

APÉNDICE 2

REFORMS IN THE ADMINISTRATION OF JUSTICE IN HONDURAS AND BOLIVIA REASONS THAT HAVE HINDERED ITS SUCCESS AND HOW TO ADDRESS THEM (EXECUTIVE SUMMARY)

Purpose of the Report¹⁴⁴

The purpose of this report is to analyze the main reasons or interests that have prevented some recent judicial and legal reforms in Honduras and Bolivia from becoming effective. Given the fact that both countries have undergone far-reaching criminal justice system transformations as well as reforms of the judge selection system, this report focuses on those reforms.

In order to analyze the impact of the above reforms we have selected some of the most delicate situations that they intended to improve. Regarding criminal justice, the report focuses on the reasons why the reforms were unable to put an end to the misuse of pre-trial detention. The abuse or misuse of pre-trial detention is one of the most important problems affecting the criminal system in Latin America. Thus, this should be the focus of our study for Bolivia and Honduras. The report also includes a study of some of the reasons that have prevented reforms, particularly those of the criminal procedure codes, from reducing the perception of impunity prevailing in both countries.

With respect to the reforms of judicial selection mechanisms, the report focuses on the interests that have prevented the public perception of judicial independence from improving in spite of the implementation of those reforms.

¹⁴⁴ This study was possible thanks to the generous support of the World Bank Group. The project was performed under the direction and general supervision of DPLF Executive Director, Eduardo Bertoni. Also participated in the project: DPLF Programs Director, Katya Salazar, and the Equal Access to Justice Program Coordinator, Thomas Antkowiak. In addition, two consultants worked for this study: Rigoberto Ochoa, from Honduras, and Iván Lima Magne, from Bolivia.

The study on Honduras¹⁴⁵ covers mostly the period 2002–2006 from a qualitative and quantitative perspective, and it is exploratory in nature. To carry out that study, information was obtained from several sources, and several texts, laws and documents were analyzed; also, many

interviews were conducted, and they are mentioned in the report. The opinions expressed by several national and international experts at an international workshop hosted by the Due Process of Law Foundation (DPLP) in Tegucigalpa in July 2007 were also a valuable contribution for this research. The preparation of the report did have its limitations and difficulties, such as the scarce literature on this problem in Honduras and incomplete statistical information. Although it was impossible to have access to some quantitative information and files, we consider that the necessary data to prepare the document was obtained.

The study on Bolivia¹⁴⁶ analyzes some of the problems encountered in the implementation of the Bolivian criminal procedure reform, considering two main aspects: the enforcement of precautionary measures in connection with the guidelines proposed by the reform and judicial independence. The study describes the bodies in charge of implementing the reform of the criminal procedure, the guidelines established by such reform and the areas in which the implementation work was divided, with the purpose of relating each of these categories to the current problems in the field of precautionary measures. Here we analyze the role of cooperation agencies in the implementation of the reform of the criminal procedure. As for judicial independence in Bolivia, the role of the Judicial Council (*Consejo de la Judicatura*), the judicial career system, the judicial disciplinary system and the judicial motion system have been specifically addressed in a separate section.

Reforms in the Administration of Justice in Latin America

It is important to begin our analysis with a description of the regional context of the reforms in Bolivia and Honduras.

More than two decades ago, a significant process of legal and structural reform commenced within the Latin American judicial sphere. Among other reasons, this transformation process was triggered by the crisis of the old justice administration structures. Today, more than two decades after those reforms began, few would dispute that the problems faced by the criminal systems at that time were critical. The reforms were originally intended to solve those problems. Impunity and human rights violations could not be tolerated in a state that purported to respect the rule of law and hence the need to carry out the reforms.

145 This study was prepared by Rigoberto Ochoa, DPLF consultant for this report.

146 This study was performed by Iván Lima Magne, DPLF consultant for this report.

At that time, the reforms were the result of political as well as economic needs.¹⁴⁷ From the political point of view, the return to democracy in the countries of the region gave rise to social claims intended to improve the quality of emerging democracies. Human rights advocates also played a significant role in including the reforms in the political agenda. However, the reforms were also the result of economic reforms implemented in several countries where international cooperation agencies played a significant role.

In addition to the above political and economic grounds, the work of a network of Latin American lawyers, who both drafted the amended laws (particularly those laws related to the criminal system) and worked towards their implementation, was essential. This network of lawyers was able to convince both national and international actors and donors of the benefits of their proposed reforms.¹⁴⁸

Responses varied from one country to another within the region, and they did not take place simultaneously. But a process of change did indeed begin and it entailed profound legal and judicial reforms. More than twenty years after the commencement of the reforms in Latin America, the argument that it is difficult to measure the impact or the success of the reforms can no longer be valid.¹⁴⁹

By way of example, it is worth mentioning that assessments of the judicial reform processes have been recently conducted in six countries of the region.¹⁵⁰ Several experts stated that, in general terms, the results of the reforms undertaken more than twenty years ago are not satisfactory, as they have not fulfilled the purposes intended for them. For example, Linn Hambergren, one of the experts who delivered the closing address, stated that she felt an overall disappointment for the results of the reforms. Douglas Cassel, who also participated in the conclusions panel, suggested that reform processes should take into account society's unsatisfied demands. Juan Enrique Vargas, Executive Director of the Justice Studies Center of the Americas (JSCA,) expressed a clear message: though he remarked that there had been progress in the last 15 years of reforms, he considered that the demands that had triggered these reforms were far from being satisfied. Another problem that has been frequently noted is that the ambitious goals of many of the reforms were very difficult to achieve and generated excessively high expectations. The

147 See: Lisa Bhansali and Cristina Biebesheimer, "Measuring the Impact of Criminal Justice Reforms" in *Promoting the Rule of Law*, Thomas Carothers, Editor, Carnegie Endowment for International Peace, p. 362, Washington, D.C. 2006

148 Máximo Langer suggests this idea in a recent work. See, Máximo Langer, "Revolution in Latin America Criminal Procedure: Diffusion of Legal Ideas from the Periphery" in *55 American Journal of Comparative Law* 617 (2007.)

149 Bhasali and Biebesheimer, *supra* note 147, p. 301

150 The countries assessed were Argentina, Chile, Colombia, Peru, Venezuela and Guatemala. The conference summary can be found in http://www.csis.org/media/csis/pubs/0609_latino_judicial_reform.pdf

failure to keep up with these expectations helps reinforce the perception that reforms achieved little or no success.

This report is not intended to undertake a thorough analysis of the results of the reforms in the administration of justice within the region. Nonetheless, it is important, at the very least, to note that drawing any generalized conclusions may be a mistake. The reforms of the Chilean criminal procedure are often mentioned as successful experiences, as opposed to other reforms, such as those implemented in Bolivia and Honduras, whose results are discussed in this report. Notwithstanding a general feeling of dissatisfaction towards the reforms, in some cases it can be empirically demonstrated that there has been a significant improvement in terms of due process and individual guarantees. In countries with a recent history of massive human rights violations, these advances must be acknowledged.

Main Reforms in the Administration of Justice in Honduras

To better understand the obstacles that prevent the success of reforms, it is advisable to review the circumstances in which such reforms occurred. Only after the second half of the 21st century—with the so-called liberal reform—the legal and institutional basis was set for the construction of an emerging state under the rule of law in Honduras. The Honduran legal system consolidated at the second half of the first decade of the 20th century with the coming into force of the new civil code, the new codes of civil and criminal procedure, and with the organization and granting of powers to the courts of the Republic. However, its development has been chaotic as a result of the political instability that prevailed during the last century.¹⁵¹

In effect, the Judiciary in Honduras was seriously influenced by traditional political parties and their constant partisan fights: once parties assumed power they would exercise a complete control over the weak Honduran Judiciary. In 1963, there was a breach in the constitutional order that paved the way for a series of *de facto* military governments that—except for the brief period during which the lawyer Ramón Ernesto Cruz was in office¹⁵²—dissolved the Executive and Legislative Powers and controlled the Judiciary for 19 years. In 1982, Honduras resumed constitutional life in the context of the East-West conflict and, more specifically, in the context of the internal armed conflicts in Central America, particularly in Guatemala, Nicaragua and El Salvador. These circumstances gave way to a democracy that, for many people, was purely formal.

151 See Ramón Romero and Leticia Salomón, “*La Reforma Judicial: Un reto para la Democracia*” (The Judicial Reform: A Challenge for Democracy), Tegucigalpa, Centro de Documentación de Honduras (CEDOH), 2000, p. 57.

152 Ramón Ernesto Cruz was in office from April 1971 to December 1972.

This transition from authoritarianism to formal democracy has advanced significantly, and the situation of the Judiciary, which in the 1980s accepted serious human rights violations resignedly, has gradually improved. In this way, due to constant social demands, on the second half

of that decade that tendency began to reverse and the Commission for Judicial System Reform was created.¹⁵³ This commission fostered many important measures, such as: the enforcement of the law that regulates the judicial career; the creation of the Judicial School (*Escuela Judicial*); the creation of the Public Defender's Office (*Defensa Pública*); the start-up of the Court Inspection Office (*Inspectoría de Tribunales*); and the implementation of family, juvenile and contentious-administrative courts.

In the 1990s progress concentrated on the readjustment of the military to the organic structure of the Executive and on the transfer of police powers to the civil sphere. At the same time, the image of the justice system was distorted by its lack of credibility, its failure to properly enforce laws and its weak institutional presence¹⁵⁴. Therefore, the old demands reappeared for an impartial system of justice and an independent Judiciary as necessary conditions for strengthening the rule of law.

In this decade, with the financial assistance of international organizations, the judicial reform was carried out as part of the State Modernization Program (*Programa de Modernización del Estado*).¹⁵⁵ Also, progress was made as to the partial implementation of the judicial career and the improvement of the organization and administration of the Judiciary. Subsequently, the Judiciary Modernization Program (*Programa de Modernización de la Justicia*)¹⁵⁶ was created to develop the infrastructure of the Judiciary, support the institutional consolidation of the Public Defender's Office and the Court Inspection Office, and to enact and enforce new laws¹⁵⁷.

With the new millennium, the issue of judicial reform was taken to the constitutional level; important amendments to the constitutional regulation of the Judiciary were made. In 2000 the constitutional amendment was enacted and in 2001 it was ratified by the Honduran Congress.

Changes were made as to the election of the justices of the Supreme Court of Justice, who are now elected with the vote of two thirds of all members of the Honduran Congress, out of a list of 45 candidates proposed by a nominating board formed by representatives of the Supreme Court of Justice, the Bar Association, the National Human Rights Commissioner, the

153 Created by the Supreme Court of Justice by mid-1980s.

154 See United Nations Development Program (UNDP), *Report on Human Development*, p. 73, Honduras, 2002.

155 Created in 1992 within the authority of the Executive.

156 Created by the Judiciary in the second half of the 1990s.

157 UNDP, *supra* n. 155, p. 76.

Honduran Board of Private Companies, legal scholars, civil society organizations, and workers' unions¹⁵⁸. Despite the new features of the judicial election system, for many its results are somehow discouraging; others, instead, view the new system as a step forward in the depoliticization of the Judiciary.

By far, one of the positive aspects of the constitutional reform of the Judiciary is the increase in the number of justices of the Supreme Court of Justice from nine to fifteen and the extension of their office from four to seven years, which provides more stability to the function and continuity to the Court, regardless of changes in the government. Furthermore, the Court has been organized in divisions and a constitutional division has been created to control the constitutionality of laws and to guarantee constitutional rights.

The enactment of the Criminal Procedure Code (2002), the Constitutional Justice Law (*Ley de Justicia Constitucional*) (2005) and the amendments to the Criminal Code (2005) among others, evidence that a modernization is taking place in the Honduran legal system. However, it is important to highlight that problems not only arise in connection with law enforcement by the institutions within the justice system, but are also associated with political and economic factors external to this system.

It is now a favorable time to lay the foundations of the justice system of the 21st century. Judicial independence should be furthered and a judicial career should be created. This tendency is reinforced by the advancement of the Law Regulating the Judiciary (*Ley Orgánica del Poder Judicial*), the law regulating the Judicial Council and the Judicial Career (*Ley del Consejo de la Judicatura y de la Carrera Judicial*)—which are yet to be enacted by the Honduran Congress—and the Civil Procedure Code (*Código Procesal Civil*), that would modernize and introduce changes to the current court system, and contribute to the strengthening of a democratic and constitutional State under the rule of law.

January 2007 marked the 25th anniversary of the Political Constitution of the Republic of Honduras, an unprecedented event in the short and troubled history of democracy in the country. Despite the problems that still subsist, there is no doubt that the organization and operation of the democratic system and the Honduran justice system have improved during the last century.

In conclusion, we may say that the judicial reform process was made possible through the support provided by international cooperation agencies to the country. The cooperation has concentrated, to a great extent, on organizational, technical and administrative aspects, and the internal reorganization of the Judiciary is remarkable. Efforts by international cooperation

158 Political Constitution of the Republic of Honduras, Article 311.

agencies to provide the courts with the necessary infrastructure are also visible; it will help many jurisdictions meet the minimum requirements to duly carry out their judicial mission. An example of the above is the implementation of the new Criminal Procedure Code, which required suitable facilities for conducting oral and public trials, and which is part of the modernization efforts mentioned above.

Main reforms in the administration of justice in Bolivia

Just like in the case of Honduras above, in order to understand the obstacles that prevent the success of the reforms in Bolivia, we must first review the context in which such reforms took place.

Until 1997, the Bolivian criminal system had been governed by the “Banzer Codes” enacted in 1972. The Criminal Procedure Code (*Código de Procedimiento Penal*) was in accordance with a reformed inquisitorial model: it adopted the principles that proceedings should be oral, continuous and adversarial and provided for written proceedings. This system brought about a great degree of discrimination and instituted the belief that the “criminal system” was the most effective way for collecting debts. The system put special emphasis on the prosecution of property crimes and, as from 1989, on the prosecution of drug-trafficking crimes.

The period from 1982 to 1997 was characterized by the subordination of the Judiciary to the Executive, as the judicial term was four years and they were appointed by political agreement on the basis of majority in Congress. The Prosecutor’s Office was legally within the sphere of the Ministry of Government (*Ministerio de Gobierno*) and the appointment and removal of prosecutors was at the sole discretion of the Ministry of Government.

A second issue to be considered is the use of physical coercion for monetary debts: before 1995, no realistic assessment of the criminal system could be made, as prisons were crowded with people who had been unable to pay their debts (this situation degenerated to the point where a great majority of detainees were “indefinitely” detained for not paying their attorneys’ fees.) These laws were repealed in 1994, and all forms of coercion and detention for failure to pay debts were expressly eliminated.

Finally, before the criminal procedure reform of 1997, a Criminal Code Reform was enacted updating the general provisions of the Code to keep up with the new developments in criminal law doctrine, amending some serious mistakes of the previous Code and adjusting the definition of certain crimes contained in the special provisions.

By 1997, the Preliminary Draft of the Criminal Procedure Code (*Anteproyecto del Código Procesal Penal*) was ready for legislative consideration. However, due to a change in government,

its consideration was postponed until 1999, when the new Criminal Procedure Code (*Nuevo Código de Procedimiento Penal, NCPP*) was promulgated. It was agreed that the Code would become effective 24 months after the date of its publication.

This two-year grace period of *vacatio legis* was provided to prepare the institutions within the justice system for the adequate implementation of the NCPP. As will be explained in the section dealing with the implementation of the reform, several actions were taken to that end. However, it is worth mentioning at this point that the most important task undertaken at that time was in terms of legal adaptation; once the NCPP was enacted, the focus was placed on the design, analysis and debate of several bills on the subject of implementation, so that institutions could be fully adapted to the reform at the legislative level.

As for the rules governing precautionary measures, legal amendments in Bolivia were similar to those of other Latin American reforms. In this regard, the NCPP makes provision for the principle of exceptionality and proportionality; time restraints on pre-trial detention; judicial control over the need to extend precautionary measures; the requirement that material basis (defined as the existence of persuasive elements of commission or participation in the crime) and procedural risk (the possibility of risk of flight on the part of the accused or of risk of obstruction of efforts to establish the truth) be verified; and, finally, the enforcement of other precautionary measures in place of pre-trial detention (home detention, the duty to appear periodically before a designated authority, posting of bonds, prohibition to visit certain places or to communicate with certain individuals, oath of compliance, bond on one's own recognizance and property bond.)

In spite of the above reforms, statistics indicate that the number of people subject to pre-trial detention was not reduced after the NCPP became effective. We can infer from this that, when compared to the pre-reform scenario, changes in terms of pre-trial detention were not very significant. Nevertheless, the new requirement that an oral and public hearing be held prior to imposing precautionary measures has permitted a greater access to information regarding the administration of the criminal justice system. Paradoxically, as a result of this increased access to judicial administration, in 2002 the media began to criticize the provisions of the NCPP regarding precautionary measures and to demand its amendment, requiring "stricter" Code provisions and criticizing the "lenient" implementation of these mechanisms.

Faced with pressures and demands for an amendment to the system of precautionary measures, the Legislative Committee on Constitutional, Justice and Judicial Police Issues of the Chamber of Deputies (*Comisión de Constitución, Justicia y Policía Judicial de la Cámara de Diputados*) held a public hearing in the Santa Cruz Department (a locality where pressure from civil society organizations had been most intense and where a bill modifying precautionary measures had been proposed) to discuss the issue of citizen safety and the reasons that have caused its impairment. Surprisingly, the citizens present at the hearing (at least the individuals and entities that

participated in the public hearing) did not see the laws governing precautionary measures as a factor directly affecting the increase of “citizen insecurity.”¹⁵⁹

In spite of this public hearing and of initiatives to come up with genuine solutions to address security demands, the discussion resulted in the amendment of the NCPP and the incorporation of a measure to assess recidivism risk as a condition for the enforcement of precautionary measures of detention.

In the final analysis, it is evident that as a result of security demands, and due to the media campaign against the enforcement of precautionary measures on individuals associated with the wave of crime, the law was amended without taking into consideration any statistical reports regarding the current crime situation in Bolivia.¹⁶⁰ Today, the number of detainees under preventive custody continues to rise, proving the failure of a reform to the criminal procedure that purported to reduce the use of pre-trial detention.

As far as reforms to guarantee the independence of the judiciary are concerned, constitutional amendments were introduced in 1994 designating the Judicial Council as the body responsible for overseeing such independence. However, the operating independence of the Judicial Council set out in its regulatory framework has been severely questioned. The procedure for the appointment of the Members (*Consejeros*) of the Judicial Council is within the competence of the legislative branch, and this circumstance may be pointed to as the fact that undermines said independence.

The appointment of the Members of the Judicial Council within the Bolivian political system may lead to one of the following two situations: either the ruling parliamentary majority appoints the Members or, in the absence of such majority, appointments are the result of a “consensus” or “agreement” between the government in office and the opposition; in this case the process becomes little more than a sharing of positions in which political patronage and favoritism prevail. The merits, qualifications and skills of the candidate are not assessed in either case.

The possibility that the Judicial Council may act on the basis of political, party or other interests leads us to believe that mechanisms for the selection, appointment and removal of judges and magistrates are probably subject to the same criteria.

159 Information taken from the report submitted to the Legislative Committee on Constitutional, Justice and Judicial Police Issues of the Chamber of Deputies by the Normative Adequacy division of the Implementation Technical Team in 2002, as part of a debate on the possible reform to the existing system of precautionary measures.

160 For further information, see the Follow-up Report on the Criminal Procedural Reform in Bolivia (*Informe de Seguimiento a la Reforma Procesal Penal en Bolivia*), Part I. p. 119, 2004

This is because the Law of the Judicial Council (*Ley del Consejo de la Judicatura*) has prevented this institution from fulfilling the needs and achieving the objectives that inspired its creation. This fact sheds light on two contrasting moments in time in Bolivia: when the institution was created and the present situation, characterized by the presence of a Judicial Council that is nothing more than a series of good intentions. But this reality should not be viewed as a justification for the elimination or drastic reduction of its powers; on the contrary, it implies the great responsibility of analyzing and assessing the problems of the Council to help strengthen the administrative and disciplinary body of the Judiciary.

Reasons that hinder the success of the criminal system reforms in Honduras

The information that has been gathered suggests that significant economic resources from international cooperation agencies have been allocated to judicial reform. Nonetheless, open spaces for developing judicial independence and the autonomy of the Prosecutor's Office have been scarce and co-opted by different forces.

In practice, prosecutors have been unable to assume a leading role in investigating crimes, the police has not managed to conduct such investigations professionally and, as a result, judicial orders and charges are not well founded. Under these circumstances, social pressure shifts to trial judges (*jues de letras*,) expecting that they order the pre-trial detention of accused individuals, and to sentencing judges (*jueces de sentencia*,) so that they convict defendants, guided by the belief that these mechanisms are the most effective for improving public security.

On the other hand, the exclusive authority of the Prosecutor's Office to institute criminal actions interferes with the rights of victims to advance the investigation. The most obvious consequences of this monopoly are the absence of efficient criminal prosecution owing to the limitations of the Prosecutor's Office, the impunity enjoyed by offenders and the vulnerability of victims.

Under this model, during the investigative stage, the assessment of fundamental rights is left to administrative authorities and the prosecutor and the investigator are expected to work in collaboration; the fact that such cooperation has not been accomplished yet has helped undermine the rights and guarantees of individuals.

With the implementation of the new police model, the Prosecutor's Office was profoundly affected by the transfer in 1998 of its Criminal Investigation Division (*Dirección de Investigación Criminal*) to the National Police, a change that impaired investigation initiatives and which led to a high level of impunity. This contradictory measure constituted a backward step for the jus-

tice system as the reform passed by the National Congress, rather than enhancing professional investigation within the framework of the new criminal procedure, served only to debilitate the struggle against impunity.

Poor professionalism on the part of investigation personnel, together with the lack of appropriate skills, equipment and materials to conduct a criminal investigation, are all factors that impact negatively on the quality of public prosecution and, consequently, on the overall efficacy of criminal justice. This, in turn, paves the way for increasing levels of impunity, widespread social distrust and skepticism towards the institutions of the justice system.

Given the incompetence of criminal investigation and public prosecution, and the difficulties that the burden of proof entails for prosecutors, there is a clear tendency to produce evidence in the early stages of trial. Evidence is read out and introduced as documentary evidence; this practice, however, is a serious regressive tendency as it contributes to the preponderance of written procedures over oral ones.

Specifically with regard to pre-trial detention, during the term that the new Criminal Procedure Code has been in force (2002-2006) 49,348 precautionary measures have been issued, the most common being pre-trial detention (24%), periodic appearance in court and the prohibition to leave the country, in order of frequency. There has been a trend towards gradually increasing the enforcement of precautionary measures, though such enforcement rate had only a limited growth between 2004 and 2006. Furthermore, the number of individuals detained by virtue of the laws against youth gangs (*ley anti-maras*) has reached 1,028, and this confirms the idea that subsequent legislation at odds with the procedural reform can only represent a serious obstacle impairing the success of reforms. In other words, ensuring legislative consistency is key to a successful reform.

Of all the circumstances that must be present for a judge to order a pre-trial detention, the “risk of flight of the accused” is the most common. One of the most persuasive factors for establishing the risk of flight is the absence of strong ties in the country (*arraigo*). In judicial practice, risk of flight is established by judges on the basis of whether the accused owns his house or not. Therefore, in the Honduran scenario, pre-trial detention will most likely be imposed on any accused individual who does not own the house where he lives, whose address may not be verified due to the fact that he lives in “*cuarterías*” (shanty houses), or who has no permanent job or regular income and does not maintain strong family ties. That is to say, even reforms that are inspired by laudable principles get distorted in practice.

The actual enforcement of pre-trial detention shows that, although this precautionary measure is different from imprisonment, it is indeed punitive in nature and neglects the fact that the person subject to it has a constitutional right to be presumed innocent.

The public opinion is still that imprisonment is the right remedy for fighting crime and prosecutors feel compelled to request the issuance of detention orders and the pre-trial detention of the accused upon filing formal charges. Judges, in turn, feel constrained to issue detention orders as a precautionary measure. Similarly, tighter punishment continues to be used as a “deterrent.”

In spite of reforms and training programs, the new judicial culture that a criminal system respectful of civil rights entails has yet to be assimilated by judicial personnel, prosecutors, police officers and citizens in general. The characteristics of the inquisitorial system are still present, and this fact is manifested, for instance, in the excessive use of pretrial detention as a form of anticipated punishment.

The enforcement of pre-trial detention orders is intended to address social demands for security, as growing crime rates and the victimization of citizens—a sign of social alert that should not be confused with the social reality that media convey—call for a response; this argument of criminal policy understands pre-trial detention as having a retributive purpose that far exceeds its precautionary nature and that is clearly punitive.

Two examples that confirm the adoption of pre-trial detention and reinforce the country’s inquisitorial culture are: first, the Guidelines for the Enforcement of Precautionary Measures in place of Pre-trial Detention for Organized Crime (*Instructivo sobre la Aplicación de Medidas Cautelares Sustitutivas de la Prisión Preventiva en Delitos de Crimen Organizado*) approved by the Supreme Court of Justice, which states that “in the case of very serious crimes... pre-trial detention is the appropriate precautionary measure for the success of the procedure...”; and second, the reform incorporated to the Code of Criminal Procedure which states in Section 184, last sentence, that “under no circumstances shall pre-trial detention be replaced with any other precautionary measure in the case of crimes committed by members of organized crime groups or illegal associations.”

The way politics has handled crime has resulted in the use of pre-trial detention as a general rule rather than as an extraordinary measure; it is regarded as a logical solution to crime. This position acknowledges social pressure from different sectors, like the news media.

The situation in Bolivia

The Inter-American Commission on Human Rights (IACHR) has recently prepared a report on Bolivia.¹⁶¹ The chapter on administration of justice mentions, among the problems identified by the IACHR, the institutional inadequacy arising from lack of training, adequate infrastruc-

¹⁶¹ See “Access to Justice and Social Inclusion: The road towards strengthening democracy in Bolivia,” IACHR, Washington D.C., in <http://www.cidh.org/pdf/%20files/BOLIVIA.07.ENG.pdf>

ture, technical support and personnel stability, as well as the uneven allocation of cases among courts and tribunals.¹⁶²

From the information presented in this report we can identify the problems associated with the reforms undertaken in the field of criminal justice, more specifically the problems posed by pre-trial detention in three different spheres: the exclusive territory of the institutions involved in this field, the elaboration of public policies on criminal justice, and the social domain.

We believe that a major obstacle in the advancement of the reform and the achievement of its original purposes regarding respect for the rights of the parties and the use of pre-trial detention only as an exception originates from the obscurity that still surrounds the role of the hearing as a work methodology within the accusatory system.

Although the criminal procedure reform has advanced in the direction of establishing oral proceedings as a rule not only for trials but also for the other stages of the procedure, it is also true that hearings have become the oral equivalent of the written procedure conducted under the previous system; the participants in the case (prosecutors, public defenders and judges) have a formal role in the enforcement of pre-trial detention, and this results in different problems such as the lack of case analysis, the filing of petitions for pre-trial detention in cases in which other alternatives provided in the law may apply, delays of justice and little judicial control.

Furthermore, although there is awareness regarding the need to adapt the institutions involved in the administration of justice to the new procedural system, reality suggests that, in a way, the structure that has been adopted still conforms to the logic of the inquisitorial system. The manner in which institutions administer cases also appears to evidence the same logic: every participant operates individually, in isolation from the rest of the institution, assumes responsibility for a given number of cases and neglects issues that do not have to do with their cases. It is worth noting that today this form of organization causes interruptions, delays, lack of coordination in the proceedings and eventually extends the term of procedures that could otherwise be settled in an expedite manner with the agreement of all participants.

As long as unnecessarily lengthy procedures are permitted, pre-trial detention will continue to be used, as it operates as a mechanism that conveys a certain sense of “reassurance” to society. As long as the institutions involved in the administration of justice do not realize that reaching an agreement, as to holding hearings and attaining tangible results that are measurable and that can be assessed both internally and externally, is key to a better implementation of the criminal procedure reform, excessive delays of justice will continue to occur.

162 *Ibid*, par. 117.

Another issue that appears to be problematic is the specialization of training. Although a structured training plan had been devised for implementing the reform, one cannot deny that, given the manner in which such training has been approached, its actual impact has not lived up to expectations. In terms of training methodology, efforts to instill the values of accusatory systems have resulted in excessively theoretical training programs and have ignored an aspect that is central to the effective application of said values: the inherent practices of oral procedures. Litigation itself was considered in most cases as a secondary issue, and priority was given to the study of written materials and case analysis, always from a theoretical perspective. The passing of time and the analysis of other reform experiences have taught us that the best way to conduct training is by taking into account the specific needs of those who work within the justice system (rather than designing courses according to demand) and designing the contents of courses on the basis of the tools that are needed for each position. Some people consider that, in order to improve the quality of the service, periodic tests should be taken.

Complications also arise around the fact that there is little interest in Bolivia in the creation of public policies regarding implementation. Although coordination bodies have been set up to properly implement the procedural reform (*Comisión Nacional de Implementación, Comité Ejecutivo de Implementación,*) the role of these bodies has been rather sporadic and has resulted from the evaluation meetings organized and scheduled by international cooperation agencies.

Finally, we believe that it is essential to conduct an analysis of the criminal procedure reform at the social level. It has been suggested that some of the work of the Technical Implementation Team (*Equipo Técnico de Implementación*) was aimed at disseminating the contents and values of the reform to the civil society. However, citizens' perception of the criminal procedure reform is often expressed in phrases like "*it is a copied code*" or "*this is a law that favors criminals.*" Perhaps one of the reasons for this feeling is the way in which the criminal procedure reform was made known, almost conceiving the NCPP as a brand that had to be publicized¹⁶³. In this respect, there has been a limited incorporation at the social level of the constitutional values and principles that inspired the reform and their importance for peaceful coexistence. This, in turn, contributed to the subsistence of certain conflicts which are often mentioned by various powerful sectors of society (like news media and certain political spheres) with the purpose of engendering negative feelings about the criminal procedure reform.

163 Advertising spots were broadcasted, billboards with information on constitutional guarantees were placed alongside roads, short radio programs were aired explaining the advantages posed by the reform, and several communication initiatives were carried out, all of which, though necessary, were insufficient to instill the values of the accusatory system in society.

What should we aim for?

In June 2007, DPLF organized a series of expert meetings on judicial reform in the city of Tegucigalpa that specifically addressed the impact of such reforms on the reduction of pre-trial detention rates and the enhancement of judicial independence. At the meetings, national experts were joined by their international counterparts.

The purpose of gathering national and international actors in one place was to broaden the perspectives of the debate and to assimilate the lessons learned from contrasting experiences. Judges, prosecutors, former judges, members of judges and prosecutors' associations and representatives of non-governmental organizations attended the meeting.¹⁶⁴

Participants' response to the agenda of the meeting was overwhelming. On the one hand, the experience of judges and prosecutors highlighted the practical obstacles to the enforcement of well-designed laws. They all agreed in that the issue of "judicial culture" is one of the major factors preventing the full enforcement of laws protecting civil rights in Honduras and emphasized the tension between laws that are respectful of fundamental rights and the problem of lack of safety that afflicts the country, which forces citizens to demand strict measures from judges and prosecutors along the lines of crime (*mano dura*.)

As this report shows, the "inquisitorial culture" continues to prevail among justice operators in Honduras and Bolivia in spite of legal reforms. Written procedures that for years have dominated the judicial practice in the region are rooted in a system that is based on inquisitorial principles and are accompanied by a particular behavior that combines a formalist and bureaucratic mentality with obscure language. As for formalism, it has inspired the magic belief that strict compliance with certain formalities will solve a controversy. As far as the bureaucratization of the system is concerned, it has given way to even more serious consequences: the delegation of purely judicial functions to (often well-meaning) ordinary employees. It is this type of "inquisitorial culture" that has survived legal reforms.

164 Among the national participants in the meeting were Guillermo López Lone, President of *Asociación de Jueces por la Democracia*; José María Palacios, former member of the Supreme Court of Justice; Danelia Ferrera, Coordinator of Prosecutors of the Prosecutor's Office (*Coordinadora de Fiscales del Ministerio Público*); Rita Nuñez, Director of the *Centro de Informática de Estudios Legislativos del Congreso Nacional de Honduras*; Rafael López Murcia, Sentence Tribunal Judge; Sandra Ponce, Special Prosecutor on Human Rights, Honduras Public Ministry; Ana Pineda, Director, *Fundación Democracia Sin Fronteras*. International guests included: Guillermo Zepeda (from Mexico,) Associate Professional at *Centro de Investigación para el Desarrollo (CIDAC)*,) Denise Tomasini-Joshi, Legal Officer of Open Society Justice Initiative, Gustavo Vivas Usher, Argentine consultant with extensive expertise in judicial reform in Honduras, and Abraham Siles, Peruvian researcher and professor of constitutional law and jurisdictional policy.

During the meetings in Honduras, justice operators clearly pointed the misconceptions of citizens regarding the role of judges and explained that their job was not to combat lack of safety but to defend legality. In this regard, the role that the press can play in misleading citizens was also discussed.

A further issue addressed during the meetings was the role of emergency laws —such as *anti-maras* laws— that undermine the principles of the new Criminal Procedure Code. The meeting also emphasized the important role that the civil society as well as judges and attorney’s organizations can play to cope with these problems.

These conclusions reached during our research, and which are further described in the report, confirm a reality that extends beyond the situation in Honduras: criminal and procedural law compose a single body of law that should be coherent, as they both greatly influence the determination of the general criminal policy goals of the State. Unfortunately, as we will discuss further throughout this report, the need to harmonize procedural and substantive law was not taken into account in Bolivia and Honduras, and this prevented the progress and consolidation of reforms that were originally respectful of the rule of law.

A reform of the criminal procedure is only one of the foundations of any reform of the administration of justice that intends to cure the above deficiencies, but it is neither the only nor the most important pillar. Legal reform is vital for implementing a process of change, but this process is bound to fail if no implementation program for such reform is simultaneously devised. The importance of training for the success of the reform has been noted repeatedly and is further confirmed in this report; however, in some cases the training provided was not suitable.

Finally, on the basis of our conclusions throughout this report, we provide several recommendations that may help improve the quality of the implementation of reforms regarding the appointment of judges and the criminal system.¹⁶⁵

The situation in Bolivia

Below is a series of recommendations that could be implemented at different levels:

At the level of institutions involved in the administration of justice: strengthening the struggle for oral proceedings

- **Organizing institutions to meet the requirements of the hearing system.** Understanding that resources are and will continue to be scarce is of utmost importance; as a result, we think that the current planning and organization logic should be changed in order to shift

¹⁶⁵ Similar problems in both countries result in similar initiatives. But, as each country has its own peculiarities and institutions, we have made a separate analysis.

- from a situation in which the institutions involved in the administration of justice continuously complain about the lack of human, technical and economic resources to one in which they organize themselves on the basis of actual possibilities. In the last decade, the different experiences in the region have proven that, even with scarce resources, it is possible to achieve institutional goals and set up a system that respects the rights of people. We have not yet learned sufficiently from these experiences so as to avoid making the same mistakes, and it is our opinion that this is the right path to follow. Specifically, in terms of organization it is essential to abandon the case portfolio approach (*cartera de causas*) that creates watertight compartments within institutions. With respect to the Prosecutor's
- Office and the Public Defender's Office, society must understand that the job of prosecutors and defenders is to litigate and not to carry out administrative or secretarial work and therefore such offices should be organized in a manner that facilitates the work of those involved in the administration of justice. The Judiciary, for its part, needs a system of organized hearings: judges must take quality decisions on the basis of the information provided by the parties during hearings, and having staff members that are unfit for this end (such as lawyers who work as court clerks and who also act as notaries) implies underutilizing the limited resources available.
- **Litigation training for oral hearings.** In line with the previous paragraph, the training provided to individuals who work within the court system must be oriented towards improving their effectiveness at hearings and must enhance their litigation capacities. This by no means implies that training should neglect the study of academic opinions and case law within the accusatory system, but rather that theoretical knowledge and practice should intertwine so that those involved in the administration of justice can see litigation tools as true tools for their jobs and not as "resources for the theatrical performance." Training must never promote improvisation and must be carefully planned and devised in order to achieve tangible results within institutions. In this regard, gathering information about needs, clearly identifying the operators that will receive training and setting up adequate result assessment methods are all elements that must be present in training processes that are oriented towards consolidating the reform. Also important in this respect is the selection of trainers, as the instructor, who will convey both theoretical and practical knowledge to his audience and show them the way in which this two aspects interact, must have the necessary expertise and skills not to trivialize the learning experience.
- **Developing assessment indicators that can measure the effectiveness of the work carried out by justice operators.** It is important to assess the work performed by those involved in the administration of justice; otherwise, we will not be able to provide society with a clear picture of criminal justice administration. The manipulation of precautionary measures is a good example: as we have no means for assessing operators we end up as-

sessing laws and describing them as “unfit for our reality,” “lenient,” “foreign” or any other similar synonyms that pursue the same goal: to demand the amendment of laws to make up for the poor performance of operators and to make their job easier. We must develop indicators that help us assess the work of judges, prosecutors and defenders, as only then will we be in a position to state with absolute certainty which resources are needed to improve the system, and where they ought to be allocated.

- **Citizen monitoring of the actions of operators within the justice system.** Citizen participation must not be limited to acting in trials as lay judges (*juetz ciudadano*.) Instead, the administration of justice must open up to society and develop mechanisms to reach society, so that citizens themselves assess the performance of operators on a case by case basis. Today the news media act as intermediaries between the work of operators and citizens, often qualifying the work of operator based on prejudices or their own prevailing interests rather than on actual facts. Hence, promoting greater citizen participation and control in the sphere of criminal justice will help preserve a system that respects constitutional rights and guarantees.

- **Duty to produce reliable statistical information unified at the inter-institutional level.** Today, criminal justice system information varies from one institution to the other. The Judiciary and the Prosecutor’s Office produce a series of data; the Public Defender’s Office compiles its own statistics and the Special Task Force on Crime Prevention (*Fuerza Especial de Lucha contra el Crimen*) also develops its own database. Any person who checks the information from these four institutions will realize that it does not coincide, and in some cases it is so dissimilar that it appears to have been obtained from different judicial systems¹⁶⁶. An institution that cannot provide reliable information to citizens is not trustworthy, and the result, as we have already mentioned, is detrimental for legal institutions. In spite of the efforts undertaken before the enactment of the National System of Citizen Security Law (*Ley del Sistema Nacional de Seguridad Ciudadana*) to show that the number of precautionary measures enforced by the new system had not been reduced, and given that statistical information inspires very little confidence in Bolivia, no one took the data seriously, and this in turn led to the adoption of the normative solution. Mechanisms should be developed forcing institutions to provide information on their daily activities, so that citizens can get to know the work of the administration of justice and assess its reliability.

166 One of the main difficulties encountered by CEJIP when preparing the Report on the Implementation of the Criminal Procedure Reform in La Paz (*Informe sobre la Implementación de la Reforma Procesal Penal en La Paz*), was obtaining consolidated statistical information, due to the fact that information varied greatly from one institution to the other.

At the political level: perceiving the procedure as a self-generated development

- **Undertaking the reform of the criminal procedure as a self-generated process rather than as an outside imposition of international cooperation agencies.** As we have already mentioned throughout this report, the predominant presence of international cooperation agencies in the implementation of the criminal procedure reform has nurtured the perception that this is an “imposed reform.” In this scenario, the temptation of resorting to counter-reform is almost inevitable.¹⁶⁷ We believe that in order to consolidate the reform and prevent possible regressions it is essential to involve the political sector and make it
 - accountable for the process, reassigning cooperative agencies their assistance role, away from the limelight associated with results.
 -
- **Controlling the effectiveness of the actions of the institutions involved in the administration of justice.** In addition to developing the above-mentioned assessment indicators for justice operators, the political sector must promote actions aimed at effecting this control through the institutionalization of these procedures and without provoking sporadic “witch-hunts.”
- **Developing laws that provide permanent solutions and not merely interim solutions (*solución de coyuntura*.)** We have given several examples of interim solutions (from the reform of the system of precautionary measures to the current intention to use the trial *in absentia* to “combat corruption.”) We believe that it is necessary to exert pressure not with the aim of obtaining interim solutions, which only paper over the cracks, but to develop laws that are efficient in terms of meeting people’s needs and that help establish control mechanisms that encourage participation by community members and that promote community awareness regarding the existence of laws and informed participation in their enforcement.

At the social level: enhancing participation and social control

- **Programs for monitoring institutions involved in the administration of justice.** Our observations regarding individuals involved in the administration of justice also apply to this category: citizen involvement in the monitoring of the work performed by institutions is key to the consolidation of the democratic practice that the reform of the criminal procedure entails.

¹⁶⁷ For instance, during the last week of August 2007 the current Justice Minister of Bolivia maintained in several radio programs that the criminal reform has not addressed the needs of Bolivian people as it has not been designed by them.

- **Dissemination of information through alternative news media that promote a culture of respect for constitutional guarantees.** The reason we mention alternative news media in this category is that one of the lessons that have been learned regarding the publicity of the reform is that in a country where half the population lives in rural areas, mass media is hardly the best channel to reach citizens. The creation of spaces for reflection, debate and education appears to be a more realistic and appropriate means for raising awareness regarding a sophisticated and complex issue like the reform of the criminal procedure.

The situation in Honduras

In the case of Honduras, the report suggests a series of recommendations for improving judicial independence and giving a fresh impetus to criminal reforms, in an attempt to achieve success.

Recommendations regarding judicial independence

The mechanisms for nomination and appointment of the members of the Supreme Court of Justice should be reviewed. Also important in this respect is ensuring that the merits, skills and integrity of candidates, as well as their sense of duty and respect for the Constitution of the Republic of Honduras (*Constitución Política de la República*) and other laws, are not influenced by the personal interests of political and economic groups so that, in this way, the foundations of common good can be laid. None of the above can be achieved without political will.

Passing the law that creates and regulates the Judicial Council and the Judicial Career is essential to promote the structuring of the judicial career, to reorganize the system for the selection and appointment of judicial officers, as well as their training, and to improve their judicial performance. Such law shall guarantee that judges will remain in office, that their performance will be regularly assessed and that they will be promoted to higher ranking positions on the basis of objective criteria, without taking into account any kind of patronage. This, in turn, will secure the independence and impartiality of judges and magistrates in their rulings. Again, none of the above is possible without political will.

Another key issue is the independence of judicial and administrative powers: they should be exercised by separate bodies, thus allowing transparent management and reducing the risk of corruption of judicial officers.

It would also be advisable to promote the enactment of the Law Regulating the Judiciary as a strategic measure for strengthening the independence of this power of the State.

Law schools and other judicial and prosecutors training programs are the right place for promoting academic training in accordance with the requirements of democratic judicial practice. It would also be positive if justice personnel could be trained to work in an independent and impartial judiciary.

Last, the civil society should be encouraged to conduct social audits on the justice system that would help improve court activity in the country and to require from institutions of the justice system greater efficacy and efficiency in the resolution of issues submitted to them.

Recommendations regarding the reform of criminal procedure in general

It is of utmost importance to develop case law that guides the application of criminal laws, as the academic literature on the subject of fundamental rights is scarce. This will result in a more democratic judiciary that dispenses with guidelines for the application of criminal procedure laws.

A new impulse should be given to a criminal procedure in which accusatory principles prevail over inquisitorial ones, and in which evidence is offered, submitted, produced and discussed by the parties to assert their claims. Then, it is weighed by the judge in order to control its probative value and its legality, according to the principles of due process and other constitutional rights and guarantees.

The exercise of the functions and powers of the Public Prosecutor's Office requires that the institution be devoid of any partisan influence, promote the professional education of prosecutors, have an adequate budget and a criminal investigation body so that criminal actions can be brought in an effective and efficient manner.

The law on criminal procedure should be revised to do away with provisions of inquisitorial nature that prevent the transition to a procedure that is respectful of civil rights.

It would also be desirable to resume oral procedures; in this way, evidence could be produced and arguments could be presented by the parties before the court that will rule on the case.

Finally, law schools and other judicial and prosecutor programs should offer an academic education that is respectful of civil rights and provide training to justice personnel on the specifics of oral proceedings as well as on the theory and practice of criminal evidence.

Recommendations regarding pretrial detention

We believe that the following recommendations are of crucial importance:

- Within the framework of the new Criminal Procedure Code, the institutions that make up the system of criminal justice must promote institutional policies that advance the respect for civil rights within the criminal procedure.
- Developing the institutional conditions and budgetary requirements for the use and general enforcement of precautionary measures different from pretrial detention, which shall be considered as an extraordinary measure, and developing guidelines for each of them.

- Designing inter-institutional training programs that provide judicial personnel, prosecutors, police officers and public defenders with a solid education on human rights issues—with specific emphasis on the right to freedom and personal integrity, judicial guarantees and the use of precautionary measures other than pre-trial detention—is of vital importance.
- Developing case law in amparo proceedings on the right to personal freedom, advancing the conditions for this right and extending its scope, respecting its essential elements and taking into consideration the international law on human rights.
- The determination that the absence of strong ties in the country (arraigo) involves a risk of flight from the jurisdiction should be based on objective criteria. In this regard, the circumstances to be taken into consideration should be whether the person is settled in a certain municipality or city, his residence in the country, domicile (which should not imply ownership of a home); family and social bonds, profession or occupation (rather than income); and a minimum standard of arraigo.
- Strengthening institutional accountability, encouraging detention centers to keep a single, complete and transparent record indicating the reasons for detention and any relevant information regarding individuals subject to pre-trial detention.
- Ensuring that detention centers separate individuals subject to pre-trial detention from those who have been sentenced to prison; improving the conditions of facilities and securing the life as well as physical and psychological integrity of detainees.
- Promoting a public safety policy that offers comprehensive solutions to crime rates and helps reduce victimization levels within Honduran population.
- Launching information campaigns on the civil rights values reflected in the new criminal procedure and raising greater awareness among society regarding the role of precautionary measures other than pre-trial detention.
- Providing the Public Prosecutor’s Office with a criminal investigation body that guarantees that its activities are carried out effectively and efficiently, specifically regarding individuals subject to pre-trial detention.
- Strengthening the institutional character of the Public Defender’s Office, so that defenders can conduct a professional and autonomous technical defense, on an equal standing, and ensuring that public defenders can actively defend the fundamental rights and judicial guarantees of detainees.

- Encouraging judges in charge of the enforcement of judgments (*jueces de ejecución*) to exercise their duty to control the legality of pre-trial detention in compliance with the corresponding provisions of the Criminal Procedure Code; to that end, judges must have the necessary resources at their disposal.
- Designing a penitentiary system, under the authority of an autonomous institution, separate from the Department of Safety (*Secretaría de Seguridad*) and the National Police (*Policía Nacional*,) with a proper infrastructure and resources, and that is under the technical and administrative direction of professional penitentiary personnel.