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FROM INQUISITORIAL TO ACCUSATORY: COLOMBIA AND GUATEMALA'S LEGAL TRANSITION

INTRODUCTION

In the early 1990's, Colombia and Guatemala committed themselves to defending and strengthening their democracies through bold legal reform. Although many Latin American countries followed similar procedures in transitioning from the inquisitorial model of criminal justice to the accusatory system, Guatemala and Colombia's efforts are particularly admirable. In 1994, the year Guatemala began to implement a substantially reformed criminal code, it was emerging from a legacy of oppressive military rule and a thirty-six year civil war that cost the country some 200,000 lives. Through this reform effort, Guatemala asserted its desire to evolve as a democratic nation eager to break with the past. Similarly, in 1991, Colombia faced an unprecedented assault from narcotics-fueled organized crime, guerrilla, and paramilitary forces committed to violently protecting their interests. Like Guatemala, Colombia strategically approached these challenges with a long-term vision of strengthening the nation's legal system as a means of protecting and bolstering its democracy.

In this paper, I examine Colombia and Guatemala's experience in transforming their criminal codes, in order to analyze why and how these two countries, with limited resources and monumental governance challenges, undertook such demanding and high-risk reforms. The first step is to understand how the inquisitorial system was applied in each of these countries and to identify some of the most serious shortcomings. In doing so, I pay particular attention to the role of judges and attorneys under the inquisitorial model, analyzing how these roles have changed with the introduction of adversarial practices. After examining the context in which the changes occurred, I then attempt to evaluate the primary results achieved to date, the challenges that remain and the issues that will need to be addressed in the future to ensure a

successful transition. Based upon this research, I conclude that if both Colombia and Guatemala can successfully implement the reforms outlined in their respective criminal codes, in the long-term, judicial transparency will increase. Equally important, if implemented correctly, more efficient case processing can enhance the rights of individuals before the law.

BACKGROUND ON THE INQUISITORIAL SYSTEM: THE ROLE OF JUDGES AND LAWYERS

To appreciate the significance of Guatemala and Colombia's reform efforts, it is critical to first understand how criminal law was applied under the inquisitorial model. In both Colombia and Guatemala, the adjudication process was divided into two distinct stages: 1) the instruction phase and 2) the trial phase.¹ In both of these countries, the initial stage was presided over by an instruction judge responsible for determining whether a crime had been committed.² Although in theory one of the primary purposes of the initial instruction phase was to protect the fundamental rights of the accused, the deficiencies in the instruction phase came to symbolize the stark inadequacies of each country's criminal justice system.

During the instruction phase, with minor variations in Guatemala and Colombia, the presiding judge had multiple and often conflicting responsibilities. The prosecutors and defense lawyers, meanwhile, remained largely passive. Although the prosecutor had responsibility to make the initial accusation, the instruction judge in both countries was generally responsible for directing and overseeing the police investigation and the gathering of evidence. Once the police compiled evidence, the judge would then receive a case file which would often, though not always, include written arguments. In reviewing arguments and evidence the judge enjoyed considerable discretion in determining what could be admitted and in making pre-trial incarceration or release decisions. Moreover, after the instruction judge gathered the evidence, he or she had authority to examine witnesses and, if necessary, call on

¹ Bischoff, James L. *Reforming the Criminal Procedures System in Latin America*, 9 Tex. Hisp. J.L. & Pol'y 27, 35-36. (2003)

² *Id.*

the accused to testify (in writing). Somewhat paradoxically, under this system, the same instruction judge was also responsible for protecting the defendant's constitutional rights throughout the process and for ensuring that the state did not overstep its bounds in the investigation. Complicating matters even further was the fact that this entire process was conducted in secret and almost exclusively in writing.³

At the conclusion of this exhaustive initial phase, the instruction judge would decide whether or not probable cause had been established to issue a formal indictment. If the judge determined that a crime had been committed, the case would pass to a trial court, where the trial judge could decide to dismiss the case, remand for further investigation, or proceed with a criminal trial. If the case proceeded to trial, as in the instructional phase, the judge again had primary responsibility for moving the process to conclusion. Although Colombia began to incorporate some accusatory practices in allowing prosecutors and defense lawyers to make some oral argumentation during the trial phase, as in the previous stage, the presiding judge played the primary role in interrogating witnesses and was ultimately responsible for deciding guilt or innocence.⁴

DEFICIENCIES IN APPLICATION OF THE INQUISITORIAL MODEL: PROCEDURAL CHALLENGES

In both countries, the application of the inquisitorial model was woefully deficient on several fronts. In Colombia and Guatemala, the entire adjudicatory process was unnecessarily long and inefficient. As in other Latin American countries, the average criminal process could last two years.⁵ The emphasis on written and secretive adjudication, combined with the multiple responsibilities required of one judge, made it difficult to process even the simplest cases quickly. This was exacerbated by the fact that plea bargaining was not recognized as a

³ *Id.* at 37-41.

⁴ Pahl, Michael, Wanted: Criminal Justice – Colombia's Adoption of a Prosecutorial System of Criminal Procedure, 16 *Fordham Int'l L.J.* 608, 615-616. (1992/1993).

⁵ Bischoff, at 40.

valid mechanism to settle disputes and the criminal codes required full procedural completion of any case presented – even those in which a defendant pleaded guilty.⁶

Not surprisingly, this procedural inefficiency led Colombia and Guatemala – two nations historically marked by high levels of violence and criminality – to suffer from astronomical impunity rates. For example, in 1992, the year after the Colombian Constitution called for the drafting of a new criminal code but before accusatory practices and procedures were introduced, only 20% of all crimes were reported to the authorities, of which only 4% resulted in convictions.⁷ Perhaps even more telling, however, was that, although one-fourth of crimes committed were not reported, the Colombian courts suffered an estimated backlog of 1.3 million cases.⁸ Clearly, the legal apparatus was unable to effectively impart justice and as a result, it is logical to understand why criminal organizations and everyday delinquents found fertile territory in Colombia. Moreover, because judges held such extraordinarily concentrated power in accusing suspects, prosecuting defendants, and determining guilt or innocence, they were especially susceptible to bribery, intimidation and violence. The danger posed to judges was especially apparent in Colombia in the decade preceding the criminal code reform. From 1979-1991, for example, 550 Colombian judges were assassinated, presumably for deciding against the interests of one of the parties.⁹

The procedural deficiencies of the inquisitorial model were also acutely felt in Guatemala, where in 1993, only 40% of its inhabitants believed that the court system could guarantee a fair trial.¹⁰ As in Colombia, rampant impunity encouraged violent criminal behavior. In 1996, Guatemala registered one of the highest murder rates in Latin America, with

⁶ Langer, Máximo, From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, 45 Harv. Int'l L.J. 1, 22-23 (2004).

⁷ Pahl, at 609.

⁸ Id.

⁹ Moreno, Luis Alberto, Judiciary Reform in Colombia, 13 Fla. J. Int'l L. 75, 76. (Fall 2000)

¹⁰ Seligson, Mitchell, Guatemalan Values and the Prospects for Democratic Development, Latin American Public Opinion Project, 23. (1993).

3,200 homicides reported.¹¹ The dismal ability of the Guatemalan state to enforce the rule of law led 98% of Guatemalans to feel insecure in their daily activities. Moreover, the requirement to conduct all procedures in writing and in Spanish, led not only to prolonged adjudication and high impunity, but also presented significant barriers to non Spanish-speaking segments of Guatemala's considerable indigenous population, further deteriorating confidence and credibility in the system.¹²

DEFICIENCIES IN APPLICATION OF THE INQUISITORIAL MODEL: INDIVIDUAL RIGHTS

In addition to the significant procedural shortcomings noted above, the rights of individuals facing accusation before the state were significantly compromised. As previously mentioned, in both countries instruction judges enjoyed wide discretion in determining whether or not to incarcerate or release suspects before any indictments were made. As a result, like other Latin American countries, over 60% of the inmates in Guatemala and Colombia's overcrowded, mismanaged, and under-funded jails were pre-trial detainees.¹³ Even more disturbing, however, is the fact that citizens, guilty or innocent, were often imprisoned for longer periods than the maximum sentence would have allowed.¹⁴

Individual rights before the court were further weakened by the lack of legal representation available to citizens without the means to pay for a private attorney. Under the old system, an indigent facing any charges – felony or misdemeanor -- would be fortunate to receive legal assistance from an unpaid law student volunteering his or her time. However, even if an accused citizen could afford professional and experienced representation, the magistrate's multiple roles as prosecutor, judge and defender made impartiality a difficult, if not impossible, objective to achieve in practice. Facing these obstacles, an accused person with

¹¹ Informe Para el Relator Especial de Naciones Unidas Sobre Independencia de Jueces y Abogados, Fundación Myrna Mack, p. 3. (2004).

¹² Hendrix, Steven, Innovation in Criminal Procedure in Latin America: Guatemala's Conversion to the Adversarial System, 5 Sw. J.L. & Trade Am. 365, 393. (Fall 1998).

¹³ Bischoff, p. 40.

¹⁴ Id.

resources usually had three options: first, he or she could hire a skilled lawyer to make a strong defense while hoping that a judge would remain impartial; second, he or she could intimidate court officials or the judge (as often seen in Colombia) into reaching a favorable verdict; or third, he or she could simply identify key individuals within the judicial system willing to take actions in their favor in exchange for payment. The “behind closed doors” approach to the inquisitorial model lent itself particularly to the third option. For example, from October 1, 1996 to September 31, 1997, the court system “lost” 1,061 cases in Guatemala City alone, whereby key documentation relevant to a particular case would simply disappear and as a result, adjudication would cease.¹⁵

HALLMARKS OF REFORM: TRANSPARENCY, EFFICIENCY AND PROTECTION OF INDIVIDUAL RIGHTS

In the early 1990’s, the deficiencies noted above clearly translated into a crisis of democratic governance with no simple or short term solutions. Understanding that only profound structural forms could begin the process of making their judicial institutions viable, Colombia and Guatemala took bold steps to completely overhaul their systems. To address the corrosive effects of impunity and inefficacy, both countries drafted new criminal procedure codes that called for the abandonment of the previous system in favor of the accusatory model. This process was influenced to a large extent by U.S. criminal procedure and backed financially by the U.S. Government through the United States Agency for International Development (USAID) and the Department of Justice. Among other initiatives, the new codes sought to achieve judicial transparency through the gradual implementation of oral and public trials and to increase efficiency by clearly separating the roles and responsibilities of judges, prosecutors and defense attorneys, while also allowing for the introduction of abbreviated dispute

¹⁵ Hendrix, Steven, *Guatemalan Justice Centers: The Centerpiece for Advancing Transparency, Efficiency, Due Process, and Access to Justice*, 15 Am. U. Int’l L. Rev. 813, 828. (2000).

resolution mechanisms. Each code worked to protect individual rights through strict limitations on pre-trial incarceration and through the provision of significant constitutional guarantees to the accused, such as the constitutional right to public defense.

NEW ROLES FOR JUDGES AND PROSECUTORS: SEEKING TO ENSURE FAIRNESS AND EFFICIENCY

Perhaps the most immediate and apparent change was felt through the emboldened position prosecutors would now enjoy in both countries. Each code called for the creation of a National Prosecutor's Office to be staffed with lawyers specialized in various branches of the criminal law. Well-financed and institutionally powerful, prosecutors within the *Fiscalía* in Colombia or the *Ministerio Público* in Guatemala, overtook significant responsibilities previously held by judges in both the instruction and trial stages. Henceforth in both Guatemala and Colombia, prosecutors specialized in designated fields, and not judges, would have responsibility to investigate offenses, determine whether to pursue leads, charge alleged offenders and zealously prosecute them before appropriate tribunals in oral hearings.¹⁶

While the new criminal codes greatly expanded the power of the prosecutor, they significantly curtailed the responsibilities of instruction and trial judges and altered the nature of their participation in the process. For example, under both codes, the all-encompassing role of the instruction judge (under the old system) was limited to impartially ensuring the legality of procedures such as searches and seizures, authorizing or denying warrants, and determining whether there was probable cause to continue to trial.¹⁷ Similarly, although the trial judges (not juries) continue to decide guilt or innocence, they lost all authority to conduct further investigations, present evidence, or examine witnesses and defendants.¹⁸

¹⁶ Duce, Mauricio, The Role of the Public Prosecutor's Office in Latin America's Criminal Procedure Reform: An Overview, Centro de Estudios de Justicia de las Américas: Estudios y Proyectos, 3-8. (2002).

¹⁷ Hendrix, at 393.

¹⁸ Mejía Escobar, Eduardo, El Juez del Sistema Acusatorio Colombiano, Programa de Fortalecimiento y Acceso a la Justicia (Checchi Consulting). (2004).

In addition to redefining the roles of these key actors as a means of ensuring efficiency and fairness, the adoption of the accusatory system also allowed for the introduction of procedures designed to quickly settle minor disputes while avoiding the time and expense of full trials. For the first time, in both Colombia and Guatemala, prosecutors were authorized to reach plea bargain agreements, subject to the approval of the instruction judge, whereby adequate and timely resolution of criminal charges could be negotiated between the prosecutors and defense.¹⁹ The allowance for plea bargaining and the promotion of alternative dispute resolution was designed to help make a dent in the monumental backlogs of cases while also reducing impunity.

GREATER PROTECTIONS AND GUARANTEES FOR THE ACCUSED

The new codes also fundamentally alter the position of the accused before the state. Under both codes, individuals are now considered innocent until proven guilty. They have the right to remain silent at trial and their refusal to testify cannot be held against them. Equally important, indigent defendants in both countries are for the first time constitutionally guaranteed the right to competent, professional legal representation. As a result, pre-trial detention has been dramatically restricted and is now only permitted for limited classes of crimes.²⁰

SIGNIFICANT ACHIEVEMENTS AND SHORTCOMINGS

In Colombia primarily, but also in Guatemala, the transition has already yielded some tangible results. For example, less than two years after full implementation began in Bogotá, the Colombian Judicial Council is reporting drastic reductions in processing times for cases of theft, trafficking of illicit substances, and homicide. In the year 2000, when the new criminal code was not yet in effect, the average processing time for a theft case taken to a Bogotá court was approximately 567 days. Bogotá courts today, however, are reporting an average

¹⁹ Bischoff, at 46.

²⁰ *Id.* at 44-49.

processing time of 69 days – an 87% reduction. Similarly, trafficking and homicide cases in Bogotá have seen a reduction in processing times of 81% and 76% respectively, and no crime brought before a Bogotá court since full implementation began has taken more than 4.7 months to process.²¹ As processing speed is increasing, it is not surprising that a higher percentage of Colombians are expressing their trust in the system. Overall trust in the judicial system increased from 52% in 2004 to 55% in 2006, with 61% of the population expressing trust in the National Prosecutor’s Office.²²

Paradoxically, these improvements in processing time could also cause significant inequities. As previously mentioned, prosecutors have gained considerable power under the new code while professionalized public defense is only now emerging and is heavily dependent upon US assistance. As a result, indigent defendants continue to face significant inequities in terms of legal representation as public defenders seem to be institutionally overpowered by the state. Moreover, although the new criminal code seeks to reduce pre-trial detention to only “exceptional” circumstances, it seems judges are interpreting that language broadly, as more than 60% of Colombia’s prison inmates – some 30,284 people – are awaiting trial.²³

Like Colombia, a higher percentage of Guatemalans are also expressing greater trust in their legal institutions. For example, in 1992, only 40% of Guatemalans believed that the courts guaranteed a fair trial while in 2004, 44% expressed trust in the judicial system.²⁴ Nevertheless, inefficiency and impunity remain rampant. Only 3% of an estimated 250,000 complaints filed before the Public Ministry in 2005 were prosecuted; and of that percentage, only a small amount led to convictions.²⁵ Even worse, according to a local women’s rights organization, only 5 of 1,897 murders of women between 2001 and 2005 have been resolved in

²¹ Consejo Superior de la Judicatura, *Sistema Penal Acusatorio: Dos Años de Expedición del Código de Procedimiento Penal*, 17-19 (2006).

²² Seligson, Mitchell, *La Cultura Política de la Democracia en Colombia*, Latin American Public Opinion Project, 98. (2005). Although these indicators tend to show progress in Bogotá, they do not take in to account the other three jurisdictions (Armenia, Pereira, Manizales) that have begun complete implementation.

²³ US Department of State, *Colombia: Country Report on Human Rights Practices 2005*, p. 9.

²⁴ Seligson, Mitchell, *La Cultura Política de Democracia en Guatemala: 2004*, Latin American Public Opinion Project, p. 66.

²⁵ US Department of State, *Guatemala: Country Report on Human Rights Practices 2005*, p. 5.

the courts.²⁶ Moreover, mirroring the situation in Colombia, although pre-trial incarceration is theoretically limited, in 2005 60% of Guatemala's inmates were incarcerated before trial, and prosecutors and judges seem to be even more susceptible to intimidation and violence. In 2005 for example, there were 79 cases of threats or aggression against judges, as opposed to 61 in 2004. Despite these setbacks, it is worth noting that (U.S. funded) efforts are being made to improve the quality of, and availability of, public defense services. For example, in 2005, 16 interpreters and 9 bilingual public defenders were contracted to provide legal assistance to non-Spanish speaking communities.²⁷ This, however, is numerically insignificant for a country in which 85% of defendants require government-appointed defense.

FUTURE CHALLENGES

It is clear that both Colombia and Guatemala have made important constitutional changes to deepen democracy and strengthen the rule of law in their countries. Nevertheless, at first glance, implementation seems meager, subject to healthy skepticism, and even, perhaps, counter-productive in places. However, it would be entirely unrealistic to expect major improvements in either country in such a short period of time. More than legal reforms, these countries are seeking to institutionalize deep cultural change in the way the state and its citizens interact. . Given the history of military oppression in Guatemala, institutional failure in Colombia and the legacy of formalism in both countries, a cultural transition of this magnitude will take decades.

In my view, one of the keys to securing a successful transition is to ensure that citizens become acculturated to the exercise of adversarial practices and values within the judiciary. Among other things, this requires that governments continue to work with the international community to provide the resources to educate new generations of lawyers, judges, and

²⁶ The Economist, "Impunity Rules", November 16, 2006.

²⁷ US Department of State, Guatemala: Country Report on Human Rights Practices 2005, p. 5-6.

laypeople over a sustained period of time. The United States has a particularly important role to play in this area. Historically, the U.S. has contributed to the erosion of democracy in Guatemala through support for right wing military regimes, and drug consumption in the U.S. continues to fuel the culture of violence and criminality that has run Colombia's institutions ragged. Moreover, both Guatemala and Colombia have based their reforms on the U.S. model, in large part, to help facilitate the economic and political integration of the hemisphere under the leadership of the United States. Ultimately, however, domestic state actors and civil society in Colombia and Guatemala must take ownership over the implementation of the accusatory model and make it a priority to find creative ways of demonstrating tangible short-term results while continuing to work towards the achievement of long-term goals. If this can be achieved and financial and political will is sustained, I believe each country's adoption of the accusatory system will serve to further solidify democracy by increasing transparency and efficiency with respect to the judicial process.

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