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THE PROPOSED CODE OF CRIMINAL PROCEDURE OF GUATEMALA

Daniel E. Murray*

INTRODUCTION

It is the purpose of this article to make a rather detailed examination of selected portions of the proposed Code of Criminal Procedure of Guatemala.¹

The present Code of Criminal Procedure of Guatemala was adopted in 1898, with relatively few amendments being made during the intervening sixty-five years.² As a result of this relatively ancient origin, the existing code is not in complete harmony with the Constitution of 1956 and the Declaration of Human Rights proclaimed by the General Assembly of the United Nations in 1948.³

In 1961, former President Ydigoras commissioned the renowned Argentine law professor, Doctor Sebastian Soler, and two well-known Guatemalan attorneys, Romero A. DeLeon and Benjamin L. Moran, to prepare a “projected” draft (proyecto) of a code of criminal procedure. This commission submitted its draft, Projected Draft of the Code of Penal Procedure and Exposition of Motives (Proyecto de Código Procesal Penal y Expresión De Motivos), in September 1961, and it was published in December of that year.⁴ It is hoped that this projected code,

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¹ Soler, De León and Morán, Proyecto de Código Procesal Penal y Exposición de Motivos (1961).
² For the existing code of criminal procedure, Código de Procedimientos Penales, see Alvarado, M., Constitución y Códigos de la República de Guatemala 387-486 (2d ed. 1957).
³ Note 1 supra at 9-10.
⁴ Note 1 supra.
which has already received favorable foreign comment\(^5\) will be adopted in the near future.

This article will not attempt to examine all of the proposed code because much of it (e.g., jurisdiction of courts, special proceedings for crimes, "misdemeanors," extradictions, appeals, and execution of judgments, etc.) would have little interest for the Anglo-American reader. Attention will be focused on those facets which parallel (by being similar to or, in many cases, entirely dissimilar with) the stages in the development of an Anglo-American criminal case.

The remainder of this article will follow the following outline:

**BASIC RIGHTS OF THE ACCUSED**

Constitutional Guarantees
Guarantees Granted by Decree
Declaration of Human Rights by the United Nations
Procedural Guarantees

**PRE-TRIAL INVESTIGATION (LA INSTRUCCION)**

The Denunciation
The Private Complaint
Demand of the Prosecutor
The "Judicial Police"
The "Acts of the Instruction"
Judicial Inspection and the Reconstruction of the Fact
Search of a Domicile and Personal Inspections
Sequestration of Physical Evidence
Declaration of the Accused
Declarations of Witnesses

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5. See Alcalá-Zamora y Castillo, *La Reforma Procesal Penal in Guatemala*, XII *REVISTA DE LA FACULTAD DE DERECHO DE MÉXICO* 211-236 (April-June 1962) for a comparative discussion of the first draft (anteproyecto) and the present draft.
Before commencing the detailed presentation of the code, it is advisable to delineate the basic court framework underlying the code. The basic trial court for crimes is the court of “first instance.” The judges of this court are divided into three divisions. The first division is composed of the “judges of instruction” who are charged with the investigation (the “instruction”) of the crime from the time that a complaint is made until the record of the case is “elevated” for trial to the “judges of sentence,” who constitute the second division of the same court. After the trial is completed, the “judge of sentence” will impose the sentence; however, the execution of the sentence will
be under the jurisdiction of the "judges of execution," who constitute the third division of the court.\textsuperscript{6}

It should also be noted that this code articulates three stages of development of a criminal trial. The first stage, the pre-trial investigation (\textit{la instrucción}), is completed when the case is "elevated" to the "judge of sentence." Then the "judge of sentence" opens the proceedings for a period of thirty days for the taking of proof to supplement or contradict proof received in the pre-trial investigation. When this second stage is completed the trial (\textit{vista}) will be conducted before the judge of sentence. This judge will then hear the witnesses, experts, the accused, and the prosecution and defense lawyers, and will decide the case upon the basis of the proof introduced at the final hearing (\textit{vista}) together with the proof previously received at the pre-trial stage (\textit{la instrucción}) and the "thirty-day" intermediate stage. To an observer from the United States there seems to be no clear line of demarcation between the investigation and the trial in the Guatemalan procedure as is found in Anglo-American practice. In effect, the code of procedure seems to be a more or less continuous progression of pre-trial investigation blending into an intermediate stage which in turn blends into the trial.

**BASIC RIGHTS OF THE ACCUSED**

**Constitutional Guarantees (Garantías de la Constitución)**

The Constitution of Guatemala contains three precepts which are in conflict with the present Code of Criminal Procedure, but which have been incorporated into the projected code.\textsuperscript{7} The first precept provides that no one may be condemned without having been cited, heard, and "defeated" (\textit{vencido}) in court, by means of procedures which assure all of the guarantees necessary for his defense.\textsuperscript{8} The second provides that the administration of justice is obligatory, gratis, and independent. Trials will be public except when the morals or the national interest directs that they be conducted secretly.\textsuperscript{9} A "secret trial" in this con-

\textsuperscript{6} See Arts. 4, 116-339, 429-470, SOLER, DE LEÓN AND MORÁN, PROYECTO DE CÓDIGO PROCESAL PENAL Y EXPRESIÓN DE MOTIVOS (1961). All citations hereafter refer to this "Proyecto" (project) unless otherwise indicated.

\textsuperscript{7} Note 1 supra at 9-10.

\textsuperscript{8} Art. 68, Constitution of Guatemala. For the text of the Constitution see ALVARADO, M., CONSTITUCIÓN Y CÓDIGOS DE LA REPÚBLICA DE GUATEMALA 3-49 (2d ed. 1957).

\textsuperscript{9} Art. 187, Constitution of Guatemala. Art. 74 of the proposed code provides
text means that the public will be excluded, but all persons who are involved as parties in the case may attend along with their respective attorneys. As a practical matter, virtually all criminal trials are not conducted in the presence of the public. The practice has developed of conducting criminal trials in private unless one or more of the parties (the prosecutor, defendant, or any third party complainant or persons liable for damages) insist that it be conducted publicly. Usually a prosecutor has no incentive for requesting a public trial, and an accused in the ordinary case will prefer as little publicity as possible unless the case involves political overtones and he desires to be a martyr. It is submitted, with some hesitancy, that this practice will probably continue under the new code when it is adopted.

The last precept provides that anyone detained for a crime will be interrogated within forty-eight hours. At the time of his interrogation the accused will be informed of the reason for his detention, the name of his denouncer or accusor, and everything which is indispensable for him to know about the punishable act which has been attributed to him. From this “step” (diligencia) he may “avail himself” of an attorney who has the right to visit him in any “qualified” hour (hábil, in the sense of “visiting hours” in this context).

The Constitution has further interesting safeguards which are consistent with the proposed code. “Preventive detention” (in the sense of detention prior to indictment) may not exceed five days and within this term the judge must dictate an order remanding the accused to prison or ordering his liberty. The judge that prolongs this term incurs legal responsibility (in the sense of liability). The authority that orders or maintains a person incommunicado and the head of the prison or the employees who order or maintain the person incommunicado will be dismissed from their duties without prejudice to the application of the penalties which are provided by law.

No one may be detained or imprisoned unless for a crime (delito) or wrong (falta), by virtue of a judicial order issued according to law by a competent authority. Nevertheless, a judicial order will not be necessary in the case of flagrante delito or in the event that the person is a criminal fugitive. Those

that “The Acts of the Proceedings shall be public, save when the moral or public interests demand secrecy.”

10. Art. 64, Constitution of Guatemala.
11. Ibid.
detained must be placed immediately at the disposition of the judicial authority and imprisoned in designated centers (centros destinados) for preventive prison, separate from those who are serving sentences for crimes.\textsuperscript{12}

A judge may not dictate an order of imprisonment without having previously (preceda) obtained information of a crime having been committed and without the concurrence of sufficient reasons to believe that the person detained is the delinquent.\textsuperscript{15}

The domicile is practically inviolable. No one may enter the domicile without permission of the owner, except by written order of a competent judge and never before six in the morning nor after six o'clock in the evening. The law (in the sense of the codes as distinguished from the Constitution) shall determine the formalities and the “cases of exception” in which the breaking into of a domicile may proceed. The search (registro) of documents and goods (efecto) must always be performed in the presence of the interested person, or of his agent, or an adult member of his family, and in their absence before two witnesses who are neighbors and who are acknowledged to be honorable.\textsuperscript{14} In a later section of this article, it will be noted that the code does make provision for the “cases of exception” authorizing the breaking into of domiciles in exceptional cases.\textsuperscript{15}

No one may be obliged to “declare” (in the sense of testify) in a criminal cause against himself, against his spouse, or his relatives within the fourth degree of consanguinity or the second degree of affinity.\textsuperscript{16} However, a later section\textsuperscript{17} of this article will show that the “judge of instruction” (the investigating judge) may make a note of the fact that the accused has refused to testify, and, it would appear, that this factor may be considered in determining his guilt or innocence.

The laws will not have a retroactive effect except in penal matters when it is favorable to the criminal,\textsuperscript{18} and actions and omissions which are not “qualified” (in the sense of classified)

\textsuperscript{12} Art. 43.
\textsuperscript{13} Art. 67.
\textsuperscript{14} Art. 56.
\textsuperscript{15} Note 81 infra.
\textsuperscript{16} Art. 60.
\textsuperscript{17} Note 95 infra.
\textsuperscript{18} Art. 61.
as crimes or wrongs by the laws prior to their perpetration are not punishable.\(^{19}\)

Any person who "finds himself" illegally imprisoned, detained, or restrained in any manner in the enjoyment of his liberty, or who suffers "scurrilous criticisms (vejámenes), even when his imprisonment or detention was founded in the law, has the right to request his immediate "exhibition" to the end that his liberty be restored, or for the cessation of the scurrilous criticisms or for a termination of the "compulsion" (coacción) to which he has been subjected. If the tribunal decrees the liberty of the person illegally imprisoned, he shall "remain free in the same act and place" (in the sense that his freedom will be granted immediately). The "exhibition" of the person detained in whose favor there has been presented the recourse of habeas corpus is "unavoidable" (in the sense of non-evadable). The authorities who order and the agents that execute the concealment of the person detained, that refuse to present him to the respective tribunal, or in any other manner evade this guarantee commit the crime of abduction (plagio); and they will be punished in accordance with the Penal Code.\(^{20}\)

**Guarantees Granted by Decree (Garantías Para "Decreto Ley")**

The present military regime has temporarily suspended the Constitution; however, a decree\(^{21}\) of the "Chief of Government" has articulated the following fundamental guarantees for the individual:

"(1) No one may be detained except by virtue of a written order dictated by a competent authority for a crime or wrong or as a measure of security with the exception of a case of delito infraganti. (2) No one may be obliged to testify (declarar—declare) in a criminal cause against himself, against his spouse or relatives within the fourth degree of consanguinity or the second degree of affinity. (3) No one may be condemned without having been cited, heard and convicted in court. (4) There is established [estatuye sic — the draftsmen meant re-established] the re-

\(^{19}\) Art. 62.

\(^{20}\) Art. 81.

course of habeas corpus or of personal exhibition for the purpose of establishing the treatment of those [persons] detained. The judges and tribunals which ‘know’ (conozcon—in the sense of ‘hear the case’) of said recourses shall limit themselves to order the exhibition of the person detained and to decree his liberty if he is being illegally detained. The judges and tribunals may not order the liberty of those who are subject to measures of security in application of the law of defense of democratic institutions [Anti-Communist measures]. (5) The exercise of all rights and the enjoyment of the individual guarantees are held limited by the measures of security dictated by the chief of the government. All individual or associate communist action is punishable."

It is interesting to note that the concept of habeas corpus was re-established by a military regime.

Declaration of Human Rights by the United Nations

The projected code has taken into account two provisions of the Declaration of Human Rights of the United Nations. The first declaration provides that every person has the right, in conditions of full equality, to be heard publicly and with justice by an independent and impartial tribunal for the determination of his rights and obligations or for the examination of any accusation against him in penal matters. And the second provides that any person accused of a crime has the right to be presumed innocent so long as his culpability has not been proved in accordance with the law and in a public trial in which he has been assured all the guarantees necessary for his defense.

Procedural Guarantees (Garanties Procesales)

The code repeats some of the concepts of the Constitution by stating that no one may be condemned without having been cited, heard and "defeated" in a trial conducted in accordance with the precepts of this code. The concept of double jeopardy is clearly articulated. "No one may be submitted to a criminal proceeding more than once for the same act."
The concept of mandatory legal representation for all criminal defendants is well enunciated. An accused has the right to be assisted and defended by a lawyer who is a member of the bar association. If he is not able to appoint an attorney (in the sense that he is without funds), he has the right to have one appointed by the judge.\(^{26}\) The designation of an attorney by the judge does not prejudice the right of the accused subsequently to name another attorney in whom he has confidence (*de su confianza*—literally, of his confidence), but the substitution shall not take effect until the new attorney accepts the duty.\(^{27}\) The defense of several defendants may be entrusted to one attorney unless the defenses are incompatible.\(^{28}\) The defense attorneys and the defendants may agree to designate substitute counsel in cases involving a legitimate impediment. If the defense attorney should be absent for any reason, the substitute attorney assumes his obligations, but he does not have the right to agree to extensions of times for the doing of acts nor for hearings.\(^{29}\)

In no case may the defense attorney abandon the defense, leaving his client without an attorney. If this should happen and the original attorney has not named a substitute or if the accused does not name one within a term fixed by the judge, he will be provided an attorney by the judge. When the latter event occurs a little before the trial or during it, the new attorney may request an extension of three days for the hearing. The trial may not be suspended again for the same cause, even though the tribunal allows the intervention of another defense attorney, and the judge-appointed attorney will remain as such, (*la que dejará subsistente la del defensor de oficio*). The abandonment of the case by the "counseling attorneys" (*abogados directores*) or attorneys of the other parties will not suspend the case.\(^{30}\)

The nonfulfillment of obligations upon the part of the defense attorneys may be corrected through the "pressures" established by the law, without prejudice to the suspensions which may be imposed by the Supreme Court of Justice according to the gravity of the case.\(^{31}\)

\(^{26}\) Art. 66.  
\(^{27}\) Art. 67.  
\(^{28}\) Art. 68.  
\(^{29}\) Art. 69.  
\(^{30}\) Art. 70.  
\(^{31}\) Art. 71.
As the discussion of this code progresses, it will be noted that the judges of instruction and the judges of sentence are repeatedly enjoined to make sure that the accused is provided with counsel for his defense. Some Guatemalan lawyers have opined to the author that this code goes too far in protecting the accused, with the result that it may hinder the proper prosecution of crimes. This complaint would seem to have a familiar ring to the ears of many United States prosecutors.

**PRE-TRIAL INVESTIGATION**

"The Denunciation" (La Denuncia)

Every person who has knowledge of a crime the "repression" of which is under the control of state prosecution ex oficio may denounce it to the judge, the Public Ministry (public prosecutor), or the Judicial Police. When the penal action depends upon the instance of a private person, it may only be "denounced" by the person offended by the crime or by his legal representative. For example, if a wife should commit adultery, this would be considered a private wrong, and the prosecution of both her and the correspondent would depend upon the denunciation by the offended husband.

The denunciation may be made in writing or orally by the denouncer personally or through his attorney (mandatario) acting under special authorization. The written denunciation must be signed or ratified by the denouncer before the public officer (or judge) who receives it. When the denunciation has been made verbally it shall be reduced to writing. In both cases the official receiving the denunciation is obliged to verify and record the identification of the denouncer.

The denunciation must contain, in a clear manner and in as much detail as possible, an account of the act (hecho) with the details of the place (lugar), the time and manner of execution of the act, an indication of its "authors" and other participants, the damaged persons, the names of witnesses, and other elements which may be conducive to its substantiation and legal "qualification" (calificación — qualification is used to mean

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33. See art. 326, *Código Penal*.
34. Art. 117.
35. Art. 118.
the classification of the facts and the law to determine the kind of crime involved).

The following persons are obliged to denounce:36

1. Officials and public office holders who acquired knowledge of an ex-officio prosecutable crime in the exercise of their duties.

2. Doctors, midwives, pharmacists, and other persons who know of facts communicated to them in their professional capacity, except for those facts which are "under the protection" (bajo el amparo) of a professional secret; and

3. The guardian (tutor) of (or the person who has under his care) a minor or incapacitated person against whom a crime was committed.

No one may denounce his spouse or his ascendants, descend- ants, or brothers and sisters except for a crime which was committed against himself or against a person whose relationship to the denouncer is equal to or closer than the relationship of the denouncer with the person denounced.37

The denouncer is not a party to the proceedings nor does he acquire any responsibility except in the case when the denun- ciation is slanderous.38 The denunciation will be rejected when the facts upon which it is founded do not constitute a crime.39 The Public Ministry which receives a denunciation is required to formulate it to the judge if the facts constitute a crime calling for a public pros- ecution.40 When the denunciation is made before the Judicial Police, they are immediately to inform the judge and the Public Ministry who shall then "perform" (practicará) urgent investigative steps (diligencias) without delay.41

The Private Complaint (La Querelia)

The querella (complaint) is designed to interject the claims of a victim for damages (or restitution of goods) into the criminal proceedings as well as to aid the state in the prosecu-

36. Art. 119.
37. Art. 120.
38. Art. 121.
40. Art. 123.
41. Art. 124.
tion of the wrongdoer. Any person offended by a crime has the right to present his querella and to exercise jointly his civil action. The representative of an incapacitated person who has been a victim of a crime has a similar right. The querella shall be extended against all who have participated in a crime.

When there are several complainants (querellantes) and they are protecting the same interest they must act under one representation (representación.) If the complainants cannot agree to designate a common representative within a time designated by the judge, he will designate one by court order.

The querella must contain:

1. The complete name, generales (age, marital status, occupation etc.), domicile and residence of the complainant;
2. The name, generales, domicile, and residence of the accused, or if the complainant is ignorant of this data, a description which will serve to identify the accused;
3. A detailed account of the act including the place, date, and hour in which it occurred;
4. An expression of the “steps” (diligencias) which are deemed conducive for the substantiation of the facts; if the complainant proposes the obtaining of the statements (declaraciones — declarations) of witnesses he must indicate their residences;
5. The petitions which are pertinent to the penal and the civil action; and
6. The signature of the complainant or of another person if the complainant is illiterate or if he does not sign the complaint.

The complaint may be initiated in writing or orally by the complainant or his attorney (mandatario) under special authorization. However, the private actions (for example, sex crimes, slander, etc.) must always be in writing. A written complaint must be signed or ratified by the complainant before

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42. See arts. 21-28, 31-35.
43. Art. 29.
44. Art. 125.
45. Art. 127.
46. Art. 128.
47. Art. 129.
the judge, while a verbal complaint will be drawn up before the judge and similarly signed by the complainant. In both cases, the official must substantiate and make a record of the identification of the complainant.\textsuperscript{48} As with the denunciation, the querella may be rejected when the facts alleged do not constitute a crime.\textsuperscript{49}

\textit{Demand of the Prosecutor (Requerimiento Del Ministerio Publico)}

The Public Ministry shall demand (requerirá) the instruction (instrucción — in the sense of the investigation process) whenever he has knowledge of a crime of "public action."\textsuperscript{50}

The petition (requerimiento) shall contain:\textsuperscript{51}

1. The identification of the accused, or, if this is not possible, the "signs" (señas) and data by means of which the identification may be made;

2. A detailed account of the facts, indicating the place, time, and manner of execution, if it be possible; and

3. An indication of the investigative steps (diligencias) which, in his judgment, are conducive to the substantiation of the facts.

\textit{The Judicial Police (La Policía Judicial)}

The judicial police on their own initiative, or because of the making of a denunciation or by order of the competent judicial authorities, shall proceed to investigate public crimes. They shall "individualize" (individualizar) those persons culpable, and gather the proofs and all the necessary "information" (antecedentes). But if the public crime in question depends upon the "private instance" of a person, they shall proceed only upon denunciation by the person admitted by this code to do so.\textsuperscript{52}

The judicial police will fulfill their functions under the direction and "vigilance" of the Public Ministry; they are required

\textsuperscript{48} Art. 130.
\textsuperscript{49} Art. 131.
\textsuperscript{50} Art. 132.
\textsuperscript{51} Art. 133.
\textsuperscript{52} Art. 134.
to execute his orders and likewise the orders of the judges and tribunals. The judicial police have the following functions:

1. To receive denunciations;

2. To investigate the public action crimes and those which depend upon private instance when this has been made;

3. To take care of everything which is related to the crime and its details and to conserve the things in an unmodified state until the judge or Public Ministry arrives at the place. Nevertheless, when the police are dealing with wounded persons they are required to take the means necessary for their cure by moving them immediately to where they may be given aid. If there be any danger that any delay should jeopardize the success of the "inspection," the police shall then perform the indispensable steps (diligencias) without waiting for the presence of the judge or the Public Ministry;

4. To perform the non-postponable sequestration of the instruments of the crime and any object which may serve for the investigation;

5. To proceed to the detention of the culpable person in cases of flagrante delito and those other cases authorized by this code;

6. To draft plans, take photographs of the place and perform the operations "suggested to them" (aconsejadas) by the techniques of police science;

7. To proceed, in urgent cases, to interrogate the person detained and the witnesses, performing to this end proper examinations, inspections, and confrontations; and

8. Ordering, if it is necessary, the closing of the place where the crime was consummated, or ordering that no person depart from the place or adjacent places before the conclusion of the first step (diligencias).

The police may not open correspondence which they have sequestered, but they must remit it to the judicial authority; however, the judicial authority may authorize the opening of the correspondence in urgent cases if he believes that it is fitting
to do so. The police shall prepare reports (actas) in which they will record all of the steps which were performed specifying with the greatest exactitude possible, the facts, the inspections, declarations, acts performed by experts, and all other useful details. These reports will be signed, after being read, by the acting official and by the other persons who were present.

Members of the police who violate any legal or regulatory provisions by omitting or retarding the execution of a proper act within their duties, or by negligently discharging their duties, will be reprimanded by the judges and tribunals (on their own motion or at the request of the Public Ministry) with a reprimand, or a fine, or imprisonment for no longer than fifteen days without prejudice to suspensions and dismissals (censantias) which may be ordered by the competent authorities.

The Acts of Instruction (Actos de Instrucción)

The judge who has knowledge of the commission of a crime (whether by denunciation, complaint (querella) or by communication of the Public Ministry) shall immediately execute all of the acts and steps (diligencias) necessary for the elucidation of the truth of the act, its perpetrators and participants, and the damage caused by the crime. The "instruction" (in the sense of investigatory proceedings and the records of these proceedings) shall be directed to prove the facts which (according to the Penal Code) must be taken into account in order to appraise the nature of the crime, the circumstances which "qualify" or excuse it, or which aggravate or attenuate the penal responsibility of the accused.

Before ordering the "measures of instruction," the judge may hear from the interested persons who contradict each other (in their statements) if he believes that it will be useful to their understanding (avenimiento — agreement) or to the discovery of the truth.

The Public Ministry may participate in all of the acts of the instruction, request the performance of steps, and formulate the

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55. Art. 137.
57. Art. 139. The word "imprisonment" has been interpolated by the author because it seems called for by the sense of the wording; the text is incomplete.
58. Art. 140.
59. Art. 141.
"observations and reservations" which he believes fitting. If the Public Ministry has manifested his desire to assist one act of the instruction, he will be advised opportunely under a citation (bajo constancia), but the step will not be suspended nor retarded by his absence. The judge shall perform the steps proposed if he considers them pertinent or useful; if not, the judge will deny any requested step and his resolution may not be appealed.60

At the first opportunity, and in any case before starting the accused's unsworn testimony (la indagatoria), the judge shall instruct the accused about his right to designate counsel (defensor) from among the members of the bar association (abogados colegiados). The judge shall name a public defense attorney if the accused requests it.61

The accused, the civil actor (civil plaintiff), and third persons responsible for the civil damages may propose investigative steps and the judge shall approve all of them which are not manifestly impertinent. The rejection of any proposed step will not give right to any recourse, but the request shall remain "of record" (constancia for consideration by the trial court at the trial).62 The judge may permit, in a manner compatible with the good progress of the investigation, that the counsel or attorneys (mandatarios) of the parties be present at the acts of instruction. But these persons may not make any signs of approbation or disapprobation and in no case may they "take the floor" (tomarán la palabra) without express authorization by the judge.63

The actions taken (in the sense of written records) in the instruction may be examined by the parties after the accused has given his unsworn testimony (indagatoria), but at any stage of the instruction the judge may order total or partial secrecy provided that there exists sufficient cause which he must make a matter of record. The duration of this period of secrecy may not be longer than ten days, and it may be decreed only once during the course of the instruction. The instruction must be kept secret from strangers to the proceedings.64

Despite the sweeping terms of the foregoing, "in no case

60. Art. 142.
61. Art. 143.
62. Art. 144.
63. Art. 145.
64. Art. 146.
may the judge decree the secrecy of expert examinations (pericias), examinations, inspections, searches of homes and reconstructions (of the crime or parts of it) which by their nature and characteristics are to be considered definitive and unreproducible” (in the sense that they cannot be repeated again). Before proceeding to perform any of the acts previously referred to, the judge must order (under a penalty of nullity) that the accused’s counsel and the Public Ministry be notified, and the step may then be performed with or without their presence. This notification is not necessary for the search of domiciles and sequestration (of physical evidence), but the parties will have the right to attend (with or without their attorneys) at the performance of this act. Only when there exists the greatest urgency may the judge proceed without notifying the parties or before the fixed time, by making the reasons a matter of record under the penalty of nullity.

The period of instruction must be completed within a term of thirty days from the date of the order indicting the accused (auto de procesamiento). The first steps of the instruction may be performed by the judges of the peace who shall give an account of their actions to the proper judge instructor within a term which must not exceed five days. In urgent cases these steps may also be performed by any judge, of any grade or jurisdiction (fuero).

The first steps of the instruction are considered as those which may not be deferred and which are designed for the substantiation of the criminal act and the discovery of those who have participated in it. At the end of the thirty-day period, or before if there are no pending steps, the judge instructor shall give an account of what has been performed (con lo actuado) to the respective judge of sentence (juez de sentencia).

The Judicial Inspection and the Reconstruction of the Act (de la Inspección Judicial y de la Reconstrucción Del Hecho)

The judge shall verify, by means of an inspection of persons,
places, and things, the traces (clues) and other material effects which the crime has left, describing them in detail and gathering and conserving the probative elements for the trial, if it be possible. If the act has not left traces, or has not produced material effects, or if they have disappeared or have been altered, the judge shall describe the existing state of these objects and, when possible, shall verify their pre-existent state. The judge shall make a record of the manner, time, and cause of the disappearance or alteration of these objects.\textsuperscript{71}

The judge, when he considers it necessary, may proceed to a physical examination of the accused, provided that the examination must not be a matter for experts and that the judge respects the modesty of the accused when he makes the examination. The judge may also make physical examinations of other persons in cases of grave and founded suspicion or of absolute necessity with the same requisite. No one has a right to assist in the inspection except a person who has the confidence of the person being examined.\textsuperscript{72}

The judge, in order to accomplish the inspection, may order that those persons who were found at the site of the crime or who were encountered in any other place contiguous to the scene of the crime to remain during the judicial examination or he may call in others who are elsewhere.\textsuperscript{73} If the instruction is being performed because of a violent death or a death suspected of criminal nature and the deceased is unknown, the judge shall examine witnesses and obtain all data in order to identify the dead person by scientific means before ordering the exhuming of the body. If the identification cannot be obtained by these means, the body will be exposed for a public examination in order that those who have information about the identity of the cadaver may communicate it to the judge.\textsuperscript{74}

The judge may order the reconstruction (in the sense of re-enactment) of an act in order to prove if the act was produced or may have been produced in a determined manner. The accused may not be obliged to take part in this re-enactment, but he may request permission to do so.\textsuperscript{75} The judge may also order the performance of all useful, technical, and scientific opera-

\textsuperscript{71} Art. 153.
\textsuperscript{72} Art. 154.
\textsuperscript{73} Art. 155.
\textsuperscript{74} Art. 156.
\textsuperscript{75} Art. 157.
tions in order to conduct the inspection and reconstruction in the most efficient manner. The experts and witnesses who intervene in the acts of inspection or reconstruction must take an oath under the penalty of nullity.

Search of a Domicile and the Personal Inspections (Del Registro Domiciliario y de la Requisa Personal)

If there are sufficient reasons to presume that in a definite place there are things pertinent to the crime, or there may be effectuated the arrest of an accused, or of a person suspected of criminality, or of a person who has escaped from prison, the judge shall order the search of this place in a resolution which states the reasons for the search (resolución fundada). The judge may direct the police forces (la fuerza pública) and proceed personally to the search, or he may delegate the step to an official of the judicial police, in which case the order shall contain the name of the official charged with this duty, and the place, date, and hour in which it ought to be made. The police official will then make the search before two witnesses.

When the search must be made in an inhabited place or in its closed "outbuildings" (dependencias), the search may only be accomplished between six a.m. and six p.m. unless the "head of the house" permits a search at other hours. The foregoing hours are not in effect for public offices, establishments for meetings or recreation, and any other closed place which is not designated as a habitation or personal residence. In these cases, notice must be given to the person in charge of the place unless it will be prejudicial (in the sense of harmful) to the investigation. To order the entry and search of the Legislative Palace and the closed buildings of the University of San Carlos, the judge needs the authorization of the President of the Congress, the rector or the deans in the respective cases.

Notwithstanding what has been provided in the foregoing articles, the judicial police may proceed to search without a judicial order in the following cases:

76. Art. 158.
77. Art. 159.
78. Art. 160.
80. Art. 162.
81. Art. 163.
1. When it has been denounced that unknown persons have been seen while gaining access into a house with manifest intent to commit a crime; and

2. When voices have been heard within a house which indicate that a crime is being committed or that somebody is asking for help.

The person who is living in or has possession of the house, or in his absence, the person in charge of the house, will be notified of the search order. If there is no one in charge, the notification will be given to any other person of apparent legal age who is found in the place, preference being given to the members of the family of the interested party. The person notified shall be invited to be present at the search by a verbal communication. If no one is found in the house, a record shall be made of this in the "act" (in the sense of the record) which shall be subscribed to by the witnesses. The record shall also contain an account of "circumstances of interest" for the proceedings. The record will be signed by all of those present, and if any should fail to do so the reasons will be recorded.\(^82\)

Any competent administrative or municipal authority who in order to fulfill his functions or because of hygienic reasons, morality, or public order needs to make a search of a domicile, may request a competent judge to order the search. In order to resolve this request, the judge may require all information which he considers to be pertinent.\(^83\)

If there are sufficient reasons to presume that anyone has hidden on his body things which have a relationship with a crime, the judge (in a "founded" resolution) shall order an inspection of the person. Before proceeding to make the physical inspection, the judge must request the person to exhibit the thing which is presumed hidden. The inspection of the body of a woman will be made by another woman when it will not prejudicially delay the investigation. The inspection of persons will be made separately, respecting, as much as possible, the modesty of the persons examined. A record of this examination will be drawn up and signed by the person inspected, and, if he refuses to sign, the record will indicate this fact.\(^84\)

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82. Art. 164.
83. Art. 165.
84. Art. 166.
Sequestration of Physical Evidence (Del Secuestro)

The judge may order that the things having a relationship with the crime or which may serve as means of proof will be conserved or gathered, and he will order their sequestration when it is necessary. In urgent cases this "measure" may be delegated to an official of the judicial police in the same manner prescribed for the delegation of the power to search (as mentioned in the preceding chapter). 85

Instead of ordering the sequestration, the judge may order (when it be fitting) the presentation of the objects and documents involved, but this order may not be directed to those persons who may abstain from declaring as witnesses because of relationship, professional secrecy, or state secrecy. 86 The things or effects which are sequestered will be inventoried and arranged under secure custody at the disposition of the tribunal. In a necessary case the judge may order their deposit by requiring a bond from the depositary. The judge may also order the obtaining of copies or reproductions of the sequestered things when it is useful for the instruction. The things sequestered will be affixed with the seal of the tribunal and with the signature of the judge and secretary who will sign each leaf (page) of any documents involved. If it is necessary to remove the seals, this shall be done after a verification of the identity and integrity of the same. After the act is completed, the seals will be re-affixed and a record shall be made of this fact. 87

Whenever he considers it useful for the substantiation of the crime, the judge may order the interception and sequestration of postal and telegraphic correspondence and any other kind of communication in which the accused intervenes (even under an assumed name) as the recipient or remitter. The judge will then proceed to open this correspondence and record its contents. After examining the objects and reading the documents, he shall order their sequestration if they have a relationship with the proceedings; if they do not he shall order their delivery to the addressee or to his representatives and nearest relatives for which they shall sign receipts. 88 The judge may also order the interception of telephonic communication which manifestly relate to the act under investigation in order to prevent them,

85. Art. 167.
86. Art. 168.
87. Art. 169.
88. Art. 170.
hear them, or "record" (grabar) them by means of a recording device. However, no one may sequester letters or documents of a professional nature which are sent or delivered to counsel for the accused or monitor the telephonic communications between the accused and his counsel.

The sequestered things which are not the objects of restitution or attachment proceedings are to be returned (as soon as their retention is no longer necessary) to their owners, possessors, or the persons in whose possession they were found.

Declaration (Statements) of the Accused (de la Declaración Del Imputado)

When there is sufficient reason to suspect that a person has participated in the commission of a punishable act, the judge shall proceed to interrogate him in the presence of his counsel if this is requested by the counsel or the accused. If the accused is being detained, he will be interrogated "at the latest within forty-eight hours computed from the moment of the detention." If there appears to be more than one person implicated (complicada — literally complicated) in the same crime, their declarations will be taken separately from one another.

Before proceeding to interrogate the accused about the criminal act, the judge shall "formulate an interrogatory of identification" inviting the accused to declare his name, surname, nickname (if he has one), age, civil state (estado civil), profession or occupation, nationality, place of birth, actual domicile, and principal places of former residence; name, state, profession, or occupation of his parents; if he has been indicted before and, if so, for what crime, before what tribunal, what sentence was received, and if it was complied with. At the conclusion of this "interrogatory of identification," the judge will inform the accused of the act which has been attributed to him, that he has the right to refrain from declaring, and that he may appoint an attorney (defensor) to be present at this proceeding. The interrogation may be suspended in order for the accused to appoint an attorney. If the accused refuses to declare, this

80. Art. 171.
81. Art. 172.
82. Art. 173.
84. Art. 175.
85. Art. 176.
fact will be recorded in a report (acta) signed by him. If he refuses to sign, the report will also state this circumstance.95

If the accused is willing to declare, the judge shall minutely state the act which has been attributed against him, as well as the proof and indications against him, and, provided that it may not result in harm to the instruction, the origin or sources of this proof. The interrogation will be continued by inviting the accused to state as much as he has which is useful in his exoneration and to indicate the proof which he has in his favor.96

In no case shall the declarations of an accused be required under oath, promise, or warning, nor shall there be employed any compulsion or deceit.97 The judge shall direct to the accused such questions which he believes fitting. The questions may not be formulated in any case in an ambiguous, insidious, or suggestive manner, "nor may the answers be pressed peremptorily." The accused may dictate his answers, in any event his own words ought to be recorded. If signs of fatigue or "lack of serenity" of the accused are noted during the course of the interrogation, the interrogation will be suspended until these "signs" have disappeared.98

The accused and his attorney may read the report (acta) when the interrogation has been concluded. If this reading is not made, the secretary shall read it "in a loud voice" (en alta voz) and shall make mention of this under penalty of nullity. After this reading the accused may make clarifications or corrections which he desires without altering the writing, and finally the report will be signed by all those present. If any person present cannot sign or does not wish to sign, this fact will be noted, and the report will be considered valid without this signature.99

The accused may declare as many times as he wishes and the declarations will be received, provided that they have a relationship with the cause and they are not mere dilatory or perturbatory proceedings.100 The judge must investigate all of the facts and circumstances to which the accused has referred as long as they are useful and pertinent.101

95. Art. 177.
96. Art. 178.
97. Art. 179.
98. Arts. 180 and 73.
100. Art. 182.
**Declarations of Witnesses (Declaraciones Del Testigos)**

The judge shall interrogate every person informed of the facts under investigation whose declaration he considers useful for the discovery of the truth. Save for the exceptions provided by law, no one may refuse to declare as a witness. 102

Any person is competent to give testimony without prejudice to the power of the judge to appraise its probative value. 103 However, persons who have not “passed eighteen years of age” and those who are found “in the moment of the act” (the act of testifying) in a state of insanity or of unconsciousness may not be “witnesses of actuation” (testigos de actuación). 104 The foregoing two articles, although seemingly contradictory, may be reconciled by stating that the testimony of witnesses over the age of eighteen will be considered as “full proof,” while the testimony of persons less than eighteen will serve to create a “presumption” (in the sense of an indication or inference which is less weighty than “full proof”). 105 It is interesting to note that the proposed Civil Code of Procedure provides that only persons at least sixteen years old may be witnesses. 106 The reasons for this disparity between the two codes is not clearly apparent to the author. 107

The proposed code provides for the absolute exclusion of some witnesses and a privilege to refrain from testifying for others. The spouse or “concubine” of the accused and his ascendants, descendants, or brothers and sisters are forbidden to testify against him, except when the crime was committed against them or against a person whose relationship with them was equal to or closer than their relationship with the accused. 108 The collateral relatives of the accused until the fourth grade of consanguinity and the second grade by affinity and his guardians (tutores) and wards (pupilos) may abstain from declaring

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102. Art. 184.
103. Art. 185.
104. Art. 79.
105. This interpretation seems to be indicated by art. 576 of the Codigo De Procedimientos Penales, the existing code.
107. The author realizes that it is necessary for minors of any age to testify in criminal cases, particularly when they have been the victims of a crime. However, it would seem that the ends of justice might also necessitate the testimony of a minor below the age of sixteen in a civil case.
108. Art. 186.
as witnesses provided that they are not the denouncers (denunciates) or complaining parties (querellantes). 109

The judge under a penalty of nullity (and leaving a record of this (dejando constancia de ello) must inform the foregoing persons of this power (facultad) to abstain from testifying which may be asserted even after the beginning of the declaration. 110 The following persons must abstain from declaring about secret facts which have been brought to their knowledge by reason of their “peculiar” state (propio estado), occupation, or profession under the penalty of nullity:

1. Ministers of any religion (culto);
2. Attorneys, notaries, and “solicitors” (procuradores);
3. Medical doctors, pharmacists, midwives, and other [like] assistants; and
4. Members of the military forces and public officials about state secrets.

The persons mentioned in numbers 2, 3 and 4 above may not refuse to give their testimony when they are freed from the duty of keeping these secrets. The judge shall proceed to interrogate a witness if he erroneously invokes an obligation of secrecy about an act which may not be included in the foregoing. 111

In order to examine witnesses, the judge shall issue a citation which shall contain the following items:

1. The personal data of the witness;
2. The authority before whom the witness must appear and the place, day, and hour of the presentation;
3. The object of the “step” (diligencia); and
4. The indication of the sanction he will incur if he does not appear.

In urgent cases the witness may be cited verbally. The witness may also appear spontaneously and a record will be made of this fact. 112 When there is a considerable distance between the

110. Art. 188.
111. Art. 189.
112. Art. 190.
place where the judge is located (encuentre—literally, encountered) and the residence of the witness, and the importance of the cause does not make the presence of the witness necessary, the performance of this step may be delegated to the judicial authority of the place of the witness' residence. 113

If the witness without any justification does not appear in response to the first citation, he will be forced to pay the costs incurred 114 without prejudice to his being indicted. When a witness appears and refuses to testify (declare) he will be ordered arrested for two days, and, if he persists in his refusal, he will be subjected to criminal proceedings. 115

When the witness lacks a domicile or there is a founded fear that he will conceal himself, flee, or absent himself, the tribunal (under its responsibility) shall take legal measures to secure his testimony; these measures shall last for the period in which they are strictly necessary. 116

Before commencing the declaration, the witnesses will be instructed about the penalties of false testimony, under the penalty of nullity if this requisite is not complied with. The witnesses will take an oath, with the exception of minors less than fourteen years old. Following the performance of the foregoing requisites, the judge shall proceed to interrogate each witness separately by requiring his name, surname, age, marital status (estado), profession, domicile, and "bonds" (vinculos) of relationship, or of interest with the parties or other circumstances which may be useful to the judge in the evaluation of his independence and veracity. After this the judge interrogates the witness about the act in question and will then prepare the proper records. 117 The following persons are not obligated to appear as witnesses and they may give their declarations by means of a written report (informe escrito) which shall be issued under oath: the president of the governmental agencies

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113. Art. 191.
114. Pursuant to art. 100: "When the presence of a person is necessary for some procedural act, the tribunal shall cite him by observing the formalities prescribed for notifications. The witnesses, experts, interpreters and depositaries may be cited by means of the judicial police. Said persons will be cited under a summons to be conducted (apercibimiento de ser conducidas—in the sense of a bench warrant) which will be effective immediately if a justified cause [in the sense of excuse] does not intervene. The unjustified failure to appear will cause the person to incur the costs caused, without prejudice to the penal responsibilities which are fitting."
115. Art. 192.
117. Art. 194.
(organismos) and ministers of state, the magistrates of the Supreme Court of Justice and the Court of Appeals; foreign diplomatic representatives (if they agree to do so) and the Rector of the University. In addition to the foregoing persons, those persons who because of their "hierarchy" merit special consideration (in the judgment of the judge) and those that cannot appear before the tribunal because they are physically impeded will be examined in their offices or residences.

Finally, if a witness declares falsely, a certificate to this effect will be prepared and remitted to the Public Ministry for criminal prosecution without prejudice to the judge's ordering his detention.

Confrontation of Witnesses With Each Other (De Los Careos)

The judge may order the confrontation of the persons who have declared or who have been examined in the proceedings when there have been discrepancies among them about important facts and details. However, the accused may not be obliged to confront the witnesses. The confrontation will be performed between only two persons at a time. The confronted (witnesses) will take an oath before the act while the accused is not obliged to do so. The accused's attorney may be present at his confrontation. The pertinent contradictory declarations of the witnesses will be read to them, and the discrepancies will be called to their attention in order that they may admit or resolve the discrepancies between themselves. A record shall then be made of the ratification or rectifications which have resulted as well as of the charges which have been made by the confronters and all that occurred in the act of confrontation.

Opinions of Experts (De Los Peritos)

The judge shall make use (acudirá) of experts following the rules established by law. When there are permanent official experts available, the judge shall resort to them; but if there

118. Art. 195
119. Art. 196.
120. Art. 197.
121. Art. 198.
122. Art. 199.
123. Art. 200.
124. See art. 201; Alvarado, Constitución y Códigos de la República de Guatemala 261-299 (2d ed. 1957).
are none available and the urgent nature of the case demands it, he may appoint experts on his own motion. In other cases the appointment will be made in accordance with the proposals of the parties.\textsuperscript{125} When an official expert intervenes in the proceedings, it will not be necessary to appoint him (in a formal manner) for this duty or to have him ratify his report (informe), except when there is doubt about its authenticity. The report of the official experts may be controverted by means of a new expert examination (diligencia pericial).\textsuperscript{126}

The following persons may not be experts:\textsuperscript{127}

1. Minors and incapacitated persons;
2. Those who must or may abstain from declaring as witnesses, and those that have been called as witnesses (in the sense of non-expert witnesses) in the cause; and
3. Those persons disqualified by a judicial sentence.

The judge shall conduct the expert examination (pericia) by concretely formulating the questions, fixing the time in which the examination is to be performed, and, if he judges it fitting, by attending the operations. He may likewise authorize the experts to examine the records of what has been done and to attend at designated proceedings.\textsuperscript{128} The experts as well as the judge shall endeavor to conserve the things examined, if it be possible, so that they may be renovated (in the sense of restored). If it be necessary to destroy or alter the objects analyzed or if the experts disagree about the manner of conducting the operations they must give an account to the judge before proceeding.\textsuperscript{129}

The experts are to make the examination together, and the Public Ministry and the parties who have the power to formulate observations may be present. At the conclusion of their examination the experts are required to retire to deliberate and draft their report in common if they are in agreement; if they are in disagreement, they will draft their reports separately.\textsuperscript{130}

The expert opinion may be produced by a written report or

\textsuperscript{125} Art. 202.
\textsuperscript{126} Art. 203.
\textsuperscript{127} Art. 204.
\textsuperscript{128} Art. 205.
\textsuperscript{129} Art. 206.
\textsuperscript{130} Art. 207.
in the form of a declaration and it should include, if it be possible:\textsuperscript{131}

1. The description of the person, thing, or fact examined in the condition in which it was found;

2. A detailed account of all of the operations performed and of their results;

3. The conclusions formulated by the experts conforming to the principles of their science, art, or technique; and

4. The date on which the operation was performed.

Under certain circumstances the judge shall require expert opinion in order to establish if the accused is a socially dangerous person before ordering a “measure” (\textit{para disponer una medida} in the sense of placing the accused in a mental institution, etc.) or applying a penalty.\textsuperscript{132} In every case of violent death or of suspected criminality an autopsy will be ordered, even when by an exterior inspection one may presume the cause of death, except when the cause of death may be determined with only a doctor’s examination or when the state of the cadaver makes an autopsy evidently unnecessary in the judgment of the coroner (\textit{a juicio del Forense}).\textsuperscript{133}

The judge shall take care that the things which have to be submitted to the expert examination (if the examination may not be conducted at once) will be conserved and not damaged in such a manner that it will be difficult to perform the examination or detract from its results.\textsuperscript{134}

When it is necessary to examine or compare a false document, the judge shall order the presentation of other documents for purposes of comparison and he may utilize “private writings” if he has no doubts about their authenticity. In order to obtain these “private writings” he may order their sequestration, except when they are held by a person who must or who may abstain from declaring as a witness.\textsuperscript{135} The judge may order also that any of the parties write certain phrases, and in case the party refuses a record will be made of this.\textsuperscript{136}

\begin{itemize}
  \item \textsuperscript{131} Art. 208.
  \item \textsuperscript{132} Art. 209.
  \item \textsuperscript{133} Art. 210.
  \item \textsuperscript{134} Art. 211.
  \item \textsuperscript{135} Art. 212.
  \item \textsuperscript{136} Art. 213.
\end{itemize}
The experts named ex-officio by the judge have the right to receive honoraria unless they have regular compensation from the state for duties performed (por cargos desempeñados) by virtue of their special knowledge in science, art, or technique. The expert named pursuant to the petition of a party shall in any case receive his honorarium directly from the party or from the person who is condemned to pay the costs.\textsuperscript{137}

When the person who shall declare does not know the Spanish language but knows how to read and write, the judge shall draft the questions in writing and they shall be translated in writing to the language of the person being examined and then shown to him. The declarant then will write his answers which will be translated in writing by the interpreter and made a part of the records. If the declarant is illiterate, the examination will be recorded by a recording machine (if possible) and the recording will be conserved by the tribunal.\textsuperscript{138}

\textit{Examination Proceedings (De Los Reconocimientos)}

The judge may order the performance of an act of recognition (reconocimiento) of a person in order to identify him or in order to establish that the person who mentioned or alluded to him really knows him or has seen him.\textsuperscript{139} The person who is to make the identification will be interrogated (before making the actual identification) in order that he may give a description of the person and to state if he knows the person, or has seen him personally, or has seen his "image" (imagen). The declarant, other than the accused, will give an oath.\textsuperscript{140}

The identification or recognition step will be performed by bringing the person who is to be identified to the sight of the one identifying him, and making him appear (if possible) in the same condition as he was seen together with other persons of similar appearance among whom the person to be recognized will choose how he is to be placed. In the presence of all the assembled persons, or from a point from which he may not be seen (as the judge deems fitting), the person making the recognition will declare if he encounters in the "row" the person whom he has made reference to by pointing him out affirmatively in a manner that does "not leave any place for doubt."

\textsuperscript{137} Art. 214.
\textsuperscript{138} Art. 215.
\textsuperscript{139} Art. 216.
\textsuperscript{140} Art. 217.
This step shall be recorded and a report made of all of the circumstances including the names of those who formed the row.\(^{141}\)

When various persons are to identify one accused, each identification will be made separately without the identifiers communicating among themselves. On the other hand, if various accuseds are to be identified by the same person, the identification of all of them may be made in one act.\(^{142}\) When a person who is not present is to be the subject of identification, and there are photographs of him, these photographs will be added to the photographs of other similar persons and the identification will be made in the same manner as stated in the preceding paragraph.\(^{143}\)

Before the identification of a thing is made the judge shall invite the identifier to give a description of the object, and this will be mentioned in the report of the act.\(^{144}\)

**The "Position" of the Accused (De La Situación Del Imputado)**

**The Presentation and Appearance of the Accused (de la presentación y comparecencia del imputado)**

The person against whom criminal proceedings have been initiated has the power to “present himself” before the Tribunal in order to declare. This spontaneous presentation shall not impede an order for his detention if this is proper.\(^{145}\)

Except in flagrant cases, when the imputed act does not call for deprivation of liberty or, if it does, conditional liberty may be granted to the accused, the judge shall order the appearance of the accused by a simple citation, unless the judge has founded reasons to presume that the order will not be complied with or that the person cited intends to destroy the “traces” of the infraction or induce someone to give false declarations. If the person cited does not present himself or justify his absence by a legitimate impediment, the judge shall order his detention.\(^{146}\) Except as previously stated (in the preceding article) the judge shall order the detention of an accused when he has a basis for receiving the unsworn declaration of the accused. A resolution which orders the detention of the accused is appealable.\(^{147}\)

\(^{141}\) Art. 218.  
\(^{142}\) Art. 219.  
\(^{143}\) Art. 220.  
\(^{144}\) Art. 221.  
\(^{145}\) Art. 222.  
\(^{146}\) Art. 223.  
\(^{147}\) Art. 224.
The order of detention will be in writing and it shall contain the generales (names, age, occupation, etc.) of the accused, any data which serves to identify him and the crime which is attributed to him. He will be informed of the foregoing when the citation is served or immediately afterwards. The detention shall be effectuated in a manner which is the least damaging to the person and reputation of the accused.\(^\text{148}\)

The members of the Judicial or Administrative Police are under the duty of detaining anyone whom they find in flagrante delicto. In said case, when the crime depends upon private petition, they shall make the detention when he that may "promote" the action voluntarily declares to the police present at the scene of the crime.\(^\text{149}\)

The crime shall be considered flagrante when its author is surprised at the moment of committing it or immediately afterwards, while he is being pursued by the Public Forces (Fuerza Publica), by the victim, or public clamor, or while he has the objects or present traces of the crime which makes it persuasively presumptive that he has just taken part in the act.\(^\text{150}\)

The members of the Judicial or Administrative Police must detain, even without a judicial order:\(^\text{151}\)

1. A person who intends to commit a crime, at the moment of preparing or committing it; and

2. A person who is fleeing from legal detention.

In those cases in which the members of the Judicial or Administrative Police have the duty of detaining without the necessity of a judicial order, all private persons also have the power to do so, but all of them must deliver the detained person immediately to the judicial authority.\(^\text{152}\) When at the commencement of the investigation of an act in which several persons have participated it is not possible to distinguish between the wrongdoers and the witnesses and abstaining from proceeding would harm the instruction, either the judge or the police may order that none of the persons being present may leave the place and even order their arrest if this is indispensable. This arrest may

\(^{148}\) Art. 225.

\(^{149}\) Art. 226.

\(^{150}\) Art. 227.

\(^{151}\) Art. 228.

\(^{152}\) Art. 229.
not be prolonged longer than the indispensable time required to
take the declarations.\textsuperscript{153}

The Indictment Order and "Preventive" Imprisonment (Del
Auto de Procesamiento y de la Prisión Preventiva)

Within the term of five days after the detention of the ac-
cused, the judge shall dictate an indicting order (auto de pro-
cesamiento) provided that the following circumstances con-
cur:\textsuperscript{154}

1. That it appears that a crime has been committed; and
2. That there are sufficient reasons to believe that the ac-
cused has participated in it.

The indicting order will be "founded" (in the sense of being
based) upon law and evidence and it must contain, under a pen-
alty of nullity:\textsuperscript{155}

1. The generales of the accused;
2. A brief enunciation of the facts which have been attrib-
uted to him;
3. The legal "classification" (calificación — literally the
qualification) of the act with a mention of the applicable
dispositions (articles of the Penal Code or other codes);
4. The dispositive resolution; and
5. The signature of the judge and the secretary.

In no case may there be decreed an order of indictment
(under penalty of nullity) without the unsworn statement of
the accused or without a formalized record of his refusal to de-
clare.\textsuperscript{156} The indicting order shall include the command to keep
the accused in preventive imprisonment if the crime is punish-
able by deprivation of liberty.\textsuperscript{157}

On decreeing the indictment of a person who will be per-
mitted provisional liberty, the judge may order that he shall not
absent himself from a determined place, that he shall not "at-
tend a certain place," or that he present himself to the judicial
authority on the days which are fixed in the order. If the ac-

\textsuperscript{153} Art. 230.
\textsuperscript{154} Art. 231.
\textsuperscript{155} Art. 232.
\textsuperscript{156} Art. 233.
\textsuperscript{157} Art. 234.
cused does not comply with these conditions, the judge will order his detention. If any special disqualification (inhabilitación) is applicable, the judge may also order that the accused abstain from the specific activity.\textsuperscript{158}

If consistent with expert opinion it appears that the accused, at the moment of committing the act, “was in a state of mental infirmity that makes the act unimputable to him,” the judge may provisionally order his being taken into a “special establishment” (in the sense of a hospital).\textsuperscript{159} Likewise, if the accused becomes mentally incapacitated after the act and during the course of the proceedings, the judge shall order the suspension of the cause and the taking of the accused into an “adequate institution” whose director shall be obliged to report periodically about the condition of the patient. These reports will be without prejudice to the additional reports which the judge may demand. The suspension impedes the proceedings against the incapacitated accused, but the cause will proceed against any co-defendants. If the accused recovers from his illness, the judge shall lift the suspension of the cause and it will continue from the point where it was suspended.\textsuperscript{160} The accused shall be submitted to a mental examination whenever he is being prosecuted for a crime whose minimum punishment exceeds three years in prison or reclusion or when he is deaf mute or more than seventy years old.\textsuperscript{161}

The judge may order that the preventive imprisonment be carried out in the house of the accused when the applicable penalty shall not be greater than six months in prison and the person is “reputed to be honest,” is more than sixteen years old, or is sick or infirm (valetudinarias). The same disposition may be made with respect to a pregnant woman or the mother of a child no older than six months even though the crime has a greater penalty than six months in prison.\textsuperscript{162}

The indicting order is not final (causa estado); it is appealable at any time. The recourse of “reform” (reforma) is admissible in order to vary or alter the legal “qualification” (calificación) of the act. The recourse of revocation (revocatoria) may comprise all of the order (of indictment) or only the portion

\textsuperscript{158} Art. 235.
\textsuperscript{159} Art. 236.
\textsuperscript{160} Art. 44.
\textsuperscript{161} Art. 45.
\textsuperscript{162} Art. 237.
relative to the preventive prison. The resolutions which decide one or the other recourse are appealable. ¹⁶³

If within the five-day period the judge believes (because of insufficient facts) that there are not sufficient “merits” to dictate an order of indictment, but that an order suspending (sobreser) the proceedings is not justified, he will order the investigation to continue; and if anybody has been detained he will order his liberty, after complying with the provisions of article 92. ¹⁶⁴

If the accused has been set free because there does not exist a legal basis to order his indictment or because the proceedings have been suspended, even though in a provisional (in the sense of contingent) manner, the judge shall draw up a record stipulating that the proceedings will cause no limitations on the accused’s legal rights and that his detention does not affect the reputation which he enjoys, except in the cases when he has been freed subject to some “measure of security.” ¹⁶⁵

Liberty Under Bond (Libertad Bajo Caución)

The judge may grant liberty under bond to an accused who is in preventive imprisonment. ¹⁶⁶ Liberty under bond will not be granted: ¹⁶⁷

1. To those who have been indicted for a crime punished with life imprisonment;

2. To those who are at liberty under bond in another criminal proceeding; and

3. To those fugitives from justice who have been declared “defaulters” (rebeldes).

If an accused is gravely ill in prison and his liberty under bond is not available, the judge may grant him liberty under a cash or property bond (caución real) solely for the time he remains in the official hospital. The judge, under his responsibility, must be vigilant that the accused does not remain in the hospital longer than necessary. ¹⁶⁸

¹⁶³. Art. 238.
¹⁶⁴. Art. 239. Before ordering his liberty the judge must comply with the provisions of art. 92, note 174 infra.
¹⁶⁵. Art. 240.
Liberty will be granted under a juratory bond (in the sense of an unsecured promise under oath), or a personal or real bond. To grant this liberty, the judge must advise the accused of his obligations. The bonds are designed to assure that the accused complies with the obligations imposed by the judge and the orders of the judicial authority, and that he submits himself to comply with the final sentence of the court. In order to determine the quantity and quality of the bond, the judge shall take into account the nature of the crime, the economic condition and antecedents of the accused, the importance of the damage caused and the sum (of money) of the reparations which may be due. The judge shall make the estimate “so that it constitutes an efficacious reason for the accused to abstain from infringing the imposed obligations.” Notwithstanding the provisions contained in the preceding article, a real bond (in the sense of security) will be required from those accused of a crime punishable by “seclusion” (reclusión) (in the sense of “house arrest”) even when said penalty is designated as an alternative to imprisonment. This will also be applicable to those against whom are imputed crimes against property, for nonfulfillment of family obligations, and crimes against the duties of a “public function” (función publica), except when the maximum penalty does not exceed one year in prison.

The “juratory bond” (caución juratoria) consists in the sworn promise of the accused to comply faithfully with the conditions imposed by the tribunal, and it may be granted:

1. When the accused has only been cited and there are well founded reasons to believe that he will comply with the conditions; provided that the maximum penalty for the crime involved does not exceed six months imprisonment; and

2. In other cases specifically permitted by this Code.

The tribunal that grants liberty to the accused under his sworn promise may impose upon him the obligation of presenting himself periodically to a certain authority, and in any case he must comply with article 92.
The "personal bond" (caución personal o fianza) consists in the obligation that the accused assumes jointly with one or more "jointly liable bondsmen" (fiadores solidarios) to pay the amount which the judge shall fix.\textsuperscript{175} Anyone may be a bondsman who has the capacity to contract and meets the required conditions of solvency, which shall be accredited by a certificate issued by the proper fiscal office. No one may be granted and have subsisting more than two bonds at the same time, as it appears from the Registry of Bonds.\textsuperscript{176}

The "real bond" (caución real) consists in the deposit of money, or listed (on the exchange) stocks, or in the "establishing of guarantees" in an amount determined by the judge. The funds (fondos) or stock and the guarantees have a special priority privilege (privilegio) for the fulfillment of the obligations arising from the bond. Property (bienes) used as a bond must be previously valued by an institution of credit authorized to grant loans with a guaranty of the value of such property.\textsuperscript{177}

Liberty under bond may be requested at any stage of the proceedings, by the accused or his attorney, after the qualification (in the sense of classification) of the crime has been made in the indicting order.\textsuperscript{178} The request for liberty under bond is treated as an "incident" (in the sense of an issue which is incidental or subsidiary to the main issue). The request for liberty under bond shall be submitted for argument by the Public Ministry and any contrary parties (e.g., the querellante) for a period of no longer than twenty-four hours, and then the judge shall resolve the question immediately. The notification for the hearing must be made on the same day in which it is ordered. The order granting or denying liberty under bond is appealable.\textsuperscript{179}

The order which grants liberty under bond is reformable and revocable by the judge. The reform of the order will follow

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\textsuperscript{175} Art. 249. See text accompanying n. 171 supra.
\textsuperscript{176} Art. 250.
\textsuperscript{177} Art. 251.
\textsuperscript{178} Art. 253.
\textsuperscript{179} Art. 254.
whenever the "qualification" of the crime is varied. The order must be revoked when the accused does not comply with the obligations imposed, or does not appear when summoned by the judge (without sufficient excuse), or when the accused is preparing to flee, or new circumstances require his detention. The bond shall be executed before the issuance of the order granting liberty, by means of a document signed before the secretary of the court. A mortgage lien (gravamen hipotecario) given to secure a bond must be granted by a public document and previously recorded in the Registry of Immovables.

The accused and his bondsman must comply with article at the time of presenting the personal bond. Any notification and citation which must be given to the accused also will be given to the bondsman when they relate to the latter's obligation.

The bond will be cancelled and the guarantees returned:

1. When in revoking the liberty under bond, the accused was remanded to prison within the time resolved;

2. When revoking the order of preventive prison, when entering the order of "suspension" (auto de sobreseimiento), and in case of an "absolving sentence"; and

3. When the condemned person presents himself to comply with the penalty imposed (or if he were detained) within the time fixed.

If the bondsman, for well-founded reasons, does not wish to continue as such, he may request the judge to substitute another person that he presents who meets the personal qualifications required by the law. If the bondsman has good reason to fear the flight of the accused, he must give immediate warning to judge; and he will be freed from his obligation if the accused is arrested. But if the facts affirmed by the bondsman are false, the judge may impose upon him a penalty of from ten to fifty quetzales and the bond will remain in effect.

180. Art. 255.
181. Art. 256.
182. Note 174 supra.
183. Art. 257.
184. Art. 258.
185. Art. 259.
186. Art. 260.
The bond will be forfeited when the accused does not appear, after being cited during the proceedings, or when he evades complying with the penalty of deprivation of liberty. In such cases and without prejudice to his ordering the capture of the accused, the judge shall fix a term no greater than ten days for the accused to appear. The accused and the bondsman will be notified of this order and will be warned that after the term fixed the bond will be made effective if the accused does not appear or if he fails to justify his absence because of fuerza mayor (force majeure).\footnote{187}

After expiration of the time fixed, the judge shall dictate a resolution declaring the forfeiture of the bond. This resolution shall order the withdrawal of the money or property deposited, the execution of the bail or the public sale of the property, the remitting of the respective documents to the Public Ministry and the giving of notice to the Registry of Bonds. This resolution may be appealed.\footnote{188}

\section*{TRIAL PROCEDURES (LOS JUICIOS Y PROCEDIMIENTOS)}

\textit{Preliminary Acts (Actos Preliminares)}

\textit{Elevation to the Trial (Elevación a juicio)}

At the conclusion of the term for the instruction, or after having performed the steps necessary for the investigation of the criminal act and the determination of who has participated in it or when it is deemed that there exists some legal cause for suspension of the proceedings, the judge of instruction shall give an account of what has been performed to the “judge of sentence.”\footnote{189}

The “judge of sentence” will order that the accused obtain the services of an attorney within a period of three days if by any chance he was not provided with one during the course of the instruction. The judge will designate an attorney for the accused if in that period he has not obtained one, or if he manifests that there is no possibility for him to do so.\footnote{190}
Once the accused is provided with an attorney, the judge shall submit the records of the "instruction" to the Public Ministry and to all the parties for a period of nine days in which:

1. During the first three days they may interpose the dilatory exceptions which have not been decided upon during the instruction;

2. During the following three days, the private complaining party (querellante) and the Public Ministry may propose the performance of new "steps" if they are believed necessary in order to ask for a penalty and specifically set the charges; and the defense attorney may raise the prejudicial questions and make the peremptory exceptions; and

3. During the last three days, all the parties may request a suspension or the elevation to the trial specifying the charges against the accused and, in this case asking "the opening for proof" or the appointment for the day of the trial.

If the querellante does not make use of this opportunity he will be considered as having given up the accusation. If the Public Minister does not make use of this opportunity he will be given an additional period of twenty-four hours under warning of a fine of from ten to fifty quetzales. If this twenty-four period passes and he has not complied, the fine will be effectuated and an account will be given to the proper authorities in order that this official may be dismissed. If the defense attorney fails to make use of said opportunity, a new attorney may be appointed.

At the conclusion of this nine-day period, the judge of instruction shall decide to suspend the proceedings or to elevate the case to trial. In this latter case, the resolution must contain (under penalty of nullity) the charges which the judge deems justiciable to be dealt with at the trial. The judge may also "qualify" the act as a "minor offense" (falta) and remit the case to a Justice of the Peace.

In order for the judge of instruction to elevate the case for trial the crime must be established and the "conviction must..."
prevail" that the accused participated in it.\textsuperscript{194} When the state of the investigation neither permits a suspension nor the elevation to trial, the judge may decide to extend the instruction period for a term which may not exceed six months. He shall then remit the records to the judge of instruction ordering that the accused be set free under a juratory bond.\textsuperscript{195} The judge of instruction shall return the records to the judge of sentence at the end of the above period, and if the judge of sentence believes that the record does not justify the elevation of the case for trial he will "provisionally suspend" the proceedings.\textsuperscript{196}

\textit{Prejudicial Questions (Las Cuestiones Prejudiciales)}

"Prejudicial questions in penal proceedings are only those dealing with questions of a civil or administrative nature or of other kinds which, being prior to and independent of the crime, constitute a logical antecedent of the same and whose prior resolution is indispensable in order to decide the penal question."\textsuperscript{197} If there is a pending (civil) action dealing with these prejudicial questions it must be determined finally as a condition for the prosecution of the present (penal) proceedings.\textsuperscript{198} For example, an accused is charged with the theft of chattels and he raises the "prejudicial question" that he bought these chattels from the denouncer and that a civil case is now pending to determine the title to these chattels. The civil case would have to be decided adversely to the accused before the criminal proceedings could continue. If the question is alleged and the judge esteems that it is a prejudicial question, he will suspend the proceedings ordering the liberty of the accused under bond and will direct the parties to go to the proper jurisdiction.\textsuperscript{199} If one month has elapsed from the date in which the prejudicial question was declared well founded in a final decision, and the person who should demand (\textit{llamado a demandar}) has not acted nor has the other party prompted him to do so, the Public Ministry will exercise the action.\textsuperscript{200} The prejudicial question will be conducted as an "incidental" issue. The order (\textit{auto}) which rejects the question is appealable in "single effect" (\textit{un efecto}) and the

\begin{itemize}
\item \textsuperscript{194} Art. 268.
\item \textsuperscript{195} Art. 269.
\item \textsuperscript{196} Art. 270.
\item \textsuperscript{197} Art. 271.
\item \textsuperscript{198} Art. 272.
\item \textsuperscript{199} Art. 273.
\item \textsuperscript{200} Art. 274.
\end{itemize}
order which declares that it is proper may be appealed in “double effect” (doble efecto). 201

_Dilatory and Peremptory Exceptions (De Las Excepciones)_

The dilatory exceptions are: 202

1. The incompetency of the court;
2. Lack of personality (legal capacity);
3. Lack of solicitorship (personería);
4. Lack of antejuicio (in the sense that the defendant is immune from suit because he is a judge of the supreme court, a legislator, etc.);
5. The accumulation of records (in the sense of a joinder of several cases).

The dilatory exceptions may be opposed during the instruction or within the term provided in article 265.

The peremptory exceptions are: 203

1. Those which import the extinction of the penal action; and
2. Res judicata (la cosa juzgada).

These peremptory exceptions may be opposed in the term provided in article 265 and in any stage of the trial.

When a dilatory exception has been upheld, the proceedings will be suspended provisionally and the accused will be ordered freed on a juratory bond. 204 On the other hand, when a peremptory exception has been upheld the proceeding will be suspended definitively and the accused will be ordered freed. 205

The order which denies the peremptory exception is appealable in one effect and in double effect if it upholds the exception. Notwithstanding the foregoing, the exceptions which are

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201. Art. 275. Appealable in “single effect” means that the case will continue during the pendency of the appeal, while an appeal in “double effect” means that the progress of the entire case is stayed pending the resolution of the appeal. The appeal in “double effect” is somewhat similar to a supersedeas of a case upon an appeal in the United States.

203. Art. 277.
204. Art. 278.
205. Art. 279.
raised at the trial will be resolved in the final sentence and the appeal will embrace both the final sentence and the exceptions which were raised (se rige por la de esta).206

The Suspension or Cessation of Proceedings
(Del Sobreseimiento)

The sobreseimiento is the suspension or cessation of the proceedings before reaching the final sentence. It may be provisional (in the sense of contingent) or definitive, and in this case, total or partial.207 The provisional sobreseimiento suspends the proceedings and will be issued in the following cases:208

1. When a prejudicial question or a dilatory exception has been declared according to law (in the sense of being sustained);
2. When the accused has been declared in default (rebeldía);
3. In the situations provided in articles 236 and 270.

The proceedings may be re-opened when the causes which motivated the suspension have ceased.

The definitive sobreseimiento terminates the proceedings and it will be issued in the following cases:209

1. When the act being investigated has not been committed or the accused has not participated in it;
2. When the act does not constitute a crime;
3. When it appears in a definite manner that there is an exemption from penal responsibility;
4. In those cases of extinction of the penal action; and
5. When it is res judicata.

The sobreseimiento will be declared (in an auto giving the legal reasons) when it is founded on numbers one, two, and three of the foregoing article, and it must declare that the proceedings do not affect the reputation which the accused has

206. Art. 280.
207. Art. 281.
208. Art. 282.
209. Art. 283.
enjoyed. The order of sobreseimiento may also contain a "reservation in favor" (la reserva a favor) of the accused in order that he might proceed against the denouncer or querellante for a slanderous denunciation or accusation. The sobreseimiento in those cases enumerated in numbers four and five of the foregoing article may be requested and granted in any state of the trial.\textsuperscript{210} The sobreseimiento having been declared, the liberty of the accused or "the application of a means of security" (as the case may be) will be ordered.\textsuperscript{211} The denial of the sobreseimiento is appealable in "one effect," while if it is granted it is appealable in "double effect." The accused or his attorney may "impugn" (in the sense of appeal) the order of sobreseimiento when it orders any means of security.\textsuperscript{212}

This section of the code fails to define the total or partial sobreseimiento; however the concepts are relatively simple. If, for example, a man is accused of kidnapping, robbery, larceny, and rape, the judge of sentence may consider that there is sufficient evidence to show that kidnapping and rape were committed, but that there is insufficient evidence for the other two charges. As a result, the judge of sentence may order a partial sobreseimiento for the robbery and larceny charges, and the accused will be tried for the kidnapping and rape. On the other hand, if there is a failure to prove the corpus delicti of all four charges or a failure to prove that the accused participated in any of these alleged crimes, the judge will order a total sobreseimiento. With four kinds of sobreseimiento it is possible to have numerous combinations and variations.

\textit{The Proof (de la Prueba)}

\textit{General Provisions (Disposiciones generales)}

Only the facts are to be proved; nevertheless, if foreign laws are invoked which must be applied, their existence must be proved.\textsuperscript{213} The proof of the crime and of the responsibility of the accused is incumbent upon the "accusation" (acusación), while the proof of circumstances which attenuate or excuse from criminal responsibility is incumbent upon the accused. The

\textsuperscript{210} Art. 284.
\textsuperscript{211} Art. 285. The "measures of security" are provisions designed to effectuate the performance of sentences. See Article 82 of the \textit{Código Penal} and Articles 447-450 of this \textit{proyecto}.
\textsuperscript{212} Art. 286.
\textsuperscript{213} Art. 287.
Public Ministry may contribute proof which is beneficial to any of the parties.\textsuperscript{214}

All means of proof which are relevant to the facts involved in the proceedings are admissible except those which are contrary to law.\textsuperscript{215} All proof shall be received with a citation of the Public Ministry and of the contrary parties under a penalty of nullity. When the proof is non-documentary, a day and hour will be designated for receiving it, and at least twenty-four hours’ notice must be given.\textsuperscript{216}

The examination of witnesses and experts must be performed in a public hearing (\textit{audiencia pública}), except for reasons of morality or public order, wherein the judge determines that the hearing should be “carried out” (\textit{lleve a cabo}) solely with the assistance of the persons who intervene in the proceedings.\textsuperscript{217}

The accused must attend the “acts of proof” (\textit{audiencias de prueba}) and the final hearing (\textit{vista}) in “ordinary dress” (\textit{traje corriente}) and “free in his person,” but the judge must take the necessary means to impede the flight or any violence by the accused. If the accused refuses to attend, he will be represented by his attorney for all legal effects. If the attorney fails to attend an “audience of proof,” he will be declared as having abandoned the defense and the judge will order substitute counsel in accordance with article 70.\textsuperscript{218}

The judge may order that the accused or the “victim” (\textit{ofendido}) “be brought to the hearing in a compulsive manner” when it is necessary to perform some examination.\textsuperscript{219} The witnesses, before declaring, may not communicate with each other nor with other persons, nor see, hear, or be informed of what has occurred in the hearing, and they must remain in an antechamber.\textsuperscript{220}

The “pieces of conviction” (physical evidence) which has been sequestered will be presented to the parties or the witnesses in order that they might recognize them.\textsuperscript{221} In the hear-

\begin{itemize}
\item \textsuperscript{214} Art. 288.
\item \textsuperscript{215} Art. 289.
\item \textsuperscript{216} Art. 290.
\item \textsuperscript{217} Art. 291.
\item \textsuperscript{218} Art. 292.
\item \textsuperscript{219} Art. 293.
\item \textsuperscript{220} Art. 294.
\item \textsuperscript{221} Art. 295.
\end{itemize}
The judge might direct questions to the parties, witnesses, and to the experts. The Public Ministry and the parties also may formulate questions in order that the judge might direct them; before asking the questions (submitted by the parties) the judge may vary their tenor without altering their sense "to the end that they are intelligible for those who must answer them." The judge shall not admit questions which require the accused or the witnesses to make "judgments or valuations about the facts." The Public Ministry and the parties have the right to object to the questions and the judge shall decide the objections without any recourse. 222

The judge shall fix the amount of the proper expenses (in accordance with his own judgment) of the witnesses who must appear at the hearing when they do not reside at the site (sede) of the tribunal and when the witnesses request reimbursement. These expenses must be supplied in advance, and defrayed by the person who proposed the proof. 223

The civil plaintiff and the third persons responsible (for damages) must defray the expenses incurred for the assistance of witnesses, experts, and interpreters who were offered by them and admitted, except when these witnesses were also proposed by the Public Ministry. 224

If a witness, expert, or interpreter "gives indications of falsity," the judge of sentence shall certify what is pertinent, order the detention of that person, and give an account to the judge of instruction. 225 The resolution which denies any proposed proof is appealable. 226

When there are several defendants and some are present and some are absent, the proceedings will be "sustained" against the ones who are present. If the presence of a new defendant is obtained during the course of the proceedings, all of the actions which concern him will be made in a separate record to the end that it will not prejudice the co-defendants. If it occurs in the phase of the trial (i.e., after the "instruction stage") and during the rendering (or after evidence was rendered) the par-

222. Art. 296.
223. Art. 297.
224. Art. 298.
225. Art. 299.
226. Art. 300.
ties have the right to controvert the evidence produced and to offer new evidence.\textsuperscript{227}

\textit{The Periods of Proof (De los términos de prueba)}

The judge shall designate the term for the proposing and performing of proof. The ordinary term has a maximum duration of thirty days; the proposing of the proofs must be within the first ten days and the performance of the proof accomplished during the last twenty days. If the proofs have been offered and received before the end of this period the judge shall declare the period closed if the parties request it; if, on the contrary, the original period is not sufficient to perform all the proof proposed (without the fault of the proponent), the judge may extend the period for an additional ten days. The extension will not run until an appeal interposed in case of the denial of proof has been determined.\textsuperscript{228}

Proof of "faults" (\textit{tachas}) of witnesses and the recusation of experts may be proposed during this period of proof and performed during the same period.\textsuperscript{229}

When some document the original copy of which is to be found in an archive or registry located out of the country must be brought to the trial, or if the examination is proposed of witnesses who are also located in a foreign country, the judge shall designate an extraordinary period whose duration shall be fixed, taking into account the country in question and the means of communication which exist, but in no case may the extension be greater than six months.\textsuperscript{230} The request for this extension of time must contain an account of the facts which are intended to be proved and the designation of the site of the archives and registries or an indication of the names and residences of the witnesses.\textsuperscript{231} Judicial nonworking (\textit{inhábiles}) days will be included in computing the extraordinary period. As soon as the offered proof has been performed, the extraordinary period is considered closed.\textsuperscript{232} If the Public Ministry or the parties request the "opening to proof" (in the sense of opening the pro-

\begin{itemize}
\item \textsuperscript{227} Art. 46.
\item \textsuperscript{228} Art. 301.
\item \textsuperscript{229} Art. 302.
\item \textsuperscript{230} Art. 303.
\item \textsuperscript{231} Art. 304.
\item \textsuperscript{232} Art. 305.
\end{itemize}
ceedings for the taking of proof) and they do not propose any, the judge shall impose a fine of from ten to fifty quetzales.\textsuperscript{233}

\textit{Rules for the Valuation of the Proof (Normas para la valoración de la prueba)}

The elements of proof which were obtained in the period of instruction will be valued (apreciados — appreciated or valued) by the judge or Tribunal provided that they are not controverted and modified at the trial.\textsuperscript{234} The merits of the testimonial proof shall not be dependent upon the number of witnesses, but upon whether:\textsuperscript{235}

1. By their edad a instrucción (sic, this is apparently a misprint — it should read edad y instrucción — age and education) the witnesses have the capacity necessary to value the facts;

2. By their honesty, their independence of position, their disentailment from the parties and by their personal antecedents, the witnesses have complete impartiality;

3. The act involved is susceptible to be experienced by the senses, and the witness knows it personally and not by inducement or reference by other persons;

4. The declarations are clear and precise, without doubts or reticences about the substance of the act or of its essential details;

5. The witnesses have not been obligated by force or fear, nor impelled by deceit, error, or subornation (bribe); and

6. They explain in detail the facts about which they declare, the reason for knowing what they have said, and expressing why and in what manner they know of what they have affirmed.

The judge must take into account likewise “the opportunity in which the witness declares” that is, the time that intervenes between the date of the testimony and the date of the fact about which he has testified, as well as whether the fact was men-

\begin{footnotesize}
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\item \textsuperscript{233} Art. 306.
\item \textsuperscript{234} Art. 307.
\item \textsuperscript{235} Art. 308.
\end{itemize}
\end{footnotesize}
tioned in the instruction by the witness. The Public Ministry and the parties may challenge (for faults—tachas) the witnesses, but that will not impede their testimony which will include all circumstances that may be useful for the valuation of the testimony. This right of challenge shall not hinder the judge from considering the challenges on his own initiative.

In the valuation of the conclusions of the experts, the judge shall take into account:

1. That the things which were the object of the expert examination were guaranteed as to their authenticity, that is, that there are no reasons to suspect their alteration from when they were possessed by the judge until their receipt by the experts;

2. The professional competency of the experts and issues considered, if the points treated are in their specialty;

3. If the conclusions are assertive, reasoned, and supported by accepted scientific experience; and

4. If there has been observed the rules of procedure as to their designation, oath, actuation, and intervention of the Public Ministry and the parties.

Documents contributed at the trial shall be evaluated taking into account whether they deal with acts for which they are specifically requested, and if the legal requirements as to the manner of making, emitting, or issuing them were observed. Documents having the legal requisites of substance (fondo) and form have probative value. The impugnation of the documents as being null or false shall have no influence until these vices are proven. When a notoriously false document is contributed to the trial, the judge shall certify the pertinent facts and give an account of this to the judge of instruction.

The judge shall "grant value" to the confession of the accused, provided that the following requisites concur:

1. That the crime has been established by means of proof separate from the confession;

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236. Art. 309.
237. Art. 310.
238. Art. 311.
239. Art. 312.
240. Art. 313.
2. That it be made with complete liberty before a judge having cognizance of the proceedings; and

3. That it be logical and congruent with the manner in which the act was accomplished.

If the accused qualifies (in the sense of vary or modify) his confession and there do not exist other means of proof about the circumstances which he invokes, the judge may or may not accept the qualified confession in its totality. The judge shall consider the probable and logical manner in which the facts may have occurred, the other data which appear in the proceeding, and the personal quality and antecedents of the accused, in such a manner that, evaluating all of them together, there will be a sufficient basis in order to verify the truth or falsity of what has been stated.243

Even if the accused retracts his confession, the confession will always be valued (in the sense of full value being given to it) if it conforms to the requisites above mentioned, except when the accused produces proof about the reasons which induced him to retract it.244

Circumstantial evidence (indicios) may be taken into account by the judge by way of deduction in order to hold determined facts as proven, but this circumstantial evidence must be established with direct proof and be of such "weighty manner" that, in the judgment of the judge, it excludes all possibility of error. When the circumstantial evidence is varied or concurs with other means of proof, the former must be in conformity to the latter.245 The mental conviction which the judge forms from his direct observations through the "judicial inspection," through the reconstruction of the act or through an examination, will prevail over other probatory elements, except when the facts deal with questions which require special knowledge whose determination must be made by experts.246

In every resolution in which the judge must make an evaluation of the proof, he is obliged to expound "with all precision" (under penalty of nullity) the bases for his giving or denying value to the proof.247

243. Art. 316.
244. Art. 317.
245. Art. 318.
246. Art. 319.
247. Art. 320.
The Final Hearing (La Vista)

When the term of proof has been concluded, the judge shall place the records at the disposition of the Public Ministry and the parties for a term of eight days in order that they may present their conclusions (in the sense of their allegations and qualification and penalty absolution of what has been proved). After the presentation of the conclusions or the termination of this eight-day period (if the parties have not presented their conclusions), the judge will designate a day and hour for the final hearing (vista) which must take place within a term of no greater than fifteen days. This hearing will be open to the public, and it may only be performed in camera (with the attendance of only the Public Ministry and the parties) when, in the judgment of the judge, reasons of morality or public order require it. On the day designated, the judge after verifying the presence of the Public Ministry, the parties, their attorneys, the witnesses, experts, and interpreters whose attendance has been requested, shall declare the trial opened. The trial will be “developed” by observing the requirements of this chapter and, if none, the requirements of the General Rules of Tribunals.

The judge will exercise discipline in the hearing and may punish infractions by a penalty of up to fifty quetzales or arrest up to eight days, provided that the infraction does not constitute a crime. When a crime is committed at the trial, the judge shall draw up the proper record, order the detention of the one who appears to be responsible, and place him at the disposition of the judge of instruction.

The trial proper commences with the address of the Public Ministry followed by the addresses of the querellante, the civil plaintiff (if any), third persons who are responsible for the civil damages (if any), and finally by the attorney for the accused. In the course of the hearing, the accused may make all the declarations which he considers pertinent, provided that they refer to his defense. The judge may impede all “wandering” declarations and “even remove the accused from the hearing if he persists.” The accused also has the right to speak with

249. Art. 322.
250. Art. 323.
251. Art. 324.
252. Art. 325.
his attorney (without this causing an interruption of the hear-
ing), but he may not consult with his attorney in order to answer the questions which are asked him nor may his attorney or other persons make any suggestions to him relative to his answers.\textsuperscript{254}

If it is manifest in the hearing that new means of relevant proof exist, the judge may order (even \textit{ex-officio}) that this proof be received in the hearing if it be possible, and if not the judge will designate a new session of the court for this purpose.\textsuperscript{255}

The judge, Public Ministry, and the parties and their attorneys may interrogate the accused, the witnesses, and the experts in accordance with the requirements of article 296. The "pieces of conviction" (physical evidence) which have been sequestered may be presented to be identified in accordance with article 295.

After all questions have been asked, the judge shall "grant the floor" to the Public Ministry and to the parties in the order designated in article 326 in order that they may make the observations which they consider pertinent and add to their conclusions. The Public Ministry and the attorney of the accused may reply in that order, and their replies must be limited to a refutation of the adversaries' arguments which have not been previously discussed. Finally, the judge will ask the accused if he has anything else to manifest and after this the debate shall be closed.\textsuperscript{256}

\textit{The Final Sentence (La Sentencia)}

The judge must pronounce sentence within a term of no greater than fifteen days after the conclusion of the hearing.\textsuperscript{257} The sentence must observe the rules prescribed in the Constitutive Law of the Judicial Organization (\textit{Ley Constitutiva del Organismo Judicial})\textsuperscript{258} and in this chapter.

The wording of the final sentence will be in accordance with the following form:\textsuperscript{259}

1. The introduction shall state the place and date in which

\textsuperscript{254} Art. 327.
\textsuperscript{255} Art. 328.
\textsuperscript{256} Art. 330.
\textsuperscript{257} Art. 331.
\textsuperscript{258} Art. 332.
\textsuperscript{259} Art. 333.
the sentence was pronounced and the "individualization" of the parties, especially the accused.

2. The imputed acts will be described along with all of the details. Only the pertinent facts will be taken into account; those which have no relevance in the trial will be rejected. All mention of the proceedings will be omitted, except when they may serve as information for some statement in the final judgment (fallo).

3. The means of proof must be recapitulated in a form which, being of the same nature, refers to the same facts.

The "considerative" (considerativa) part of the sentence, shall be in the following order in regard to the evaluation of the proof giving the proper reasons:260

1. The existence of the crime and its "qualifications" (in the sense of being classified as murder, robbery, etc.);
2. The participation of the accused;
3. Its "exempting" or modifying circumstances from responsibility;
4. The penalties and "measures of security" or absolution;
and
5. What refers to the civil action and the costs.

The "resolutive" (resolutiva) part of the "condemnatory" sentence shall determine the principal and accessory penalties and the measures of security, determining with precision the place and form of their performance. If the civil action has been exercised, this part of the sentence will order the restitution of the thing obtained by the crime, or reparations or indemnification (as the case may be) indicating the time and manner for the performance of the respective obligations. If the amount of the foregoing were not determined during the course of the proceedings, the amount will be determined by means of experts in the execution of the sentence.261

The resolutive part of the "absolving sentence" must contain the following declarations in this order:262

261. Art. 335.
1. That the act was not committed or (if it was committed) it does not constitute a crime;

2. That the proofs have demonstrated the innocence of the accused or that they are not sufficient to prove his culpability; and

3. That there exists an exemption from responsibility or a cause which prevents the punishment of the crime.

The absolving sentence shall order the freedom of the accused and the cessation of the provisional restrictions or the application of measures of security which were imposed. The "absolution" shall not prevent the judge from pronouncing about the civil action if it be proper. When the absolution is founded on the basis that the act was not committed, or that it did not constitute a crime, or that the accused is innocent, the sentence will declare that the proceedings will not affect the reputation which the accused enjoyed prior to the institution of the proceedings.

If the Tribunal notices that the penal action is barred by the prescriptive period (statute of limitations), or that the accused has already been adjudged for the same act, or that there has been an amnesty law or general pardon for the same act, it shall declare an absolution even when none of these exceptions has been raised.\(^\text{263}\)

The Public Ministry, the parties, and the attorney of the accused may appeal the sentence and the judge shall grant the appeal which shall operate in double effect.\(^\text{264}\)

The sentence is void:\(^\text{265}\)

1. If it does not "individualize" the accused;

2. If it lacks an enunciation of the facts;

3. If the "reason to value" the proof is lacking or contradictory;

4. If the essential elements of the resolutive part of the sentence are lacking or are incomplete; and

5. If the date or the signatures of the judge or members of the tribunal and the secretary are lacking.

\(^{263}\) Art. 337.  
\(^{264}\) Art. 338.  
\(^{265}\) Art. 339.
CONCLUSION

It would appear that the adoption of this code should result in two great improvements in the administration of criminal justice in Guatemala. First, it should expedite the proceedings so that in the average case an accused will not be detained for many months before his case is tried. At present, it is relatively common for an accused to be detained from six to eight months before the day of the final hearing. Of course, the finest plan will remain just a plan unless it is really enforced.

Second, the appointment of counsel for the accused before he makes his first declaration to the judge of instruction and the right of the accused to be assisted by counsel for each step thereafter should do much to balance the "awesome power" of the state in a quasi-inquisitorial proceeding. To the eyes of an Anglo-American lawyer, it would seem that this code combines the best of the right-to-counsel due process aspect of truly adversary proceedings with the best of the quasi-inquisitorial system. Unfortunately, the reforms contemplated by this code will have little value during the existence of Decreto Ley No. 10 which provides that the military courts have jurisdiction over the crimes of murder, kidnapping, robbery, (both armed and unarmed), theft, and subversive conduct, and they are enjoined to deal with these crimes in accordance with the Military Code of Procedure.

It is believed that jurisdiction over the majority of these crimes will be returned to the regular criminal courts when the internal situation has been stabilized.

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266. Pages 18-19 of the Proyecto.
268. Código Militar, Segunda Parte, sec Alvarado M., Constitución y Códigos de la República de Guatemala 520-584 (2d ed. 1937).