

URUGUAY – CRIMINAL LAW CHANGES

Introduction:

In Uruguay, on 1 November 2017, a new criminal procedural code, expressed in Law No. 19.293, came into effect.

The law passed in December 2014, but because the changes it makes are so fundamental it has taken three years for the authorities to finally bring it into force.

There is widespread recognition the previous system had multiple failings. But at the same time, there are concerns the administrative and judicial authorities will not be able to implement all the changes proposed – at least in the short term.

Nevertheless, the government decided to go ahead.

Failures of the old system:

The failings of the old code were multiple, but the most important can be resumed as:

- Judges were not truly independent. They oversaw investigations from day one and would make the initial decision to investigate and arrest. Then, decide on prima facie guilt, before moving on to the full investigation and a decision on the offence.
- Most prisoners (68.9 % in 2016) were on remand awaiting a decision on their actual guilt and a definitive sentence.
- Effectively, guilt was resolved within 48 hours of a person being arrested. It was at this point the judge decided if there was a case to answer and sent many suspects to immediate jail.

Thus, the constitutional principles of innocent until proven guilty, and not being subject to any punishment without a definitive sentence, were pretty much ignored.

Being remanded in custody was considered a “preventive measure” rather than a form of punishment - but in practice this is a distinction without a difference.

These issues led to numerous complaints at an international level from the Inter-American Court of Human Rights and other human rights organisations, such as Amnesty International.

Thus, Uruguay has been under international pressure to change its criminal procedure for several years. There has also been a general acceptance within Uruguay that suspects and prisoners in general deserved a better deal.

Changes introduced:

The fundamental changes introduced can be summarized as:

- The process is now accusatory instead of inquisitorial. Judges will not be involved at the start of an investigation or arrest.

Instead, prosecutors will take on a much more important role in the process. As it is they who will be contacted first by the police and make the decision whether to pursue the matter.

If they do, then they will inform the “Instructing Judge”—a new category of judges, who will act solely at this first stage to authorize search warrants, arrests, etc.

However, these instructing judges will not be further involved in the decision on whether there is a case to answer, whether to grant bail, and neither will they resolve on guilt/innocence.

Eighty-five new judges have already been appointed in this capacity.

- A right to bail, instead of being remanded in custody. If a person is arrested and a decision to prosecute is made, the suspect must be taken before a Judge, who, in accordance with the Constitution (unchanged by the procedural rules), must still decide within 48 hours whether there is a case to answer.

However, the new code states a suspect has a right to be given bail, except in certain specific situations. This contrasts the previous system in which suspects were routinely remanded in custody.

- Judges are now more independent. Rather than overseeing the criminal process from start to finish and effectively deciding on guilt within 48 hours, now, there are two distinct categories of judges: those dealing with preliminary aspects (“instructing judges”) and those dealing with the trial (“trial judges”).

Whilst the latter will still have to decide whether there is a prima facie case to answer within the 48-hour deadline (and at least, now, it will be the same judge who decides on that, who hears the case at trial), they should be more open to examine the evidence critically and exclude improper evidence.

- Oral Hearings. All proceedings will consist of oral hearings, instead of an almost never-ending exchange of written briefs and arguments.

It will be interesting to see how Uruguayan lawyers step up to the plate on this aspect, as historically they have been able to concentrate on making written filings.

- Public hearings. In addition, hearings will be open to the public. This is a major advance. To date the public (including the media) have not had access to criminal proceedings.

Logistically this will present issues as the justice system does not have any big buildings capable of holding a large courtroom. But what is important here is the principle - no longer will criminal justice be dispensed behind a veil of secrecy.

- A final sentence must be handed down within a reasonable period of time. Whilst

no specific time limit is set, this also seeks to deal with the problem of “justice delayed, is justice denied”, which in the criminal context means thousands of prisoners being held in custody on remand.

- Victims will have the right to be heard. This is applicable at all stages of the process. They will have a right to intervene in the investigation phase to suggest measures and evidence and to ask for protection, if necessary.

Victims will also be able to prosecute themselves if the public prosecutor does not want to.

- Prosecutors will have the right to settle proceedings. Thus, plea bargaining has arrived in Uruguay for the first time, although the judge will still have full control of sentencing.

Criticisms:

Some lawyers argue our previous criminal code was not perfect, but at least it kind of worked in practice – in terms of keeping “criminals” off the streets, whilst the new system will not work in practice.

In addition, there are fears prosecutors will be under pressure to agree to a plea bargain to avoid taking a case to trial, for fear of losing, or just to skip over the hassle of going to trial and/or simply to keep control of their own docket.

Further, there is a perceived risk of prosecutors’ openness to corruption – in order not to continue an investigation or to agree to a plea. We in Uruguay like to think our judges may be slow, but they are not corrupt.

But likewise, there is no evidence that prosecutors will be any more (or less) corruptible than judges.

The same judge will still deal with the case when a person is detained and on their eventual guilt. Thus, they will decide whether there is a case to answer (and decide whether to remand on bail or in custody), which means that the judge could be suspected of having formed his opinion at that earlier stage, making it difficult for him or her to let go of it.

The Judge will also know of all the evidence on file and the suspect’s previous criminal record (if any), which could unduly influence him. But these are conflicts which already existed under the previous system. So, this is something which needs to be addressed in the future, probably by appointing more judges.

Police will need to step up their performance in ensuring evidence is properly collected and not contaminated. With public hearings, they will be open to criticism if cases are lost because evidence is not presented or is declared inadmissible or otherwise questioned.

Conclusion:

It has taken over three years since the legislation's approval by parliament for the new code to come into effect.

Inevitably there will be teething problems. More so at first, whilst on-going cases continue under the old rules.

But the overall changes look so positive, I believe going ahead with the implantation, now, is a good call!

Under the old system everything was decided within 48 hours. Because of this, nobody cared about the actual final decision on guilt or not.

Now there will be a public hearing and a proper trial with the judge making his finding on guilt – all within a reasonable time – and with the suspect on bail unless there are convincing reasons not to provide it. These are all massive, positive changes.

From a personal view, I have always said that I love Uruguay, but the day I have a problem with the Uruguayan criminal law system is the day that I take the first plane out. Fortunately, that didn't happen and now if it does, hopefully I won't need that plane ticket.

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