Comparative Report

Criminal Procedure Reform in Latin America: Results of the Follow-up Study

Justice Studies Center of the Americas (JSCA)

Revised Version: October 2004

By: Cristián Riego Ramírez
Academic Director, JSCA cristian.riego@cejamericas.org

Assistant: Fernando Santelices Ariztía
Project Assistant, JSCA fernando.santelices@cejamericas.org

Introduction

The third stage of the *Follow-up Study on Criminal Procedure Reforms in Latin America* concluded in 2003. This effort followed two stages that focused on the drafting of country reports on seven countries and one province. Specific reports were generated on Chile, Costa Rica, Paraguay and the Argentine province of Córdoba in 2001 and Ecuador, El Salvador, Guatemala and Venezuela in 2002. The following year, reports were prepared for Bolivia, Honduras and the Argentine province of Buenos Aires, thus completing the gathering of information on virtually all of the jurisdictions that had implemented criminal procedure reforms in Latin America.

The purpose of this effort was to generate empirical information on the functioning of the reformed systems in order to revitalize and enhance the discussion of the criminal justice reform implementation process at the national and regional levels. The country reports have been published JSCA's website (www.cejamericas.org). Each provides detailed information on and analyses of the problems identified in the implementation processes under study.

Methodology

The main project team designed information gathering instruments in coordination with local representatives who were selected during the preparation of the first version of the report in 2001.[1] A single methodology was used throughout the life of the project. Each local team used the instruments mentioned above to prepare a report. The main tools were a questionnaire on the proposed procedure reform, its implementation and the new system's performance and a set of forms that were used by local consultants to record the results of oral trial observations. Observations were conducted in the courts in each jurisdictional territory over a short period of time, usually one month. JSCA's project coordination team provided ongoing supervision of information gathering and report preparation activities. Once drafted, each country report was subjected to a validation process that consisted of meetings with local justice system actors. The results were incorporated into the study, and comparative reports were prepared on the basis of all of the data collected. The problems

[1] This questionnaire and all official instruments (the manual, project description, general instructions, guidelines, etc.) are available in the research section of JSCA's website: www.cejamericas.org/estudios.

identified in the country reports are quite similar, and are explained in detail in the 2002 and 2003 comparative reports, which were published in issues 3 and 5 of *Judicial Systems Journal,* respectively.[2]

Initial Reflections on the Third Comparative Report

The purpose of this report is to describe trends observed in the jurisdictions analyzed. We have changed the format in order to include observations on the operation of the various reformed systems and demonstrate the waves of challenges, advances and new challenges that emerge during the implementation process. These developments can be grouped into stages, thus lending form to a very complex reality. Viewed a priori, this complex reality could still seem far from complete, or full of errors, which draws attention away from equally important results. This format allowed us to highlight some of the most valuable reflections on the process.

The information contained herein consists of valuable knowledge that will be most useful for countries that are about to embark on a reform process. Some of the key conclusions reached are as follows:

1. All of the countries studied have made important progress in implementing reforms and in most cases these efforts have produced good results.

2. In general, the gap between the programs' success and the expectations that have been produced is either a product of reform promoters' inability to identify new challenges on the basis of their achievements or deficient handling of the instruments required to face these new challenges. In some cases, the problem is related to limited or inconsistent political support or institutions' inability to maintain or rebuild external support systems.

3. The implementation process must be sustained over a long period of time. This provides opportunities for improvement (for systems that get off to weak starts) and recovery (for those that were initially vigorous).

4. The implementation process requires the deployment of a broad variety of discourses and instruments for resolving the challenges faced throughout the process. There is a need to identify the specific needs produced by each challenge in order to select appropriate tools for responding to it.

The classification that we are using has been selected for purely analytical purposes, and we hope it will help readers form a varied view of the issues. There purpose of this exercise is not to place countries on an evolutionary scale, as this type of simplification cannot be applied to these very complex realities. Furthermore, many of the institutions and systems analyzed are experiencing advances and challenges that place them on more than one of the levels described below. We trust that this analytical perspective will serve to emphasize the need for follow-up on all ongoing reform implementation processes. It is

[2] See www.systemsjudiciales.org.

essential that long-term, systematic and empirical studies be conducted and discussion encouraged in order to identify the specific challenges that the reform processes face during the implementation stage. This in turn will allow system actors to adopt the measures required to overcome these problems each step of the way in an evolving institutional learning process.

Areas Analyzed

1. Problems in the Area of Legal Design

The purpose of the follow-up study is to produce information on the processes by which many countries are implementing a similar procedural model. In many cases our observations revealed significant design problems that cannot be resolved using the instruments produced through the implementation process itself, such as training, management models and increased staffing. These difficulties are related to the model's design and are normalized in legal or even constitutional provisions. This may impede the overall functioning of the institutions proposed through the reform or may distort some of its core elements.

Such distortions are normally linked to a gap between political and legal discourses. In other words, the proposals approved by government authorities and agreed to by officials and citizens, which we call the political "offer" of the reform program, are in some cases not consistently expressed in the legal texts. This occurs because these texts are the result of a bargaining process that involves the political will for change and traditional legal culture, which often influences the drafting of such documents much more than the public discourse.

It is therefore common for the political will for change -expressed for example in messages heralding the new codes, constitutional writings, or authorities' discourse- to be contradicted or at least toned down in the legal text which, at least in part, reproduces the rules of the old system. As these "old" rules are inconsistent with the new system, they become important obstacles to implementation. Though they are correctable in some cases, these throwbacks can represent a serious obstacle in excessively formal cultures and can be used as a political excuse for not taking action.

The following are among the most serious design problems for the implementation process:

1.1 - Flawed Regulation of Orality

The replacement of written procedures with oral ones has been one of the central themes of the reforms and the debates that develop before and during the discussion of the legal texts. The laws introduced in most of the countries under study clearly identify orality as the method for transmitting information and presenting evidence during the trial stage.[3]

[3] See, for example, Articles 326 and 333 of Costa Rica's CPC, Article 362 of the Guatemala's CPC and Article 291 of Chile's CPC.

Most of the practical difficulties of installing orality have been related to a lack of training, and new criminal procedure codes feature rules that are inconsistent with the oral method. (Most are related to the presentation of evidence and not rules regarding oral trial itself.) These problems contribute to the reproduction of the case file logic by which this artifact is viewed as the main tool for transmitting information. Evidentiary rules that require the use of written procedures include investigative activities that are assumed to be irreproducible and are very formally regulated. These often involve documents that will have to be read out loud at trial. It is also common to find that investigative work is still carried out according to the notion of neutral, court-appointed investigators whose reports consist of documents that are not subject to the rules of oral debate.[4]

Furthermore, oral trial rules or those related to evidence assessment often reproduce the logic of *prueba tasada*, which identifies which types of evidence must be used for each type of case, and the relative weight of each (as opposed the free assessment of evidence promoted under the new system). For example, many rules related to a defendant's statement are still tied to the *declaración indagatoria*[5] (unsworn statement) model specific to inquisitorial systems. Similarly, rules on witnesses' statements impede the exercise of examination[6] or allow the court little opportunity to question their credibility.[7]

While we cannot analyze each of these problems in detail, we can summarize by stating that when reform includes initiatives designed to facilitate the practice of orality, the procedural rules will also usually need to be reviewed in order to correct problems related to the design stage. Of course, this can be guarded against if the oral trial is effectively regulated as such from the beginning; however, accomplishing this requires testing the rules that govern the elements of the trial, for example through case simulation.

1. 2.- Failure to Regulate the Guarantee Function

As we will see below, one key problem in the implementation process has been the functioning of the guarantee or procedural oversight courts, which receive cases during the pre-trial stage. The work of these agencies has tended to reproduce problems found in the old system such as lack of transparency, delays, and the delegation of responsibilities, which are due to design and implementation problems in this area.

The guarantee courts are completely new in Latin American systems and have little theoretical or doctrinal history. This is reflected in the scant and sometimes confusing regulations that govern them. In some systems these courts have been granted few powers, as those that were held by the investigative judge have been passed on to prosecutors.[8] In more favorable situations the law has established the function of these judges -to impartially resolve disputes that arise between prosecutors and defendants-, but has failed

[4] See, for example, Articles 225 and ff in regard to Article 364 of Guatemala's CPC, Articles 213-224 in regard to Article 350 of Costa Rica's CPC, and Articles 231-246, in regard to Article 392 of Cordoba's CPC.
[5] See, for example, Articles 308 and following of the CPC of the Province of Buenos Aires.
[6] See, for example, Article 378 of Guatemala's CPC.
[7] See, for example, Article 144 of Ecuador's CPC in regard to the indivisibility of defendants' testimony, or Article 301 of the same text on allowing the judge to request additional evidence.
[8] See, for example, Articles 281 and following of the Cordoba CPC.

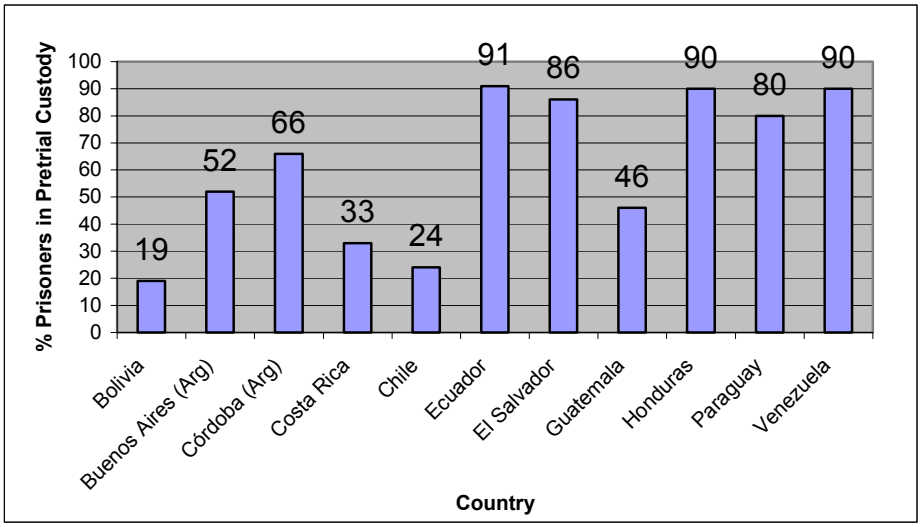
to establish clear boundaries for their authority on key issues such as the type of procedure that can be applied (oral or written, public or secret)[9] and whether or not they should play a passive and impartial role or continue to perform the official functions of the old system on issues such as the application of protective measures. In many countries traditional regulations system prevail, and protective measures are applied according to rigid, abstract parameters that can include mandatory pretrial custody for certain types of crimes.[10]

These regulations severely limit the judicial guarantee function in that they prohibit judges from resolving the main dispute. In practice, this abolishes procedural guarantees for those who are subject to mandatory pretrial custody, thereby reducing the role of these judges to its most limited expression. It seems that all of these regulations have limited the guarantee courts' impact on the use of pretrial custody, which continues to be used widely.

Figure 1

Percentage of Defendants Remanded to Pretrial Custody in Trials Observed

Source: JSCA Follow-up Project[11]



We will return to this issue later in this article in order to examine the way in which these legislative problems, combined with those of implementation, have made general procedural activity one of the weakest and most problematic aspects of the new systems.

[9] See, for example, Article 70 of Chile's CPC.

[10] See Article 281 of the Province of Córdoba CPC, Articles 157 and following of the Province of Buenos Aires CPC in regard to Article 171, and Articles 259 and following on Article 264 of Guatemala's CPC.

[11] According to the report, the figures do not represent the reality of the situation in Bolivia where prison system data suggest that 77% of those in custody have not been sentenced. For Buenos Aires the figure only refers to the criminal courts of the San Isidro *departamento*. Furthermore, according to the Buenos Aires report, prison system figures show that over 85% of inmates have not yet been sentenced. In Chile, for example, the Public Defender's Office 2003 Annual Report reported that 17.7% of inmates are being held in pretrial custody.

1. 3.- The Public Prosecutor's Office: Powers and Organization

Other design problems that can seriously affect procedural system implementation are related to the powers and organization of the public prosecutor's office. In some cases the transfer of the responsibility for criminal prosecution from the examining judges to prosecutors has not been accompanied by the provision of the authority that would allow this body to effectively reorganize and streamline its work. In general, these restrictions arise because legislators are reluctant to abandon the principle of traditional legality, which holds that those responsible for criminal prosecution must be permitted to dismiss cases.[12] When prosecutors' authority is overly restricted they are forced to bring all cases forward, as occurred under the old system, thus replicating the one-size-fits-all bureaucratic response. The following paragraphs discuss the ways in which these powers have been addressed in different codes and by the respective public prosecutor's offices.

Table 1

Prosecutorial Discretion, Alternative Outcomes and Mechanisms for Procedural Simplification

Regulated by Criminal Procedure Codes

Source: JSCA

Country	Prosecutorial Discretion			Alternative Outcomes		M. Proced. Simplification
	Stay	Dismissal	Prosecutorial Discretion	Cond. Stay	Reparatory Agreement	Shortened Procedure
Bolivia	YES	YES	YES	YES	YES	YES
Buenos Aires (Arg)	YES	NO	NO	YES	YES	YES
Córdoba (Arg)	YES	YES	NO	YES	NO	YES
Costa Rica	YES	YES	YES	YES	YES	YES
Chile	YES	YES	YES	YES	YES	YES
Ecuador	YES	YES	NO	NO	NO	YES
El Salvador	YES	YES	YES	YES	YES	YES
Guatemala	YES	YES	YES	YES	YES	YES
Honduras	YES	YES	YES	YES	YES	YES
Paraguay	YES	YES	YES	YES	YES	YES
Venezuela	YES	YES	YES	YES	YES	YES

However, even in those cases in which adequate powers have been granted, the options available to prosecutors are based on very general ideas or abstract concepts. Options based on a more or less realistic idea of the expected workload, desirable social responses, and available resources have only been designed in a few cases. From a design perspective, laws should not only grant the agency enough authority to control its workload and provide differentiated responses, but should also develop estimates regarding the potential results. The lack of such estimates makes it difficult to demand results and may lead to serious errors in the calculation of the resources needed.

[12] See, for example, Article 5 of the CPC of the Province of Córdoba.

2. Implementation Problems

Another key area is the challenges and difficulties associated with the implementation processes themselves. In order to analyze this aspect of the reform process we propose dividing the implementation process into three levels. These levels may or may not coincide with specific chronological stages and are intended to serve as categories for identifying problems at different levels.

Level 1: The System's Capacity to Absorb Changes

The implementation of criminal procedure reforms in Latin America has been vigorous over the past few decades. As a result, the reforms that we are reviewing have been accompanied by significant investments in human resources, infrastructure and training programs. This was not the case in the processes that were implemented in the region during other periods.

The strength and consistency of these programs has varied from country to country; however, in virtually no case could one say that they were implemented on paper only, with no practical expression. Significant efforts have been made to translate legal changes into modifications of practices within the criminal justice systems. These efforts have been driven by governments, international cooperation agencies and, in some cases, both.

As a result of this situation, which is somewhat novel for reforms in the region, we have not considered the reform's existence to be a key challenge, and have therefore excluded it from our analysis of this initial stage. This reflects a great deal of progress in comparison to other innovations, which have failed because the provisions made in new laws have not been implemented in a forceful manner.

In general, the challenges faced at this first level are closely related to the availability of the resources needed to implement the new activities, which often include increasing staffing levels, changing infrastructure, financing and creating training programs, and coordinating the work of the institutions involved. Practically all of the reforms studied have come with important budgetary resources to finance the installation of the new system. This is not to say that shortfalls have never impeded the resolution of some of the challenges mentioned in this article. However, a lack of resources affects only some aspects or segments of the system. There are, however, enormous differences among countries. Some have multiplied the sector's budget various times and others have only provided the minimum of funding for the new procedural system.

The challenges of this initial level also have a strong political expression, which is linked in certain aspects to justice system agencies' own resistance to change. This has been quite significant in some cases, and has even included direct expressions of ideological or corporate opposition. But the most important forms of resistance have been more subtle, dressed in the verbal acceptance of the new procedural methods but with very strong opposition to the changes required to make the new procedural mechanisms operational. This is due to a lack of understanding of the changes, protection of professional privileges or power, and the natural tendency to maintain the status quo. However,

resistance of this sort has not been generalized, nor does it come from all sectors involved. For example, while judiciaries have usually demonstrated willingness to innovate, public prosecutor's offices have resisted at least partially. Judges from lower courts have tended to be strongly committed to change, while Supreme Court justices have not.

A second political dimension has to do with the relationship between the criminal justice system and the rest of the judiciary. For example, there may be weak political support for the reform process, which runs out of steam in the legislative process, gets diluted and even turns against change when high profile problems or errors emerge. These situations may make the new system the favorite target of its critics, which further undermines the implementation process. Unrelated political and/or institutional crises can seriously affect the reform implementation process and may lead to the manipulation some of the reform components, the disintegration of groups that support the reform process and general budgetary limitations. This has been observed in a number of the countries studied, as the implementation period has coincided with political upheaval in the region.

The following are the most common challenges that have developed during this first stage of implementation in the countries studied:

i).- Assigning Responsibility for Prosecution to the Public Prosecutor's Office

The most problematic aspects of implementation are usually related to the initiation of criminal prosecution by prosecutors. In most of Latin America, the *Ministerios Públicos* were established in the XIX century under the Napoleonic Code system and carried out functions related more to formulating charges and controlling the legality of judicial rulings. They have also been generally weak organizations with limited staffs and a low profile in the judicial system.

As a result, making these agencies responsible for criminal prosecution, the direction of criminal investigation and the presentation of charges before the courts has represented an enormous challenge, often the most important one in the history of the public prosecutor's office. The most significant hurdles have been associated with the reception of old cases in the investigative courts and the tendency to reproduce the old systems' methods. In regard to the former, in various countries the transition from one system to another has included transferring all pending cases to the public prosecutor's office.[13] This has generated a serious initial crisis that has required the agency to spend a great deal of time and resources organizing and processing old cases, leading to long delays and given the public a bad image of the new system.

Table 2
Public Prosecutor's Offices Responsible for "Old" Cases
Source: JSCA

Country	
Bolivia	Yes
Buenos Aires (Arg)	No
Córdoba (Arg)	No
Costa Rica	Yes
Chile	No
Ecuador	Yes
El Salvador	No
Guatemala	Yes
Honduras	No
Paraguay	Yes
Venezuela	Yes

In some countries only cases filed after a certain date can be processed under the new system, which has left cases in the investigative courts (old system) there until they are resolved. Special provisions have been established in order to process them quickly. The second problem, and one that is quite prevalent, is the tendency of public prosecutor's offices to reproduce the work methods of the old system. As we have mentioned, these agencies had a very passive role. Furthermore, transition programs generally do not include mechanisms designed to facilitate prosecutors' use of the new responsibilities passed to them from the investigative judges.

In spite of all of this, public prosecutor's offices have begun to exercise their new functions, and in most cases this process has been accompanied by a significant increase in budgets and staffing levels. Table 3 presents data on the increased budgetary allocations to the public prosecutor's offices and the ratio of prosecutors per inhabitant:

Table 3
Budgetary Increases in Public Prosecutor's Offices, in US$
Source: JSCA Follow-up Study[14]

Country	Year	Budget	Year	Budget
Bolivia	1999	US$ 6.98 million	2003	US$10.64 million
Chile	2001	US$ 18 million	2003	US$64 million
Ecuador	2001	US$ 7.65 million	2002	US$12.14 million
El Salvador	1997	US$ 8 million	2000	US$19 million
Guatemala	1995	US$ 11 million	2001	US$45 million
Paraguay	1998	US$ 7.71 million	2000	US$20.28 million

[13] See for example, the Costa Rica country report.
[14] In the case of Chile this includes startup and operating costs. In addition, in 2003 part of the budget includes implementation in the Metropolitan Region. 2001 was compared with 2003 because the reform was in effect (since December 2000) in 2 regions of the country.

Table 4
No. of Prosecutors per 100,000 Inhabitants
Source: Second Comparative Report
(except data for Chile, taken from *Boletín Estadístico Ministerio Público*, first semester 2004)

Country	No. Prosecutors/ 100,000 inhab.
Bolivia	3.7
Buenos Aires (Arg)	2.7
Córdoba (Arg.)	8.5
Costa Rica	6.5
Chile	3.8
Ecuador	2.7
El Salvador	9.9
Guatemala	4.5
Honduras	6
Paraguay	3.2

Table 5
No. Prosecutors per 100,000 Inhabitants in Developed Countries
Source: DUCE, Mauricio. "Reforma y Ministerios Públicos"[15]

Country	Year	Nº prosecutors/ 100,000 inhab.
Germany	2002	6
Canada	2000-2001	6.2
United States[16]	2001	10.5
Italy	1997	3.7

These new responsibilities also have raised prosecutors' profile as judicial system actors, especially when they handle high profile cases cases.

[15] See article by Mauricio Duce in *Judicial Systems Journal*, No. 8.
[16] The figure corresponds to cities with populations between five hundred thousand and one million inhabitants. Cities with over one million inhabitants record a ratio of 12.3.

ii).- Introduction of Oral Hearings

Orality is a novelty for most of the countries that have embarked on reforms. In this context, the public hearings that have been held to resolve certain high profile cases have represented a milestone in legal culture, and this aspect of the new system has had a positive impact in the community and attracted support that will allow the changes to be maintained over time. As there has been no systematic approach to implementing orality, during the early stages it only operates in the few cases that reach the oral trial stage and where the actors exhibit great enthusiasm and a capacity for improvisation. As we will see, after successfully facing the initial challenge of organizing the first oral trials, actors must quickly face problems with the system's capacity to deal with increased case flow.

iii).- Defense Present During All Procedures

Most reforms have coincided with the birth of public defense as a key actor in the criminal justice system through the creation of a new institutional defense service or an increase in the system's human resource base. The new system requires that defense counsel be present at least during all oral hearings. As a result, the first challenge that these professionals face is thus appearing in court. Furthermore, most defendants cannot afford to hire an attorney and require government support.

Table 6
Institutional Structures for Public Defense
Source: JSCA

Country	Name	Type of Structure	Type of Professional	Reporting to
Bolivia[17]	Defensa Pública	Hierarchical	Public servant	Executive Branch
Buenos Aires (Arg)	Ministerio Público de Defensa	Hierarchical	Public servant	Ministerio Público (Judicial Branch)
Córdoba (Arg)	Asesores Letrados	No Institution	Public servant	Judicial Branch
Costa Rica	Defensa Pública	Hierarchical	Public servant	Judicial Branch
Chile	Defensoría Penal Pública	Hierarchical	Mixed System[18]	Executive Branch
Ecuador	Defensores públicos	No Institution	Public servant	Judicial Branch
El Salvador	Procuraduría General de la República	Hierarchical	Public servant	Ministerio Público
Guatemala	Instituto de la Defensa Pública Penal	Hierarchical	Mixed System[19]	Autonomous
Honduras	Defensa Pública	No Institution	Public servant	Judicial Branch
Paraguay	Ministerio de la Defensa Pública	Hierarchical	Public servant	Judicial Branch
Venezuela	System Autónomo de la Defensa Pública	Hierarchical	Public servant	Judicial Branch

[17] Law 2496 "Establishing the National Public Defense Service" has been under implementation since August 4, 2003.
[18] Chile's system includes staff defenders and private attorneys hired through formal procurement processes.
[19] Guatemala's mixed defense system has "staff defenders," who are permanent staff members and "*de oficio* public defenders" who are private attorneys hired to defends individuals charged with certain minor crimes.

Most countries have addressed this issue by creating new public defense systems or reinforcing old ones. This has generally involved hiring large numbers of public defenders, which has guaranteed a minimum level of service to defendants during the most important parts of the process. There is still a lack in a few countries, where new procedural legislation has been implemented but funding shortfalls have limited the number of defenders hired,[20] thus generating serious problems in scheduling hearings, procedural delays and low quality service in general.

Table 7

No. of Public Defenders per 100,000 inhabitants

Source: JSCA Follow-up Study Reports

NO. PUBLIC DEFENDERS PER 100,000 INHABITANTS		
	Public Defenders	Public defenders per 100,000 inhab.
Bolivia	68	0.8
Buenos Aires (Arg)	132	0.9
Córdoba	17	1.4
Costa Rica	223	5.73
Chile[21]	192	2.1
Ecuador	32	0.26
El Salvador	278	4.26
Guatemala	471	3.92
Honduras	233	3.3
Paraguay	96	1.7

Where resources for public defense have increased and the presence of public defenders has become the norm, these actors have become one of the most dynamic pillars of the new system, at least in its initial stages. The presence of defense attorneys has greatly improved respect for basic guarantees and has contributed to other procedural actors' effective performance. The public defense institution has become an important supporter of the new system. In many cases it has publicly opposed regressive proposals and developed innovative solutions to problems related to management and the production of statistics.

Level 2: Technical and Organizational Challenges

The first level of challenges in reform implementation is related to the new systems' capacity to summon the enormous initial effort required to address a variety of completely

[20] One of the special cases it that of Ecuador, where defense service is practically non-existent, although the creation of a defense service is imminent. See the second comparative report and the Ecuador country report.
[21] Data from the Public Defender's Office 2003 Annual Report (Cuenta Pública 2003). Does not include the Metropolitan Region, does include 92 on-staff defenders and 100 private attorneys.

different tasks. The second seems to revolve around system components' capacity to introduce substantial changes in their routines and work methods. This stage involves technical and organizational challenges of innovation, learning from one's own mistakes, and sustaining incremental processes of learning, professionalization, and complexity in the diverse tasks required under the new system.

This level also presents the challenge of applying new procedures to a high volume of cases. While in the beginning it is enough to ensure that a few high profile cases are processed properly under the new system, shortly thereafter it will be necessary to take charge of large-scale case processing to avoid overloading the system with great numbers of backlogged cases, which would make the new system look ineffective.

The main challenges of this second level are:

i).- Managing the Public Prosecutor's Office's Workload

Once the public prosecutor's office has assumed responsibility for criminal prosecution, its workload must be controlled. As we have stated, these agencies have tended to reproduce the traditional methods of preliminary investigation courts and bureaucratic processing formulae, with their attendant delays and low response capacity. The first challenge for these offices therefore involves effectively operating the case management model implicit in the new rules, which should create a more sophisticated system with responses that are more tailored to individual circumstances.

In almost all of the countries that have undertaken reforms, the law has granted public prosecutor's offices a set of very important powers to allow them to organize criminal prosecution in the most effective manner possible. In some cases these regulations have had defects that were addressed in the new system's design, but there is still room for innovation. One aspect of these normative changes focuses on the internal organization of the public prosecutor's office. In general, the modifications have made the internal structures more flexible: rigid faculties have been abolished and structures no longer mirror the arrangement of the courts, wherein one or more prosecutors is assigned to a specific instance, thus reproducing a judicial hierarchical structure. Prosecutors are also granted the power to use outcomes such as temporary stays of proceedings, plea bargains, and shortened or simplified procedures.

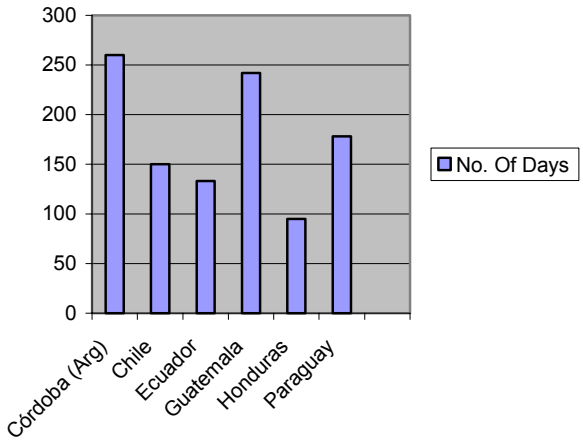
The main problem during this stage is the marked tendency to reproduce the work methods of the investigative courts, which has weakened the impact of the legal changes.

Table 8
Use of Alternative Outcomes and Prosecutorial Discretion
Source: Reports from the JSCA Follow-up Project[22]

Country	Used in % of cases
Bolivia	40%
Córdoba (Argentina)	1 %
Costa Rica	64 %
Chile	75 %
Ecuador	2 %
El Salvador	26 %
Honduras	8%
Guatemala	4 %
Paraguay	10 %

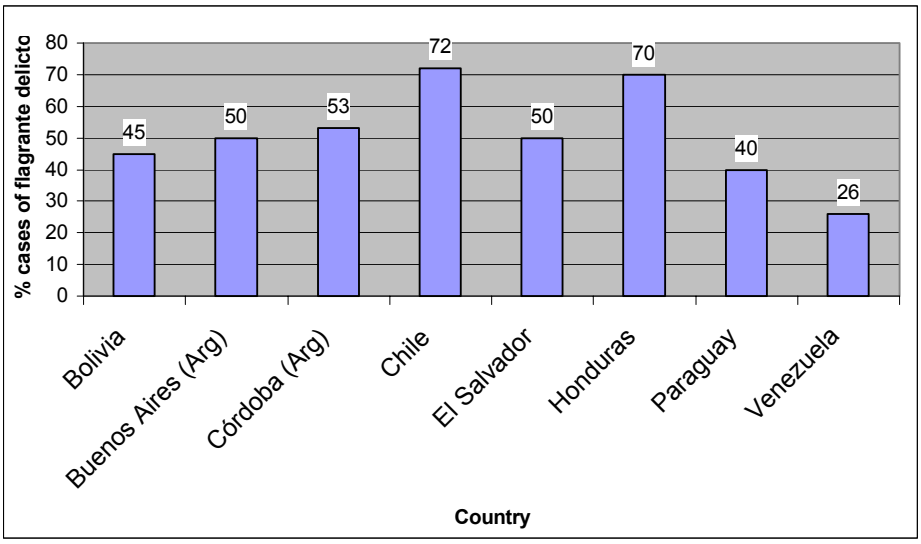
There is a general tendency to reproduce the highly bureaucratic nature of the investigative activity handling all cases using one (generally slow) written process.

Figure 2
Average Duration of the Investigative Stage[23]
Source: JSCA Follow-up Project Reports



[22] With the exception of Chile, for which the public prosecutor's office *Boletín Estadístico* 2003 was used.
[23] Some figures on this table were obtained from data on the duration of cases in different countries (from criminal act to oral trial or indictment to oral trial). For Costa Rica this calculation has not been done, and therefore figures include the cases under the old system. For Chile the calculation was made from figures obtained in the 2001 study, which appear to be far from the current situation. For example, according to the public prosecutor's office Boletín Estadístico 2003, the average time for processing a case in that year in regions in the follow up study (regions IV and IX), from filing to any outcome was 71 days in the IV region and 54 days in the IX region (for robbery). In Buenos Aires, according to the information in the report, we estimate that the investigation stage lasted 305 days, as the average duration of the trial order and trial is approximately 465 days, and the average duration of preventive prison is 730 days in the cases observed.

Figure 3
***Flagrante delicto* Offenses**
Source: JSCA Follow-up Project Reports



Though they are not based on statistically representative samples, the above graphs provide us with a general idea of the duration of the investigative stage. In most countries it is rather lengthy, with a delay of 150 days between the commission of the crime and charges being laid. This is particularly interesting given that in many cases the defendant was caught *en flagrante delicto*, which, in principle, should shorten the investigation.

Furthermore, despite the legal flexibility allowed, in many cases the internal organization of the public prosecutor's office has become rigid, reproducing the more traditional work distribution systems. The main challenge of this stage is therefore to effectively apply the system's legal design.

ii).- Making Orality the Norm for Judicial Processes

Immediately after the introduction of oral procedures, systems must address the enormous amount of coordination and management required to make this the norm throughout the system. In other words, the first oral processes are held while the management and coordination mechanisms are still quite precarious, and significant efforts are made to ensure that they succeed. The mechanisms inherited from the old system are stretched to the limit in the attempt to produce oral hearings, and in the end these are produced in a way that could be called "do it yourself." Each hearing requires a special effort from staff that have neither the proper training nor a precise idea of their role, much less any experience working in systems specifically designed for this purpose.

After a short time, the hearing management and coordination system faces the challenge of establishing routines to ensure that a greater volume of hearings can be held in order to meet the system's growing needs. Of course, the intensity of this demand depends

on the level of efficiency achieved by the public prosecutor's office case management system, which we have addressed above.

Once this issue has been addressed, the coordination and management system must be able to pass to the next level, or risk maintaining its small-scale, "do-it-yourself" structure. In the latter case, which has been the rule in most Latin American countries, the small-scale system quickly loses the motivation and improvisational capacity that are characteristic of the initial implementation stage, and becomes a bureaucratic obstacle to the proper functioning of the system. The poor definition of roles, procedures and incentives generates enormous coordination problems that impede the timely occurrence of hearings and quickly cause bottlenecks at this stage, engendering lengthy delays. Trials held under a new system lacking serious or professional management quickly begin to degenerate, as schedules, access, the certainty of the hearing schedule and other formal aspects are left to the discretion of the staff involved.[24] This leads to a high failure rate of hearings and increased delays between the laying of charges and beginning of the oral trial.

Table 9
Oral Hearings Scheduled versus Oral Hearings Held
Source: JSCA Follow-up Project Reports

	Hearings scheduled	Hearings held	%
Bolivia	103	36	35%
Buenos Aires (Arg.)*	91	39	31%
Córdoba (Arg.)	117	97	83%
Costa Rica	179	54	30%
Chile* *	65	64	98%
Ecuador	222	59	27%
El Salvador	170	69	41%
Guatemala	50	38	76%
Honduras	55	27	49%
Paraguay	17	13	76%
Venezuela***	(867)	(144)	(17%)

* Only San Isidro Judicial Dept.
** Only Antofagasta. First report indicated 80% success
*** Figures on total trials in the Caracas Criminal Circuit

Figure 4

Oral Hearings Scheduled versus Oral Hearings Held

Source: JSCA Follow-up Project Reports

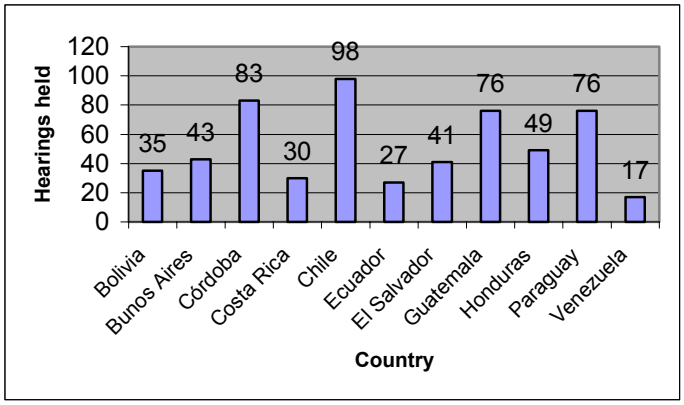
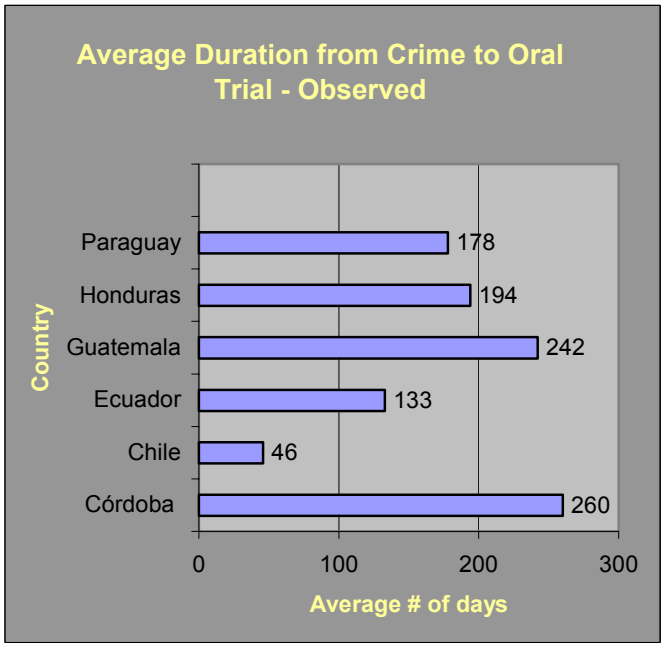


Figure 5

Average duration from Indictment to Oral Trial

Source: JSCA Follow Up Project Reports



This generates a very negative view of the system among users and greatly diminishes their respect for some of the most important values of the new procedural system, such as transparency and the recovery of the legitimacy of judicial acts.

[24] See for example Table 6 and Figure 2.

Level 3: Improved Provision of Services

When a judicial reform process overcomes the tense, traumatic initial stage and the reform process is able to support the extension of the new mechanisms across the system; when it is able to resist being crushed and falling into ineffectiveness and neglect as a result of the accumulation of great volumes of cases that do not arrive in a timely manner at the different procedural steps; only then is the process in a position to face the third implementation stage, which is directly linked to the reform's political and social aims.

In a certain sense, before this third level the challenges of the system and their successful solution are internal issues, as they do not directly change the service provided to citizens. It could therefore be described as an improvement in the amount and quality of services provided.

i).- Strategic Positioning of the Public Prosecutor's Office

Public prosecutor's offices have had varying levels of success in managing case flow. This has become a very serious problem in most offices, and it has been hard to find and implement mechanisms to allow the system to prioritize and resolve the bulk of cases. It is also clear that as long as these agencies cannot do this work efficiently, it will be difficult for them to handle more complex institutional challenges in a timely manner. In practice, the urgency of social demands often forces these bodies to take charge of more complex requirements such as the investigation of serious public interest cases. However, if the case management problem is not resolved, these efforts will not extend beyond the most urgent cases. This will lead to a lower quality of service in an already overburdened agency, wherein resources are diverted from regular cases to deal with urgent ones.

Public prosecutor's offices also have to face the community's demand for more effective security. It is beyond the scope of this report to analyze these agencies' ability to improve levels of security, in terms of both the number of crimes that are committed and public perceptions of fear. Indeed, there is much debate around whether the public prosecutor's office should concern itself with tasks of this kind or whether its functions should not include responsibility for any aspect of public security. We will limit our discussion of this issue to mentioning that some sectors are demanding this and that public prosecutor's offices must adopt a clear position on this issue. We feel that public prosecutor's offices must assume some level of responsibility for public security. While the level of this commitment can be discussed, they cannot avoid this challenge completely.

These demands force the entity to look beyond its traditional role to the adoption of a more strategic position on the issue of public security. This involves identifying resources that can be used to achieve specific results in this area, which include financial and human resources as well as the legal powers of the public prosecutor's office. Any strategy developed in this regard must take into account obstacles, restrictions and limitations.

In regard to results, it should be noted that new challenges in criminal prosecution generally have been focused on two key areas: crime rates and fear. These are clearly two

distinct, though related, aspects. While the first is linked to decreasing the number of crimes committed, the second refers to the subjective perception of security among citizens.

Precise, measurable objectives must be defined for each area. In other words, there is a need to determine whether prosecutorial activity is responsible for the achievement of the changes observed. In this sense it does not seem advisable to set general objectives such as a reduction in crime rates, given that it would be difficult for any strategy to cover such a broad range of circumstances; furthermore, numerous variables could influence such a general objective. It is therefore necessary to define precise objectives. These could include a reduction in certain types of crimes, or improvements in security in a certain area of the city. In regard to subjective issues, goals could include better public perception of the justice system or increased awareness of prosecutors' work.

A third, broader objective also has been proposed: improved quality of life. This proposal is more complex, and is based on the idea that the crimes, and especially a perception of insecurity, radically affect peoples' lives. The most concrete expression of this idea is the profound effect of living in a highly insecure environment (this may be based on objective evaluations, such as crime rates, or subjective factors). Insecurity leads to the deterioration of the environment, decreased property values and fewer job opportunities. People living in these conditions tend to go out less, which increases stress and affects their mental health. One of the aims of criminal prosecution should be to improve quality of life. This goal must be configured so as to allow for the assessment of the strategy adopted. In other words, the exact changes expected must be defined precisely.

Though there are many approaches to this problem, the most important for the purpose of this study is clearly prosecutorial faculties. This involves organizing prosecutorial decision-making around the measures that must be taken in order to achieve the desired outcome. If the objective is to improve security in a certain part of the city, the response could involve energetically prosecuting serious crimes committed there. It could also include solving minor incidents through reparatory agreements or stays that include commitments to avoid the most conflictive types of behavior in the same place. The public prosecutor's office also can develop an improved capacity to communicate its decisions to the public or more effective coordination with the police. Such a strategy should include measures that are external to the prosecution system and requirements for bringing those involved with these measures on board. For example, local governments could agree to enforce municipal building by-laws more effectively. Health and education agencies should also be involved, as they could take part in a strategy aimed at improving public security or trust. Furthermore, citizens can participate in such strategies collectively or individually.

Finally, a strategy of this nature should address the obstacles to achieving the defined objectives. These difficulties come in many different forms; some are related to the complexities of the situation, while others have to do with the limitations of the system itself. In general, the kind of interventions that we are discussing involve a learning curve, meaning that any strategy applied should be continually assessed and adjusted so the criminal prosecution system learns from and builds upon its experience.

These kinds of strategic approaches often are associated with two very important ideas. The first is the notion of problem-solving criminal prosecution. This means that prosecution should move beyond processing on a case by case basis and take in the social reality from which the cases derives, identifying the situations the engender them. This should be followed by the development of solutions that contribute to resolving or at least mitigating the circumstances that generate the incidents. This involves shifting our attention from the incident to the problem, and from there to the proposed solution in the form of a strategy (the use of prosecutorial faculties in a strategic context), all of which is followed by institutional assessment and learning processes.

The second is community-oriented prosecution, which involves reestablishing a strong linkage between criminal prosecution and the community. In other words, the problems dealt with are those perceived and prioritized by the community. This implies allowing the public to exercise some control over prosecutorial activity and increasing the system's openness to public scrutiny or monitoring. Community orientation is also often linked to a change in territorial assignment of prosecutors, decentralization programs and the permanent assignment of prosecutors to particular neighborhoods or zones of the city, so they may form bonds and develop responsibilities *vis a vis* the community.

Multi-agency coordination should also be considered. In order for prosecutors to understand the situations that contribute to criminality, they must make use of the collective experiences and knowledge that could be contributed by the other agencies and organizations that work on the same problem. Prosecutorial agencies also should seek to involve all or at least some of these agencies in the problem-solving strategy.

The role of the public prosecutor's office in these types of strategies can vary widely. In addition to proposing strategies, these agencies can support those developed by other actors, such as local government or the police. These ideas first arose in the Anglo-Saxon context in the area of police work. The police are the most likely actors to lead the way in problem-solving and community-based work, with prosecutors coming on board later to support them. However, the public prosecutor's office could adopt more of a leadership role in the strategic approach, convening the actors required for a preventive approach, in which criminal prosecution serves a broader aim.

Another key strategic point is victim assistance. The vast majority of reform legislation has given the victim a heretofore unheard of role in criminal prosecution as well as a series of rights. However, as with the aspects examined above, in general these regulations are not put into practice, and in some cases have produced deep questioning of the reforms themselves. This situation assumes that the public prosecutor's offices will generate the conditions required to put the stipulated conditions into effect, and thereby grant the victim his/her rightful role in the process.[25]

[25] Various efforts related to this issue have been developed in the region. Most involve the introduction of victim assistance offices, though these have tended to lack specialization and geographic coverage.

ii).-Highly Effective Use of Orality

We have seen that the main challenges related to the use of orality are related to the system's capacity to hold hearings in a context of high case flow. Once this has been achieved, the system's ability to steadily improve the quality of these hearings must be addressed. Experience suggests that orality does not produce all of its effects spontaneously. Simply holding oral hearings during the initial implementation stage does generate public oversight of the work of the actors involved and increased awareness of the system itself, which contribute to legitimizing it. However, if the quality of hearings is improved through the increased use of orality, other improvements can be achieved.

First, orality can and should substantially improve evidence management and thus make evidentiary activity more rigorous and professional, producing more accurate results. Much has been said about the advantages of allowing the judge to evaluate evidence directly and the controls introduced through the adversarial method. The problem is that obtaining these effects requires system actors to develop sophisticated work methods and capacities that can only be acquired over long periods of time.

Another very important effect of the use of orality is reduced formality. The fact that the most important decisions are made as a result of the debates generated in oral hearings should help to dismantle many of the formalities that have traditionally structured criminal investigation systems, and which imply an enormous waste of time and resources. Stated differently, where the decisions made in hearings depend upon the capacity of the parties to produce relevant, high quality information, all preparation for the hearings should be oriented towards this objective. As a result, it does not make sense to follow a formal process. This new set of values should lead to the abolition of useless procedures, shortening of timeframes and better quality investigative or preparatory processes.

All of this requires gradual learning and improvement processes, as well as well-directed training programs to enhance performance of the different roles. There is therefore a need to present conceptual arguments to replace the legal evidentiary notions that are often internalized among system operators and even in the new legislation itself.

Last, we wish to mention the capacity of oral hearings to organize the different system actors, which makes them the source of both formal and informal incentives. Prosecutors, public defenders, police officials, and experts attend oral trials and account for their work in a rather demanding context, thereby receiving clear indications that enable them to direct their future work and stimulate their improvement over time, thus fostering creativity and innovation and rewarding attitudes that produce these. But in order to produce this effect and for these performance messages to be generated and transmitted appropriately, orality must be of high quality. This involves meeting training and professional development needs and engaging in continual monitoring in order to avoid the deterioration of the main procedural rites.

The quality of orality must improve progressively if it is to produce its most meaningful effects on the criminal justice system, the legal system in general and the

population. One could say that these effects depend on the development of a legal culture based on orality, which will take a long time and be learned only gradually.

iii).- Development of a Comprehensive Public Defense System

As we have noted, reforms have been accompanied by substantial improvements in public defense. These new and remodeled systems have played a key role in a high percentage of criminal cases. The third level of implementation is therefore marked by the challenge of providing defense services in a comprehensive manner. This involves responding to the diverse demands of the public and creating formulae for areas such as self-regulation and monitoring that foster the progressive improvement in quality of service and public satisfaction. In other words, while the system can function with a group of public defenders in the beginning and a relatively uncoordinated group of private attorneys, these modes could limit the level of service, guaranteeing the availability of defense counsel but providing limited opportunities for professional development.

Possible solutions include the generation of a market of private services that offers the basic conditions of transparency and free access. This system would feature mechanisms for quality control, certification, professional training and other aspects aimed at professional development. The lack of development of professional markets impedes public access to justice services, especially for those who can afford to pay for legal services but do not have enough resources to hire "top" attorneys. This intermediate sector that does not require free legal aid usually has to turn to a market that lacks transparency, clear price schedules and quality services. The only other option is to use pro bono services, which prejudices the poorest segment of the population.

Furthermore, provision of State-financed services should be opened up to formulae that could provide the public with choices. They could be designed to meet the needs of specific groups such as minorities or special interest groups such as victims or human rights groups or to generate a common standard of service for direct public defense service and sub-contracted private attorneys.

It is important to keep in mind that achieving high quality service assumes concern for the final outcome in terms of quality and client satisfaction. This requires moving beyond the perspectives of system operators and maintaining a certain level of flexibility in adapting mechanisms to clients' needs while undertaking regular assessments of the elements involved.