

- (c) Arbitrary detentions. The system was indifferent to repressive activities of the State.
- (d) Unlawful detentions and torture.
- (e) Induced confessions.
- (f) Atmosphere favoring abuse of power and over-bureaucratization.
- (g) Hinderance of efficient or technical investigation, especially in non-conventional crimes.
- (h) Conflicts of interest for the judges.
- (i) Violation of Constitutional due process.
- (j) Slow and complicated.

While the old system failed to address criminal activity causing the greatest social destruction, the system did concentrate its weight upon the most marginalized social sectors.<sup>185</sup>

### C. Criminal Procedure Reform.

New Criminal Procedure Codes in civil law countries have moved toward the adversarial (accusatorial) model. Italy, Portugal and Córdoava, Spain, have each developed new codes with adversarial law concepts.<sup>186</sup> In 1989, Italy abolished the position of examining magistrate (*juez de instrucción*), due to criticisms of secrecy and length of proceeding.<sup>187</sup> Guatemala is seen as consistent with this tendency.<sup>188</sup> In fact, Guatemala's efforts are really a first in Latin America.<sup>189</sup>

185. See *id.*

186. See ALBERTO BOVINA, TEMAS DE DERECHO PROCESAL PENAL GUATEMALTECO 60 (1996).

187. See FAIRCHILD, *supra* note 163, at 128.

188. See BOVINA, *supra* note 186, at 60.

189. Bolivia, Panama, Colombia, Peru, El Salvador, Costa Rica and Argentina have all made moves to reform their Criminal Procedure frameworks. However, none go as far as Guatemala in creating a true adversarial system. For example, "oral trials" in Panama, Colombia, Costa Rica and Peru did not mean doing away with the written collection of evidence in the *sumario*. In those countries, the files are read aloud now. On very rare occasions there might be a witness. However, the process remains much as ever under the old *jueces de instrucción*. Similarly in Argentina, there is a so-called "mixed-modern" system combining the old *sumario* with some oral elements, not an adversarial system. See generally, ROBERTO A. BÜSSER & NORBERTO JUAN ITURRALDE, EL JUICIO CON DEBATE ORAL: CÓDIGO PROCESAL PENAL DE LA NACIÓN (1993).

In Colombia, the figure of *juez de instrucción* was abolished, but the legal characteristics were simply transferred to the prosecutor. In Peru, much of the reform law has yet to come into effect. Honduras has pending legislation to reform its Criminal Procedure Code. See Interview with Timothy Cornish, USAID/CREA, Guatemala City, Guatemala (May 11, 1998); See generally, Timothy Cornish, Development Associates, *Accusatorial Model of Criminal Procedure in Peru* (1993); Marta Lucía Zamora, *Nuevo Código de Procedimiento Penal Colombiano* (1992).

El Salvador's new reforms came into effect in April 1998. The new package is much in line with the Guatemala model. New oral procedure, changes in pre-trial detention, and new sen-

On September 22, 1992, the Guatemalan Congress unanimously approved revisions of Guatemala's Code of Criminal Procedure.<sup>190</sup> The new Code came into effect in July 1994.<sup>191</sup> At the same time, the then existing Public Ministry was slit into two separate institutions: The Prosecutor's Office (*Fiscalía General, Ministerio Público*) and a Solicitor General's office (*Procuraduría de la Nación*).<sup>192</sup>

Preliminary investigations (*procedimientos preparatorios*) are now handled by the Public Ministry, replacing the instruction judge.<sup>193</sup> The role of the instruction judge was redefined, limiting the judge to only supervision of the process, and authorization of searches, seizures and detentions.<sup>194</sup> By getting the judge out of the business of carrying out the investigation, the authors of the new Code hoped to make the judge more impartial to the evidence, consistent with the goals of an adversarial system.<sup>195</sup>

Under the old system, the judge was placed in the position of having to gather evidence for the prosecution, and then weigh the evidence in neutral fashion.<sup>196</sup>

tencing and parole rules are the highlights. See generally CÓD. PROC. PEN., Decreto No. 904, D.O. No. 11, Tomo No. 334 (Jan. 20, 1998); U.S. Embassy Cable, *El Salvador begins implementation of new criminal codes - getting the bugs out*, (May 12, 1998).

Venezuela passed legislation in 1998 to introduce oral trials and abolish the *sumario*. This legislation is set to come into effect in mid-1999. See Steven Gutkin, Associated Press, *L. Americans Revamp Court Systems*, (June 3, 1998); Presentation by John Pate, Attorney at Law, De Sola & Pate (Caracas, Venezuela), at the Inter-American Law Committee Meeting, International Practice Section Meetings of the American Bar Association in New York (April 30, 1998).

Of the other countries that have enacted reforms, perhaps Colombia stands out as the closest in creating an adversarial system, more for its restructuring of the prosecutor's role. See Interview with Timothy Cornish, Development Associates, USAID/CREA, in Guatemala City, Guatemala (May 11, 1998).

190. See WOLA, *supra* note 180, at 25.

191. See HUMAN RIGHTS WATCH/AMERICAS, HUMAN RIGHTS IN GUATEMALA DURING PRESIDENT DE LEON CARPIO'S FIRST YEAR 3 (1994) [hereinafter HUMAN RIGHTS WATCH/AMERICAS]. The Code was finally published in the *Diario de Centroamérica* on December 14, 1992. Article 555 of the Code stated that the Code would take effect one year from publication. However, the Court asked for an additional six month delay to prepare for the new Code. See GLADIS YOLANDA ALBEÑO OVANDO, DERECHO PROCESAL PENAL: IMPLANTACIÓN DEL JUICIO ORAL AL PROCESO PENAL GUATEMALTECO 48 (1994).

192. See HUMAN RIGHTS WATCH/AMERICAS, *supra* note 191, at 3.

193. See Guat. CÓD. PROC. PEN., art. 8, Decreto No. 51-92; OVANDO, *supra* note 191, at 97; JOSÉ MYNOR PAR USEN, EL JUICIO ORAL EN EL PROCESO PENAL GUATEMALTECO 208 (1997) (referring to the preliminary investigative stage as the *fase preparatoria*).

194. See WOLA, *supra* note 180, at 25-26; A justice of the peace (*juez de paz*) cannot order a pretrial detention. Any such order must come from a judge. See CÓD. PROC. PEN., art. 44, Decreto No. 51-92. Further, in any case where the accused is deprived of liberty, he must be informed of his rights. See CÓD. PROC. PEN., art. 71, Decreto No. 51-92.

195. See BOVINA, *supra* note 186, at 53.

196. See *id.* at 58.

Under new law, once the criminal investigation, or instruction, is complete, the process moves to the *fase intermedia*,<sup>197</sup> equivalent in the U.S. to the probable cause phase.<sup>198</sup> Defense attorneys have an opportunity to oppose prosecution and contest the investigation.<sup>199</sup> Any coerced statements or illegally obtained evidence will be suppressed.<sup>200</sup> If the judge finds sufficient grounds, the case proceeds to oral trial.<sup>201</sup> The process concludes with a written judgement (*sentencia*) which is either guilty (*sentencia condenatoria*) or not guilty (*sentencia absolutoria*).<sup>202</sup> Judgements are written and must contain the legal basis for the decision including an evaluation of the evidence - without which the judgement would be void.<sup>203</sup>

Under the new Code, three judge panels (*tribunal de sentencia*) now determine probable cause, based on evidence presented by the prosecution and defense in oral hearings.<sup>204</sup> Responsibility for criminal investigation passed from judges under the old law, to prosecutors under the new.<sup>205</sup> Spanish translation is required for non-native speakers. The changes were designed to provide more direct access to judicial procedures for the majority of the rural population which are illiterate.<sup>206</sup>

Other major aspects of the new Criminal Procedures Code include:<sup>207</sup>

PRE-TRIAL DETENTION (*prisión preventiva*): Under old legislation, suspects were often held for two or three years.<sup>208</sup> This is now changing, albeit slowly.<sup>209</sup> Article 14 of the Constitution and Article

197. See ALBEÑO OVANDO, *supra* note 121, at 105; JOSÉ MYNOR PAR USEN, EL JUICIO ORAL EN EL PROCESO PENAL GUATEMALTECO 221 (1997).

198. See Ana Montes Calderón, Interpretación y alcance de la Reforma Procesal Penal 14-15 (Oct. 1997)(unpublished manuscript, on file with author)hereinafter Montes Calderón, Interpretación](discussing how the probable cause investigation is carried out).

199. See ALBEÑO OVANDO, *supra* note 121, at 105.

200. See CÓD. PROC. PEN., art. 91, Decreto No. 51-92.

201. See ALBEÑO OVANDO, *supra* note 121, at 109.

202. *Id.* at 123.

203. See CÓD. PROC. PEN., art. 11, Decreto No. 51-92.

204. See WOLA, *supra* note 180, at 25; BARRIENTOS PALLECER, *supra* note 144, at 38; CÓD. PROC. PEN., art. 259 (setting forth the probable cause standard).

205. See BARRIENTOS PALLECER, *supra* note 144, at 37.

206. See WOLA, *supra* note 180, at 25.

207. This list was presented in: WOLA, *supra* note 180, 26-28.

208. See *id.*

209. About 82 percent of persons held in prison in the country do not have final sentences against them. The prison population is about 8,000 inmates. 1,030 have final sentences. In many cases, the entire trial process takes about two years. See Oneida Najarro, 82% de reos está sin ser condenado, PRENSA LIBRE, Nov. 16, 1997, at 3.

14 of the new Code create a presumption of innocence.<sup>210</sup> The rule now is no detention, except in exceptional and specific conditions (*principio de excepcionalidad*).<sup>211</sup> Such conditions might be a reasonable risk of flight or destruction of evidence.<sup>212</sup> The new law puts a cap on detention at one year, guaranteeing a speedier trial.<sup>213</sup> In no case can preventative detention exceed the amount of time an accused would receive if convicted of the alleged offense (*principio de proporcionalidad*).<sup>214</sup> Further, pretrial detention is only possible upon request by the Public Ministry, the exclusive entity in charge of public prosecution.<sup>215</sup>

PLEA BARGAINING: An abbreviated procedure<sup>216</sup> (*proceso abreviado*) for less serious offenses (those which do not affect the public interest and which carry sentences of under five years) allows prosecutors and defendants to reach an agreement on a plea without going to trial. The agreement requires the approval of the instruction judge.<sup>217</sup>

TRIAL: Public prosecution is the exclusive domain of the prosecutor. Judges cannot begin a trial on their own initiative.<sup>218</sup> Three judges now hear the cases. All testimony is oral rather than written. Parties can now challenge the evidence in court.<sup>219</sup>

EXECUTIVE JUDGE (*juez de ejecución*): Executive courts ( *juzgados de ejecución*) oversee compliance with sentence requirements, human rights conditions for prisoners, and the rehabilitation of prisoners.<sup>220</sup>

APPEAL: In general terms, under the new Code, appeals are only allowed for erroneous application of the law or the legal conduct of

210. See BOVINA, *supra* note 186, at 39. Under Article 10 of the Constitution, persons in detention should not be held with convicts. In practice, however, this is not always honored. See Najarro, *supra* note 209, at 3.

211. See BOVINA, *supra* note 186, at 39-43.

212. See *id.* at 45.

213. See BOVINA, *supra* note 186, at 50 (citing art. 268 (3) of the Code). While there is the limit on pretrial detentions, note that there is no fixed term for a criminal investigation. See ALBEÑO OVANDO, *supra* note 121, at 103. Article 7 (5) of the Convención Americana sobre Derechos Humanos requires that "Toda persona detenida. . . tendrá derecho a ser juzgada dentro de un plazo razonable o ser puesta en libertad." The same provision is found in Article 9(3) of the Pacto Internacional de Derechos Civiles y Políticos. See BOVINA, *supra* note 186, at 49.

214. See BOVINA, *supra* note 186, at 39-43.

215. See *id.* at 64.

216. See CÓD. PROC. PEN., art. 464-465. For a general discussion of *proceso abreviado* in Argentina, see José I. Cafferata Nores, *Juicio Penal Abreviado*, 4 REVISTA DE LA FACULTAD 117 (1996)(Universidad Nacional de Córdoba, Argentina, Facultad de Derecho y Ciencias Sociales).

217. This list was presented in: WOLA, *supra* note 180, at 26-28.

218. See BOVINA, *supra* note 186, at 68.

219. This list was presented in: WOLA, *supra* note 180, at 26-28.

220. This list was presented in: WOLA, *supra* note 180, at 26-28.; BARRIENTOS PALLECER, *supra* note 144, at 40-41.

the trial (*recurso de apleación especial*).<sup>221</sup> Questions of law could ultimately go to the Supreme Court (*recurso de casación*).<sup>222</sup> In extraordinary cases, a special review procedure will be available when new, clearly disculpatory evidence becomes available after the trial (*recurso de revisión*).<sup>223</sup> The *recurso de revisión* corresponds as well to the Supreme Court.<sup>224</sup>

**PUBLIC DEFENSE:** A professional public defense service was created.<sup>225</sup> Under the old system, public defenders, usually law students, were not paid.<sup>226</sup>

**HABEAS CORPUS:** Habeas corpus petitions presented on behalf of missing or detained individuals will now have to be carried out. Judges will perform this task and will have the power to conduct searches, inspect police, military and other installations. Judges may also designate others to perform this task, including human rights representatives, the Human Rights Ombudsman, or relatives of the individual missing or detained.<sup>227</sup>

Not everyone was enthusiastic about the change in the Criminal Procedure Code. Luis Salas, Director of the Center for the Administration of Justice at Florida International University argued that the government lacked the institutional capacity to carry out the reforms.<sup>228</sup> Others were suspicious of the reforms backed by Rodil due to his own controversial record. He had been a legal advisor to the Council of State under military dictator Ríos Montt. He had been linked in public perception to the special courts (*tribunales de fuero especial*) which carried out extrajudicial killings. As Minister of Interior under Cerezo, several notorious political killings occurred and went unpunished.<sup>229</sup>

#### D. Oral Proceedings.

Under the French system, major criminal offenses are tried in the Assize Courts (French: *cours d' assises*). The case file, or dossier, is available to all the judges prior to the trial. However, under the French "principle of orality," all prosecutions in the Assize Courts require that evidence be brought out in open court.<sup>230</sup> Despite the pres-

221. BARRIENTOS PALLECER, *supra* note 144, at 39.

222. *See id.*

223. This list was presented in: WOLA, *supra* note 180, at 26-28.

224. *See* BARRIENTOS PALLECER, *supra* note 144, at 39.

225. *See* Article 92 of the Criminal Procedure Code established a right to a defense.

226. This list was presented in: WOLA, *supra* note 180, at 26-28.

227. *See id.*

228. *See* WOLA, *supra* note 180, at 30.

229. *See id.* at 33.

230. *See* FAIRCHILD, *supra* note 163, at 168-69.

ence of oral proceedings, the French system is still classified as inquisitorial, since an instruction judge still presides over the police investigation.<sup>231</sup> In this sense, the reform of the Guatemalan Criminal Procedure Code can be seen as much more radical because it not only introduced oral proceedings, but also converted from an inquisitorial to an adversarial model.

The Peace Accord documents call for oral judicial processes as a way to improve the delivery of justice services.<sup>232</sup> Still, while oral proceedings are supposed to be the rule under the new code,<sup>233</sup> there is an exception. In special cases, when it is impossible to wait for trial, an *anticipo de prueba* is possible. A judge oversees this process of taking and approving of evidence in advance of trial.<sup>234</sup>

Another curiosity of the Guatemalan Code, at least from the U.S. perspective, is its standard for determination of guilt. The U.S. standard for conviction is "beyond a reasonable doubt." In Guatemala, the comparable standard is referred to as "*sana crítica*" (reasoned judgement).<sup>235</sup>

#### E. Plea Bargaining and Case Settlement.

In a number of cases, the new code allows for settlement of cases short of a full trial. These special procedures are often referred to in Spanish as "*procesos de agilización*."<sup>236</sup>

The first mechanism is the "*criterio de oportunidad*" ("principle of opportunity").<sup>237</sup> In the U.S. system, it would be much like discre-

231. For Chile, *see* NEIRA ALARCÓN, *supra* note 164, at 16; Mexico and Spain also have oral proceedings, despite being "inquisitorial" systems. *See* JORGE ALBERTO SILVA SILVA, DERECHO PROCESAL PENAL 365 (1990); For Argentina, *see* JORGE R. MORAS MOM, MANUAL DE DERECHO PROCESAL PENAL 315 (1993).

232. *See* ACUERDO SOBRE FORTALECIMIENTO DEL PODER CIVIL Y FUNCIÓN DEL EJÉRCITO EN UNA SOCIEDAD DEMOCRÁTICA, ACUERDOS ENTRE EL GOBIERNO DE GUATEMALA Y LA URNG 109 (1996).

233. *See* Cód. PROC. PEN., art. 362.

234. *See* ALBEÑO OVANDO, *supra* note 121, at 101 (citing art. 317 of the Code).

235. BOVINA, *supra* note 186, at 167 (citing art. 385 of the Code; prior law, Cód. PROC. PEN., art. 638, Decreto 52-73 (repealed)).

236. Memorandum from Timothy W. Cornish, Director, Centro de Apoyo al Estado de Derecho (CREA/USAID), to Maggie Triviz and Vivian Keller 1 (June 24, 1997) (on file with author).

237. Cód. PROC. PEN., art. 25, amended by Art. 5, Decreto No. 79-97 (Oct. 13, 1997)(D.O., Oct. 15, 1997); ALBEÑO OVANDO, *supra* note 121, at 63; The *principio de legalidad* (principle of legality) in Latin American law prohibits prosecutorial discretion in bringing charges against criminal actors. In contrast, the *principio de oportunidad* (principle of opportunity) allows for prosecutorial discretion. Typically, the *principio de oportunidad* has been rejected by Latin American and European legal systems. *See* Timothy Cornish, Development Associates, *Accusatorial Model of Criminal Procedure in Peru*, 6 (1993).

tionary "nolo pros" (dismissals).<sup>238</sup> The *criterio de oportunidad* applies when a prosecutor determines that the particular facts in a case are such that it makes little sense to carry out the prosecution.<sup>239</sup> Such is the case in the Spanish and Mexican criminal procedure codes.<sup>240</sup> In Guatemala, the judge need not accept the prosecutor's recommendation.<sup>241</sup> Such dismissals would often occur when the victim and the accused have reached an agreement to repair the damage and compensate the victim,<sup>242</sup> and where the action was not the sort that would result in imprisonment for more than five years.<sup>243</sup>

A second mechanism, "*criterio de oportunidad para complicados o encubridores*" ("principle of opportunity for accomplices") is similar to the U.S. concept of witness immunity.<sup>244</sup> In Guatemala, the prosecutor again makes this decision.<sup>245</sup>

The third mechanism is "*desestimación*." Under Guatemalan law, the prosecutor moves to file (*archivar*) a case when either no crime has been committed or when some other reason prevents prosecution.<sup>246</sup> Similarly, in the U.S., this discretion rests with a prosecutor.<sup>247</sup> Cases are filed, for example, when an investigation fails to reveal the identity of the person who committed the crime. Another example might be if the individual has been declared a fugitive. In Guatemala, the prosecutor's decision can be revoked by a judge at the request of the victim, in the event the victim can provide leads sufficient to justify the continuation of the investigation.<sup>248</sup>

Guatemalan law provides a fourth mechanism similar to prosecution diversion in the U.S. This procedure, referred to as "*suspensión condicional de la persecución penal*,"<sup>249</sup> is currently under-

238. Cornish, *supra* note 236, at 1; Cornish, *supra* note 237, at 6.

239. See Cornish, *supra* note 236, at 1.

240. See ALBEÑO OVANDO, *supra* note 121, at 63; Cód. PROC. PEN., art. 5, Decreto No. 79-97 (Sept. 10, 1997) printed in DIARIO DE CENTRO AMÉRICA 1 (Oct. 15, 1997)(modifying Cód. PROC. PEN., art. 25, Decree No. 51-92).

241. See BOVINA, *supra* note 186, at 109-10.

242. See Montes Calderón, Interpretación, *supra* note 198, at 4-5. It is similar to the process of "*consenso*" envisioned by Prof. B.J. Maier. See Timothy W. Cornish, *Sistemas Alternativos en la Solución de Conflictos en el Proceso Penal Guatemalteco y el Derecho Consuetudinario* 1 (1997).

243. See Cód. PROC. PEN., art. 5, Decreto No. 79-97.

244. See *id.*

245. See Cornish, *supra* note 236, at 1.

246. See PAR USEN, *supra* note 120, at 244.

247. See Cornish, *supra* note 236, at 1.

248. See *id.*

249. BOVINA, *supra* note 186, at 119-25.

used in Guatemala, since no structures, regulations or forms facilitate its use.<sup>250</sup>

A fifth mechanism allows the conversion of public prosecutions into private actions (*conversión de la acción pública en acción privada*).<sup>251</sup> This can be carried out at the prosecutor's discretion and does not need the judge's approval.<sup>252</sup> The process can be used whenever the "*criterio de oportunidad*" would apply, or in any case of crime against commercial property. For more serious crimes, the process can still be used, if the injured party guarantees an effective prosecution.<sup>253</sup> Once authorized by the prosecutor, the decision is irrevocable.<sup>254</sup>

A sixth and final mechanism, the "*procedimiento abreviado*,"<sup>255</sup> is a combination of the U.S. concepts of a "guilty plea" proceeding and plea bargaining. Where a prosecutor believes that a sentence of two years or less is "sufficient," then the prosecutor can request this procedure.<sup>256</sup> The procedure also requires: (1) consent by the defendant and the defense attorney, (2) an admission of guilt, and (3) acceptance of the proposed disposition.<sup>257</sup>

In this case, a judge must hear the defendant and consider the criminal evidence presented. The defendant has the right to present mitigating proof or technical issues of innocence. The judge can acquit or condemn. No punishment can exceed the limit recommended by the prosecutor. Alternatively, a judge can refuse to accept the plea, and proceed as if the offer were never made.<sup>258</sup> In this sense, all the elements of the "bargain" (*proceso de consenso*) are present.<sup>259</sup> Again, there are no forms, structures or regulations beyond the Code itself to govern or give form to these proceedings. Consequently, they are either drastically under-used or are abused for other purposes potentially inconsistent with a rule of law.<sup>260</sup>

250. See Cornish, *supra* note 236, at 1.

251. BOVINA, *supra* note 186, at 117-18.

252. See Cornish, *supra* note 236, at 4-5.

253. See *id.*

254. See *id.*

255. BOVINA, *supra* note 186, at 141-42.

256. See BARRIENTOS PALLECER, *supra* 144, at 47.

257. Cornish, *supra* note 236, at 1.

258. See Cornish, *supra* note 236, at 1; BARRIENTOS PALLECER, *supra* note 144, at 47.

259. See Cornish, *supra* note 236, at 1.

260. See *id.* at 1-3. For an example of the silly cases that come to trial in Guatemala, see, e.g., *Tribunal celebra juicio por robo de dos cajas de margarina*, SIGLO VEINTIUNO, June 26, 1997, at 6. (discussing how a full trial was ordered for stealing two boxes of margarine).

In Guatemala, there is no national legal doctrine, no case law and no Latin American comparative law on how plea bargains and other settlement mechanisms should work.<sup>261</sup> U.S. legal doctrine could be very important to fill these holes.

#### F. Popular Justice and the 1997 Reforms to the Code.

For many, a major concern about "popular justice" is due process. Popular Courts ("tribunales populares") have sprouted in Guatemala. These "courts" resolve criminal disputes quickly, and usually have juries of hundreds of town residents. Needless to say they do not follow the procedures of the Code of Criminal Procedure.<sup>262</sup> Incredibly, the Arzú Administration is encouraging creation of "Local Security Boards,"<sup>263</sup> despite decades of human rights violations at the hands of "Civil Patrols."<sup>264</sup> Not surprisingly, there is an inverse relationship between the level of education and the belief that citizens can take law into their own hands because of the lack of justice in the formal system.<sup>265</sup>

Further examples of people taking law into their own hands are the rampant popular lynchings of criminal suspects.<sup>266</sup> According to

261. See Cornish, *supra* note 236, at 1.

262. See Francisco Mauricio Martínez and Jorge Castillo, *Aldeanos de Totonicapán crean su tribunal popular*, PRENSA LIBRE, July 5, 1997, at 3 (discussing the new popular courts in Totonicapán).

263. *Recomiendan mayor participación civil*, PRENSA LIBRE, Jan. 30, 1998, at 4; Danielo Valadares, *Gobernación impulsa Juntas Locales de Seguridad*, EL PERIÓDICO, Jan. 30, 1998, at 8. Citizen action groups are being set up in Quetzaltenango, San Marcos, Quiché and Huehuetenango. See also Carlos Menocal, *Occidente se organiza contra la violencia*, EL PERIÓDICO, Jan. 27, 1998, at 5.

264. See generally, RFK MEMORIAL CENTER FOR HUMAN RIGHTS, CIVIL PATROLS AND THEIR LEGACY (1996).

265. See J. Michael Dodson, Donald W. Jackson and Laura Nuzzi O'Shaughnessy, *Comparing the Survey Results from El Salvador and Guatemala* 7 (Nov. 1997). See also, Julio F. Lara & Mynor De León, *Cunén: campesinos solicitan armas o policías para capturar a delincuentes*, PRENSA LIBRE, Feb. 21, 1998, at 3.

266. See Elías Salazar, *Mendoza: Lentitud en aplicación de justicia obliga a población a optar por linchamiento*, SIGLO VEINTIUNO, July 8, 1997, at 4; Ramón Hernández S., *Huehuetenango registra nueve casos de linchamiento, sin ningún detenido*, PRENSA LIBRE, Sept. 16, 1997, at 8; Julio Vásquez Morales, *San Marcos: Turba lincha a tres supuestos violadores y asaltantes*, SIGLO VEINTIUNO, Aug. 15, 1997, at 55; Jorge Mario García, *Linchados eran hijos de empresario*, PRENSA LIBRE, Oct. 14, 1997, at 2; *Linchamiento frustrado en Quetzaltenango*, SIGLO VEINTIUNO, Nov. 25, 1997, at 63; *Se salva de ser linchado*, EL PERIÓDICO, Nov. 29, 1997, at 4; *Delincuente se salva de ser linchado*, EL PERIÓDICO, Jan. 12, 1998, at 20; *PN evita triple linchamiento*, SIGLO VEINTIUNO, Jan. 12, 1998, at 63; *A punto de ser linchada*, SIGLO VEINTIUNO, Jan. 13, 1998, at 47; Samuel Flores, *Turba lincha a tres personas en Zacualpa*, PRENSA LIBRE, Jan. 23, 1998, at 3; *Linchan a tres personas en Zacualpa, Quiché*, SIGLO VEINTIUNO, Jan. 23, 1998, at 55; *Transladan a hijo de linchados a Zacualpa*, PRENSA LIBRE, Jan. 24, 1998, at 2; *A punto de ser linchados*, EL PERIÓDICO, Feb. 5, 1998, at 3; *Intentan linchar a dos personas en Totonicapán*, EL

Interior Minister Rodolfo Mendoza, these popular acts of justice are a reaction to the slowness and inefficiency of the formal system.<sup>267</sup> Some times public authorities arrive in time to prevent the mob action, other times not.<sup>268</sup>

The Peace Accord documents call for incorporation of alternative mechanisms to promote dispute resolution.<sup>269</sup> Further, the Accord on the Identity and Rights of Indigenous People recognizes that indigenous people have been marginalized from participating in political decisions affecting the country.<sup>270</sup> That same accord recognized indigenous law (*normas consuetudinarias*) as governing indigenous community life.<sup>271</sup>

PERIÓDICO, Feb. 6, 1998, at 29; *Otro linchamiento en Quiché*, EL PERIÓDICO, Feb. 7, 1998, at 31; *Linchados: 34 en dos años*, SIGLO VEINTIUNO, Feb. 12, 1998, at 4; *Capturan a sindicatos de linchar a dos hermanos en Almolonga*, PRENSA LIBRE, Feb. 18, 1998, at 75; *Linchan a presuntos asaltabuses en Quiché*, EL PERIÓDICO, Feb. 20, 1998, at 7; *Linchan a presuntos asaltantes en Chibul*, PRENSA LIBRE, Feb. 20, 1998 at 79; *Rescatan a asaltante antes de ser linchado*, PRENSA LIBRE, Feb. 25, 1998, at 8; Ana Lucía González and Giovanni Bautista, *Turbas con antecedentes*, PRENSA LIBRE, Mar. 15, 1998, at 6-7; Haroldo Marroquín, Daniel Tucuc & Francisco Méndez, *Aldeanos linchan a seis hombres*, PRENSA LIBRE, Mar. 18, 1998, at 91; Francisco Mauricio Martínez, *Pánico en jueces por linchamientos*, PRENSA LIBRE, Mar. 24, 1998, at 2. In 1997, there were 60 lynchings in Guatemala. Further, a recent report noted 85 cases of lynchings were no follow-up action has been taken by the government. See Myriam Larra, *Impunes 84 casos de linchamiento*, PRENSA LIBRE, Jan. 25, 1998, at 3; Julieta Sandoval, *Aumentan los linchamientos*, PRENSA LIBRE, Jan. 28, 1999, at 2; Erick Campos, *Intenta trenar linchamientos*, PRENSA LIBRE, Feb. 6, 1999, at 2; *Justicia por propia mano: Reportan promedio de un caso cada seis días*, SIGLO VEINTIUNO, Feb. 10, 1999, at 6.

267. See Elías Salazar, *Mendoza: Lentitud en aplicación de justicia obliga a población a optar por linchamiento*, SIGLO VEINTIUNO, July 8, 1997, at 4; See Nuria Maldonado, Julio Lara and Olga López, *Linchamientos reflejan penosa situación del sistema judicial*, PRENSA LIBRE, Sept. 11, 1997, at 2. See also *La justicia es muy lenta, opina Flores Asturias*, PRENSA LIBRE, Oct. 29, 1997, at 16 (comments by Vice President Flores Asturias). Supreme Court President Angel Alfredo Figueroa believes that community courts will avoid lynchings. See *Juzgados comunitarios evitarán linchamientos, dice presidente de CSJ*, PRENSA LIBRE, Oct. 27, 1997, at 26.

268. See, e.g., Edgar René Sáenz Archilla, *Turba lincha a presunto delincuente y vapulea a dos*, PRENSA LIBRE, July 5, 1997, at 5; Ramón Aguilar Vela, *Petén: Queman vivo a supuesto criminal*, SIGLO VEINTIUNO, June 29, 1997, at 43; Elder Interiano, *Intentan linchar en Iztapa, Escuintla, a presunto violador*, PRENSA LIBRE, May 11, 1987, at 39; Jorge Mario García and Julio F. Lara, *Linchan a tres presuntos asaltantes de buses en la aldea Akal, Huehuetenango*, PRENSA LIBRE, May 2, 1997, at 4. The Interior Ministry plans to deploy new PNC troops to areas were lynchings have been a problem. See *Gobernación conformó grupo especial por linchamientos*, SIGLO VEINTIUNO, Oct. 27, 1997, at 5.

269. See ACUERDO SOBRE FORTALECIMIENTO DEL PODER CIVIL Y FUNCIÓN DEL EJÉRCITO EN UNA SOCIEDAD DEMOCRÁTICA ¶ III-16-f (1996), printed in ACUERDOS ENTRE EL GOBIERNO DE GUATEMALA Y LA URNG 109 (1996).

270. See ACUERDO SOBRE IDENTIDAD Y DERECHOS DE LOS PUEBLOS INDÍGENAS ¶ IV-D-1 (1995), printed in ACUERDOS ENTRE EL GOBIERNO DE GUATEMALA Y LA URNG 59 (1996) [hereinafter ACUERDO DE LOS PUEBLOS INDÍGENAS].

271. See ACUERDO DE LOS PUEBLOS INDÍGENAS, *supra* note 270, at ¶ IV-D-1. See also International Labour Organization (ILO) Agreement 169 [hereinafter ILO 169]. ILO 169 came into

Oral criminal procedure under the new Criminal Procedures Code should allow for greater access to the legal system for the poor and indigenous people.<sup>272</sup> Indigenous customary law (*derecho consuetudinario*, or *derecho maya*) is an oral process.<sup>273</sup>

In response, on September 10, 1997, Congress approved new reforms to the Criminal Procedure Code.<sup>274</sup> The reform was opposed by then Attorney General Héctor Hugo Pérez Aguilera, Court President Angel Alfredo Figueroa, and law school dean, Francisco de Mata Vela. All three thought that Constitutional reform should proceed any change to the Criminal Procedure Code, if change was needed at all.<sup>275</sup> One major sticking point was the role of community courts with non-attorney judges using local law as compared with the more traditional point of view of formal law with attorney judges. Further, both the Court and Public Ministry were miffed that Congress had passed major legislation without their full input.<sup>276</sup> Still, the idea of the reforms is to allow prosecutors to concentrate on more important criminal offenses.<sup>277</sup>

A principle change in law applies to certain crimes where the penalty is a misdemeanor (*falta*), a traffic-related crime, or where the penalty is a fine.<sup>278</sup> In these cases, a Justice of the Peace (*juez de paz*) can preside in an oral trial without a prosecutor.<sup>279</sup>

effect in Guatemala in June 1997. See María Julia Serech Quiná, *Los Acuerdos de Paz y el Convenio 169*, SIGLO VEINTIUNO, Dec. 29, 1997, at 3 (Mayan supp., "Iximulew").

272. See BARRIENTOS PALLECEER, *supra* note 144, at 34.

273. See BARRIENTOS PALLECEER, *supra* note 144, at 34. This paper will not attempt to describe indigenous law practices, since that issue has been dealt with effectively elsewhere. See generally, RACHEL SIEDER, *DERECHO CONSUECUDINARIO Y TRANSICIÓN DEMOCRÁTICA EN GUATEMALA* (1996); ASIES, *DERECHO CONSUECUDINARIO INDÍGENA EN GUATEMALA* (1995); Rachel Sieder, *Customary law and Democratic Transition in Guatemala* (1996) (Latin American Studies Research Paper, Institute of Latin American Studies, University of London)(on file with author); Universidad Nacional Autónoma de México - UNAM, Instituto de Investigaciones Jurídicas, *Etnicidad y Derecho: Un diálogo postergado entre los científicos sociales* (1996).

274. See Decreto No. 79-97 (Sept. 10, 1997) printed in DIARIO DE CENTRO AMÉRICA 1 (Oct. 15, 1997). It is hoped the Tribunales will deter lynchings. See *Tribunales disminuirán linchamientos*, PRENSA LIBRE, Jan. 24, 1998, at 2.

275. See *Controversia por reformas al Código Procesal Penal*, EL PERIÓDICO, Sept. 12, 1997, at 5.

276. See *id.* In fact, the Court and Public Ministry had been provided copies of draft legislation in April 1997. Both institutions commented on the legislation in May. However, the bill which was later introduced and passed was very different from this earlier bill and was more than twice its length.

277. See Martín Juárez and Abner Guoz, *En qué consisten las reformas penales*, EL PERIÓDICO, Sept. 12, 1997, at 5.

278. See Montes Calderón, *Interpretación*, *supra* note 198, at 2.

279. See Martín Juárez and Abner Guoz, *En qué consisten las reformas penales*, EL PERIÓDICO, Sept. 12, 1997, at 5; CÓD. PROC. PEN., art. 5, Decreto No. 79-97 (Sept. 10, 1997) printed in

The legislation also creates Community Courts in five new locations.<sup>280</sup> The new Community Courts have the authority to resolve less pressing criminal cases,<sup>281</sup> those with a penalty in the formal system of five years or less.<sup>282</sup> These community courts can use local law or practice, including indigenous law (*derecho consuetudinario*), to resolve the conflicts assuming the decision does not violate the Constitution, human rights legislation, international treaty obligations<sup>283</sup> or national law.<sup>284</sup> The idea of the community courts is to advance dispute settlement in indigenous areas among indigenous people.<sup>285</sup>

Use of local or indigenous law allows the communities to come up with local solutions to local problems. The three judges on the panel need not be lawyers, but must know the local legal practice and be able to opine on constitutional and human rights law. The procedure is oral and public, and defendants have a right to counsel. The community court's job is really one of ratifying agreements between local litigants with criminal law disputes, so long as the Constitution or human rights precepts are not violated. If the litigants themselves cannot reach an agreement, there is always recourse to the formal legal system.<sup>286</sup>

Community court decisions have *res judicata* effect (*cosa juzgada*) for defendants. For plaintiffs, the decisions are executable judgments:

DIARIO DE CENTRO AMÉRICA 1 (Oct. 15, 1997)(modifying CÓD. PROC. PEN., art. 25, Decreto No. 51-92).

280. The locations are: (1) San Andrés Semetabaj, Sololá; (2) San Luis, Petén; (3) Santa María Chiquimula, Totonicapán; (4) San Miguel Ixtahucán, San Marcos; and (5) San Rafael Petzán, Huehuetenango. See *Juramentan a jueces comunitarios*, EL PERIÓDICO, Jan. 22, 1998, at 7; *Juramentan a Jueces Comunitarios*, SIGLO VEINTIUNO, Jan. 22, 1998, at 8. There is discussion of raising the number of tribunals to 35. See *Ampliarán número de Juzgados Comunitarios*, PRENSA LIBRE, Jan. 25, 1998, at 3; *Dudas sobre funcionamiento de juzgados comunales*, PRENSA LIBRE, Jan. 23, 1998, at 3.

281. See CÓD. PROC. PEN., art. 49, Decreto No. 79-97 (modifying CÓD. PROC. PEN., art. 552, Decreto No. 51-92). The Court requested a delay until April 1998 in the implementation of the new courts, which were to start up on January 23, 1998. See *Falta de Tribunales Comunitarios provocará impunidad y anarquía*, EL PERIÓDICO, Jan. 14, 1998, at 6; *Inician capacitación para poner a funcionar Tribunales Comunitarios*, EL PERIÓDICO, Jan. 16, 1998, at 6; *Juzgados comunitarios listos para iniciar funciones*, SIGLO VEINTIUNO, Jan. 15, 1998, at 6.

282. About two-thirds of all offenses carry punishments of up to five years. Consequently, this is a major reform. For a complete listing of offenses subject to community courts or conciliatory processes, see Montes Calderón, *Interpretación*, *supra* note 198, at 23-29.

283. See ILO 169, *supra* note 271, at art. 8(2); Interview by Raquel Irragoyen and Steven E. Hendrix with Víctor Ferrigno F., Legal Advisor, MINUGUA (Dec. 5, 1997) [hereinafter Ferrigno meeting].

284. See CÓD. PROC. PEN., art. 50, Decreto 79-97.

285. See Ferrigno meeting, *supra* note 283.

286. See Montes Calderón, *Interpretación*, *supra* note 198, at 17; Interview by Steven E. Hendrix with Ana Montes, Guatemala. (Dec. 4, 1997)[hereinafter Montes Interview].

should a defendant not comply, the decisions can be executed in ordinary civil courts.<sup>287</sup>

Unfortunately, the legislation also requires that any settlement proposed by a community court (*juzgado comunitario*) be consistent with national law.<sup>288</sup> This will mean that use of customary law will be severely restricted only to those cases where there is no national criminal law on point. In short, the community courts will not be taking full advantage of customary law. On the contrary, use of customary law will be extremely selective. In cases where a community court does use local law, and it contravenes national law, the decision of the community court could be set aside on appeal to the formal court system.<sup>289</sup>

The community courts have another defect in that the legislation creating them was passed without consultation of the communities themselves.<sup>290</sup> Guatemalan law requires that any legislation affecting indigenous communities be discussed with communities prior to passage.<sup>291</sup> In this particular case, the Criminal Procedure Code reform did not include any consultation process, making it vulnerable to attack on Constitutional grounds.<sup>292</sup>

Perhaps because of a lack of a consultative process, the new community courts create a new authority at the local level which previously did not exist, instead of reinforcing existing authority.<sup>293</sup> In this sense, the new community court structure could be subject to the criticism that it distorts traditional systems of authority at the local level.<sup>294</sup>

Yet another drawback of the community courts is their limited subject matter jurisdiction.<sup>295</sup> Many conflicts involve both civil and criminal elements. A conflict such as a dispute over property boundaries, if left unresolved, could turn bloody later on. However, the community courts have no authority to resolve a civil conflict until it later

287. An executable judgment in Spanish is referred to as a *título ejecutivo*, as noted in Art. 8, Decreto No. 79-97; See also Montes Calderón, Interpretación, *supra* note 198, at 17; Montes Interview, *supra* note 286.

288. See Cód. Proc. Pen., art. 50, Decreto 79-97.

289. See Ferrigno meeting, *supra* note 283.

290. See Edwin Palacios, *Rechazo a los Tribunales Comunitarios*, EL PERIÓDICO, Jan 13, 1998, at 6.

291. See ILO 169, *supra* note 271, at art. 6(a).

292. See Ferrigno meeting, *supra* note 283.

293. See Palacios, *supra* note 290, at 6.

294. See *id.*

295. See Cód. PROC. PEN., art. 50, Decreto 79-97 (limiting the subject matter jurisdiction of the community courts to criminal matters).

becomes a criminal problem. This artificial distinction between civil and criminal conflicts means that courts will be hamstrung in resolving what the community feels are its disputes at the local level.<sup>296</sup>

On the positive side, a Commission has been created to evaluate the progress of the community courts.<sup>297</sup> Also, MINUGUA is preparing an empirical study on indigenous dispute resolution which should provide critical information on how disputes are in fact handled by communities.<sup>298</sup> Further, USAID is working on models for community level conciliation processes, with pilot activities in Zacapa and Quetzaltenango.<sup>299</sup> As community courts gain experience, and as the USAID and MINUGUA work is brought before the Commission, it is hoped that there can be mid-course adjustments to the community court model.<sup>300</sup>

"Conciliation centers" are also created under the new legislation. These "centers" are parallel to the community courts, and have the same legal effects, but are effective for both indigenous and ladino communities. To become a "center," an attorney can simply notify the court that the attorney intends to be a conciliator. No further qualification is required.<sup>301</sup>

How a conciliation procedure works in practice may be akin to a contingent fee for criminal prosecution. An aggrieved client goes to the attorney's office. The attorney agrees to represent the client in negotiations with the accused. If the attorney can reach a settlement, the attorney can write up the deal and take a percentage of any settlement, subject to statutory limitations on attorneys fees. If there is no deal, the attorney can prosecute in the normal courts, both civilly and, where appropriate, criminally. Both the Community Courts and the Conciliation Centers should help reduce the demands on the formal system while allowing parties to work out their own problems with legal backing.<sup>302</sup> Curiously, unlike the Community Courts, the Concil-

296. See Ferrigno meeting, *supra* note 283.

297. Supreme Court Magistrate Carlos Conzulún is the head of the Commission. He also heads up the Court's criminal law section (*Sala Penal*).

298. See Ferrigno meeting, *supra* note 283.

299. See generally, National Center for State Courts, Plan Anual Operativo: Componente Fortalecimiento de los Canales No Formales de la Administración de Justicia, (Nov. 1997) (unpublished report, draft, on file with author).

300. See Ferrigno meeting, *supra* note 283.

301. See Montes Calderón, Interpretación, *supra* note 198, at 17; Montes Interview, *supra* note 286.

302. See Montes Calderón, Interpretación, *supra* note 198, at 17; Montes Interview, *supra* note 286.