undermined the criminal justice system's legitimacy and affected the judicial actors' self-perception. They were amid social and political pressure with limited mechanisms to resist. Publicity, which was expected to enhance the legitimacy of the criminal justice system, had the opposite effect when the true nature of the system's functioning was uncovered.

Selfish political interests dynamize transformations, but they are not the only impulse. There are always competing interests during these turbulent processes. This article explains how inter and extra-systemic pressures played a key role throughout the reform in Santa Fe. This situation proves in its terms that even if political interests and needs are relevant, they are not sufficient to drive a structural reform. In the particular case of Santa Fe, the reform was only possible when the external pressure broke the resistance wall that the criminal judges had built for decades. Even after its implementation, the change of rules had to deal, and still has, with traditions, practices, and actors that influence, and in many cases determine, the depth and extension of the transformations.

Although, the dynamics of the reform have undermined the power of the judicial actors. Politicians have turned the criminal justice system into part of the political discussion regarding public safety. To underline that new character, they have passed bills that are aligned with what they considered the punitive expectation of society and not necessarily with improving the system's functioning. The criminal justice system has turned into an instrument to elude social pressure. Judicial actors witnessed politicians create this new narrative through discourses and political actions.

The criminal judges are the actors who have faced the most profound transformation in the last ten years. Based on the recent legislature's decision to create jury trials, we see how their power passed from almost absolute to suffering significant reduction. The principal sources of power of the judge in the inquisitorial system were secrecy and lack of accountability. Through these, they prevent the public's participation in trials and other judicial practices. A totalitarian judge demands that society be left outside the tribunals. This assertion can foster the idea that a professional judge in an inquisitorial system is incompatible with a democracy. As soon as they opened the doors of their courts, they had to face the deafening claim of society. They could not keep hiding behind their written decisions. That

195. *See* Jonathan Simon, *Sanctioning Government: Explaining America's Severity Revolution*, 56 U. MIAMI L. REV. 217, 239 (2001).

process ended in what ten years ago seemed impossible. Criminal judges are willing to accept the jury and lose the last vestige of their formerly absolute power: the power to judge whether an individual is guilty.

Regarding the lack of an Evidence Code in the Province of Santa Fe, the existence of a powerful judge at the beginning was among the major obstacles. The power of the judge influenced this absence in two ways. First, the judges strongly opposed the incorporation of jury trials at the time. There is a direct relation between evidentiary rules and jury trials. Criminal judges sent messages, sometimes tacit but often quite explicit, that the jury trials would go too far and deep in the reform. Other sectors who tried to advocate for the changes believed them. Second, the judges considered, as well as some sectors of the reformers and experts in favor of the reform, that evidentiary rules would limit them through excessive rigidness. They believed a more informal process would allow them to conserve great influence on the prosecutors and the system. Following these ideas, the judges wanted to maintain the power to influence the trials through the evidence. They accepted to be stripped of the power to investigate but nothing more.

This presumption led the judges to the same conclusions as some reformers but from a different avenue. Some reformers thought an accusatorial system 'ought to be' informal, while the judges wanted to keep it informal to maintain their unofficial influence.

When the Criminal Procedure Code was written, the necessity of a Code of Evidence in Santa Fe was a marginal discussion that did not deserve complete acceptance from experts and judicial actors. Because of that, the reformers and supporters were willing to renounce its inclusion in the original list of legislation and codes to be reformed. These positions have changed with the consolidation of accusatorial practices in recent years.

Many judicial actors argue that certain rules, even if not part of a specific Code, could help address or alleviate some issues present in the criminal justice system. There is a shift in the previous understanding that many actors had. Even many who thought that evidentiary rules were improper for an accusatorial code because they created rigid standards outside the hearings and trials where the controversies were supposed to be solved are now evaluating their benefits. From these perspectives, the evidentiary rules would be a valid method to enhance legal certainty. To this traditional validation of foreseeing any possible objection of core evidence, another creative reason must be added to defend the inclusion of evidentiary rules: reduce the tendency to bureaucratize. As the article explains, several practices are being repeated mechanically and unnecessarily because they are deemed mandatory by standards and guidelines. With a Code establishing

silver lines, countless hours of sterile discussion would be saved as judicial discretion would be reduced.

Furthermore, the incorporation of jury trials in Santa Fe, decided at the beginning of 2024, will bolster the incipient defense of the necessity of clear rules to determine what evidence is relevant and trustworthy to be presented to the jurors. This article underlines the traditional relationship between evidentiary rules and juries. Even more so when its incorporation is attached to its potential legitimacy boost. The decision to rely on the membership's jurors to the community implies paying a cost in terms of the risks they decide on an improper basis. Jurors cannot identify what evidence is legally producible and center their attention on the evidence's conviction power. The system must include rules to guarantee that all the evidence presented to them is legal and respects fundamental rights. When the evidence has already been introduced, it is too late, even if the judges can give them directions regarding the legal and correct uses. Jurors are called to determine whether a defendant is innocent or guilty; the Codes and statutes governing the procedure must assure the trial's legality. If there are no clear rules to establish which evidence will be accepted or denied, the possibility of the jurors' decision being legitimate but unfair exists.

This article contributes to the attempt to answer important unanswered questions about the criminal procedure reforms in many countries in the global south. It exemplifies how analyzing a reform requires including political, historical, academic, and cultural elements to build a holistic comprehension. Perhaps the main contribution of this paper was to raise questions in areas that until now only offered silence. The article is hesitant to generalize its conclusions. Notwithstanding, it is a bet on the future. The motives why Codes of Evidence remain outside countries' legal systems with deep historical traditions of codification, such as in Latin American, are still unexplored. The article suggests reasons to explain why this occurred in Santa Fe with the hope that future research and hypotheses come from other latitudes with criminal justice systems that share this contradiction.

VI. METHODOLOGY

For this project, I conducted nine in-depth interviews. Six of the interviewees were judicial actors, either active or retired. One was a representative of a relevant Non-Governmental Organization. The last two were specialists in accusatorial systems and evidentiary rules. Moreover, six were from the Province of Santa Fe.

The interviews were semi-structured. Most of the dialogues quickly derived to a conversational nature. Even though the interviews were conducted through video calls to foster the intimacy of the interviewees, none

of them were recorded. This decision permitted the interviewees to express themselves freely. I promised anonymity to my informants. Because of that, I will avoid any reference to their positions or institutional affiliations in the paper.

The interviewees came from two groups. The first group includes three individuals representing the NGO and experts sector. I eventually realized that the NGO and experts' influence was not fundamental in the process that I attempted to understand, which was more focused on the interaction of the local actors in Santa Fe. However, it is a line of search that can be studied in depth in further explorations to amplify the scope of this study. The second group is composed of six judicial actors of Santa Fe. To select them, I use two parameters. First, to elude self-reporting bias and institutional official posture, I interviewed representatives from the three actors in the criminal justice system in Santa Fe: the Prosecution Office, the Public Defense Office, and criminal judges. I relied on information that was not the result of direct perception or comment of any of them but derived from the common traits and repetitions found in several. Second, I interviewed active actors and retired actors. The retired were part of the inquisitorial system and the active of the accusatorial. In addition, three were part of the codification process as experts.

The study relied almost entirely on qualitative methods. I added secondary sources to the referred interviews to provide historical context to relevant events and circumstances. I used some quantitative data about crime rates and other indicators relevant to the functioning of the current system, but the study is essentially qualitative.