

**The Conceptual Challenge of Procedural Reforms in Latin America.  
The Colombian Case.  
By Orión Vargas<sup>\*</sup>**

**The Foundations of the Law of Evidence and  
Their Implications for Developing Countries  
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**Abstract**

The study of evidence is the starting point that makes it possible to speak of a discourse about administration of justice and, at the same time, it is the indispensable complement for implementing procedural reforms. The administration of justice is translated into a proper handling of evidence into the judicial process<sup>1</sup>; that makes the judge contact the reality of life and allows him to reach a legal and fair decision in the aforementioned process. Evidence is the backbone that gives character to the judicial process according to freedom, restriction, or a mixture of both, to dominate the field of this matter<sup>2</sup>. The events of the past must be reconstructed to determine their occurrence in the present and, by the way, to regulate wisely the new laws that will be part of the procedural reforms that will regulate the behaviours of the future<sup>3</sup>.

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<sup>\*</sup>Chief of the Law of Evidence Masters Programme at the University of Medellín and Professor of Logic at EAFIT University, in Medellín, Colombia. The author thank to professor Ronald. J Allen for his support and recommendation of this article. Thanks to professors Rodrigo Coloma, Jorge A. Larroucau and Daniela Accatino (Chile) for their valuable assistance in structuring this Article. Thanks to professors Carlos I. Ruiz, Maria C. Arcila, Liliana D. Pabón and Vicente J. Ramirez (Colombia) for their valuable assistance in the revision of this Article.

<sup>1</sup> Jeremy Bentham, *Tratado de las pruebas judiciales*, I, 10 (Ediciones Jurídicas Europa-América, Buenos Aires, 1959).

<sup>2</sup> Santiago Sentís Melendo, *El proceso civil*, I, 182, (Ediciones Jurídicas Europa-América, Buenos Aires, 1957).

<sup>3</sup> Hernando Devis Echandía, *Teoría general de la prueba judicial*, I, 2 (5a. ed., Editorial Temis S.A., Bogotá, 2006).

Thus, in Latin America is imperative to improve the knowledge about evidence, about its purpose within the judicial process and about necessary conditions for the achievement of this objective that is provided at higher education institutions on the subject of judicial decision making, on the evidence's objective into the judicial process and on the necessary conditions to achieve it, which will allow judges, lawyers, legislators and indoctrinators to be better prepared to face the conceptual challenges of the current procedural reforms intended to ensure a proper administration of justice.

The article is divided into three parts. The first part attempts to show the strong influence of Europe in the procedural law in Latin America (where the model of the Inquisition is still weighing), by some authors, beyond the advent of a model of adversarial character in several areas of Law. The second part shows the coexistence of proceduralists in Europe (having fixed their gaze on Carnelutti, Calamandrei Chiovenda and Taruffo) and philosophers of law in Europe, as Taruffo, with their gaze fixed on the Anglo-Saxon law (Wigmore, Twining, Schum and Allen) and some epistemologists (Haack and Laudan). The third part proposes a revision of the procedural reforms from evidence and court's decision to advance on the dialectic doctrine referred to the administration of justice subject.

### **Europe and its influence in Latin America**

In the development of European legal culture, there are several senses that are pointed with reference to evidence and there are varied historically posed discourses:

The *primitive period* of the history of legal evidence (in which there is no a law of evidence system yet) corresponds to a rough procedural system where evidence is left to personal impressions' experience judgments. From the breaking point suffered by Roman legal civilization with the fall of the Empire, other stages are presented in the historical evolution of evidence in Europe known as the

*mystical age*, the *age of the system of legal fee*, the *era of moral conviction* and the *scientific age*<sup>4</sup>.

The *mystical or religious era* that initially corresponded to a) the old *German law* where evidence has a purpose in itself that judge can not ignore and must take in issuing the respective verdict, which corresponds to the so called *ordeals*<sup>5</sup> or judgment of God, evidence that is applied to particular cases and in which the material or real truth is irrelevant; b) canonical law which calls for the abandonment of the ordeals as barbaric proofs and where the ecclesiastical judges performed a true evaluation of the evidence despite being subject, each time, to a larger number of procedural rules<sup>6</sup>.

The *time of the system of legal proof legal rate system* is meant to give a legal basis to the inquiry process, and given the poor preparation of judges, it does it predetermining all evidentiary system, limiting evidence and assigning to each of them a certain weight, which is seen by some indoctrinators and illustrated men as a logical extension of the ordeals<sup>7</sup>, but with a certain degree of rationality basing their judgments on natural laws or on experience key principles<sup>8</sup>. Fixing the facts in the system of legal proof comes from evidentiary premises that guarantee the truth of its contents by deductive reasoning of the type: if p then q, and p, therefore q.<sup>9</sup> In words, this corresponds to the Aristotelian syllogism: *Every person who confessed is guilty of the crime. And John confessed. Therefore, John is guilty of the crime.* The scholastic method, Roman traditions (especially the ones from the law established by Justinian) and fragments of the Bible<sup>10</sup>, sometimes, are useful for the creation of rules of evidence in the canonical process (in the case of

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<sup>4</sup> *Ibid.*, p. 47.

<sup>5</sup> Marina Gascón Abellán, *Los hechos en el derecho. Bases argumentales de la prueba*, 9, (2da. ed., Marcial Pons, Madrid, 2004).

<sup>6</sup> Mittermaier, *Tratado de la prueba en materia criminal*. 8-13 (9a. ed., Editorial Reus, Madrid, 1959).

<sup>7</sup> Luigi Ferrajoli, *Derecho y razón. Teoría del garantismo penal*, 135, (Editorial Trotta, Madrid, 1989). Cesar Beccaria, *De los delitos y de las penas*, 97, (ed., de F. Tomás y Valiente Madrid, 1974).

<sup>8</sup> C. Varela, *Valoración de la prueba*, 95 (Editorial Astrea, Buenos Aires 1990).

<sup>9</sup> Luigi Ferrajoli, *Derecho y razón. Teoría del garantismo penal*, 133, (Editorial Trotta, Madrid, 1989).

<sup>10</sup> See *Deuteronomy* 19:15 ("A single witness shall not suffice to convict a man accused of committing some crime or offense. Every matter shall be settled by the testimony of two or three witnesses") and *Matthew* 18:16 ("But if not, take with thee one or two more for that 'the whole matter is resolved by the testimony of two or three witnesses'").

testimonial evidence, for example), and rules of burden of proof and, as seen, deductive logic plays a decisive role in this type of process.

With the change of an adversarial process to a pure inquisitorial process, the common process that prevails and spreads at Europe in the Middle Ages (also known as Roman-canonical or Italian-canonical process) gives the judge broad power to achieve the confession, which results in repeated practice of *judicial torture* exercised by the Holy Office Tribunal or the Holy Inquisition<sup>11</sup>, process which was divided into three stages: the general and the special inquisition, that were preparatory stages done secretly, and the stage of the trial that was public<sup>12</sup>.

Two events of great importance occurred in the year 1215: the first one is that King John granted the *Magna Carta Libertarum*, in London, which is considered the first constitution in Europe's history and led to a long history of English constitutional law, in which Chapter 29 highlights<sup>13</sup> as the *jury trial* symbol<sup>14</sup>; the second one is that Pope Innocent III imposed on the Fourth Council of Letran the banning of the practice of ordeals in court disputes, which symbolizes, in the Middle Ages trials history, the decision of the ecclesiastical authorities of not include the Church in legal disputes<sup>15</sup>.

The testimonial and documentary evidence become important in *Las Siete Partidas de Alfonso el Sabio*<sup>16</sup>, while the judge saw his power of inquisitive and free evaluation of taken evidence suppressed, but maintaining the test of torment, which was secretly applied by the same judge who dictated the judgment and

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<sup>11</sup> Santiago Sentís Melendo, *Teoría y práctica del proceso*, 599, (ediciones Jurídicas Europa-América, Buenos Aires, 1959).

<sup>12</sup> *Id.*

<sup>13</sup> "No freeman shall be taken or imprisoned, or disseised of his free tenement, liberties or free customs, or outlawed or exiled or in any wise destroyed, nor will we go upon him, nor will we send upon him, unless by lawful judgment of his peers, or by the law of the land. To no one will we sell, deny or delay right or justice".

<sup>14</sup> Michele Taruffo, *Simplemente la verdad. El juez y la construcción de los hechos*, 13-14, (Marcial Pons, Madrid, 2010).

<sup>15</sup> *Ibid.*, p.14.

<sup>16</sup> Jordi Nieva, *La valoración de la prueba*. 58, (Marcial Pons, Madrid, 2010). This author points: "Requirement of the presence of two witnesses in any litigation to take a fact as proven" (*Partida III, Title XVI, Law 21*); "The documents, generally, made as provided in the law (the multiple laws of Partida III, Title XVIII, especially the law 114) had full evidentiary value in their content" (*Partida III, Title XVIII, Laws 115 and 117*).

whose acquittal was only achieved by the accused when, for a second time, he was subjected to torture and then he kept himself in its refusal<sup>17</sup>.

Already in the eighteenth century various encodings are presented, such as *Bavaria*, the *Joseph the Second's Criminal Justice Ordinance* and the law enacted by Leopold, the Grand Duke of Tuscany (1786), which reproduce the dominant ideas of the time<sup>18</sup> and introduce improvements into which the abolition of torture and the pursuit of truth are among others<sup>19</sup>.

The U. K evolves similarly abandoning the ordeals and establishing the jury. In the sixteenth century an evidentiary system of rules of exclusion (*Law of Evidence*) is created, whose foundation is the theory of probabilities taken from canonical law<sup>20</sup>. In Russia, the adversarial process of the ordeals is replaced by a rudimentary inquisitive or "investigative" process<sup>21</sup>, ending in the eighteenth century with the legislation of Peter the First, where formal testing system and the legal rate are put in place<sup>22</sup>.

The time of moral conviction is rooted in the French Revolution<sup>23</sup>, which takes the doctrines of Beccaria, Montesquieu and Voltaire, regarding to formal evidence<sup>24</sup>, on the laws of January 18 and September 29 of 1791. Here there is an absolute divorce of civil and criminal processes, for while the former are still subjected to the system of legal proof, the writing process and the initiative of the parties in the search for evidence, the latter are oral, public, based on the system of free self-belief for evidence assessment, and carried out under strict conditions of equality and contradiction to the parties in the judicial process. The criminal

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<sup>17</sup> B. Quintero, E. Prieto, *Teoría general del proceso*, 141, (Editorial Temis S.A., Bogotá, 2000).

<sup>18</sup> Mittermaier, *Op. cit.*, p. 13.

<sup>19</sup> Hernando Devis Echandía, *Op. cit.*, p. 54.

<sup>20</sup> *Ibíd.*, p. 55.

<sup>21</sup> Vishinski, *La teoría de la prueba en el derecho soviético*, 94-96 (Editorial Nuevo Derecho, Buenos Aires, 1951).

<sup>22</sup> Hernando Devis Echandía, *Op. cit.*, p. 55.

<sup>23</sup> As an antecedent of the French Revolution, a movement arises against the predominance of the legal system of evidence in criminal proceedings, resulting in the *humanization process* led by the Marquis of Beccaria—who in his work *On Crimes and Punishments* defends both the presumption of innocence for the defendant and the system of free self-belief, based on "the intimate and innate sense which guides every man in the important events of life"—, through the institution of the jury in addition to the abolition of torture.

<sup>24</sup> Hernando Devis Echandía, *Compendio de derecho procesal*. I, 23 (10a. ed., Editorial ABC, Bogotá, 1985).

process requires a jury who has legal, logical and psychological knowledge and also an objective criterion to make such evidence assessment, which is seen as a failure in the systematization of the criminal evidence<sup>25</sup>.

The *scientific era*<sup>26</sup> is characterized by the abandonment of the system of legal proof in European codes of civil procedure, remaining the discretion of the evidence by the judge so attenuated in the codes of civil procedure in some countries in Latin America, according to objective criteria established by the rules of logic, experience and science. This period is also characterized, in the civil process, by the orality and the evolution that occurs around the judge's (inquisitive) powers of instruction, especially when it allows him, ex-officio, availability of all the evidence he deems necessary to fulfill the purpose of the act of proving in the judicial process. In criminal proceedings, this stage begins with the restriction of cases subjected to jury, the implementation of orality and recognition of free evidence assessment, understanding it from rationality.

Current processes in contemporary codes are of mixed character (adversarial + inquisitorial) and divorce that have been mentioned above now allows an approximation of the civil and criminal processes, leaving behind the artificial divisions created over the last centuries<sup>27</sup>, which opens the way for a general theory of legal evidence, established by common guiding principles.

In the Sixteenth Century, state officials experienced the "replacement" of the testimonial evidence by the documental evidence, as they have a greater research involvement in the production of them, especially in the criminal field. So, the notion of probability arises, with the firm intention to ensure accuracy, economy

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<sup>25</sup> Jeremías Bentham, *Op. cit.*, p. 45.

<sup>26</sup> Hernando Devis Echandía, *Op. cit.*, p. 24 (2006).

<sup>27</sup> Alessandro Giuliani, *Il concetto di prova contributo alla logica giuridica*. 230-236 (Dott. A. Giuffrè, Editore, Milano, 1961). According to this author, from the resurgence of Roman judicial culture through the canonical law, the concept of evidence evolves and its scene, in the Middle Ages, tends to establish abstract dogmatic conclusions, based on the logic of judgment and ethical concepts, which, although it is not consistent with the reality of the time, results in the theory of presumptions as a type of reasoning or judgment, which, since the Thirteenth Century, is searched with an objective criterion of probability. The validity of the testimony is based on a numerical criterion, and the value granted to the credibility of the witness in the testimonial evidence is exaggerated due to the lack of psychological knowledge about the causes of inaccuracy of his statements.

and agility of research. It is an “official” and abstract logic that is imposed to avoid arbitrariness<sup>28</sup>.

In the Seventeenth Century, with the rise of modern science, empiricism gained strength in England with its top representatives: Francis Bacon, John Locke and David Hume. In his greatest work<sup>29</sup>, Bacon represents one of the first historical efforts to support inductive logic and attempts to show how from the observation and processing of empirical data it can be obtained a necessary and safe knowledge about reality<sup>30</sup>. Locke<sup>31</sup> took Bacon’s ideas and laid the foundation of English empiricism when he said that all knowledge comes from sense experience<sup>32</sup>. In the Nineteenth Century it was produced a transformation in the field of law about the concept of legal evidence with the development of inductive logic of John Stuart Mill, whose rules allowed to establish events that keep a close causal relation between them<sup>33</sup>.

The main exponent in the legal field of the utilitarianism of Mill is Jeremy Bentham who, through his work *Treatise of legal evidence*<sup>34</sup>, revolutionized modern law. It is inductive philosophy and experimental science of Bacon the starting point of Bentham to the introduction of a modern concept of evidence in which legal logic is assimilated to inductive logic to the point of assimilating legal evidence to indirect or circumstantial evidence and where the scientific basis of the evidence is established by switching from a known fact to another fact that is unknown<sup>35</sup>. Bentham assigned to reason the ability to appreciate a degree of probability for each piece of evidence by means of an objective and quantitative measurement method using a balance of probabilities. He attacked exclusion rules of evidence

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<sup>28</sup> Hernando Devis Echandía, *Op. cit.*, p. 60 (2006).

<sup>29</sup> Francis Bacon, *Novum Organum*, (Editorial Losada, Buenos Aires, 1949).

<sup>30</sup> Marina Gascón Abellán, *Los hechos en el derecho. Bases argumentales de la prueba*, 14, (2da. ed., Marcial Pons, Madrid, 2004).

<sup>31</sup> John Locke, *Ensayo sobre el entendimiento humano*. (Fondo de Cultura Económica, México, 1999).

<sup>32</sup> Marina Gascón, *Op. cit.*, p.15.

<sup>33</sup> *Ibid.*, p.18.

<sup>34</sup> The French translation was published in Paris, in 1823, with the title *Traité des preuves judiciaires* (Dumont edition) and the English version was published by Hunt & Clarke four years later in Edinburgh, with the title *Rationale of Judicial Evidence* (J. S. Mill’s edition).

<sup>35</sup> Peter Murphy, *Evidence, Proof and Facts. A Book of Sources*, 25 (Oxford University Press, New York, 2003).

(non-exclusion principle) and the idea that the weight of evidence is likely to be governed by formal rules<sup>36</sup> and insists that any evidence should not be excluded. When given a purely logical character to the evidentiary appraisal, he forgot human nature and the social, psychological and technical aspects of the act of proving<sup>37</sup>.

The influence of Bentham and Mill in Europe is a major advance in the modern concept of evidence, which is based on inductive logic and experience, in which the investigation of facts constitutes a technical operation. Thus, the principle of the enlightened self-belief in the value of the evidence is a logical consequence of empirical science and involves a technical concept of investigating the truth of the facts by the judge, which requires that it must resort not only to logic but to other disciplines of empirical knowledge to take a fact as proven, in light of the evidence into the trial<sup>38</sup>. In this scientific age, the judge's investigation labour is compared to the work of the historian<sup>39</sup>, and evidentiary science is a part of the reconstructive sciences, philosophy and applied logic, as well as of judicial psychology, among other disciplines<sup>40</sup>.

In summary, it can be seen generally that, after the French revolution and as a result of it, it has been implemented in Europe<sup>41</sup>: a) the oral system and the system of free assessment of evidence, in penal proceedings and, in civil proceedings, b) the system of legal proof of evidence system, the written procedure with permanent judges representing the State, the principle of burden of proof on the applicant's head (with some exceptions), the generalization of evidence inquisitorial principle and the free assessment of evidence by the judge.

### **Europe and its influence in Colombia**

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<sup>36</sup> *Ibid.*, p. 386; see also Marina Gascón, *Op. cit.*, p. 31.

<sup>37</sup> Hernando Devis Echandía, *Op. cit.*, p. 61(2006).

<sup>38</sup> Hernando Devis Echandía, *Op.cit.*, p.14 (1985). Under this author's opinion, this shows the need to provide inquisitive faculties to judges from all areas of law, with regard to the evidence which has been given in modern processes through various reforms of procedure codes of several countries in the Twentieth Century.

<sup>39</sup> Francesco Carnelutti, *La prueba civil*, 4 (Edic. Arayú, Buenos Aires, 1955).

<sup>40</sup> Antonio Dellepiane, *Nueva teoría general de la prueba*, 7 (Editorial Temis, Bogotá, 1961).

<sup>41</sup> Hernando Devis Echandía, *Teoría general de la prueba judicial*, I, 66 (5a. ed., Editorial Temis S.A., Bogotá, 2006).



The first doctrinal works on evidence into the legal proceedings in Colombia are presented in the mid/late Nineteenth Century, with the emergence of the first national codes in some Latin American countries, which were heavily influenced by Exegesis school, as it was the case of Chile with Andrés Bello (1781-1865), Brazil with Freitas (1816-1883) and Argentina with Vélez Sársfield (1800-1875)<sup>42</sup>, integrating what is known as the *Latin American legal formalism*<sup>43</sup>. This procedural law period bloomed in France as a product of their Revolution, under the Rousseauian concept of “*law is the expression of the general will*”, and entered the teaching of *proceeding* as a lecture at universities employing the method of Exegesis for the study of law.

The study of procedural law arose with scientific proceduralism in Germany, in the mid-nineteenth century, and spread to the middle of the next century in Europe. It was introduced as a lecture at universities and characterized by the independence between procedural and substantive law, which gave rise to procedural's autonomy for the explanation of various institutions of that kind, such as action, jurisdiction, pretension and process, among others, which are permanently taken over by the State for their own aims, regardless of the process being adversarial or inquisitorial<sup>44</sup>.

It is important to point that the work of Oscar Von Bülow (*The theory of procedural objections and procedural requirements*), sees the process as a legal relationship of public law, independent from substantial relationship presented between the judge and the parties, making clear that the main purpose of procedural science is the process.<sup>45</sup> For Von Bülow, breach of these assumptions implied that the judge could not take the process knowledge. The theory of the procedural requirements, with some modifications, was applied by the Colombian Supreme Court of Justice in its judgment of July 9 of 1936 with a presentation by

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<sup>42</sup> Andrés Botero, *El positivismo jurídico en la historia: las escuelas del positivismo jurídico en el siglo XIX y primera mitad del siglo XX*, 38, (Universidad de Medellín, Medellín-Colombia, 2012).

<sup>43</sup> Diego López, *La teoría impura del derecho. La transformación de la cultura jurídica latinoamericana*, 129-233, (Universidad de los Andes, Legis y Universidad Nacional de Colombia, Bogotá, 2004).

<sup>44</sup> Oscar V. Bülow, *La teoría de las excepciones procesales y los presupuestos procesales*, 1, (Astrea, Buenos Aires, 1964).

<sup>45</sup> B. Quintero, E. Prieto, *Teoría general del proceso*, 144, (Editorial Temis S.A., Bogotá, 2000).

Judge Juan Francisco Mujica<sup>46</sup>, which allowed subsequently outlining some important conceptual aspects concerning the procedural prerequisites in Colombia.

Giuseppe Chiovenda begins in Italy the scientific school of procedural law, and he was the one who in 1903 exposed at the University of Bologna his doctrine on *The action on the system of rights*. In 1924 the journal *Rivista di Diritto Processuale Civile* is founded, of which Giuseppe Chiovenda, Francesco Carnelutti and Piero Calamandrei were co-founders and directors, and the Italian school major procedural indoctrinators. This publication advocated for the development of civil procedural law in Italy, in the scientific and legislative fields, and it was especially devoted to the scientific study of procedural law<sup>47</sup>, with appropriate institutions, principles and rules to the achievement of a material verdict.

The proceduralists of this historical moment spoke of the evidential issues from an exegetical-normative perspective that excludes any systematic analysis of the rule, which ends up being a simple form-content requirement<sup>48</sup> and therefore it can be said that the legal decision making that is achieved in a fair process, based on assessment procedural criteria, must be taken *prima facie* as just and acceptable to a greater extent<sup>49</sup>. Regardless of the type of process, the judge must assess the legal fact, which is an essential concept of both general process theory and the general theory of law, therefore, in this one's absence, the judge requires other facts called *evidence* that let him know it<sup>50</sup>. At this time, it was still the dominant idea that the evidence for the prosecution and judicial decision making was of syllogistic character, where the major premise represents the rule, the minor premise represents the fact and the conclusion represents the decision, being it an excessive simplification, characteristic of deductive certainty, which shows the lack

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<sup>46</sup> Juan F. Mujica, *Sentencia de julio 9 de 1936*, I (Gaceta Judicial, Corte Suprema de Justicia, Bogotá, 1936)

<sup>47</sup> B. Quintero, E. Prieto, *Teoría general del proceso*, 145, (Editorial Temis S.A., Bogotá, 2000).

<sup>48</sup> Michele Taruffo, *La motivación de la sentencia civil*, 9 (Editorial Trotta, Madrid, 2011).

<sup>49</sup> Michele Taruffo, *Simplemente la verdad. El juez y la construcción de los hechos*, 119 (Marcial Pons, Madrid, 2010).

<sup>50</sup> Francesco Carnelutti, *Instituciones del proceso civil*, I, 257 (Ediciones Jurídicas Europa-América, Buenos Aires, 1959).

of familiarity of proceduralists from this period with the philosophy and the general theory of law.<sup>51</sup>

The Iberoamerican proceduralism found important indoctrinators, conducting the study and the Castilian translation of the major works of the proceduralists in the German and Italian schools. Because of the immense conflict that occurred in Italy and Germany, and other parts of Europe (World War II and Spanish Civil War), it was presented a strong migration of European indoctrinators to America, who settled in countries such as Brazil (Enricco Tulio Liebman), Argentina (Santiago Sentis Melendo), Mexico (Niceto Alcalá Zamora) and Uruguay (Robert Goldschmidt). The Spanish Santiago Melendo Sentis did a great dissemination job with the translation of the doctrines of the leading European scientific proceduralists. Jaime Guasp, one of the initiators of the Spanish Procedural School, made the Castilian translation of important works of German proceduralists.

In Colombia, Hernando Devis Echandía handles transplantation and dissemination of the various doctrines of proceduralists from Europe and he is, without a doubt, the mainstay of the Colombian and Latin American procedural law<sup>52</sup>, given the magnitude of their contributions to design a course of "general process theory" as a lecture in the Colombian faculties of law, which allowed the dissemination of procedural science among the legal professionals. Similarly stands out as essential their input and insight into the various reforms that led to the enactment of the Colombian Code of Civil Procedure, in 1970. This great influx of legal doctrine is expanded by most of indoctrinators of Latin America, to the point that the controversy surrounding them has no historical reference. In turn, these scientific works were used in the design of public processes and policies for the administration of justice and in the study of the existing codes in Latin America.

Historically, it was not until 1810 that each of the states that make up the Colombian federal government began to issue its own legislation, which subsequently, due to centralization, led to the adoption of the *Code of Cundinamarca* in 1887, the source text distinctly Spanish that was governed by a

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<sup>51</sup> Michele Taruffo, *La motivación de la sentencia civil*, 10 (Editorial Trotta, Madrid, 2011).

<sup>52</sup> *Id at.* 146.

common process and by the liberal principles of the written dispositive system and under the rating system of the legal fee. After numerous and inconsequential reforms of the Code of Procedure, in 1969 a drafting committee from which was part Hernando Echandía Devis, who presented the regulatory criteria of the new code, which were accepted unanimously by the commission.<sup>53</sup>

The reform was crucial because the challenge to the 1970 Code's coders was to materialize a quick and effective justice. And that purpose could be achieved giving the judge inquiring faculties by which he could enact evidence ex-officio<sup>54</sup>, evaluate evidence according to the rules of logic, experience and science, moralize the process and balance the activity of the parties of the litigation.

In the 80s, little was visible through the proposed Code of Civil Procedure to improve the judicial system in Colombia, given its written character and with little intervention of the judge, which resulted in slow progress and congestion in procedural system. In 1991, Colombia adopted a new Constitution in which it is stated that it is a social and democratic state of law, which is concerned with public order and social welfare, and constitutes itself in an antecedent of orality and promptness in the judicial processes, which determines different dynamics and major changes in terms of procedural reforms, resulting in reshaping of their institutions from a set of principles called *effective legal tutelage*<sup>55</sup>.

In light of this new Constitution, executive power in Colombia, through an advisory committee, restructured the judiciary authority and amended some of the formalities of the Code of Civil Procedure. From this reform was born, among other important provisions, the holding of a preliminary hearing for some processes before the presentation of evidence, hearing that allowed the judge to propose an alternative way to solve the dispute between the parties while using tools as orality, immediacy and concentration to interrogate the parties, establish the facts disputed by them and clean up errors in the process to avoid delays. Currently, a new reform is presented to improve the functioning of the administration of justice in

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<sup>53</sup> Jaime A. Camacho, *Manual de derecho procesal*, II, 2 (Editorial Temis S.A., Bogotá, 2000).

<sup>54</sup> Which is similar in the United States of North America to the *Rule 614 (a) Calling*. The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.

<sup>55</sup> Diana M. Ramírez. *Temas procesales. Edición especial sobre el Código General del Proceso. Ley 1564 de 2012*, 12 (Librería Jurídica Sánchez R. Ltda., Medellín, 2012)

Colombia implementing the *General Code of Procedure* (Law 1564 of 2012) to unite in one body the procedural regime, which had been gradually developed since 2004. This new amendment is to eliminate the written process and, implementing the oral process, to adopt a new legal culture in Colombia<sup>56</sup>.

These are so, roughly, some of the different time orientations on the subject of evidence that can be initially traced from a part of the legal community, in a particular historical moment and on which it can build several of the evidentiary foundations on the field in Latin America. In this trace there can be found some conceptions of evidence, of their evidentiary institutions, of their aims as well as the necessary conditions in which they have made major changes.

Proceduralists and philosophers are tasked to review these concepts in order to tune up a speech of evidentiary law and of evidence in itself, according to the current requirements, that allows them to turn the pages of this field's history and watch with satisfaction how evidentiary reforms' history usefully repeats itself in what has been considered by our doctrine and by the ones of other countries as a *science of evidence*<sup>57</sup>.

### **The conceptual challenge: Evidence and judicial decision as a starting point for a procedural reform**

At judicial process, the judge is thrust into a world of facts, evidence and procedures, but rarely has sufficient judging elements to allow him to make a decision. Discussing the above statement is, actually, trying to find a practical solution to the issue of decision making in the judicial process<sup>58</sup>; something that

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<sup>56</sup> Liliana D. Pabón G. *Temas procesales. Edición especial sobre el Código General del Proceso. Ley 1564 de 2012*, 20 (Librería Jurídica Sánchez R. Ltda., Medellín, 2012). For this author, this unification would be in line with that has been called in procedural matters *Unitary School of Procedural Law*, trying to: 1) overcome the paradigm of proceduralism, 2) overcome the clashes between the various areas of legal science and 3) show that due process is one and as such should be integrated into a philosophical and epistemological framework that aims for the proper administration of justice.

<sup>57</sup> David A. Schum, *A Science of evidence: contributions from law and probability*. 8, 197-231 (Law, Probability and Risk 2009).

<sup>58</sup> Ronald J. Allen, *Structuring Jury Decision making in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94, 2, 321-322 (Harvard Law Review, 1980)

Wigmore apparently would agree<sup>59</sup> when he says the following quote given on the frontispiece of his book *Science of Judicial Proof* (1937, 3d ed.). This quote comes from the book *The Big Bow Mystery*, by Israel Zangwill:

*"Have you ever given any attention to the Science of Evidence?" said Mr. Grodman. "How do you mean?" asked The Home Secretary, rather puzzled, but with a melancholy smile. "I should hardly speak of it as a Science; I look at it as a question of common sense".*

*"Pardon me sir. It is the most difficult of all the sciences. It is indeed rather the science of the Sciences. What is the whole of inductive logic, as lay down (say) by Bacon and Mill, but an attempt to appraise the value of evidence, the said evidence being the trails by the Creator, so to speak? The Creator has (I say it in all reverence) drawn a myriad of red herrings across the track. But the true scientist refuses to be baffled by superficial appearances in detecting the secrets of Nature"*

A logical starting point would be to define precisely what are the facts, evidence and rules or procedures established therein. But before doing so, it should be noted that the facts, evidence and rules or procedures are *data*, it is to say they are the inputs to the judicial process for it can begin operating. Therefore, the rule that establishes a legal consequence for whoever performs a particular behaviour is a *datum*; the facts stated by the plaintiff in the lawsuit are *data*; the evidence offered or requested by the defendant is a *datum*; the procedure outlined for the notification of the lawsuit is a *datum*.

If so, what could be the judicial decision? The judicial decision is the product or result that the process throws and it depends on how the judge processes the respective *data*. The judicial decision corresponds to the statement of the fact that the judge declares as proven<sup>60</sup>. If so, the portion of the data that affect the judge's decision can be regarded as *information*. This means that if the judge is *prima facie* in the universe of data, he must take into account the portion of them (information) that can impact<sup>61</sup> the *judicial decision*.

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<sup>59</sup> Israel Zangwill, *The Big Bow Mystery*, (Rand, McNally, Chicago, 1895) (Cited by Wigmore as the frontispiece of *The Principles of Judicial Proof*).

<sup>60</sup> Michele Taruffo, *La prueba*, 131 (Marcial Pons, Madrid, 2008). To Taruffo, "once you have practiced all relevant and admissible tests, it's time to make that decision. The judge must assume that the evidence is the starting point of an argument that should *lead to a conclusion that resolves the uncertainty about the facts of the case and establishes what facts has been proven to be true.*"

<sup>61</sup> See Rule 401. *Test for Relevant Evidence*. Evidence is relevant if: **(a)** It has any tendency to make a fact more or less probable than it would be without the evidence; and **(b)** The fact is of consequence in determining the action.

Now, one datum, that is a fact, evidence or a rule or procedure, could be information at any given time. The term set for the response to the petition is a datum, but for anyone who needs to answer to that, it is definitely information and must make a decision. This distinction between facts, evidence, and procedures makes sense if there is a *decision* to be made that can be considered *information*.

Two questions can be asked by the judge: Guilty? Innocent? Then, there will be enough to enter necessary data and define the various procedures; and not just the judge's ones, also the parties' and experts' ones. This means again to be immersed in the universe of *data* and expect a judge decision-making will surely be challenged by any party and finally decided by a higher judge, totally oblivious to the initial process and immersed in a larger data universe<sup>62</sup>.

Now, it is possible to "tame" <sup>63</sup> the judicial decision? To approach to a plausible answer to this question, we must understand that judicial decision making, that is, what we consider information, is based on evidence of the facts, which is based on the data. The data may be wrong or true and therefore the decision could be right or wrong. The uncertainty associated with the judicial decision making regarding the evidence presented by the parties is a high price to pay for that. Reducing uncertainty is apparently a good strategy. How to do it? Asking the right questions to get information; that is, making questions to get the necessary *knowledge* to make a decision<sup>64</sup>.

Information is power to make decisions in uncertainty contexts. If the judicial decision is the output product or the outcome of the judicial process, the goal of the judicial process may be no other different than this<sup>65</sup>. And what about uncertainty? Of course, it must be reduced in order to make the right decision. How? Again, asking the right questions to have the required knowledge<sup>66</sup> for decision-making.

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<sup>62</sup> Ronald J. Allen, *Rationality and the Taming of Complexity*, 62, 5, 1048-1049 (Alabama Law Review, 2011)

<sup>63</sup> Ronald J. Allen, *Rationality and the Taming of Complexity*, 62, 5, 1048 (Alabama Law Review, 2011)

<sup>64</sup> Michael S. Pardo and Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27, 3, 224-226 (Law and Philosophy, 2008)

<sup>65</sup> Michele Taruffo, *La prueba*, 20 (Marcial Pons, Madrid, 2008).

<sup>66</sup> Terence Anderson, David Schum, William Twining, *Analysis of Evidence*, 46 (2th Edition, Cambridge University Press, 2005)

From the above it is concluded that the objective of evidence in the judicial process is to provide the judge with the necessary knowledge for making a decision.

And what about regarding to the truth? Independently of the judge's conviction of what the parties believe, it is just one. The relative to truth is in keeping with the knowledge that the judge and the parties have about it<sup>67</sup>.

Once defined 1) the purpose of the judicial process and 2) the purpose of the evidence inside the process, it should be another question: who has the right to determine the purposes of the process and the legal evidence? This means to respond: who is the owner of the judicial process? Who is (are) the owner(s) of evidence into the judicial process? Who is authorized to answer these questions? Is it the State? Are the parties involved in the judicial process? Is it the judge? Are the judge and the parties? Is it jurisprudence? Is it the doctrine? Setting a goal and agree with it has the advantage of harmonizing the dialectic that occurs around a procedural reform. If there are several objectives of the judicial process and evidence within that one, there will be a "salad" of different flavours that some will enjoy and others will not.

For example, the General Code of Procedure in Colombia, which recently reformed the Colombian Civil Procedure Code of 1970, presents a problematic aspect in Colombia and the rest of Latin America in relation to a theme: *the evidence ex-officio*. There are multiple manifestations of the doctrine in favour and against this article. The Colombian Civil Procedure Code of 1970, in its Article 180<sup>68</sup>, says the judge **may** order the evidence ex-officio. In the new reform of 2012, the Colombian General Process Code, in its Article 170<sup>69</sup> says that the judge **must** order the evidence ex-officio and the same article **adds the reasons why the decree of this evidence should be a judge's requirement rather than a power of him**.

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<sup>67</sup> L. J. Cohen, *Introduction to the Philosophy of Induction and Probability*, 13-177 (Oxford University Press, 1989)

<sup>68</sup> Rule 180. *Calling and practice. The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.*

<sup>69</sup> Rule 170. *Calling and practice. The court must call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness, when necessary to clarify the facts in dispute. Each party is entitled to cross-examine the witness.*



A dialectical around this concept must be permeated by several questions.

1) What is the purpose of the evidence in the judicial process? If the purpose of the evidence in the judicial process is to provide knowledge to judge (to decrease the uncertainty associated with the demonstration of the truth of the occurrence of events) to reduce the uncertainty associated with the ruling, then the evidence ex-officio makes sense. 2) What are the necessary conditions for achieving this goal? They are a lot. Therefore, it is plausible to think of various lines of thinking about necessary objectives and conditions to achieve them.

Comments in favour and against procedural reforms pose disconnected aspects either of the targets of the judicial process or of the purpose of the evidence into that issue. These comments often confuse *the necessary conditions* to achieve the objective, with the objective itself. A serious discourse on procedural reforms requires defining clearly the purpose of the judicial process, the objective of the evidence within the process and the conditions for achieving these objectives. Otherwise, the discussion will never be serious. That is the real challenge of procedural reforms.

The economic "efficientism", intended with the current procedural reform that has been implemented in Colombia through the General Code of Procedure, should be consistent with constitutional guarantees. This noble purpose can be understood as a *necessary condition* for achieving the objective of the judicial process and the evidence into that process, which requires a reflection that is built from *the evidence and the judicial decision*, that is, one that allows articulating evidentiary law to procedural law, not intending to be yesterday's powerful solution, but, on the contrary, a solution that enables a proper administration of justice in the present and in the future.