



Center for the Administration of Justice
Florida International University

**PARAGUAY'S REFORM OF CRIMINAL
PROCEDURE:
A MAJOR USAID ACHIEVEMENT**



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Beginning first in Latin America in 1984, the United States committed itself to supporting modernization of justice systems throughout the world.¹ While much of the early US assistance went to the reconstruction of justice systems following civil wars, recent US Rule of Law support in Latin America has focused on reform of criminal justice systems including the judiciary, the prosecution and law enforcement. Central to this effort has been the promotion of a shift from inquisitorial systems of criminal procedure to adversarial systems that are hearing-based rather than pleading or paper driven.²

Shortly after the onset of democracy in Paraguay, the USAID Mission chose to focus on reform of criminal procedure and invested a considerable share of its limited resources in supporting adoption of an accusatorial criminal justice model. Most Paraguayan justice professionals judge the reform positively and the transition from one system to another as one of the smoothest in the region. The purpose of this paper is to review, albeit cursorily,³ the Paraguayan reform effort and the role that USAID played.

The author of this report has engaged in USAID-sponsored missions to Paraguay several times beginning in 1992. The current review was undertaken during several site visits in 2002 and included interviews of key justice reform actors and civil society opinion makers⁴ as well as documentary review. INECIP⁵ personnel assisted the author in compiling this review.⁶

¹ In a 1999 report by the General Accounting Office, it was reported that Latin American countries received \$180,974 million in Rule of Law assistance during the period 1993-1998. Paraguay's share came to \$3.351 million or 1.85% of the regional total. See: General Accounting Office, Rule of Law Funding Worldwide for Fiscal Years 1993-1998, June 1999, GAO/NSIAD-99-158.

² For a review of some of the most significant projects see: General Accounting Office, US Rule of Law Assistance to Five Latin American Countries, August 1999, GAO/NSIAD-99-195; Linn Hammergren, "Code Reform and Law Revision," U.S. Agency for International Development, PN-ACD-022, August 1998.

³ Not enough time has elapsed for a thorough review of the Paraguayan reforms nor were there sufficient resources available from USAID to conduct an in-depth evaluation of the reforms.

⁴ A list of all the persons interviewed is available upon request. The group included: four judges; four prosecutors; one public defender, one police high-level police official (Comisario Principal); six lawyers, and three foreign experts (José Luis Albiñana who directed the European Union State Modernization project; Gerardo Villalobos who led the SUNY and NCSC USAID projects; and Alberto Binder who was the primary Argentinean consultant during the drafting and transitional stages). A number of media owners and journalists were consulted during site visits and workshops. In addition, 5 representatives from nongovernmental organizations were interviewed (Kuña aty, FUMPARE, Asociación Americana de Juristas, DECIDAMOS, Centro para la Justicia y el Derecho Internacional-CEJIL).

⁵ INECIP ("Instituto de Estudios Comparados en Ciencias Sociales y Penales") is a Paraguayan NGO, which has become the primary civil society proponent of the justice reform and has been a recipient of USAID funding. It is currently a subcontractor to Florida International University in the current journalism and anticorruption project described subsequently.

⁶ In addition to the support furnished by INECIP in data gathering for this report, the author benefited from reading a number of reports, especially: María Victoria Rivas, "Informe de Paraguay: Proyecto de Seguimiento de los Procesos de Reforma Judicial en América Latina," Consulted on November 7, 2002 <http://www.cejamericas.org/newsite/infoceja/PARAGUAY/INFOFINALPARAGUAY.pdf>.

1. Introduction

In a 1995 USAID report evaluating the evolution of democracy in Paraguay, the author concluded that “Paraguay’s road to democracy after decades of military rule has not been easy but its accomplishments have been noteworthy. Yet, democratic institutions remain underdeveloped and fragile. If democracy is to be consolidated and deepened, the institutions that support it will have to be strengthened. The judicial system’s role in supporting democracy through the efficient and impartial administration of justice is particularly important.” This conclusion is as true now as it was seven years ago.

Paraguay’s history has been characterized by instability and war. In the War of the Triple Alliance (1865-1870), it faced the armies of Argentina, Brazil and Uruguay and lost two-thirds of all adult males and much of its territory. Fifty years later, it fought Bolivia in the Chaco War of 1932-1935. General Stroessner led a coup in 1954 and governed, though a combination of cooptation and repression, for the next 35 years. Another coup in 1989 ended his rule and signaled the beginning of democracy for Paraguay. Democratic governance following the coup has not been easy, as successive governments have faced crisis and challenges that have delayed consolidation of democratic rule. Among these, the most significant were the assassination of Vice President Luis María Argaña, the release from prison of General Lino Oviedo, and the resignation and flight into exile of President Cubas. In March 1999, the President of the Senate, Luis González Macchi, assumed the Presidency following Cubas’ resignation and formed a coalition government that collapsed in January 2000. González Macchi’s rule has been characterized by economic stagnation and political instability culminating in the current Congressional decision to begin his impeachment trial.

The deterioration of the economy, political instability, and the Argentinean crisis have contributed to a rise in crime and lack of confidence in the ability the justice system to meet growing popular concern about public safety. Conditions deteriorated so much in Ciudad del Este, on the border with Argentina and Brazil, for example, that the military was called on to patrol the city early in 2001. While crime has been on the rise, it is still not comparable to the violence that characterizes many Latin American countries.⁷ The continued political instability and rising crime, however, have led many to question the value of democracy and made Paraguay’s democratic development one of the most fragile in Latin America.⁸

⁷ Crimes reported to police in Paraguay have risen from 9,548 in 1991 to 23,035 in 2001. See: Ministerio Público, Dirección de Política Criminal y Criminología, “Hechos denunciados a la Policía Nacional: Total País: Período 1990-2001”.

⁸ For example, among Paraguayans, only 35% choose democracy as being preferable to other forms of government. This figure is lower than twelve other Latin American countries. When asked if they are satisfied with democracy, only 10% of Paraguayans responded affirmatively, the lowest percentage in the hemisphere, tied only with Colombia. Another especially worrisome result of surveys is that confidence in democracy dropped quickly between 1996 and 2001. Latinobarometro 1996-2001.

In spite of all of these challenges, Paraguayan reformers enacted far reaching legal reforms.⁹ Of these, two of the most significant are the 1992 Constitution and substitution of the inquisitorial system of criminal procedure with an accusatorial one. The fact that the change has been achieved as successfully as it has in a country recently emerging from autocratic rule, with limited democratic traditions, a weak economy, continuing political interference in judicial selection and decision making, and rising criminality is one of the most surprising features of the Paraguayan reform.

2. Why Criminal Procedure Reform

Paraguay's procedural system remained virtually unchanged from its Spanish colonial roots and adoption of its first criminal procedure code in 1890¹⁰ until enactment of the new adversarial code. Although some changes were made in these 100 years, the basis of the system remained rooted in the European civil law tradition.¹¹ Criminal proceedings were characterized by written pleadings and the secret nature of the key stages of the process.¹² The investigating judge acted as an investigating magistrate during the pretrial stage of the criminal proceeding.¹³ The system relied on a conception that all crimes must be brought to trial, thus, eliminating prosecutorial discretion and preventing the State from focusing its prosecutorial resources on the most severe problems. Rather than being the main accuser and lead investigator, the prosecutor was a passive depository of pleadings. Defense counsel was notably absent throughout the most critical stages of the proceedings. The result was an obscure, inefficient, lengthy process in which the rights of the accused were routinely violated and the majority of defendants lingered in prison while awaiting trial. It is notable that prior to the adoption of the new procedural system, 90 to 95% of all inmates were pretrial detainees, the largest percentage in Latin America.¹⁴

⁹ The Criminal Code was enacted in July 1998; one year later (July 1999) the Congress approved the Code of Criminal Procedure to take effect in March 2000; and in November 2000 the Organic Law of the Public Ministry was passed by the Congress.

¹⁰ The authors, Ricardo Brugada and Ramón Zubizarreta, were Spanish immigrants who based their code on the Spanish and Argentinean codes of criminal procedure. In the case of Spain, the "Ley de Enjuiciamiento Criminal" of 1882 had replaced the legislation they had relied on.

¹¹ The Criminal Code was largely a copy of the Buenos Aires' Code with only a few changes. See: Ley del 24 de agosto de 1871. This legislation was replaced in 1910 by a Paraguayan Criminal Code drafted by Teodisio González. González was inspired by the Bavarian Code and European trends of his day.

¹² An overview of the prior and current systems is found in: Alfredo Enrique Kronawetter, "Paraguay," in Julio Maier, Kai Ambos and Jan Woishnik, *Las reformas procesales penales en América Latina*, pp. 605-656, Buenos Aires: Ed. Ad Hoc, 2000; see also the "Exposición de Motivos del Anteproyecto de Código Procesal Penal para la República del Paraguay," INECIP, *Código Procesal Penal*, Asunción: Servibooks Ed., 2002.

¹³ For some of the historical rationales for the development of the inquisitorial system see: Francisco Tomás y Valiente, *El derecho penal de la monarquía absoluta: siglos XVI, XVII y XVIII*, Madrid: Tecnos, 1992; Víctor Fairén Guillén, *Temas del ordenamiento procesal*, vol. 2, Madrid, Tecnos, 1969; Juan Montero Aroca, "La garantía procesal penal y el sistema acusatorio," *Revista Jurídica Española La Ley*, 1994, pp. 973-984

¹⁴ Elizeche Modesto, et al., "Sistema Penitenciario y reacción estatal contra la Criminalidad," Cidsep U.C.A. Asunción 1990 p. 121 quoting Elías Carranza, et al., *El preso sin condena en América Latina y el Caribe*, ILANUD, San José, 1983.

After the onset of democratic rule in 1989, the inquisitorial system became identified with the autocratic rule of Stroessner while the accusatorial model was viewed as a key feature of a new democratic justice model. Following adoption of the 1992 Constitution, transformation of the criminal process became the primary goal of legal reformers. Unlike other countries in which law reform was basically a foreign initiative, Paraguayans primarily led this reform effort, albeit with a substantial Argentinean influence.

3. USAID's Law Reform Experience

The priority of US-funded code reform efforts in Latin America has been modernization of criminal procedure due to the negative impact that these antiquated codes have on human rights and a growing popular demand to combat rising crime rates. National reformers argued against prevailing criminal policies that relied on abstract legal theory and ignored national realities. In this system, criminal proceedings were so technical that writs and pleadings took on a greater importance than the outcome of the dispute. The system's success depended on a cadre of poorly trained and overworked instructional judges. Prosecutors were assigned few tasks under the old system and were largely passive figures in the process while the right to an efficient legal defense was largely ignored. Police power and abuse was unchecked. Meanwhile, more than 80% of prison inmates were pretrial detainees who had to wait an average of two years prior to sentencing.

It was against this background that the first reforms were implemented. Guatemala was one of the first countries to shift from the inquisitorial to the accusatorial model.¹⁵ The reform encountered numerous obstacles as proponents underestimated the level of opposition of stakeholders and did not devote sufficient resources to adequately implement the change. Uruguay, on the other hand, adopted oral proceedings for its civil process with greater ease as it implemented a massive training program, developed a gradual implementation plan and its Judiciary received adequate financial support from the other branches of government for implementation of the reform. These experiences, combined with that of other countries, were not lost on the Paraguayans as they planned their own reforms with the support of consultants who had worked on similar changes in the hemisphere.

Reform is now the rule rather than the exception in Latin America. El Salvador adopted the accusatorial model in its new code of criminal procedure and modified its procedure for juvenile courts; Costa Rica enacted a new accusatorial code of criminal procedure; Guatemala's initial obstacles have been largely overcome and its code is operational; Honduras' code is now effective; Venezuela has also followed suit while some of the most traditional countries, notably Chile¹⁶, have also adopted the model,

¹⁵ Steven E. Hendrix, "Innovation in Criminal Procedure in Latin America: Guatemala's Conversion to the Adversarial System," *Southwestern Journal of Law and Trade in the Americas*, volume 5, pp. 365-419, 1998.

¹⁶ See: Carlos Rodrigo de la Barra Cousino, "Chile: Adversarial v. Inquisitorial Systems: The Rule of Law and Prospects for Criminal Procedure Reform in Chile," *Southwestern Journal of Law and Trade in the*

either fully or partially (Argentina).¹⁷ Elsewhere, Bolivia and Colombia have also reformed their procedures. Unfortunately, there are no empirical evaluations of these reforms. The expectations of reformers have proven to be overly optimistic in many countries and some of the major features of the system, primarily expanded pretrial release and diversion opportunities, have been rolled back while sanctions in the criminal code were stiffened.

AID's law reform model rests on two basic assumptions: "first the conclusion that one of the fundamental causes of sectoral performance was the structure of the justice process, and, second, that any improvement would necessarily require the rewriting of the basic substantive and procedural codes that shaped it."¹⁸ Many lessons have been learned from AID's support of law drafting. Among these, some of the most important are:

- Law reform is a lengthy reform strategy that challenges basic legal tenets rooted in a country's history and customs.
- Law reform should be part of a comprehensive justice reform strategy that relies on objective assessments of specific areas of the justice system.
- A danger of most reform initiatives is to approach law reform from a technical point of view and to ignore the political, cultural and economic aspects.
- Foreign donors and national reformers have sometimes overlooked the vested interests that might be negatively affected by modernization of the legal system.¹⁹
- A critical component of any law reform strategy is to devise a sound implementation plan that estimates the costs of the reform, the potential effects on existing processes and institutions, takes into account local idiosyncrasies and devises an outreach strategy to win over the public and silence opponents. Of these, the most neglected component of an implementation strategy is a social marketing and outreach campaign aimed at lawyers and the public.
- Finally, code reform cannot be successful in an environment in which poorly educated and inadequately compensated judges are selected for political reasons, there is limited judicial independence, and public corruption is widespread.

Americas, volume 5, pp. 323-364, 1998; Andrés Baytelman, "Informe de Chile: Proyecto de Seguimiento de los procesos de reforma judicial en América Latina,"

<http://www.cejamericas.org/newsite/infoceja/CHILE/InformedeChilecompleto.pdf>

¹⁷ For a review of the countries see: Julio Maier, *op.cit.*

¹⁸ Linn Hambergren, *op. cit.*, p. 1.

¹⁹ For example, political parties will resist attempts to merit-based personnel systems that reduce their patronage pool. Practicing lawyers and bar associations have tended to be among the staunchest opponents of legal reforms. For many, the justification is as simple as not wanting to learn new codes while for others this is seen as a interference in the operation of a system which they have learned to manipulate and from which they derive benefits. It is critical to identify the main possible opponents or unconvinced pressure groups from the very beginning and to involve them in the drafting process.

4. The Paraguayan Law Reform Process

The adoption of the 1992 Constitution was a watershed event in the Paraguayan democratization process. The Constitutional Convention, composed of representatives from all political sectors, realized the importance of an independent judiciary in sustaining a democratic process and introduced reforms to achieve this.²⁰ Thereafter, the Congress enacted major legislative changes to the criminal justice system. Of these, the most significant reform has been the abolishment of the longstanding inquisitorial system of criminal procedure and its substitution with an accusatorial model. The reform process, while not complete, has been a major achievement of a coalition of national reformers and donors, with USAID at the lead, who have remained steadfast in their commitment to the reform.

Unlike other national reform processes in which the change emanated from the Judiciary or academic circles, the Public Ministry²¹, whose leader, Luis Escobar Faella, became the standard-bearer for the reform, was the driving force for change. Faella proposed not only enactment of legislation that specified the organization and role of the Fiscalía but also defined its functions within the context of a new accusatorial model in which the Ministry would bear the primary burden of leading the investigation and prosecution of criminal cases. The absence of a powerful Public Ministry at the time was fortuitous for reformers who did not have to contend with opposition from bureaucratic stakeholders seeking to protect their turf. Young new motivated prosecutors adopted the reform with an almost missionary zeal. Their activism was rewarded by substantial increases in budgetary allocations to the Ministry whose growth has been the most impressive in the justice sector, from 684,000 guaranis in 1991 to 10 billion guaranis in 1995.

Eventually, the Supreme Court assumed leadership of the reform and introduced the code of criminal procedure in the Congress. Since then, the Court has remained steadfast in its support for the procedural reform, arguing that it is the only viable response to growing caseloads and backlogs.

U.S. support to the code reform effort began in 1992, as set forth in greater detail in the section that follows, with an award to the Public Ministry and the Supreme Court for \$142,000.²² Entering into an agreement directly with the implementing institutions proved to be critical in the early stages of normative reform and design of implementation strategies.

²⁰ Some of the major changes included establishment of a Judicial Council (“Consejo de la Magistratura”) for the selection of judges, assumedly on the basis of merit, at all levels; expansion of the size of the Supreme Court and adoption of lifetime appointments for its members; amplification of the Court’s jurisdiction to allow it to rule on the constitutionality of laws; award of 3% of the national budget to the Judicial Sector (Judiciary, Public Ministry, Electoral Justice, and Judicial Council). Another significant step toward modernization of the Judiciary was the establishment of the Public Ministry with functional and budgetary independence.

²¹ The term Public Ministry is used to refer to the prosecutorial agency, which in Paraguay is officially called the “Fiscalía.”

²² “Convenio para impulsar la reforma estructural de la justicia penal en Paraguay.”

Under the initial agreement between USAID and the Public Ministry, the Fiscalía assigned prosecutors to work with foreign consultants, selected by them, in drafting the legislation. A joint-team approach that relied on the experience of consultants who had worked on prior reform efforts with local prosecutors and judges knowledgeable of the local situation also contributed to the success of the effort and overcame potential accusations by opponents that this was a foreign code drafted by Argentines and funded by Americans.

Once the first draft of the proposed code was completed and published, a process of public review and consultation began. The public review process consisted of workshops in eight of the nine judicial regions in the country. Lay persons, as well as lawyers, were invited to participate. Rather than lecturing to participants, team members encouraged dialogue and assured them that their feedback would be taken into account in drafting the final version of the code. The consultation process enabled reformers to overcome the absence of sufficient empirical data to support their assumptions, generated attitudinal change among participants, and established support networks. In addition to these workshops, the public consultation and dissemination process included radio and television programs as well as press interviews.²³ Finally, the draft was forwarded for review to a committee of judges and experts.

The final draft was completed in 1996. The Supreme Court then forwarded it to the Congress as its own legislative proposal.²⁴ Introduction of this legislation was followed by preparation of a proposed law detailing the organization, structure and functions of the new Public Ministry in accordance with its role under the new accusatorial system.

At the same time that this law drafting was going on, a German law professor, originally funded by the United Nations Development Program, prepared a Criminal Code.²⁵ A joint legislative committee was assigned to review the proposed legislation with the support of consultants hired with USAID funding. The Criminal Code was enacted in 1997, followed by the Code of Criminal Procedure in 1998 and the Organic Law of the Public Ministry in 2000.

Although the bulk of the criminal procedure draft remained largely intact, some major changes were introduced during parliamentary review. A major reform was elimination of a proposal that permitted the filing of a criminal complaint by any citizen charging any public official with the violation of human rights.²⁶ The code also reduced the number of situations in which a victim could initiate a private prosecution.²⁷

²³ For the importance that the courts place on public opinion see: Enrique A. Sosa Elizeche, "Restructuring of Justice Administration in Paraguay," *Saint Louis Law Journal*, vol. 42, pp. 1153-1162, 1998.

²⁴ Paraguayan law permits the Supreme Court to introduce legislation in the parliament on its own.

²⁵ Professor Wolfgang Shone.

²⁶ Article 70 of the proposed Code.

²⁷ Latin American criminal codes and codes of procedure, inspired by European traditions, typically classify certain crimes as "private action" crimes. The victim must pursue these crimes as a private prosecutor with little assistance from the State. Under Paraguayan law, the following crimes are classified

5. The Key Aspects of the Reform

The current code of criminal procedure represents a major break with Paraguayan legal custom and with ingrained European legal traditions. The shift towards the accusatorial system required a number of major changes, both in the mindset of operators as well as in the role that the different justice institutions were to play in the process. A major change was the establishment of a prosecutorial body to oversee the investigation and prosecution of cases, something that was originally assigned to “an investigating magistrate” who was part of the Judiciary. The Judiciary’s role in the new system shifts from being an active participant in the process to a more neutral and passive role. Assignment of the prosecutorial function to the Public Ministry, although legally autonomous but most often functionally dependent on the Executive, without an equally strong legal defense system creates an imbalance in favor of the Government. The Constitution and the new code guarantee a legal defense to all defendants and calls for the assignment of public defenders to indigent defendants. As in many countries, this has not happened in Paraguay although public legal defense has come a long way since 1992.

Some of the other major changes are:

- Establishment of a procedural system based on hearings in the presence of the parties, and in which the centerpiece is a public trial;
- Rules mandating the duration of the different stages of the process with consequences for noncompliance;
- Prosecutorial ability to determine charges and usage of non-trial case resolution alternatives;
- Greater emphasis on pretrial release over incarceration;
- Different procedures for cases that require specialized treatment (private prosecutions and procedures for indigenous communities for example);
- Prosecutorial discretion in the filing of charges with oversight by victims and judges;
- Participation of victims in the process.

6. Implementation Model

The success or failure of reform processes have largely rested on the implementation model adopted and the resources devoted to it. In many countries, law drafters have declared victory after enactment of the legislation and failed to take into account implementation issues, especially those that require statistical analysis, case tracking projections, personnel changes, or budgetary allocations. Oftentimes, the donors have likewise claimed success and withdrawn support after enactment. In either case, the reform process has been hindered or derailed.

as “private actions” crimes: assault, domestic violence, battery, unauthorized medical treatment, slander, libel, joy riding, and unauthorized entry into a private residence. See Article 17 of the Code of Criminal Procedure.

The Paraguayan experience is notable because of the amount of resources devoted to implementation planning and the role that key actors in the drafting process played in the subsequent stages. USAID's commitment to this stage provided resources not available from local funds.

The Paraguayan Supreme Court, early on, became aware of the need for a detailed implementation plan supported by legislation and regulations. It assigned two judges and a foreign consultant to lead a team of Paraguayan prosecutors and judges in drafting the requisite legislation, which was eventually introduced in the legislature by the Supreme Court.²⁸

The first point of the new legislation was to establish a five-year transitional period²⁹ during which all cases begun under the 1890 Code must be completed under its procedures. All cases filed after March 1, 2000 are processed under the new procedures regardless of when the crime took place.³⁰ Processing of cases under two procedures required operation of two sets of courts. Establishment of parallel court structures has advantages. The Paraguayan approach is similar to the Uruguayan transitional model to deal with pending cases. Uruguayans recognized that a side benefit to this transitional model is that it allowed them to assign the youngest judges, knowledgeable in the new system and its proponents, to processing cases under the new system while allowing their more recalcitrant colleagues to continue operating under the old model.

In order to overcome constitutional challenges regarding the applicability of procedural or substantive norms that might benefit accused persons differentially, the transitional legislation afforded some of the most beneficial provisions of the new code to persons processed under the old system. One of the primary examples is the application of the new norms allowing for greater forms of pretrial release to cases filed under the old system.³¹

Another important provision of this transitional legislation establishes the mechanism for purging cases in order to reduce overburdened courts and clear backlogs. As can be seen from Figure 1, the program cleared 95.3% of the cases pending in Asunción courts in 1999. Of the 182,931 criminal cases pending before Paraguayan courts at the beginning of the purge program, only 18,258 (10%) remained active by November 2001³². The majority of these cases were cleared by closing of files (18.5%);

²⁸ Ley No. 1444, Ley de Transición que regula el período de transición al Nuevo sistema procesal penal," http://www.abogados.com.py/busqueda/codigos/procesal_penal/abo_1444.htm, Consulted November 4, 2002.

²⁹ Article 1 sets the period as July 9, 1999 to February 28, 2003.

³⁰ Article 3.

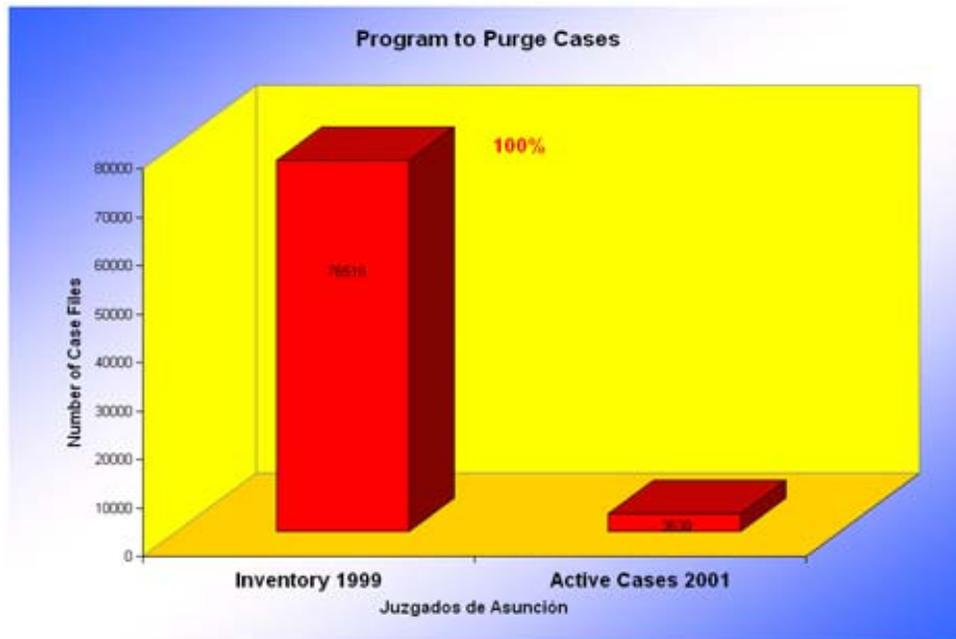
³¹ Other situations are set forth in Article 2.

³² Poder Judicial, Programa de Depuración de Causas Penales, "Informe Global año 2001," Nov. 16, 2001.

permanent dismissal (17.7%); running of statutes of limitations (14.9%); provisional dismissal (6.8%); and termination of the criminal action (5.7%).³³

FIGURE 1

Program to Purge Cases: 1999 Inventory and 2001 Active Cases



Source: Judicial Technical Office for the Implementation of the Reform of the Criminal System, “Informe de Avances de la Implementación del Nuevo Sistema Penal”, August 2001.

One important speedy trial provision called for the final dismissal of all cases, filed under the old system, that are not completed prior to the five-year transitional period.³⁴ While this appears, on its face, to be a salutary requirement, it is now judged as overly broad, especially because it may benefit a number of public officials accused of corruption and human rights abuses.³⁵

Establishment of a transitional phase allowed public acceptance of the new system to develop gradually. Another important feature of the transitional legislation is the establishment of a high-level interagency commission to lead the changeover. The

³³ These figures represent 91,306 cases in Asunción and other major population centers. Of the 4,035 cases purged in Villarica, 51.5% were closed because the statute of limitations had run. Hugo Valiente, *op. cit.*, p. 91.

³⁴ Article 5.

³⁵ Recently, the Supreme Court upheld a constitutional challenge to this provision and set aside the statute of limitations provision. However, since constitutional rulings are only applicable to the parties, the practical implication of this decision is unclear.

Commission is composed of the President of the Supreme Court, another Supreme Court justice, and the Fiscal General and is charged with oversight of the transitional process.³⁶ Working groups, denominated Technical Commissions, are formed with the participation of the Judiciary, the police, and the correctional system and will facilitate each agency's adoption of the new process and resolve potential disputes before they arise.

Training of judges, prosecutors and public defenders continued to be a priority during this transitional stage. Manuals were developed for justice officials and distributed throughout the country. A diverse set of methodologies were employed in the training. Eventually 137 prosecutors, 107 judges and 79 public defenders were trained in the new system. Emphasis was placed on practical training that focused on trial advocacy and case management including simulations in a Model Court in which students' advocacy skills were critiqued. Ultimately, 549 justice officials were trained in the Model Court including 150 judges, 122 prosecutors, 128 public defenders and 149 clerks. Inclusions of court clerks ("secretarios") proved to be a significant innovation from other Latin American experiences in which clerks, ignored during the training and implementation stages, opposed the change or were ignorant of its requirements.

Unlike other countries in which there was strong opposition from lawyers and justice officials, the new code did not encounter formidable organized opposition.³⁷ There were several factors that contributed to this. The first, and possibly most important factor, was the timing of the reform which coincided with the end of a long dictatorial period and the beginning of widespread democratic reforms. The old code was equated with the repression of the Stroessner period while the new code became synonymous with modernization and democratic development. The Judiciary was overwhelmed with backlogs and delays that affected its image and concluded that the prevailing system was incapable to meet modern demands. The success of the case purging process in decreasing backlogs and speeding up processing periods established a favorable image for the new system.

7. The Implementing Institutions

Implementation of the change over to the new code not only required overcoming established legal traditions but also bureaucratic cultures and organizational structures. Three key agencies of the criminal justice system were primarily affected: the Judiciary, the prosecution and public legal defense.

³⁶ Article 11.

³⁷ In other countries, El Salvador for example, there has been strong opposition from the police while in others some lawyers have charged that the code is a transplant of a US system that the country is neither prepared culturally to accept nor financially able to manage it.

7.1. The courts

Three types of courts were established under the new system.³⁸ The guarantee courts (“tribunales de garantías”) oversee the pretrial stages and the investigatory actions of the Public Ministry while trial courts (“tribunales de sentencia”) hear public trials, adjudicate guilt and impose sentence. At the same time, “liquidation” courts continue to operate under the old pleading-based system.³⁹ Even courts of appeal are affected by the operation of two simultaneous systems. In Asunción, for example, 6 of the twelve appellate judges are assigned to two panels that handle cases arising under the old system.⁴⁰

A computerized system for random case assignment has been established by the Supreme Court. The Court also created a Public Assistance Office (“Oficina de Atención”) to meet the emergency investigative needs of prosecutors (for example, search warrants) that require immediate attention. This office is staffed by support personnel and a duty-judge who also rules on pretrial release and detention. Trials are commonly held before three-judge panels.⁴¹

7.2. The prosecution

The Public Ministry has been organized both territorially and functionally.⁴² In the largest city, Asunción, it has 11 prosecutorial units (“unidades fiscales”), each composed of three prosecutors and support staff. In order to meet the demands of cases processed under the old system, liquidation prosecutorial units are assigned to cases arising under the 1890 code. These temporary prosecutorial units will cease to operate in 2003.⁴³

Case assignment is a function of an intake office that screens police referrals or complaints filed directly with the prosecution by victims. The screening office refers the case to the appropriate specialized unit or to an ordinary prosecutorial office. If immediate action is required, the file is sent to a duty-prosecutor charged with dealing with emergencies and is subsequently referred to the appropriate office. Caseloads are rising with each prosecutor handling approximately 189⁴⁴ new cases annually⁴⁵ and an

³⁸ There were 36 guarantee judges in 2001, 7 “execution” judges that oversee prison sentences, 48 trial judges and 39 appeals court judges.

³⁹ In Asunción, seven of the thirteen trial judges were liquidation judges charged with managing pending caseloads under the old system. See: Cristián Riego, “Informe comparativo: Proyecto Seguimiento de los procesos de reforma judicial en América Latina,” Consulted on November 12, 2002, http://www.cejamericas.org/newsite/infoceja/COMPARATIVO/informecomparativo_completo.pdf

⁴⁰ In 2000, there were 551 judges in Paraguay with 232 assigned to Asunción.

⁴¹ Trials involving private prosecutions are held by one-judge courts.

⁴² There were 186 prosecutors assigned to criminal cases in the end of 2001. Ministerio Público, *Memoria de Gestión 2000-2001*.

⁴³ In 2001, there were 142 prosecutors, 17 liquidation prosecutors and 30 assigned to juvenile cases.

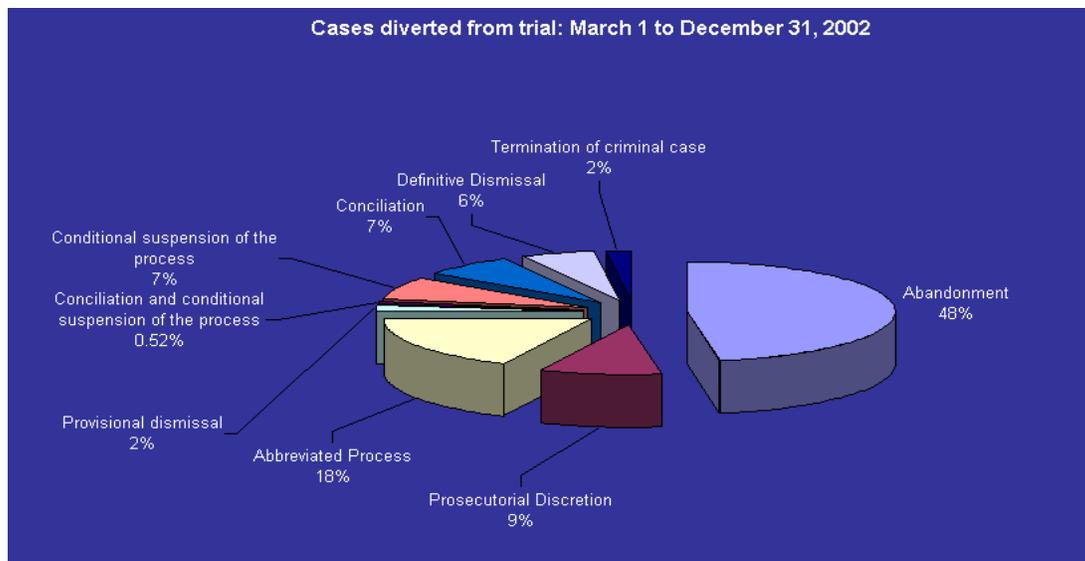
⁴⁴ There are contradictory figures which show an average of 411 cases per prosecutor and 756 new cases per prosecutor in 2001. See: Ministerio Público, “Informe sobre la distribución de las causas ingresadas a la mesa de entrada a Asunción- Año 2001: Censo Criminológico en el contexto del sistema judicial penal, la prevención del delito y la seguridad ciudadana,” April 2002.

active average caseload of 433 cases with wide regional differences in 2001. At one extreme, for example is the Amambay region with an average caseload of 136 cases per prosecutor and at another Paraguari with 603 cases per prosecutor.⁴⁶

One of the main features of the new procedural system is the discretion afforded to prosecutors. For example, prior to filing formal charges, the prosecutor may divert the case through a referral of the victim and defendant to conciliation, may suspend the case, close it permanently, or may agree to a plea negotiation exercised through an abbreviated or summary process.

FIGURE 2

Cases Diverted from Trial: March 1 to December 31, 2000



Source: Ministerio Público, *Memoria de Gestión 2000-2001*, Asunción, 2002.⁴⁷

Critics of the accusatorial system complain that in order for the system to operate, especially if processing time periods are complied, is to divert a substantial percentage of cases so that a reduced number of cases go to trial. The extent to which prosecutors use these new diversion procedures will determine success in reducing backlogs and processing time periods. It appears that alternative measures are being widely used. For example, during a ten-month period in 2000 (March to December) prosecutors forwarded

⁴⁵ During 2000, 35,305 cases were received by the Public Ministry with a decrease to 21,238 cases in 2001. Ministerio Público, *op. cit.*, p. 30.

⁴⁶ *Ibid*, p. 31.

⁴⁷ The source is the: Ministerio Público, Fiscalía General del Estado, Dirección de Política Criminal y Criminología, "Situación procesal de las causas ingresadas en el año 2000 a la mesa de entrada de la Fiscalía General y a la Oficina de Distribución de Causas de la Corte Suprema, Asunción, Marzo-Diciembre del 2000," diciembre del 2001. These statistics do not coincide with a similar graph presented in María Victoria Rivas, *op. cit.* p. 19.

3,819 cases to first instance courts. Of these, some final resolution was reached in 1,590 (41.6%) cases. Surprisingly an alternative to trial was utilized in 1,548 (97%) cases while only 42 went to trial. Of the cases diverted from trial, the most used diversionary measure, used in 55% of the cases that were diverted, is abandonment (“desestimación”), which is utilized by prosecutors when they have determined that no crime was committed or when there is some legal obstacle to proceeding.⁴⁸ In this, as in other cases, the code requires that the prosecutor obtain judicial authorization before utilizing the alternative measure.

Although the Paraguayan reform permits prosecutorial discretion in case filing and disposition, it restricts it by requiring judicial authorization. This is one of the main differences between the Paraguayan model and the US system. The reason for these controls responds to the European traditions that still characterize much of the Paraguayan legal system, the potential opposition of judges if prosecutorial discretion was left unfettered, and the potential for abuse of this power if left unchecked.

7.3. Public Legal Defense

An accusatorial system is only effective if it establishes a balance between an aggressive prosecutorial force and an equally aggressive and capable public legal defense. Like many Latin American constitutions, Paraguay’s charter guarantees the right to counsel but this right is not enjoyed fully in practice, primarily due to the small cadre of public defenders employed by the Judiciary. For example, in Asunción there were only 26 public defenders and only 102 nationally in 2001. This led the authors of the U.S. State Department Human Rights Report for 2001 to conclude that “(m)any destitute suspects receive little legal assistance, and few have access to an attorney sufficiently in advance of the trial to prepare a defense. In practice public defenders lack the resources to perform their jobs adequately.” Today there are about 150 public defenders nationally with 95 of them assigned to criminal cases.⁴⁹

Given the large number of pending criminal cases and the indigence of many defendants, the number of public defenders is insufficient. This is aggravated by the need to supply public defenders to represent defendants processed under the new system while continuing to represent defendants under the old one. A difficulty in selecting and retaining personnel is that there are salary disparities between prosecutors and public defenders leading to dissatisfaction among the latter.

A critical issue in gauging the effectiveness of a legal defense is the determination of the procedural point in which the right to counsel attaches. The new code of criminal procedure calls for the right to be effective after the Public Ministry acts or within 6 hours of being notified of a detention or the 6 hours in which a judge must be notified.⁵⁰ The authors of the Code went further than most other accusatorial systems by permitting the “accused and his/her defender (to) intervene in all investigatory actions undertaken by

⁴⁸ Article 305, Code of Criminal Procedure, hereinafter referred to as CCP.

⁴⁹ Approximately 23 additional defenders await selection and appointment.

⁵⁰ Article 6 CCP.

the National Police and (to) have access to all of the investigations, in accordance with the provisions of this Code, except when the evidence is under seal in accordance with the law.”⁵¹ This broad access provision is curbed however by a subsequent code section that, while requiring that the prosecution “permit the presence of the parties in the actions which it undertakes, ensuring that their presence does not obstruct the investigation.”⁵²

7.4. The Police

The police under Stroessner’s rule was guilty of political repression and human rights violations. In 1993, Congress enacted a new law that created the National Police, and removed it from military control. The national police force, numbering approximately 13,000, is under the overall authority of the Ministry of the Interior, and has responsibility for maintaining internal security and public order.⁵³ Police abuses of human rights, including extrajudicial killings, have continued.⁵⁴ Of special concern are police sweeps of minors, pressed recruitment of conscripts into the armed forces and excessive force used by police and security forces.⁵⁵ In July 2002, the Government imposed a state of emergency after violence broke out between police and demonstrators seeking the ouster of President González Machi.⁵⁶

Compliance with the due process guarantees established by the Code will require close cooperation between police and prosecutors and the development of a certain degree of trust between these institutions. While the code places general oversight responsibility over investigations in the hands of prosecutors this does not mean that police are hierarchically or operationally subordinate to prosecutors. Adding to the natural distrust between police and prosecutors is the prosecutorial plan to employ its own detective force.

The code sets forth some controls over police investigations: to notify the Public Ministry of the receipt of criminal complaints within 6 hours of having received them; to “act in a coordinated fashion when the Public Ministry orders a preventive investigation;”⁵⁷ within five days of completing pretrial investigations, to forward all of their evidence and case information to the Public Ministry;⁵⁸ notify the Public Ministry and judge of any arrests within six hours of the detention;⁵⁹ and an express prohibition of interrogations of prisoners while in detention.⁶⁰ Critics have complained of excessive

⁵¹ Article 297 CCP.

⁵² Article 317 CCP.

⁵³ In 2001 there were approximately 11,000 police personnel.

⁵⁴ See: US State Department, “Paraguay”, *Country Reports on Human Rights Practices 2001*, <http://www.state.gov/g/drl/rls/hrrpt/2001/wha/8297.htm>, Consulted on November 7, 2002.

⁵⁵ See for example: Amnesty International, “Paraguay”, *Amnesty International Report 2002*, <http://web.amnesty.org/web/ar2002.nsf/amr/paraguay!Open>, Consulted on November 7, 2002.

⁵⁶ Article 296 CCP.

⁵⁷ *Ibid.*

⁵⁸ Article 300 CCP.

⁵⁹ Article 239 CCP.

⁶⁰ Article 90 CCP. The purpose of this provision is to withdraw the benefits of coerced confessions by excluding such testimony at trial in much the same way that the exclusionary rule operates in the United States. In practice, however, this ban will only be effective insofar as judges do not permit the introduction

police discretion to make arrests in those cases in which “there are sufficient indicia of a person’s participation in a criminal act and the act is one that permits preventive detention.”⁶¹ Others argue that the only effective means of controlling police behavior and improving investigations is to establish a “civilian police” dependent on the Public Ministry with exclusive responsibility over instigations of serious crimes and to relegate the police to patrol and crime prevention functions.⁶²

Like police forces elsewhere, Paraguayan police exercise a great deal of discretion in determining the conduct of investigations regardless of the code provisions that appoint prosecutors as the overseers of criminal investigations. While this is partially due to the police subculture, it is largely a product of police resources, its military command structure and insufficient capability of prosecutors to oversee criminal investigations.

8. Results of the Reform

This section reviews some of the most important arguments that were made to justify the reform and determine whether they have proven to be accurate. The most significant ones were:

8.1 Reduction of caseloads and backlogs

One of the main criticisms of the inquisitorial system is that because of its inefficiency delays were inevitable and led to the congestion in the courts. The most important measure to reduce the backlog of cases was to establish the program to purge caseloads described previously. As a result of this measure, by November 2001 only 18,258 (10%) of the 182,931 criminal cases pending before Paraguayan courts when the Code was first enacted remained active.

8.2. Pretrial release

One of the goals of the new procedure was to reduce the percentage of prison inmates awaiting trial, the largest in the hemisphere, by speeding up the process and using alternative pretrial release options. While the prior practice favored pretrial detention, the new procedure emphasizes pretrial release as the rule and detention as the exception.

of evidence resulting from confessions. Human rights groups have complained that police routinely violate this provision and coerce confessions and statements from detainees and thereafter introduce them through their reports or introduce the fruits of the coerced statements. See for example: Inter-American Commission of Human Rights, “Follow-Up Report On Compliance with the Recommendations of the IACHR in the Third Report on the Situation of Human Rights in Paraguay,” <http://www.cidh.oas.org/annualrep/2001eng/chap.5b.htm>, Consulted November 7, 2002.

⁶¹ Hugo Valiente, “Detenciones ilegales y arbitrariedades,” *Coordinadora de Derechos Humanos del Paraguay (CODEHUPY)*, *op. cit.*, p. 93.

⁶² Hugo Valiente, “Tortura y otros tratos crueles, inhumanos y degradantes,” *Coordinadora de Derechos Humanos del Paraguay (CODEHUPY)*, *op. cit.*, 53-74, p. 73.

Figures released by the Judiciary indicate that during the first year of application of the new criminal procedure, 67% of the persons appearing before the courts of Asunción were ordered detained pending trial. Of the remaining 32.3%, only two cases required continued police supervision. During the first 4 months of the second year (until June 2001), the percentage of persons ordered detained decreased to 46% none of whom required police oversight for compliance.⁶³ Even in the most serious cases, culpable homicide, 6 of 37 defendants were released in 2000.

Prison statistics confirm the decrease in the use of pretrial detention. The percentage of persons incarcerated in Tacumbú, the main men's prison, for example, who were pretrial detainees decreased significantly to the point that out of a total of 1,713 prisoners, some 958 (56%) were pretrial detainees and 775 (44%) had been convicted. Of the latter, 55% of judgments were final and the remainder was under appeal. "El *Buen Pastor*" prison for women, which has the capacity to hold more than 200 inmates, had a population of 154 prisoners (according to statistics for October 2001), of which 120 have been convicted and 34 were in preventive detention. This led the Inter-American Commission on Human Rights, which had previously condemned Paraguay for the treatment of prisoners, to praise the significant reduction of pretrial detainees.⁶⁴

8.3. Convictions and Acquittals

There is a general perception that the new system is more effective in obtaining convictions by screening out the weakest cases and settling others at an earlier stage. The Supreme Court's Technical Office released comparisons of convictions and acquittals for 1996 under the old code with cases in 2000 and part of 2001 with conviction rates rising from 74.6% in 1996 to 92.1% in 2000 and 90.7% in four months of 2001 (Figure 3). While these statistics appear to support the premise of higher conviction rates under the new code, the comparisons of 1996 with 2000, in which part of the year cases were under the old code, and without separating those cases tried under the old system in 2000 and 2001, make the comparisons suspect. Another set of statistics released by the Public Ministry also appears to support the conclusion of higher rates of conviction under the new system. Of 58 defendants tried under the new system in 2000, 9 (15.5%) defendants were acquitted and 49 (84.5%) were convicted. Of the latter group, only 1 was fined while 43 (74% received jail sentences, and 5 (8.6%) were sentenced to probation.⁶⁵

⁶³ Hugo Valiente, "Detenciones ilegales y arbitrariedades," Coordinadora de Derechos Humanos del Paraguay (CODEHUPY), *op. cit.*, p. 89.

⁶⁴ Inter-American Commission of Human Rights, "Follow-Up Report On Compliance with the Recommendations of the IACHR in the Third Report on the Situation of Human Rights in Paraguay," <http://www.cidh.oas.org/annualrep/2001eng/chap.5b.htm>, Consulted November 7, 2002.

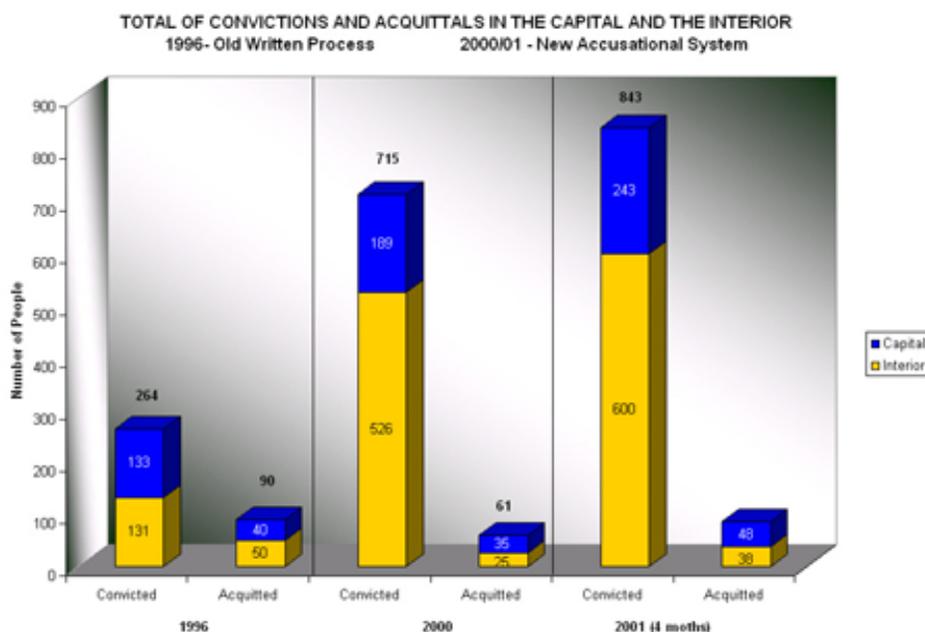
⁶⁵ Ministerio Público, Gabinete de Desarrollo Profesional, Dirección de Política Criminal y Criminología, "Informe complementario de la situación procesal de las causas ingresadas a la Fiscalía y asignados a los Jueces de Garantías en el año 2000: juicio oral y procedimiento abreviado," n. d.

8.4. Duration of the Process

One of the main purposes of the reform was to speed up the process and reduce processing time. Figure 4 presents a comparison of four crime groups and the average duration for each with sex offenses taking the longest time from detention to trial, 1,151 days in 1996 and 247 days in 2001, and the average processing period for all crimes being 963 days for 1996 and 242 in 2001. The decrease, both in numbers of days and in percentage of time is significant with an overall reduction of 75% for all crimes.

FIGURE 3

Number of Defendants Acquitted and Convicted in 1996, 2000 and 4 months of 2001



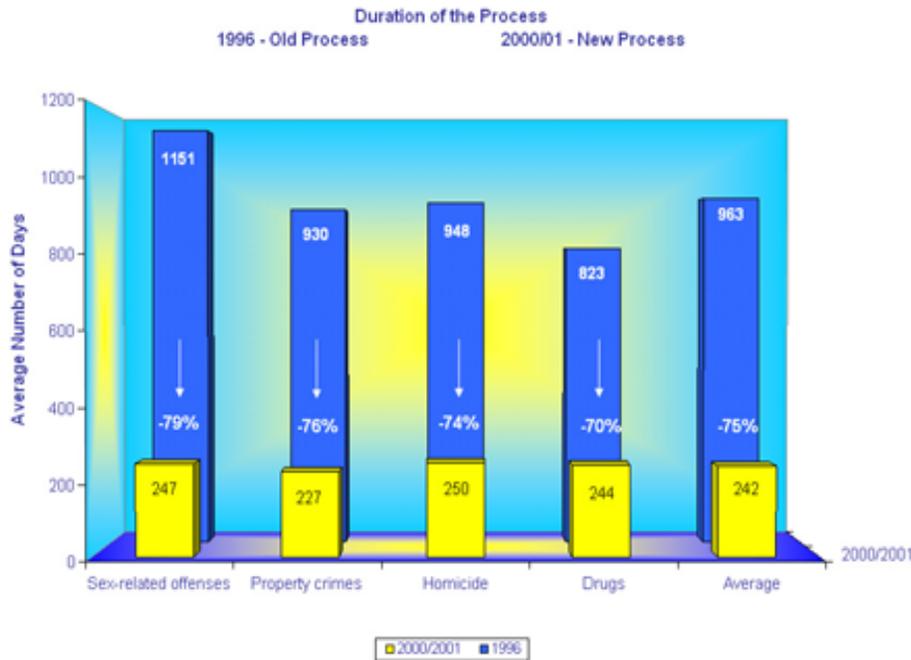
Source: Judicial Technical Office for the Implementation of the Reform of the Criminal System, “Informe de Avances de la Implementación del Nuevo Sistema Penal”, August 2001

While the code has set forth processing periods aimed at reducing the overall duration of the process, compliance problems continue to affect the success of prosecutions and the celerity of the process. Human rights activists have complained that cases are delayed “by days and sometimes months” when the time periods really call for hours.⁶⁶ Of special concern is compliance with prescribed terms required for notification of the judge or the Public Ministry, especially when carried out by the police without a judicial order; the first appearance before the judge; and the appointment of defense counsel.

⁶⁶ Hugo Valiente, “Detenciones ilegales y arbitrariedades,” Coordinadora de Derechos Humanos del Paraguay (CODEHUPY), *op. cit.*, p. 86.

FIGURE 4

Average Duration of the Process for Certain Crimes in 1996 and 2001



Source: Judicial Technical Office for the Implementation of the Reform of the Criminal System, “Informe de Avances de la Implementación del Nuevo Sistema Penal”, August 2001

8.5. Participation of victims in the Process

While victims have generally not been considered parties to a criminal proceeding, there is a modern trend to accord them a special procedural status and the Paraguayan code reflects this view. The recognition of the rights of victims is found in the legislation creating the Public Ministry, which requires that the new agency include a Victim’s Assistance Office (“Dirección de Asistencia a la Víctima”) in its organizational structure.⁶⁷ The most important recognition of victim rights, however, is found in the Code of Criminal Procedure. Some of these are:

- dignified and considerate treatment, respect of privacy rights and personal safety;
- being informed of the status of the case whenever requested;
- the right to be heard at any point in which the case may be terminated or suspended;
- the opportunity to challenge the dismissal of an action or the closing of an investigation by the prosecution;

⁶⁷ Article 65, Ley Orgánica del Ministerio Público.

- to be informed of his/her rights when the complaint is filed.

The prosecution shall also take into account compensation of victims in sentencing proposals, which may contain requirements for reparations of damages. Finally, the victim may institute a private prosecution in those instances allowed by law.

8.6. Transparency of proceedings

A claim of proponents of the adversary system is that it would result in greater transparency and, thus, increased citizen involvement and advocacy. This would appear to be an inevitable consequence of the fact that all significant judicial actions, with some exceptions, must be undertaken in public. A recent USAID-sponsored review of Rule of Law accomplishments in Paraguay praised adoption of the new criminal procedure code as a significant step in making the system more transparent and accessible. The report quotes one private criminal attorney as claiming that “the system went from *la oscuridad al sol* (darkness to sunlight). The courtrooms and trials are open to the public, and have space reserved to accommodate the press. Victims of crime had never previously been able to access information concerning their cases. Now, victims of violent crime are kept aware and informed of case progress through a specialized prosecutorial unit, and are able to attend and participate in judicial proceedings; these proceedings are no longer a secret of the State. All interested parties can have access to all documents reviewed by the judge, and defendants can confront and rebut witnesses.”

8.7. Reduction of corruption

Proponents of the new code also argued that the openness of the system and its adversary nature would decrease judicial corruption. The adversarial nature of the process and the role of the parties would, they argue, make it much harder for corruption to take place since each party would be a check on the actions of the others.

It is difficult to judge the impact of the new system on judicial corruption. One area in which there has been some progress is in the relations between the courts and the press. Paraguay’s press has been active in exposing public corruption, but has felt threatened by the continuous use of slander and libel prosecutions against reporters and media owners. Like most of its Latin American neighbors, Paraguay treats libel and slander as privately prosecutable crimes and imposes criminal sanctions for the commission of these offenses. Additionally, there does not appear to be any clear differentiation between what can be said about private persons and public figures. Consequently, the press generally views usage of these measures as a means to silence the press and protect corrupt political or economic leaders.

A current USAID project seeks to improve the quality of press coverage of corruption and the justice sector while improving relations between the courts and the press. This interchange, the first of its kind in Paraguay and one of the first in the region, has improved the situation but a great deal remains to be done. It is unlikely, however, for example, that Paraguayan officials will decriminalize slander and libel.

Overall, Paraguay's citizens continue to complain about public corruption. The perception of corruption extends far beyond Paraguay. At different times, for example, Transparency International has ranked Paraguay as one of the most corrupt countries in the world. In its latest report, for example, this NGO characterized corruption in Paraguay as "systemic." The onset of democracy has done apparently little to curb corruption and some national observers complain that "corruption over the last decade has, ironically, become 'more democratic', and now pervades the entire spectrum of power. During the Stroessner era, corruption was more of an elite monopoly."⁶⁸ Public disenchantment with the state of public integrity is revealed by surveys that show that in 2000, 90% of Paraguayans felt that corruption had become a worse problem than the previous year. While some improvements have been made in the judicial sector, the 2001 US State Department Human Rights Report for Paraguay complained that "although the Supreme Court continued to undertake judicial reforms, the courts remain inefficient and subject to corruption and political pressure."

9. Sustainability

A key objective of any development initiative is to ensure sustainability of the reform beyond the termination of foreign aid. USAID's major assistance ended in 2000 with the completion of the National Center for State Courts contract. Limited assistance is currently supported under an IQC Task Order to improve press coverage of criminal proceedings and relations between the press and the justice system. The reform, however, has developed its own momentum and there is substantial evidence of the sustainability of the change process.

9.1. Civil society

One of the main outcomes of the Paraguayan reform is the emergence of civil society organizations supporting modernization of the justice system. INECIP ("Instituto de Estudios Comparados en Ciencias Penales y Sociales") is a not for profit Paraguayan organization founded in 1994 and led by many of the same persons who constituted the core of reformers in the Judiciary and the Public Ministry. It has become self-sufficient through training of lawyers in diverse legal areas while also obtaining funding from international donors to implement research, technical assistance and training projects.

9.2. Outreach Efforts

The Public Ministry and the Judiciary have continued to inform the public about the results of the reform and to respond to criticisms. The Supreme Court has recognized the need to improve relations with the press and to tackle such critical issues as "free press v fair trial," i.e. the right of the people to be informed balanced against the rights to due process of the accused. USAID current funding has supported a series of working

⁶⁸ The quote comes from a report by José Antonio Bergues of Transparency International's Paraguay chapter. Transparency International, Global Corruption Report 2001, http://www.globalcorruptionreport.org/download/r_r_s_america.pdf, Consulted November 29, 2002.

meetings between journalists and judges and Supreme Court judges and media owners to reach agreement on controversial issues.

9.3. Other Rule of Law donors and donor coordination

A key to the success of the Paraguayan reform is the entry of other donors when USAID's assistance was winding down and the adoption of complementary strategies. For the first 8 years of the reform process, USAID was the only donor engaged substantially in this field. Others have now entered the field, thus facilitating USAID's withdrawal and ensuring continuity of reforms. Some of the major donors are GTZ, European Union, Inter-American Development Bank and Taiwan).

While the entry of new donors in the Rule of Law arena adds to the sustainability of a reform, often, the incorporation of new donors has generated conflicts and duplication among the foreign actors. In Paraguay, however, donor coordination, sponsored originally by USAID, and active involvement of local stakeholders have largely prevented this.

USAID was instrumental in establishing a formal donor coordination mechanism in the justice area. Formal meetings began in 2000 but the group has met irregularly since then. One of its major achievements has been the establishment of a project database that provides a brief summary of each project, its duration, cost and contact persons. This data is displayed in a web page (<http://216.250.201.131/cooperacionjusticia>).

10. Problems

Although the Paraguayan reform can be classified as one of the most successful in the region, it still faces serious implementation obstacles. Some of the most salient are:

10.1. Resources and budgetary allocations

While adoption of an accusatorial system will result in long-term savings for the criminal justice system, in the short-term it has an inevitable budgetary and resource impact. For example, Paraguay had to make a substantial investment to strengthen a prosecutorial agency that was previously a passive and largely ineffective agency. Likewise, a substantial investment in infrastructure was required to ensure the adequacy of sites for hearings and trials. As could be expected, criminal justice agencies complain about the insufficiency of resources allocated and also that even when their budget is approved by the legislative branch its disbursement is decreased by the Executive ("Ministerio de Hacienda"). The following Table is indicative of the problems faced by the Public Ministry, for example, in planning for and spending its approved budget. In each of the four years (1998-2001), the Public Ministry received less than it had been authorized in the budget approved by the National Assembly. A similar situation is faced by the Judiciary, which in 1997 only received 81% of its budget and 73% in 1998.⁶⁹

⁶⁹ María Victoria Rivas, "La optimización de los recursos presupuestarios como garante de la independencia judicial," Reforma Legal y Judicial y control de la corrupción en América Latina y el

Table 1

Public Ministry Approved and Disbursed Budgets by Year in Thousands of US Dollars

Budget	1998		1999		2000		2001	
	Amount	%	Amount	%	Amount	%	Amount	%
Approved	7,720	100%	19,100	100%	20,290	100%	17,902	100%
Disbursed	6,698	87%	12,238	64%	15,661	77%	9,950	56%
Difference	1,022	13%	6,862	36%	4,628	23%	7,953	44%

Source: María Victoria Rivas, "Informe de Paraguay: Proyecto de Seguimiento de los procesos de reforma judicial en América Latina," Consulted on November 7, 2002, <http://www.cejamericas.org/newsite/infoceja/PARAGUAY/INFOFINALPARAGUAY.pdf>,

A complicating factor in assignment of resources to the justice system has been the interpretation of the constitutionally mandated requirement that 3% of the national budget be devoted to the Judiciary. The Executive considers that the 3% includes the budgets of the Supreme Court, the Public Ministry, Electoral Justice and the Judicial Council combined.⁷⁰ The Supreme Court, on the other hand, has argued that the 3% constitutional requirement refers only to the ordinary court system under the Supreme Court. The result is that in 1998, for example, the budgetary assignment to all four judicial bodies exceeded the constitutional requirement, 4% of the national budget was approved, and the Supreme Court received 2.4%.

Regardless of the interpretation given, there is no question that the resources assigned to the Judiciary, whether viewed as one or four institutions, has grown significantly since the inception of democratic rule in 1989 when the four justice institutions received 1.2% of the national budget, a figure that grew to 4% nine years later.⁷¹

10.2. Politicization of the justice system

While the drafters of the 1992 Constitution took great pains in establishing mechanisms to depoliticize the Judiciary, political influences continue to affect the selection, promotion and retention of judges, a factor that affects the quality of justice and the commitment of the judges to the reform.

Caribe, World Bank, <http://www.worldbank.org/wbi/governance/madrid2002/pdf/rivas.pdf>, Consulted November 7, 2002.

⁷⁰ Centro Paraguayo para la Promoción de la Libertad Económica y de la Justicia Social, *Evolución del Presupuesto del Poder Judicial: 1989 al 2000*, Asunción, 2000.

⁷¹ *Ibid*, p. 9.

The primary mechanism for the selection of judges is through a Judicial Council (“Consejo de la Magistratura”), which holds an open competition and forwards a slate of candidates to the Supreme Court for appointment to fill vacant positions.⁷² While the objective of this system is selection of personnel based on merit, political considerations continue to plague judicial personnel decisions.

10.3. Interagency coordination

Implementation of as radical a change in justice system roles and functions in a shift from an inquisitorial to an accusatorial system requires a great deal of interagency coordination. Latin American countries have little experience in inter- or intra-agency coordination and this historical pattern can become a substantial barrier to the success of any Rule of Law initiative. This is especially true for criminal justice reforms in which a number of competing agencies, dependent on the Executive and Judicial Branches, must cooperate to ensure program success. Justice agencies, however, traditionally work in isolation of each other and guard their information zealously. Cooperation is the exception rather than the rule.

While a number of attempts have been made to improve coordination, especially between the prosecutors and judges, it remains a problem. The results of a strategic planning session in 2001 among prosecutors, for example, revealed coordination as one of the main problems facing the reform and participants complained that “coordination and cooperation with the other agencies that compose the criminal justice system is almost nonexistent” due to limited communications between agencies; limited access to police information; clashes arising from confusion of roles; and an absence of consensus in institutional policies.⁷³

10.4. Service of Process

Notification of parties and witnesses to ensure their appearance at hearings and trials is a problem common to all accusatorial system reforms and it is no less so in Paraguay. The system for service of process is not centralized and each court is responsible for notifications with a full-time employee assigned as process server under the supervision of the judge or clerk. This practice permits corruption, with lawyers offering bribes to processors so that service is completed, postponed or lost. Additionally, even though the number of notifications has increased significantly, the number of process servers has not increased sufficiently to meet the additional demands.

10.5. Appearances by defendants and witnesses

In order for trials and hearings to begin and end on time, it is necessary to have the defendant and witnesses present in the courtroom. Critics have pointed out that

⁷² See: German Burgos Silva, “Estado y derecho en Paraguay: Estado de legalidad sin Estado de Derecho,” Magazine DHIAL, Ed. No. 24, Nov. 20, 2001, http://www.iigov.org/dhial/?p=dh24/dhial24_03.htm

⁷³ Ministerio Público, *op.cit.*

oftentimes prisoners are not delivered to the appropriate courtroom on the requisite date and time forcing judges to grant continuances and postpone hearings. While there is a problem of availability of transportation resources, poor coordination is a contribution factor.

10.6. Postponements and continuances

The aforementioned problems of notifications of witnesses and the absence of parties at hearings and trials lead to delays in the process and contribute to dissatisfaction with the reform among lawyers and parties. Scheduling conflicts for judges or lawyers also contribute to delays. Absence of clear and concise procedural or other sanctions to be applied to those responsible for delays, such as dismissals resulting from continuances or running of speedy trial provisions, permits the practice to continue and opens an avenue for parties seeking delay to benefit from the absence of controls.

10.7. Delegation of key responsibilities

One of the main criticisms of the prior system is that the judge delegated many key judicial decisions, for example supervision of depositions, to staff members while involving him/herself with routine bureaucratic tasks. Adoption of the new code has not ended this practice and judges continue to delegate judicial actions, primarily those in which the judge acts as a guarantor of due process rights during the pretrial stage (including even the most serious decisions regarding pretrial release or detention), to their support personnel. While this practice may be attributed to the amount of work assigned to penal judges, it is also the result of poor court management techniques and inadequate supervision of judges.

10.8. Statistics

A continuing problem impeding evaluations of the performance of the Paraguayan justice system is the absence of reliable statistics on case processing and outcomes.

11. International Assistance to the Sector

The following section is an attempt to present the varied international assistance furnished to the sector. While the aid has supported diverse types of projects, the bulk of the funding has been directed at supporting the adoption of the new procedural system and the implementing institutions (the Judiciary and the Public Ministry).

11.1. USAID

AID has a longstanding commitment to modernization of the justice sector in Paraguay. The first activity took place in March 1990 with a summary review of the state of the justice system following the end of Stroessner rule. Beginning in July 1990, Checchi and Co. Consulting, Inc. undertook a number of discrete activities in support of

justice reform.⁷⁴ In addition to the work of Checchi, AID awarded a \$50,000 grant to a local NGO (Instituto de Ciencias Penales) to complete the work of the Checchi consultants leading to a proposal for a judicial school. Additionally, USIA was awarded \$100,000 by AID for international visits, academic specialists and American participant programs. July 1991.

In 1992, AID entered into a bilateral grant agreement (between the Supreme Court, the Public Ministry and USAID/Paraguay) of \$142,000 to support judicial reform. The agreement was amended in 1993 and 1994 to increase the original total to \$942,000 (“Judicial Reform Project”). This project ended in 1995. Among the major achievements were: elaboration of a Judicial Reform Action Plan; development of an automated jurisprudence database and a case tracking system for Supreme Court cases; support to the Supreme Court library and limited commodity assistance; establishment of a Human Rights Documentation Center to preserve files and documents of the National Police and the Ministry of the Interior under the Stroessner regime; code drafting (procedures for the labor sector, a code of criminal procedure, a Criminal Code); training of judges, prosecutors, and lawyers and drafting of a proposed Judicial Career Law.⁷⁵

In 1996, a two-year contract was issued to the State University of New York Foundation under an Indefinite Quantity Contract (IQC) for \$868,000.⁷⁶ The National Center for State Courts was awarded a follow-on contract, which built on the achievements of the first and focused primarily on law reform and implementation of legislative changes, especially the shift from an inquisitorial system of criminal procedure to an accusatorial model. NCSC worked in Paraguay from 1998 to mid 2000 under a Rule of Law Indefinite Quantity Contract amounting to \$1.164 million.⁷⁷

In 2001, the Paraguay Mission focused its attention on the role of the media in relation to the criminal justice reforms with a special emphasis on combating corruption and decreasing impunity. A Task Order awarded to MSI under another IQC began execution in October 2000 and ended in June 2001 in an amount of \$200,000 and a great deal of the work being subcontracted to Florida International University and a local NGO, INECIP.⁷⁸

11.2. United Nations Development Program (UNDP)

UNDP has carried out a number of limited assistance sectoral activities. In the human rights area, for example, they have funded visits by experts and one seminar. It

⁷⁴ This included technical assistance to code reform, design of a judicial school, improved court administration, and automation of legal information (funding was provided for a pilot effort in a criminal court).

⁷⁵ For example, in one period, 15 judges were sent to the U.S. under the auspices of USIS, 35 trainees attended AID-sponsored regional conferences; 1500 persons attended training events in country.

⁷⁶ “Assistance to the Government of Paraguay to Improve Access to a Strengthened Judicial and Legislative System,” #AEP5468100600400.

⁷⁷ Task Order #813.

⁷⁸ “Improving Quality and Coverage of the Implementation of the Paraguay's Penal Laws in Media”, #AEP-I-00-00-00009-00, Task Order #802.

also sponsored the initial visits of a criminal law expert, which gave impetus to many of the law reform projects currently under way. Currently it is conducting an evaluation of justice reforms.⁷⁹

11.3. The Inter-American Development Bank (IADB)

The Inter-American Development Bank's history of assistance to the justice sector is recent. From 1993 to March 2001, the Bank had approved 18 loans and 65 technical cooperation operations to support some aspect of the justice sector in 21 of the Bank's borrowing member countries.⁸⁰ Of the \$418 million in loans, Paraguay received a total of \$33.9 million (approximately 8%), and of the \$43 million in non-reimbursable assistance, Paraguay received \$830,000 or 2% of the total.⁸¹

The Bank, as part of its "Modernization of the State Program" in Paraguay, approved a five-year (1998-2003) Rule of Law loan for \$13.177 million. The funds supported non-infrastructure projects⁸² in the Supreme Court and the Fiscalía. The Fiscalía received the smallest portion, \$3.3 million or approximately 25% of the total, while the Supreme Court received \$9.883 million. A separate sum was awarded for the construction of court and prosecution buildings.

11.4. GTZ⁸³

Germany has been one of the largest bilateral donors to Paraguay's modernization. During 1994-1998, for example, it devoted 87 million German Marks to overall Paraguay assistance. In Rule of Law, the German assistance agency, GTZ, is implementing a six-year (1997-2003) multimillion million dollar project for penal law reform, to improve the capacity of the Judiciary and Public Ministry to conduct planning and evaluation reviews, training of justice personnel and lawyers and introduction of innovations such as a Model Court in which reforms may be tested.⁸⁴ From 1998 to February 2003, \$4.5 million marks are dedicated to support reform of the Paraguayan Penal Code. The project has been extended an additional three years in an amount of €2.3 million. One of its major achievements has been training of justice officials. In addition to traditional training methodologies, the GTZ also supported establishment of a Model Court in which trial advocacy skills could be acquired through simulations and critique.

⁷⁹ UNDP is a manager of Rule of Law projects funded by other institutions but exercises little technical oversight.

⁸⁰ Christina Biebesheimer and J. Mark Payne, "IDB Experience in Justice Reform: Lessons Learned and Elements for Policy Formulation," Inter-American Development Bank, Sustainable Development Department, Technical Paper Series, November 2001.

⁸¹ The breakdown of Mercosur member countries is: Argentina \$26.7 million; Brazil \$18.9 million; Paraguay \$34.7 million; Uruguay \$36.4 million. These figures include support to justice sector, violence prevention and citizen safety.

⁸² Of these, the main activities were information systems, coordination mechanisms, human resources, financial management and others. See: Interamerican Development Bank Loan 934/C-PR; UNDP Project PAR 997/017, "Proyecto de Fortalecimiento Institucional del Poder Judicial".

⁸³ Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ).

⁸⁴ "Apoyo a la Reforma Judicial Penal".

11.5. European Union

The European Union was responsible for the implementation of one of the most ambitious reform projects in Paraguay. The initiative, with funding of €3.6 million⁸⁵, focused on modernization of the State and attempted reforms in public administration, the armed forces and the justice system. In terms of the justice system, it focused on training judges and prosecutors in seminars, establishment of an inspector general's office for control of judicial misconduct, introduction of a merit-based personnel system, coordination of foreign assistance, and reform of methodologies and varied training that relied on usage of mostly Spanish academics and judicial personnel. Eventually the project was terminated following an evaluation that questioned the feasibility of the design and the overly ambitious nature of the tasks as well as other implementation obstacles.⁸⁶

12. Summary of the Paraguayan Criminal Process

Latin American countries have traditionally been situated in the Roman or civil law family. As such, perhaps its greatest characteristic is its emphasis on detailed codification. However, development of comprehensive codes is not unique to the civil law world. Its uniqueness derives from an attempt, first forged in France after the Revolution, to curb the power of judges and to clearly delineate the responsibility for legislating to one branch of government and trial of cases to another. For this conception to work, it required well-organized, clear and complete dictates to be followed by the judiciary. After all, its main goal was to curb discretion⁸⁷.

European procedure, and the model later adopted by Latin American countries, assigned to the judge in criminal cases the role of lead investigator and divided the process into two stages: the investigation and the trial. The first was characterized by its inquisitorial nature (secrecy and reliance on written pleadings and orders); the second was clothed with the adversarial features so common to the common law (public, continuous and contested oral trial). In an attempt to curb judicial abuse, a separate accusatory institution (denominated Public Ministry) was created and charged with the prosecution of crimes.

By the 1990s, the Latin American system was criticized for its arbitrariness and inefficiency and its detractors proposed the adoption of an accusatorial model, prevalent in common law countries, as an alternative to the prevailing procedures. This model relies on hearings in which the parties confront each other and places the role of accuser in the hands of a prosecutor while the function of judges is to act as arbiters in the process. This is the system that prevails in Paraguay today.

⁸⁵ Of which, €1 million euros has still to be spent. Project No. PRY/B7-310/IB/96/333.

⁸⁶ Andrea Costafreda, "Cómo mejorar la cooperación a la reforma del estado Paraguayo: Una evaluación crítica de la cooperación europea," Magazine DHIAL, November 20, 2001, http://www.iigov.org/dhial/dh24/dhial24_03.htm, visited on November 1, 2002.

⁸⁷ John Henry Merryman, *The Civil Law Tradition*, Stanford: Stanford University Press, 1985.

12.1. Types of Procedures

Cases are generally processed in three stages: a preparatory stage in which the prosecution oversees the investigation; an intermediate stage in which the case is prepared for trial and discovery is completed and a third stage that concludes with the trial of the accused. While this procedure is utilized for the majority of cases, special or extraordinary procedures are also used. These are:

- Procedures before justices of the peace in cases in which the potential sanction is less than 1 year, when a first instance judge is not available to deal with pretrial hearings, and in other cases of minor crimes;⁸⁸
- Private prosecutions;⁸⁹
- Abbreviated or summary process⁹⁰ whereby the judge may make a final determination as to the guilt or innocence of the accused in the following instances: a) those cases in which the maximum potential sentence is less than five years imprisonment; b) when the accused admits his/her guilt and accepts usage of this method. The ultimate sentence cannot exceed the one sought by prosecution;
- Juveniles;⁹¹
- Imposition of “special measures” when the accused is incompetent to stand trial;⁹²
- Crimes affecting indigenous people;⁹³
- Recovery of civil damages by the victim upon the conclusion of the criminal proceeding.⁹⁴

12.2. Fundamental Guarantees

Even a cursory reading of most Latin American constitutions and procedural codes would lead the reader to conclude that human rights are more than adequately safeguarded. Yet, Latin American countries have been among the nations most often cited for such abuses. Latin statutes and constitutions must be read with care since guarantees are not always followed in practice but are often suspended. Thus, for example, declaration of states of emergency in July 2002 and May 2000 in Paraguay suspended many constitutional and procedural rights.

The following are the most important procedural guarantees in the Paraguayan Code of Criminal Procedure.

⁸⁸ Article 407-419, CCP.

⁸⁹ Article 422-426, CCP.

⁹⁰ Article 420-421, CCP.

⁹¹ Article 427, CCP.

⁹² Article 428-431, CCP.

⁹³ Articles 432-438, CCP.

⁹⁴ Articles 439-448, CCP.

12.2.1. Legality

In order to subject someone to criminal responsibility there must be an antecedent statute that defines the conduct and sanctions the behavior⁹⁵. The general application of this principle bars the retroactive application of penal law unless it benefits the defendant. Respect of this prohibition is particularly significant in criminal procedure since retroactive application of legislation that is more severe than its precursor could result in violation of fundamental rights during the course of the process.

Finally, the principle of legality requires restrictive interpretation of criminal laws and bars application of procedures by analogy when the current law does not provide for the procedure being considered⁹⁶.

12.2.2. Double jeopardy (Non bis in idem)

The Paraguayan Constitution and Code of Criminal Procedure prohibit multiple trials of the defendant for the same offense.⁹⁷

12.2.3. Neutral and detached magistrate

Paraguay's Constitution and Code of Criminal Procedure establish a guarantee for trial before neutral and detached magistrates assigned to the ordinary courts.⁹⁸

12.2.4. In dubio pro reo

This procedural guarantee establishes that all reasonable doubt shall accrue to the benefit of the accused.⁹⁹ Every accused person enjoys a presumption of innocence¹⁰⁰.

12.2.5. The right to counsel

The right to counsel is guaranteed by Articles 16 and 17 of the Constitution and Articles 6 and 75 of the Code of Criminal Procedure. It calls for the right to apply from the first procedural act. This is understood to mean the first action taken by the prosecution or any action taken after the six-hour period that the prosecution has prior to informing a judge of the detention of an accused or filing of a complaint.

The right to counsel is an absolute right that cannot be waived and a violation of the right will result in a declaration of nullity of all subsequent actions. If the accused

⁹⁵ Article 17.3 of the Constitution and Article 1 of the CCP.

⁹⁶ Article 10, CCP.

⁹⁷ Article 17.4 of the Constitution and Article 8, CCP.

⁹⁸ Article 16 of the Constitution and Articles 2 and 3 of the CCP.

⁹⁹ Article 5, CCP.

¹⁰⁰ Article 17 of the Constitution and Article 4 of the CCP.

does not name counsel, the court shall, *sua sponte*, name a public defender to represent him/her.¹⁰¹

As a complement to the right to counsel, the Code provides for the appointment of an interpreter and to be informed by the police, the prosecution and the judges of the charges, the reason for the arrest and to notify immediately the person he/she designates.¹⁰²

12.2.6. Privilege against self-incrimination

Paraguay's constitution and criminal procedure code guarantee to criminal defendants the right to abstain from making any statements, which might incriminate them and bar the introduction of coerced confessions¹⁰³. However, the code requires that at several points, the convening authority will take a statement from the accused, except that the accused may refuse to testify.¹⁰⁴

Most violations of the privilege against self-incrimination occur during police interrogations, which take place outside of the presence of witnesses and in an inherently coercive environment. In order to prevent abuse of the privilege by police, the Code bars that taking of statement of accused persons by police.¹⁰⁵ There are reports, however, that indicate that police question witnesses and forward the evidentiary products of the interrogation to the prosecutor or try to introduce it at trial through the testimony of police investigators.¹⁰⁶

12.2.7. Searches and seizures

Paraguay recognizes the importance of the right to privacy in the home with the exceptions that the law may allow¹⁰⁷. The protection, however, primarily extends to domiciles or correspondence and does not apply as broadly to other areas such as the person or vehicles. Thus, police may require a citizen to identify him/herself with no reason and may search their person or vehicle without resort to a search warrant so long as he/she has "sufficient motives" to believe that the suspect has in his/her possession or in a vehicle the fruits of the crime or for weapons.¹⁰⁸ In the case of domiciles, the Code and Constitution require a judicially issued search warrant and set forth limitations in its service.

¹⁰¹ Articles 6 and 97.

¹⁰² Article 75, CCP.

¹⁰³ Article 84, CCP.

¹⁰⁴ Articles 84-96, CCP.

¹⁰⁵ Article 90, CCP.

¹⁰⁶ See: María Victoria Rivas, Proyecto de Seguimiento de los Procesos de Reforma Judicial en América Latina, "Informe de Paraguay," pp. 43-44,

<http://www.cejamericas.org/newsite/infoceja/PARAGUAY/INFOFINALPARAGUAY.pdf>

¹⁰⁷ Article 34 of the Constitution.

¹⁰⁸ Articles 179 for persons and 181 for vehicles, CCP.

12.2.8. Other guarantees

Other guarantees are: a) respect of human dignity¹⁰⁹; b) equality of all citizens in criminal cases¹¹⁰; c) public trials, although with exceptions¹¹¹; d) oral nature of the proceedings¹¹²; e) continuity of proceedings¹¹³; f) adversarial nature of the trial¹¹⁴; g) celerity¹¹⁵; h) ban on the imposition of certain sanctions such as the death penalty and cruel and unusual punishments¹¹⁶; i) remedies such as *habeas corpus*, “amparo” and unconstitutionality.

12.3. The Prosecutorial Function and Discretion

While the accusatory function belongs to the Public Ministry (prosecution), the Paraguayan model does not allow that agency to exercise unregulated discretion in deciding whether to file or dismiss charges. The Code establishes that the prosecution may choose not to proceed when: a) the crime is so insignificant or the participation of the suspect is so minimal that there is no public interest in proceeding; 2) the criminal code or other laws permit it; 3) the sanction that may be imposed is small; 4) the extradition or expulsion of the accused has been ordered.¹¹⁷ In the first two instances, the Code requires that the accused enter into an agreement with the victim to assume the damages caused.

12.4. The Stages of the Process

As mentioned previously, the criminal process is divided into three stages: the preparatory stage in which the prosecution oversees the investigation; an intermediate stage in which the case is prepared for trial and discovery is concluded; and a third stage that ends with the trial of the accused.

12.4.1. The preparatory stage

A major change introduced by the Code is a shift of the responsibility for oversight of investigations from the judge to the prosecutor.¹¹⁸ The judge’s role during this stage is to control potential prosecutorial or police abuse and to ensure the legality of investigative actions.¹¹⁹ The purpose of this stage is to investigate the allegations and reach some tentative conclusions as to the existence of a crime and the culpability of parties.

¹⁰⁹ Article 5 of the Constitution and 75(1) of the CCP.

¹¹⁰ Articles 46 & 47 of the Constitution and 9 of the CCP.

¹¹¹ Article 1, CCP.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ Articles 132-134 of the Constitution.

¹¹⁷ Article 19, CCP.

¹¹⁸ Article 42, CCP.

¹¹⁹ Article 42, CCP.

Another major change in the new Code is to break the veil of secrecy that characterized this stage under the old process. Although many aspects of the investigation will remain secret, evidence will be turned over to the accused. Additionally, the defendant, and/or his attorney, may be present in all critical stages of the investigation. This code goes further in allowing a defendant access to police investigations when it permits his/her intervention, individually or through counsel, “ in all of the investigative actions of the National Police, in accordance with the provisions of this Code, except when the information is classified, in accordance with the law.”¹²⁰ A similar provision applies to the prosecution, ensuring, however that the participation of the victim or his/her attorney does not obstruct the investigation.¹²¹

This stage of the criminal proceeding begins after evidence of a crime has been brought before the prosecutor, the police or a court. Once the complaint is filed, the prosecutor initiates the investigation. In some cases, the law requires that the victim file the complaint and prosecute the crime privately¹²². Police can also initiate the process if they detain the defendant in *flagrante delicto*. Finally, the prosecutor can proceed *ex officio* based on the evidence at his/her disposal.

Arrest of the defendant can only take place, with the exception of those cases in which he/she is detected *in flagrante delicto*, pursuant to an arrest order from the prosecutor, which must be ratified by a judge shortly thereafter. Upon arrest, the defendant must be brought before the corresponding judicial official.

The Code provides a series of processing deadlines that must be met:

- If the police initiate the process, they must notify the Public Ministry and the judge within 6 hours.¹²³ Law enforcement is also under an obligation to forward to the prosecution the evidence they have gathered within 5 days;¹²⁴
- If the accused is detained, his/her statement must be received and he/she must be brought before a judge within 24 hours¹²⁵.

Before the conclusion of this stage, the prosecutor may exercise discretion and determine whether to proceed with a formal accusation, divert the case, or close the

¹²⁰ Article 297, CCP.

¹²¹ Article 317, CCP.

¹²² Private actions require that the accuser make and prove the accusation. Many of the cases that require private prosecution involve matters of "honor" (libel and slander) and minor crimes involving apparently private disputes. These types of cases constitute a surprisingly large percentage of the caseloads with 27% (5,515) of the 20,427 cases presented before the Public Ministry in 2001. Ministerio Público, Fiscalía General del Estado, Dirección de Política Criminal y Criminología, “Situación procesal de las causas ingresadas en el año 2000 a la mesa de entrada de la Fiscalía General y a la Oficina de Distribución de Causas de la Corte Suprema, Asunción, Marzo-Diciembre del 2000,” diciembre del 2001.

¹²³ Article 289, CCP.

¹²⁴ Article 300, CCP.

¹²⁵ Article 240, CCP.

investigation without bringing formal charges.¹²⁶ Among the alternatives available to prosecutors are: a) rejection of the complaint; b) dismissal; c) conditional suspension; d) summary process; e) or conciliation. The prosecutor may also choose to proceed with a formal accusation filed with the court.

The overall term for completion of this stage is six months with only one postponement allowed in extraordinarily complex cases.¹²⁷

12.4.2. Intermediate Stage

Once the charges are filed, the judge will notify the parties and make the case file available for review.¹²⁸ During this term, the parties may also present the relevant pretrial motions.¹²⁹ The most important event during this stage is a preliminary hearing at which the court determines probable cause, establishes the validity of the accusation, orders corrections, reviews the admissibility of evidence and sets the trial.

12.4.3. Trial stage

Paraguay's code recognizes the principles of orality, confrontation of witnesses, publicity, the adversary nature of the process and the need for continuity. The trial is another significant improvement in the Paraguayan process since it breaks with a tradition in which the trial was a bureaucratic step in which the court reviewed the evidence gathered during the instructional stage. Under the new system, once the trial court receives the case file, the presiding judge must set the time and date for the trial, which must take place within the next 10 to 30 days.

Significant differences remain between Paraguay's procedural system and a common law adversarial one at trial. One of the most important differences is the way in which evidence is obtained, introduced, weighed and applied. Another difference is the standard of proof required for conviction. Unlike common law countries in which proof of the guilt of the accused must be shown "beyond a reasonable doubt," Paraguay continues with the civil law standard of proof that requires evidence of guilt leading to "an intimate conviction" of the guilt of the accused.¹³⁰ The standard is also presented as "following one's conscience."

Upon the conclusion of the trial, the court issues a ruling, this consists of two parts: a finding of guilt or innocence based on a detailed restatement of the facts and a sanction, in case of guilt.

¹²⁶ Article 301, CCP.

¹²⁷ Articles 324-326, CCP.

¹²⁸ The parties have 5 days in which they can review the case file.

¹²⁹ Article 353, CCP.

¹³⁰ Article 174, CCP.

12.5. Appellate remedies

Paraguay continues to offer simplified procedures whereby ordinary citizens may present requests for extraordinary relief (*habeas corpus* and “amparo”). *Habeas corpus* has been recognized traditionally as a rapid and simple means of securing a judicial review of detentions. “Amparo”, on the other hand, is a uniquely Latin American remedy which partially replicates *habeas corpus* while also allowing challenges to the constitutionality of laws and regulations¹³¹.

Unlike “amparo” and *habeas corpus*, which may be brought at any time, an appeal is a review remedy that challenges final orders. It can only be made in a limited number of cases since it allows the higher court discretion to review any facts presented in the lower court as well as new ones. Cassation is the most frequently used appellate remedy to review final sentences. It is traditionally addressed to errors of substantive or procedural law that may give rise to a reversal, affirmation or modification of the original sentence.

12.6. Preventive Detention and Pretrial Release

Although all Latin American codes favor pretrial release and proclaim the presumption of innocence, in practice, pretrial incarceration is the rule rather than the exception in Latin America and nowhere was this truer than in Paraguay, which led the hemisphere in the percentage of prisoners awaiting trial. Two of the main reasons for this are: an attitude of judges favoring imprisonment as the easiest and safest measure; and, legal limitations on release which sometimes make the principle inoperable. The end result is that the majority, most often over 70%, of inmates in jail are persons awaiting trial.¹³²

12.6.1. Requirements for preventive detention

Judges are authorized to order pretrial detention only when it is deemed to be “essential” and the following factors are present:¹³³

- proof as to the commission of a crime and evidence pointing to the guilt of the person to be detained;

¹³¹ It has been defined as a “constitutional suit of summary nature, the object of which is to protect, in a special case and at the request of an injured party, private persons whose individual rights as established in the Constitution have been violated through laws or acts of the authorities, or when the laws or acts of the Federal authorities injure the sovereign of the States”. Helen Clagett, quoting Dr. Manuel Gual Vidal, “The Mexican Suit of Amparo”, *Georgetown Law Journal*, vol. 33, pp. 418-437, at 418, 1945. For a review see: Hector Fix Zamudio, “A Brief Introduction to the Mexican Writ of Amparo”, *California Western International Law Journal*, vol. 9, pp. 306-348, 1979.

¹³² Research conducted by ILANUD (a Costa-Rican based United Nations criminology institute). See: Elías Carranza, *op.cit.*, p. 25.

¹³³ Article 242, CCP.

- the seriousness of the crime charged, taking into account the prescribed punishment;
- flight risk or the potential for obstruction of the investigation. In analyzing the danger that the accused may flee, the judge may take into account: ties to the community; potential penalty; the importance of the harm caused and the defendant's attitude; and the defendant's behavior during this proceeding or prior ones.¹³⁴

Pretrial detention measures will end automatically within two years of their imposition. This addresses a common problem of having the defendant in detention for an inordinate amount of time awaiting trial to the point that sometimes the pretrial detention period exceeded the potential sanction.

12.6.2. Exceptions to pretrial detention and release

Pretrial detention may not be decreed in those cases initiated by private prosecutions in order to avoid usage of the criminal process to compel parties to a civil dispute to settle. Additionally, the Code does not permit pretrial incarceration in those cases in which the potential penalty is less than one year's imprisonment¹³⁵. Neither can pretrial detention be ordered for persons over 70 years of age, women in their last months of pregnancy, women who are breastfeeding or persons gravely ill.¹³⁶

One of the most significant changes of the new code is the expansion of potential alternatives to pretrial incarceration. The Code provides that "so long as the danger of flight or of obstruction of the process can be avoided" the judge shall preferably apply an alternative measure instead of pretrial incarceration.¹³⁷ The following alternative measures are proposed:

- house arrest;
- placement in the custody of others who report to the court periodically;
- periodic presentment before a judge or other judicial authority;
- travel ban;
- prohibition to attend certain places or events;
- restrictions on communications with specified persons or institutions;
- monetary bail, but it may not be imposed on persons unable to meet it.

Like pretrial detention, these measures will cease to be operative if more than two years expire from the moment they are applied without a trial being concluded. There are some exceptional circumstances in which the law does not allow pretrial release of

¹³⁴ Articles 243-244, CCP. In weighing the danger that the defendant will obstruct the course of the proceedings, the judge may take into account suspicions he/she may have that the defendant will destroy, alter or suppress evidence or that the accused will influence witnesses.

¹³⁵ Article 237, CCP.

¹³⁶ Article 238, CCP.

¹³⁷ Article 245, CCP.

persons accused of extremely serious crimes. For example, persons accused of narcotics trafficking are not eligible for pretrial release.¹³⁸

13. Conclusion

One of the most attractive reform endeavors for foreign donors is law drafting. AID was the primary donor engaged in Latin American code reform during the last decade. The results of AID's law reform experience have been slow and costly. As AID concluded in its review of lessons learned, "(n)ormative reform is the boldest and most difficult Rule of Law strategy to undertake." Changing the legal framework of any country "means in effect refashioning the core organs of the body politic, a task even more delicate in many ways than an undertaking like economic structural adjustment... While trustworthy foreigners might tender advice here and there on such matters, the actual reform task must be handled by the principal stakeholders themselves."¹³⁹

The focus of U.S. code reform initiatives in the region has been adoption of an adversarial system of criminal procedure to substitute the outdated and inefficient inquisitorial model that has prevailed since the colonial period. Following the end of a 35-year dictatorship in 1989, the USAID Mission in Paraguay adopted a shift to an adversarial system as the cornerstone of their Rule of Law strategy. In doing so, it joined in a partnership with young Paraguayan reformers who equated the adversarial system with democracy and transparency and saw it as a logical continuation of the reformist 1992 constitution.

The prevailing legal system in 1989 was outdated, corrupt, inefficient and unable to meet rapidly growing caseloads. Reformers argued that adoption of an adversarial system would overcome many of these problems while making the system more transparent and accessible. The change required an almost total overhaul of the criminal justice system. A new criminal code was enacted in 1998 and the new procedural code went into effect in 2000. Transitional legislation was enacted to facilitate a gradual changeover to the new system. In addition to legal changes, successful implementation rested on recognition of a new proactive role for prosecutors and a more passive one for judges. Resources allocated for the transition, albeit considered insufficient by justice leaders, were considerable with the Judiciary's budget growing from 1.2% of the national budget in 1989 to 4% nine years later while the Public Ministry's budget grew at an even faster pace.

Substitution of deep-rooted legal traditions has not been easy and the results of the assistance in other countries have been mixed with many of the key reforms rolled

¹³⁸ Ley No. 1340 Que modifica la Ley No. 357/72 que reprime el tráfico ilícito de estupefacientes y drogas peligrosas y otros delitos afines y establece medidas de prevención y recuperación de farmacodependientes, Comisión Interamericana para el Control del Abuso de Drogas (CICAD), <http://www.cicad.oas.org>, Consulted on November 12, 2002.

¹³⁹ United States Agency for International Development, "Weighing in on the Scales of Justice: Strategic Approaches for Donor Supported Rule of Law Programs," USAID Program and Operations Assessment Report No. 7, 1994, Consulted on November 12, 2002, <http://www.usaid.gov/democracy/techpubs/weighingin.pdf>.

back by a counter reform movement that has blamed rising crime rates and an inefficient legal system on the new procedure. Paraguay's transition appears to be one of the smoothest in the region. The fact that this took place in a country without democratic traditions, a long-history of corruption, political instability and economic stagnation is surprising. The purpose of this review, albeit a limited one, is to analyze the Paraguayan reform and the role that USAID played.

Two and-a-half years after the system changed, the results have been impressive.

- There is general support for the reform among legal professionals;
- As processing speeds have improved, judicial backlogs have been reduced;
- The percentage of the prison population awaiting trial has been reduced from a high of almost 90%, the highest in all of Latin America, to less than 60%;
- Conviction rates have risen as prosecutors have become more selective in the number and types of cases that go to trial;
- Greater celerity in processing cases;
- Victims are now an integral part of the process and their rights are recognized by law;
- A consensual strategy based on interagency coordination and citizen outreach proved successful and continues, although not with the same driving force as previously.

Possibly the greatest evidence of the outcome of the reform is that there has been no successful counter reform as has happened in many other countries. While there are still many problems to overcome, there is general agreement on the salutary effects of the reform. There are a number of factors that contributed to the smoothness of the Paraguayan transition:

- It was a Paraguayan initiative that benefited from the experience of consultants who had worked on reforms in other Latin American countries and a partnership with USAID characterized by a minimum of donor interference.
- The decision to award the first support contract directly to Paraguayan institutions offset potential claims of foreign interference while establishing a partnership between USAID and national stakeholders. Award of USAID funding also strengthened the hand of national reformers as leaders of the change;
- In 1989 Paraguay was an isolated country. This isolation, combined with the weakness of institutions that had been an integral part of the Stroessner autocracy limited the potential opposition from within the Public Ministry or the courts;
- The inquisitorial system was viewed as a feature of the Stroessner dictatorship while the accusatorial model was equated with democracy, transparency and modernization;
- Almost all reform movements have been led by a combination of academics and judicial leaders. Paraguay is the only case in which the initial impetus arose from the ranks of prosecutors. Given the central role to be played by the prosecution in the new procedure, their support for the change was critical to its success;

- Unlike other countries in which reformers withdrew after passage of the legislation, Paraguayans were conscious of the difficulties inherent in implementation and established a post-enactment strategy that rested on interinstitutional cooperation, clearance of backlogs prior to commencement of the reform, creation of parallel court systems in which both procedures would coexist for a predetermined period, and training. USAID support during this stage was critical to its success.
- Beginning with public discussions of the proposed code to today, the Judiciary and the Public Ministry have emphasized the need to disseminate information on the progress of the reform. Thus, outreach became a key feature of the transition strategy. Relations with the press, however, were largely ignored or were strained and confrontational. The current USAID-supported initiative to improve relations between the press and the justice system may lead to greater understanding of the roles of each in a democratic process.
- USAID Paraguay recognized that law reform is a long process and has remained steadfast in its support. The entrance of other donors, primarily the GTZ, at a time when USAID's assistance was winding down was fortuitous. USAID's leadership in fostering donor coordination is to its credit. Unlike other countries, Paraguay's reform has been unusual in the level of cooperation among donors and national implementing institutions. USAID's leadership in this effort has ensured the development of a partnership among donors and national stakeholders.

While Paraguay's law reform has come a long way since 1992, a great deal remains to be done. A shift to an accusatorial procedural model is a revolutionary change that requires overcoming substantial cultural as well as technical barriers. This change requires some accommodations and seldom has there been a total adoption of the accusatorial model. In Paraguay, as in most Latin American countries, there is sufficient distrust in prosecutorial forces, most of which are incipient and *de facto* dependent on the Executive, to place unfettered discretion in their hands. Thus, the Paraguayan model retains a substantial amount of power in the hands of judges in overseeing what should be discretionary actions by the prosecution. Victims are also accorded an oversight role over prosecutorial discretion and may challenge their decision to dismiss or close cases.

The Paraguayan code transfers the role of overseer of investigations from the Judiciary to the prosecution. In doing so, it ignores the reality that in every country, including and especially common law ones, the investigation is carried out by the police and the oversight role really becomes effective once the judicial process has begun and the investigation is completed.

An instance in which the Code promises more than it can deliver is the right to counsel. While persons of means will benefit from the extensive right accorded to attorneys to be present at almost all stages of the process, it is unlikely that indigents will enjoy the same rights due to the insufficiency of defenders to meet the new demands.

Likewise, the code takes a bold step in precluding police interrogations. However, as seen in practice police will not likely terminate this practice easily, especially until they see a viable alternative in emergency situations.

Due to the requirement of speedy and open trials, the accusatorial system partially depends on diversion so that the majority of cases never come to trial. Many other reforms have failed because judges and prosecutors failed to exercise discretion and did not avail themselves of alternative dispute resolution techniques. This did not apparently happen in Paraguay where a substantial percentage of cases are resolved prior to trial.

One of the main justifications for the new code is that it would speed up a slow and cumbersome process. Thus, the code sets forth clear terms for the completion of each step of the criminal process except during the intermediate stage in which there is no term for the judge to complete this stage and forward a criminal charge for the trial to commence. Finally, the drafters of the Code set forth a final termination point of three years for the entire process to be completed, a term that appears to be excessive in light of the other terms contained in the process.

The drafters deserve praise for setting forth significant sanctions for noncompliance with procedural requirements. Thus, evidence illegally seized cannot be introduced as a result of a procedural and not constitutional requirement. Persons in pretrial detention more than 2 years are automatically released and a six-month time period for completion of the investigation with extinction of the criminal process a result of noncompliance.

While the code represents a radical break with a pleading-based system, in which the bulk of the process was reduced to writing, some remnants of the past remain. The most worrisome is a provision that permits the introduction of documentary material as evidence when testimonial evidence should be used. An example is a lineup, the results of which can be used as evidence by the prosecution in lieu of, or to strengthen the validity of, in-court identification.

Recognition of the rights of victims as participants in the process is a significant change in Paraguayan procedure but the code does not set forth clearly the manner by which the victim will participate.

On balance, the reform and USAID/Paraguay's assistance to the justice sector has been very successful. Not only in achieving reforms directly attributable to the project, but also because it has been a key player in promoting the development of a climate in which major reforms are being discussed openly and have a real chance of success. USAID/Paraguay's role as a catalyst for change should not be underestimated.