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## Wanted: Criminal Justice -Colombia's Adoption of a Prosecutorial System of Criminal Procedure

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# Wanted: Criminal Justice -Colombia's Adoption of a Prosecutorial System of Criminal Procedure

Michael R. Pahl

## **Abstract**

This Article explores the fundamental historical change in Colombia's criminal procedure. Part I of this Article will present a brief history of the inquisitorial system of criminal procedure, laying the foundation for an understanding the unique Columbian development of criminal procedure. A description of Colombia's inquisitorial system follows, focusing especially on structural barriers in the previous inquisitorial system that hampered effective law enforcement. Part II discusses the failure of the inquisitorial system. A description of the prosecutorial system adopted in November 1991 is then presented in Part III.

# WANTED: CRIMINAL JUSTICE— COLOMBIA'S ADOPTION OF A PROSECUTORIAL SYSTEM OF CRIMINAL PROCEDURE

*Michael R. Paht\**

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## INTRODUCTION

For decades, Colombia has suffered from one of the world's highest impunity rates. The Colombian government's inability to prosecute its most notorious outlaw, Pablo Escobar,

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bar, is the most prominent recent example of a criminal justice system in crisis.<sup>1</sup> During the past thirty years, it is estimated that only 1.2 to two percent of all crimes reported ended in a sentence.<sup>2</sup> More recently, conviction rates have been just as dismal. Studies conducted by the Colombian government's Office of Socio-Judicial Investigations estimate that only twenty percent of all crimes committed are reported to the authorities.<sup>3</sup> Of these, roughly four percent result in a conviction, two percent for the crimes of robbery and assault and battery,<sup>4</sup> with an estimated 1,300,000 cases pending in Colombia's courts.<sup>5</sup> Human rights violations by the military forces—including torture, disappearances, and assassination—often go unpunished as well.

Why such a high rate of impunity? The problem generally is linked to two sources, one attitudinal and the other structural. For reasons rooted in Colombia's long history of violence and corruption, crimes go unreported because of skepticism about the system itself or fear of the authorities—or worse, retribution from the accused.<sup>6</sup> Even if a crime is reported, prosecuting the accused has proven difficult. Criminals have held the sword of Damocles over a frightened judiciary, bribing, threatening, and killing judges into compliance with their demands.<sup>7</sup> Moreover, in 1992 alone, an estimated 217 police have been assassinated by guerrillas and drug-traffickers.<sup>8</sup>

Impunity thus becomes a self-fulfilling prophecy. Citizens

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1. See James Brooke, *Escobar Says He'll Surrender if U.S. Protects Family*, N.Y. TIMES, Mar. 3, 1993, at A3.

2. See Gabriel Gutierrez Tovar, *Reflexiones sobre la Impunidad*, in JUSTICIA, DERECHOS HUMANOS E IMPUNIDAD 219, 225 (Héctor Peña Díaz ed., 1991).

3. Jaime Giraldo Angel, *La Impunidad en Colombia y sus Soluciones: Desjudicialización. Instrumento para combatir la impunidad*, in JUSTICIA, DERECHOS HUMANOS E IMPUNIDAD, *supra* note 2, at 119.

4. Daniel Abello Rocco, *Fiscalía General de la Nación*, 93 GACETA CONSTITUCIONAL 2 (1991).

5. Gustavo Gallon Giraldo & Rodrigo Uprimny Yepes, *Constituyente, violencia, y derechos humanos*, 13 REVISTO FORO 37, 42 (Oct. 1990).

6. See Tovar, *supra* note 2, at 219.

7. For a thorough and in-depth analysis of the violence plaguing Colombia's judiciary, see Guido Bonilla Pardo & Alejandro Valencia Villa, *Justice for Justice: Violence Against Judges and Lawyers in Colombia: 1979-1991* (1992) (on file with the *Fordham International Law Journal*).

8. *Emergency is Declared in Colombia*, WASH. POST, Nov. 9, 1992, at A16.

resigned or indifferent to a dysfunctional criminal justice system will neither cooperate with nor work to improve it. Citizens have increasingly privatized criminal justice, contributing to the violence that has earned Colombia the reputation as one of the world's most dangerous democracies.<sup>9</sup>

The other problem is structural. The high impunity rate is generally viewed as a result of an antiquated criminal justice system, based upon the inquisitorial model, that has crippled criminal investigations and produced an almost absolute rate of impunity.<sup>10</sup> Without structural changes, many fear that criminals like Mr. Escobar will continue to be the rule rather than the exception in Colombia.

Fortunately, in 1991 Colombia ratified a new constitution.<sup>11</sup> Many believe that such reform is long overdue; others are skeptical as to the motives for and effectiveness of such a reform.<sup>12</sup> As part of the constitutional reform process two important structural changes in the criminal justice system took place. First, a secret court system has been created for drug and terrorism cases. The hope is that judges will be able to bring criminals to justice while being protected from threats or assassination through concealment of the judges' identities.<sup>13</sup>

The secret court system, however, is no panacea, due to its limited scope. Roughly five percent of the crimes committed in Colombia, essentially organized crime in its ordinary and

9. See, e.g., Susan Benesch, *Messrs. Clean: Medellin—postcard; Medellin, Colombia anti-drug militias*, *NEW REPUBLIC*, Nov. 2, 1992, at 10.

10. See generally Antonio Jose Cancino, *Comentarios a la Propuesta de Reforma Constitucional sobre la Fiscalía General*, 73 *GACETA CONSTITUCIONAL* 3 (May 14, 1991); see also Fernando Carrillo Flores, *Fiscalía General y Sistema Acusatorio*, 68 *GACETA CONSTITUCIONAL* 3 (May 6, 1991).

11. See generally *CONSTITUCIÓN POLÍTICA DE COLOMBIA* [Constitution] arts. 11-94; see also *Extradition Outlawed*, *NEWSDAY*, June 30, 1991, at 14.

12. See Steven Flanders & Ana Maria Salazar, *Columbia's Purgatory*, *N.Y.L.J.*, Jan. 29, 1992, at 2. But see William C. Banks & Edgar Alvarez, *The New Colombian Constitution: Democratic Victory or Popular Surrender?*, 23 *U. MIAMI INTER-AM. L. REV.* 39 (1991). Professor Banks and Mr. Alvarez concluded that

[i]t is unclear whether the invocation of popular sovereignty to legitimate the reform process in Bogotá reflects a genuine public demand for a new set of societal rules and institutions. Instead, it could simply be another episode of constitutional reform serving as a shield to protect the less populist and shorter term political goals of those in power. Legally, it makes no difference.

*Id.* at 85.

13. See *Colombia Struggles to Seal Its Judges' Armor*, *N.Y. TIMES*, Oct. 13, 1991, at 10.

political manifestations, fall under its jurisdiction. In order to combat the other ninety-five percent of crimes—robbery, larceny, rape, murder, etc.—Colombia is undergoing a shift from an inquisitorial<sup>14</sup> to a prosecutorial system of criminal procedure, through the creation of the *Fiscalía General de la Nación* (the “*Fiscalía*”), or central prosecutor’s office.

This reform is noteworthy for at least two reasons. First, Colombia has joined a worldwide trend toward the prosecutorial system, as seen, for example, in the case of Italy in 1988. Indeed, for a civil law country to adopt a prosecutorial system is almost by definition an extraordinary task, given the massive change in institutional structure and break with historical tradition involved. Second, Colombia, relying upon its long heritage of respect for the judiciary and the rule of law,<sup>15</sup> was able to reform its criminal justice system through enlightened debate and democratic procedure, rather than turning to the military to solve its crime problem, as so often happens in Latin America. As noted by ex-Justice Minister Fernando Carrillo Flores, one of the principal architects of the 1991 reform, the adoption of a prosecutorial system was

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14. Although prosecutorial systems and inquisitorial systems are hard to define distinctly, I rely throughout this Article upon the following largely technical distinction. “Prosecutorial” (or its cognates “accusatorial” or “adversarial”) refers to systems, such as in the United States and the United Kingdom, where the parties (prosecution and defense) have the responsibility of presenting evidence, and the judge or magistrate plays a relatively neutral role. “Inquisitorial” refers to systems, as in continental Europe, where the judge or magistrate is a powerful actor in the process, bearing the responsibility for gathering evidence as well as deciding the case’s outcome. MARY ANN GLENDON ET. AL, *COMPARATIVE LEGAL TRADITIONS* 180 (1985) [hereinafter GLENDON]. In other words, the concentration of prosecutorial and adjudicative powers in the same person is the quintessence of the inquisitorial scheme. See Ennio Amodio & Eugenio Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 62 *TEMPLE L. REV.* 1211 (1989). Others note that inquisitorial systems have generally allotted greater authority to the government, resulting in an increased emphasis on crime control, with greater judicial and investigative powers. Anglo-American adversarial systems, by contrast, are seen as better guarantors of civil liberties and rights of criminal defendants. See Lawrence J. Fassler, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe*, 29 *COLUM. J. TRANSL. L.* 245 (1991).

15. Indeed, some argue that Colombia’s long history of violence against the judiciary is a testimony to the courage and integrity of judges who refuse to be threatened or bribed. In Mexico, by contrast, there has been little violence against the judiciary, for judges have been bought or threatened into silence. Interview with Francisco Santos, Editor-in-Chief, *El Tiempo*, at Harvard Law School, Cambridge, Mass. (Mar. 10, 1992).

marked by a generous spirit of dialogue and planning, rather than by discord and violence.<sup>16</sup>

In order to understand this fundamental historical change, Part I of this Article will present a brief history of the inquisitorial system of criminal procedure, laying the foundation for an understanding of the unique Colombian development of criminal procedure. A description of Colombia's inquisitorial system follows, focusing especially on structural barriers in the previous inquisitorial system that hampered effective law enforcement. Part II discusses the failure of the inquisitorial system.

A description of the prosecutorial system adopted in November 1991 is then presented in Part III, providing a broad outline of the powers and duties of the *Fiscalía*. The shift to a prosecutorial system will be examined from the perspective of effective law enforcement, focusing upon attitudinal and structural changes that Colombia hopes to produce through using a prosecutorial system of criminal procedure. Part III concludes that the new Colombian prosecutorial system has strengthened the state's power to fight crime significantly, which should lead to a lowering of the impunity rate. Analyzing the efficacy of the new prosecutorial system is exceedingly difficult, however. Colombia's prosecutorial system, implemented on July 1, 1992, has been of short duration. The *Fiscalía* currently is training over 9000 prosecutors and investigators,<sup>17</sup> and results are not expected to take place for a year or two.<sup>18</sup> Moreover, it is difficult to be sanguine about any reform in a country as crippled by violence as Colombia. Accordingly, any conclusions about the new system's efficacy remain speculative.

Part III of this Article also raises special concerns about the relatively unchecked police powers vested in the *Fiscalía*, especially troubling given Colombia's authoritative past. Part IV discusses the need for training as well as the institutional restructuring that is needed in Colombia. This Article con-

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16. Fernando Carrillo Flores, *Presentacion a LA REVOLUCION PACIFICA DE LA JUSTICIA* 10 (Fernando Carrillo Flores ed., 1991).

17. See Carlos Enrique Cavalier, *Los Actos de Equilibrium en La Reforma de la Justicia*, in *FUNDACION GALAN Y LA JUSTICIA* 284 (Luis Carlos Galan ed., 1992).

18. For example, the current Fiscal, Gustavo de Greiff, estimates that Colombia will "only begin to see real results in a year or a year and a half." *Se hara Justicia?*, 530 *LA SEMANA* 30, June 30-July 7, 1992.

cludes that some form of warrant process must be introduced into the Colombian system in order to provide citizens with minimal guarantees and protection from the *Fiscalía's* recently expanded tentacular reach. Finally, this Article recommends that continued educational and financial support from countries that use a prosecutorial system, such as the United States, be provided to help Colombians return the rule of law to their beleaguered country.

## I. *THE INQUISITORIAL SYSTEM*

### A. *A Brief History of the Inquisitorial System*

The inquisitorial model of criminal procedure has its roots in the Middle Ages, as part of the Roman Catholic Church's attempt to root out heresy during the Holy Inquisition.<sup>19</sup> It was finally terminated as a Church institution in the fifteenth century.<sup>20</sup> The more gruesome Spanish Inquisition, however, claimed its last victim as late as 1826 and was abolished by Queen Mother Cristina of Spain on June 15, 1834.<sup>21</sup>

While the power of the Church declined in post-Reformation Europe, the inquisitorial system, stripped of its ecclesiastical rationale, soon spread throughout the continent, used by secular governments to suppress crime and political opposition.<sup>22</sup> The inquisitorial system was finally standardized in the nineteenth century by Napoleon in the 1808 *code d'instruction criminelle*, contained in the *Code Napoleon*.<sup>23</sup> His armies then spread the inquisitorial system, along with the principles of the French Revolution, throughout continental Europe.<sup>24</sup> As a result of this historical evolution, the inquisitorial system, with certain modifications, is currently in place in all the countries of the European Community, with the exception of the United Kingdom, the Republic of Ireland, Spain, and Italy, which adopted a mixed inquisitorial/prosecutorial system in 1988.<sup>25</sup>

19. See generally CECIL ROTH, *THE SPANISH INQUISITION* 36-37, 266-67 (1964).

20. *Id.*

21. *Id.*

22. See generally H. LEA, *THE INQUISITION OF THE MIDDLE AGES* 317-18 (1963).

23. GLENDON, *supra* note 14, at 50.

24. See generally ROBERT B. HOLTMAN, *THE NAPOLEONIC REVOLUTION* (1967).

25. For a discussion of the Italian reform, see generally Fassler, *supra* note 14; Jeffrey J. Miller, *Plea Bargaining and Its Analogues under the New Italian Criminal Procedure Code and in the United States: Towards a New Understanding of Comparative Criminal Proce-*



### B. Colombia's Inquisitorial System

Colombia was formed as a nation in 1819, proclaimed as the Republic of Colombia, comprising what is now Colombia, Venezuela, Panama, and Ecuador, with Simon Bolivar as president.<sup>26</sup> The legal system subsequently adopted was based upon Spanish law, especially the Spanish Code of 1822.<sup>27</sup> The code mandated the inquisitorial system and soon spread throughout Spain's former colonies in Latin America.<sup>28</sup>

Colombia reaffirmed the inquisitorial system in the 1886 Constitution which, until the 1991 reform, was the oldest living constitution in the Americas, besides that of the United States.<sup>29</sup> The inquisitorial system was included in the 1938 Code of Criminal Procedure, which remained in place, with certain modifications, until the New Code of Criminal Procedure (the "New Code") was adopted on November 30, 1991.<sup>30</sup>

The recently created *Fiscalía* has its historical antecedent in the attempted constitutional reform of 1979.<sup>31</sup> The idea of that reform was to create a central prosecutor's office for certain crimes, while retaining for others the inquisitorial model in which a neutral judge investigated, prosecuted, and decided the case. This attempted reform was declared unconstitutional by the Supreme Court, however, necessitating the criminal procedure reform of 1991.<sup>32</sup>

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*ture*, 22 N.Y.U. J. INT'L L. & POL. 215 (1990); William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1 (1992).

26. Kevin J. Lyonette, *Colombia*, in *LATIN AMERICA AND THE CARIBBEAN: A HANDBOOK* 76 (Claudio Véliz ed., 1985).

27. THOMAS E. WEIL ET AL., *AREA HANDBOOK FOR COLOMBIA* 503 (1970).

28. *See id.* at 27-31.

29. *Constitución: El Nuevo Pacto Social*, EL TIEMPO, Dec. 30, 1991, at 1.

30. Nuevo Código de Procedimiento Penal (New Code of Criminal Procedure) (English translation) [hereinafter N.C.P.P.] (on file with the *Fordham International Law Journal*).

31. *Colombia President Urges Congress to Approve Constitutional Reform*, BBC, Summary of World Broadcasts, Aug. 4, 1989, at ME/0526/D/1, available in LEXIS, Nexis Library, OMNI File.

32. *See* Francisco Pintura, "La Fiscalía General de la Nación: Una Nueva Institución en Colombia," Speech given by Vicefiscal in San Juan, Puerto Rico, July 30, 1992 (on file at the *Oficina de la Fiscalía General de la Nación*, Santefe de Bogotá, Colombia).

### C. *Characteristics of the Colombian Inquisitorial System*

Colombia's previous criminal justice system closely followed the inquisitorial model. Most proceedings were written, with judges reaching decisions based upon information contained in the case file. Colombian judges had multiple responsibilities as inquisitory judges, including managing the criminal investigation, performing the prosecutorial function, assuring the defendant's basic rights, and deciding legal questions facing the accused—including his guilt or innocence.

When a crime was reported within Colombia's inquisitorial system, the police, the *Departamento Administrativo de Seguridad* ("DAS"), Colombia's equivalent of the United States' Federal Bureau of Investigation,<sup>33</sup> the *instruccion criminal*, or members of the Armed Forces would investigate the facts, collect evidence, and hand the case to a *juez de instruccion*, or instruction judge, who was in charge of the investigation.<sup>34</sup> This judge would review the evidence, direct the investigation, determine pretrial release and incarceration, and make a determination as to probable cause for trial.

As soon as the instruction judge decided to bring charges against the accused, the case was handed over to a trial judge. Cases involving the murder or kidnapping of a non-political person, assault and battery, property damage, stolen property, minor drug offenses, and other misdemeanors went to the *Juzgado de Circuito*, or Circuit Court.<sup>35</sup> Cases of murder, crimes against national security, and treason went to the *Juzgado Superior del Distrito*, or Superior Court.<sup>36</sup> Appeals could be taken before the Magistrates of *Tribunales Superiores*, or Superior Appeals Court.

Briefly stated, the new system replaces the instruction judge with a prosecutor who is responsible for the case from the investigative stage to trial, as occurs, for example, in the U.S. prosecutorial system. The trial judge, who previously

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33. The *Departamento Administrativo de Seguridad* (DAS), an investigative and intelligence-gathering force, is charged with the investigation of crimes against the internal security of the state, crimes of fraud against the state and its financial institutions, breaches of the public faith, and crimes affecting individual liberty and human rights.

34. *See Se hara Justicia?*, *supra* note 18.

35. HOWARD I. BLUTSTEIN ET AL., *AREA HANDBOOK FOR COLOMBIA* 412 (1977) [hereinafter *AREA HANDBOOK FOR COLOMBIA*].

36. *Id.*

played an active role in the trial by interrogating the accused, is now limited to hearing evidence, ensuring fairness in the trial process, judging the culpability of the accused, and imposing punishment. As such, the judge is relatively neutral in the process, except in the case of plea bargaining, in which she controls the legality of the agreement.<sup>37</sup>

## II. *FAILURE OF THE INQUISITORIAL SYSTEM*

Why did Colombia's inquisitorial system fail? Two main reasons are generally given. The first reason for failure involved the chronic investigative incapacity of the instruction judges. The second reason for failure involved the lack of a hierarchical structure to control the functions of the independent instruction judges and the judicial police.<sup>38</sup>

### A. *Judges, Not Detectives: Investigative Incapacity in the Inquisitorial System*

The chronic investigative incapacity of the instruction judges sprang from many sources. First of all, the instruction judges were trained as judges, not as detectives or as police. As such, judges were often unskilled and inefficient in the complex craft of criminal investigation.<sup>39</sup> This problem was exacerbated as the techniques of modern crime, especially drug-trafficking and white collar crime, became more complex and international, with no corresponding investment in technical training and equipment for the instruction judges. In addition, instruction judges were not specialized by crime. Consequently, judges were confronted with the formidable task of being simultaneous experts in white collar crime, narcoterrorism, crimes to property, etc., with predictably dismal results.

Second, although the instruction judges were a mix of judge and detective, their training prepared them more for the former role than the latter. Consequently, they tended to view their function as seeking justice and fairness in the criminal process as judges, rather than increasing the conviction rate as

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37. See Pintura, *supra* note 32, at 17.

38. See German Augusto Robles Marun, *Secretario General, Fiscalía General de la Nación*, "Fiscalía General de la Nación" (on file at the *Oficina de la Fiscalía General de la Nación*, Santefe de Bogotá, Colombia).

39. See, e.g., Giraldo & Yepes, *supra* note 5, at 41.

prosecutors.<sup>40</sup> As a result, instruction judges often were insufficiently zealous in their investigative task, which contributed to the high impunity rate.

The instruction judge's self-perception as a referee, not as a player, in the criminal process had an additional ripple-effect on the judicial police. The police often became frustrated when the intensive work of identifying and collecting evidence came to naught if the instruction judge decided to free the accused because the evidence was obtained by torture or by the violation of human or criminal rights.<sup>41</sup> Indeed, the police often viewed judges with suspicion, finding them incompetent or corrupt.<sup>42</sup> As a result, police tended to take justice into their own hands, refusing to hand over evidence, detaining prisoners indefinitely, or even torturing or killing them if they felt it necessary.<sup>43</sup>

Further, instruction judges were forced to serve two masters, dividing their time between investigating and judging, which frustrated aggressive and thorough criminal investigations. Finally, instruction judges were primarily recent law school graduates, low-paid in a high-risk profession. Bribery and intimidation played a role as well in the investigative incapacity of the instruction judges.<sup>44</sup>

### B. *Hierarchical Problems with the Inquisitorial System*

Coupled with the chronic investigative capacity of the instruction judges was the lack of coordination of criminal investigations in a sole entity responsible for fighting crime.<sup>45</sup> Under the former system, the instruction judges were granted a great deal of autonomy, working independently in their investigative efforts. Indeed, the instruction judge was the sole person with the power to direct the criminal investigation.<sup>46</sup>

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40. Interview with Ana Maria Salazar in Cambridge, Mass. (Feb. 28, 1992).

41. See Tovar, *supra* note 2, at 238.

42. Dan McGillis, Attempted Application of Criminal Justice Analytic Framework to the Current Colombian Reforms 3 (1991) (unpublished paper on file with the *Fordham International Law Journal*).

43. *Id.*

44. See Vicki Quade, *Justice Under a Death Sentence*, 16 *BARRISTER* 12, 15 (1989-90).

45. See Pintura *supra* note 32, at 7.

46. See Carlos Eduardo Lozano Tovar, *La impunidad y las formas de combatirla*, in *JUSTICIA, DERECHOS HUMANOS E IMPUNIDAD*, *supra* note 2, at 203.

Effective law enforcement was accordingly crippled as isolated judges were ill-informed and ill-supported by other judges and the judicial police. Further, there was no clear linkage between the instruction judges and the judicial police, as the inquisitorial system lacked a technical corps of criminal investigators exclusively devoted to the service of the instruction judge and under her direction.<sup>47</sup>

A related hierarchical problem was that the responsibilities among the various law enforcement agencies assigned to assist the instruction judges were unclear and overlapping.<sup>48</sup> Effective law enforcement was thus crippled by turf battles and the needless duplication of investigative efforts. Also, the limited presence—or total absence—of law enforcement agencies in large parts of Colombia's national territory, especially in rural areas, allowed criminals free reign.<sup>49</sup> This situation was exacerbated by territorial limitations on the instruction judges, who could investigate crimes only in their appropriate jurisdictions.<sup>50</sup> Finally, the lack of an institutional structure to protect victims, witnesses, and other intervenors in the criminal process deterred many from assisting the judges and police in their investigative efforts, contributing to the high impunity rate.<sup>51</sup>

### III. THE OFFICE OF THE PROSECUTOR GENERAL OF THE NATION: THE FISCALÍA

In light of the above problems, a drastic change was needed in the organization and implementation of criminal

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47. See Tribunal Superior de Orden Publico, *Comentarios a la ponencia: "Impunidad y las formas de combatirla,"* in JUSTICIA, DERECHOS HUMANOS E IMPUNIDAD, *supra* note 2, at 215.

48. Twig Mowatt, 'Invisible' Justices for Drug Cases, *SAN FRAN. CHRON.*, Oct. 11, 1991, at A1. For example, the opinion of Fernando Carrillo Flores, ex-Justice Minister is that "[t]he greatest source of impunity here has been the lack of a coordinated effort at assembling evidence." *Id.* (quoting Fernando Carrillo Flores).

49. See generally Bruce M. Bagley, *Colombia and the War on Drugs*, 67 *FOREIGN AFF.* 70 (Fall 1988). Indeed, during most of the nineteenth century, an intense regionalism pervaded the newly independent republic. As a result, there was no professional, centrally controlled police force until 1891, when an experienced French police commissioner was hired to organize and train a central police corps and the National Police were formed as part of the Ministry of Interior. See *AREA HANDBOOK FOR COLOMBIA*, *supra* note 35, at 505.

50. See Rocco, *supra* note 4, at 3.

51. See Pintura, *supra* note 32, at 8.

justice in Colombia. The existing judicial system had seriously diminished the confidence of Colombians in their political system. The general skepticism toward the judicial process was seen as a manifestation of the national crisis prompting the constitutional reforms of 1991.<sup>52</sup>

In December of 1990, President Gaviria called for elections to choose members of the national constituent assembly, conferring extraordinary powers on the lawmakers to revise the existing constitution. After six months of debate, the seventy-four-member Constituent Assembly, including, among others, members of the business and financial community, union leaders, indigenous peoples, ex-guerrillas, and prestigious lawyers, produced a 380-article constitution with fifty-nine transitory articles.<sup>53</sup> President Gaviria signed the new constitution into law on July 4, 1991, praising it as a "peace treaty and a new instrument for national reconciliation."<sup>54</sup>

As part of this constitutional reform, a special thirty-six-member legislative committee was chosen to write a new code of criminal procedure, which went into effect July 1, 1992.<sup>55</sup> Resulting from this commission's efforts, the 1991 Constitution provides for the Office of the Prosecutor General of the Nation, or the *Fiscalía*, whose basic function is to investigate crimes and handle cases from the investigatory to the trial stage.<sup>56</sup> A broad outline of the powers granted the *Fiscalía* in the 1991 Constitution follows.

#### A. *General Duties and Powers of the Fiscalía*

The *Fiscalía* serves as Colombia's chief prosecutor, and is elected for a four-year period by the Supreme Court.<sup>57</sup> She must meet the same qualifications as a member of the Supreme Court. The office is considered part of the judicial branch, but

52. See *LA REVOLUCION PACIFICA DE LA JUSTICIA*, *supra* note 16, at 9 (discussing comments of ex-Justice Minister Fernando Carrillo Flores).

53. *A Look at the New Book of Rules; Congressional Clientelism is Curbed; Judiciary Reformed*, *LATIN AM. WKLY REP.*, July 25, 1991, at 4.

54. Carlos Obregon, *Constitucion: El Nuevo Pacto Social*, *EL TIEMPO*, Dec. 30, 1991, at 1.

55. See *CONSTITUCIÓN POLÍTICA DE COLOMBIA* [Constitution], trans. art. 27.

56. *Fiscalía General de la Nación* arts. 4 & 6, [hereinafter F.G.N.], in *LA REVOLUCION PACIFICA DE LA JUSTICIA*, *supra* note 16, at 99.

57. *Id.* art. 2.

with administrative and budgetary autonomy.<sup>58</sup>

The *Fiscalía*'s general prosecutorial duties include acting, either on its own initiative or in response to a complaint or a formal charge, to investigate offenses, and to charge alleged offenders before the appropriate tribunal.<sup>59</sup> Other duties of the *Fiscalía* include ensuring the appearance in court of criminal suspects,<sup>60</sup> determining and declaring whether there are grounds to proceed with an investigation,<sup>61</sup> directing the police in their investigations,<sup>62</sup> and ensuring the protection of witnesses.<sup>63</sup> The *Fiscalía* is also responsible for investigating all facts, inculpatory and exculpatory, for the accused.

The *Fiscalía* has special duties as well. Among these are the investigation and charging of high officials,<sup>64</sup> the appointment and dismissal of employees of the *Fiscalía*,<sup>65</sup> the formulation of policy on criminal matters,<sup>66</sup> the granting of temporary powers to governmental agencies under the control of the *Fiscalía*,<sup>67</sup> and the provision of information to the government regarding criminal investigations.<sup>68</sup>

### B. *Jurisdiction of the Fiscalía*

With the creation of the *Fiscalía*, the breadth of Colombian law enforcement has been dramatically broadened. The *Fiscalía*'s jurisdiction covers the entire country, with regional offices in the five major Colombian cities.<sup>69</sup> The regional offices are further broken down into sectional offices, located in each judicial district.<sup>70</sup> The sectional offices are broken down into local prosecutorial offices, known as *Unidades de Fiscalía* ("local Fiscales"), under the direct supervision of the sectional of-

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58. *Id.* art. 1.

59. *Id.* art. 3.

60. *Id.* art. 3, § 3.

61. *Id.* art. 3, § 2.

62. *Id.* art. 3, § 6.

63. *Id.* art. 3, § 7.

64. CONSTITUCIÓN POLÍTICA DE COLOMBIA [Constitution], art. 251(1).

65. F.G.N., *supra* note 56, art. 11.

66. *Id.* art. 7.

67. CONSTITUCIÓN POLÍTICA DE COLOMBIA [Constitution], art. 251 (4).

68. F.G.N., *supra* note 56, art. 8; *see* CONSTITUCIÓN POLÍTICA DE COLOMBIA [Constitution], art. 251 (5).

69. F.G.N., *supra* note 56, art. 14.

70. *Id.*

fices.<sup>71</sup>

The local Fiscales handle the day-to-day prosecutorial duties, roughly equivalent to an Office of the District Attorney in the United States. Their responsibilities include investigating crimes and bringing charges;<sup>72</sup> directing investigations undertaken by the judicial police;<sup>73</sup> expediting arrest orders, wire-taps, mail covers, electronic surveillance; and other actions inherent to criminal investigations.<sup>74</sup>

The local Fiscales are assisted in their prosecutorial duties by the judicial police, whose duties include receiving criminal complaints and conducting investigations,<sup>75</sup> as well as undertaking basic police functions such as wire-tapping, mail covers, etc., at the direction of the local Fiscales.<sup>76</sup> While the local Fiscales have broad discretion in directing the judicial police, ultimate supervision rests with the *Fiscalía*, who is in charge of directing and coordinating the judicial police in their various functions.<sup>77</sup>

### C. Law Enforcement Agencies Under the Control of the Fiscalía

Along with the judicial police, the new constitution provides for other law enforcement agencies to assist the *Fiscalía* in criminal investigations. The *Centro de Información sobre Actividades Delectivas* (the "Center for Information on Criminal Activities") is responsible for organizing the collection and processing of all basic information for criminal investigations.<sup>78</sup> The *Cuerpo Técnico* (the "Technical Corps") is charged with the organization of all technical and scientific information required for the development of investigations.<sup>79</sup> In addition, the *Division de Criminalística* (the "Criminalistics Division") is

71. *Id.* art. 15.

72. *Id.* art. 40, § 1.

73. *Id.* art. 40, § 2. The term "judicial police" is used broadly to include the three major Colombia police forces, the *Cuerpo Técnico*, the DIJIN/SIJIN of the National Police, and the DAS (the Colombian equivalent of the FBI). Ana Maria Salazar, *Brief Comments Regarding the Constitutional Reforms to the Colombian Criminal Justice System*, July 11, 1991, at 3 (on file at the Center for Criminal Justice, Harvard Law School, Cambridge, Mass.).

74. F.G.N., *supra* note 56, art. 40, § 4.

75. *Id.* art. 47, § 1.

76. *Id.* art. 47, §§ 2, 4.

77. *Id.* art. 42.

78. *See generally id.* art. 24.

79. *See generally id.* art. 43.



responsible for all matters requiring criminalistics, including the running of laboratories and coordinating the activities of the Institute of Legal Medicine and Forensic Science.<sup>80</sup> Finally, the *Escuela de Investigación Criminal y Criminalística* (the "School of Criminal Investigations and Criminalistics") is designed to develop educational programs for the nation's law enforcement agencies.<sup>81</sup>

#### D. *Who's Watching the Watchdog?*

With such increased powers of law enforcement in the *Fiscalía*, the question naturally arises concerning what agency is responsible for monitoring the *Fiscalía*. The *Fiscalía*, as well as being required to fulfill its prosecutorial function in conformity with established law<sup>82</sup> and human rights,<sup>83</sup> is itself policed by the *Oficina de Veeduría* (the "Office of Professional Responsibility").<sup>84</sup> This office is responsible for the ethical conduct of the *Fiscalía*, including determining ethical codes of conduct, visiting local *Fiscales* and judicial police to determine the propriety of conduct, and receiving complaints and investigating alleged constitutional and human rights violations by the *Fiscales* and the judicial police.<sup>85</sup>

Furthermore, the new constitution provides for the office of the *Procurador General de la Nación*,<sup>86</sup> who is the head of the Public Ministry and in charge of protecting human rights<sup>87</sup> and supervising, investigating, and sanctioning public functionaries who violate the law.<sup>88</sup> As such, the *Fiscalía* falls under its jurisdiction. The *Procuraduría* is responsible for overseeing the preliminary investigations of the judicial police,<sup>89</sup> protecting the rights of the accused,<sup>90</sup> and ensuring that the conduct of the

80. See generally *id.* art. 44.

81. See generally *id.* art. 32.

82. *Id.* art. 5.

83. *Id.* art. 6.

84. See *id.* art. 25.

85. *Id.* art. 25, § 7.

86. CONSTITUCIÓN POLÍTICA DE COLOMBIA [Constitution], art. 275; see N.C.P.P., *supra* note 30, arts. 131-35.

87. CONSTITUCIÓN POLÍTICA DE COLOMBIA [Constitution], art. 277, § 2.

88. *Id.* art. 277, § 6.

89. N.C.P.P., *supra* note 30, art. 134.

90. *Id.* art. 132.

*Fiscalía* and the judiciary conforms with the law.<sup>91</sup> As an enforcement mechanism, the new constitution provides for the *acción de tutela*, in which citizens represented by the *Procuraduría* have the right to a hearing in front of a judge for the immediate protection of their fundamental constitutional rights.<sup>92</sup> Indigents are guaranteed a public defender to protect their rights.<sup>93</sup>

A final protection is that the government is prohibited from abolishing or altering the basic organizations concerned with the criminal process—indictment and trial, even during (legally permitted) states of exception.<sup>94</sup> This is an important protection, for under the state of siege provisions enacted during the 1970s, many crimes by civilians—including kidnapping, assault, and any crime involving the use of arms—fell under the jurisdiction of the military courts.<sup>95</sup> Although these courts were arguably more efficient, swift, and stringent than regular courts, they had the effect of tacitly conceding that the ordinary judicial process had failed—precisely the situation the New Code seeks to address.

With this broad outline of the *Fiscalía* in mind, we now turn to the fundamental question concerning the new prosecutorial system: Can it enhance effective law enforcement, thereby reducing the high impunity rate plaguing Colombia?

#### IV. EFFECTIVE LAW ENFORCEMENT

##### A. *Training Judges to Become Prosecutors, Or How to Teach Old Dogs New Tricks*

As part of the constitutional reform that created the new prosecutorial system, an agreement was reached in which the new prosecutors must be drawn from the ranks of the former instruction judges.<sup>96</sup> This raises the question of how the new

91. *Id.* art. 133.

92. See Pintura, *supra* note 32, at 5.

93. N.C.P.P., *supra* note 30, art. 140.

94. CONSTITUCIÓN POLÍTICA DE COLOMBIA [Constitution], art. 252. On November 8, 1992, "President Cesar Gaviria declared a national state of emergency after leftist rebels detonated more than 30 bombs across Colombia." *Emergency is Declared in Colombia*, *supra* note 8.

95. AREA HANDBOOK FOR COLOMBIA, *supra* note 35, at 411.

96. See CONSTITUCIÓN POLÍTICA DE COLOMBIA [Constitution], trans. art. 27.

system will change the mentality and working habits of the over 8000 former instruction judges so that they become zealous prosecutors. A change in attitude is drastically needed, because the previous system lacked a party interested exclusively in *convictions*. The police were interested in making arrests, the judges in preserving legality and procedural rights, the victims in compensation, and the defendants, of course, in being acquitted.<sup>97</sup>

The new system promises to produce what may be called for lack of a better term "trickle down convictions." Otherwise stated, impunity should be lowered in the new system if the prosecutors are adequately pressured by their superiors to prosecute criminals zealously, with the lowering of the impunity rate the measure of their performance. In the past, the lowering of the impunity rate could not be used as an indicator of an instruction judge's efficiency, as she was concurrently responsible for defending justice and fair play in the criminal process.

A change in prosecutorial attitude should help to lower the impunity rate by its ripple-effect on the judicial police as well. The prosecutors will not be seen, as the instruction judges were, as working at cross-purposes with the police, but as partners in a collective law enforcement effort.<sup>98</sup> Working together should lessen the impunity rate, especially if the *Fiscalía* takes care to train the judicial police to use their investigative tools within the constraints of the New Code.<sup>99</sup>

The new prosecutorial system should also enhance effective law enforcement through the creation of prosecutorial units focusing on particular types of crime. In the previous system, judges were not specialized by crime and remained independent generalists. Efficiency should be enhanced as prosecutors develop expertise in various criminal areas. In order to achieve this, however, the prosecutors must be given training in conducting criminal investigations, as their previous status as neutral magistrates leaves them relatively unprepared for this role.<sup>100</sup>

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97. McGillis, *supra* note 42, at 12, 13.

98. *Id.* at 3.

99. *Id.* at 8.

100. *Id.*

Finally, the new prosecutors should be better able to contribute to effective law enforcement because their tasks will now be limited exclusively to prosecuting. Because the judicial role will be limited to hearing cases, the prosecutors will be able to spend more time conducting investigations and preparing their cases, which should lessen the impunity rate as well.

But teaching old dogs new tricks may prove to be a formidable task. According to Vice Fiscal Francisco Pintura, "[t]he implementation of the accusatory system in Colombia and the development of the *Fiscalía General de La Nación* requires much advice and the fruit of experience" from countries using prosecutorial systems.<sup>101</sup> Colombia has been fortunate to have received precisely this type of training in criminalistics and criminal investigation from countries such as the United States.<sup>102</sup> In addition, in August 1991, the Bush administration approved US\$36,000,000 for a six-year project to support judicial reform in Colombia. The goal is essentially to improve the Colombian criminal justice system so that drug traffickers can be brought to justice without extradition to the United States.<sup>103</sup> The United States has given technical as well as educational support.<sup>104</sup>

Unfortunately, this aid only goes so far. Colombia's transition to a prosecutorial system is suffering due to a lack of funds. As noted by the president of the Supreme Court of Justice, Pedro Lafont Pianetta, the *Fiscalía* "still does not have the infrastructure for the functioning of the new institution."<sup>105</sup>

101. See Pintura, *supra* note 32, at 20.

102. Interview with Zahir Casas, Director, School of Criminal Investigation and Criminalistics, in Bogotá, Colombia, (Sept. 10, 1992) [hereinafter Casas].

103. See AMERICAS WATCH COMMITTEE, *POLITICAL MURDER AND REFORM IN COLOMBIA: THE VIOLENCE CONTINUES* 111 (1992). Critics note, however, that the interest of the U.S. government is limited to reforming the Colombian criminal justice system to fight drugtrafficking, and that U.S. officials have expressed little or no interest in the other important judicial reforms enacted in the 1991 Constitution. In addition, A.I.D. officials assisting Colombia in its transition to a prosecutorial system limited their contact to high government officials, eschewing talks with the judges who in practice will implement the new system. As a result, many judges-cum-prosecutors remain confused about the functioning of the prosecutorial system. Interview with Fernando Royas, Director, Instituto Latinoamericano de Servicios Legales Alternativos, in Bogotá, Colombia (Sept. 14, 1992).

104. For example, the United States recently gave the Colombian government seven helicopters, 39 trucks, 28 motorcycles, and 15 German shepherds to aid in its anti-drug efforts. *Fiscalía no tiene futuro, por ahora*, EL TIEMPO, Aug. 27, 1992, at 3A.

105. *Id.*

The *Fiscalía* has yet to receive adequate material and technical support to fulfill its constitutional role.<sup>106</sup> Furthermore, ethical training, a crucial check on the increased power of the prosecutors, has been limited to the prosecutors located in Bogotá, due to lack of money.<sup>107</sup> Regrettably, ambitious constitutional reforms, without the funds to back them up, may remain mere words on paper.

### B. *Institutional Restructuring*

Effective law enforcement promises to be enhanced by the restructuring of the prosecutorial system as well as by the change in attitude of the new prosecutors.

Criminal investigations in the past suffered from the lack of coordination in the collection of evidence, resulting in the needless duplication of investigatory efforts. The 1991 Code of Criminal Procedure attempts to correct this problem by making the *Fiscalía* responsible for directing and coordinating the various functions of the judicial police at the federal level.<sup>108</sup> Further, the *Fiscalía* is ordered to coordinate and control investigations, to limit the competition between various law enforcement agencies.<sup>109</sup>

The Center for Information on Criminal Activities will assist the *Fiscalía* in this task. The Center for Information on Criminal Activities has been directed to develop mechanisms for the exchange of information among law enforcement agencies.<sup>110</sup> The judicial police also will implement mechanisms to avoid the duplication of forces in the development of criminal investigations.<sup>111</sup> Finally, the Technical Corps as well is mandated to work with other agencies to promote the coordination of investigations that should be undertaken jointly.<sup>112</sup>

Those familiar with the U.S. law enforcement system may be skeptical of this ambitious scheme. Efforts at coordinating information-gathering and investigations among U.S. law enforcement agencies, such as the Federal Bureau of Investiga-

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106. *Id.*

107. Casas, *supra* note 102.

108. F.G.N., *supra* note 56, art. 3.

109. *Id.* art. 11.

110. *Id.* art. 24 (3).

111. *Id.* art. 42 (5).

112. *Id.* art. 43 (4).

tion and the Drug Enforcement Agency, have proven difficult. Law enforcement agencies often compete for funding and jurisdiction, with institutional pride mixed in to complicate matters.<sup>113</sup>

Colombia, however, has shown great advances in this area. For example, the training schools for DAS and the police are currently working together, developing training programs for the new prosecutors. Similar programs with other law enforcement agencies are foreseen in the near future.<sup>114</sup> Furthermore, government officials note that they have received great support from the various law enforcement agencies in the coordination of training and investigative efforts.<sup>115</sup>

In tandem with the cooperation of law enforcement agencies will be the cooperation among prosecutors, who will now work in prosecutorial units. Effective law enforcement suffered in the past from independent and autonomous judges, with no hierarchical superior monitoring their activities. The new system, by contrast, utilizes a pyramidal and vertical structure, in which all prosecutorial units will act under the direction of their hierarchical superiors and, ultimately, the *Fiscalía*.<sup>116</sup>

Effective law enforcement should be enhanced by this concentration of prosecutorial duties in the *Fiscalía*. More importantly, newer and more complex forms of crime—drugtrafficking, white collar crime, etc.—cannot be fought by lone individuals. As is becoming manifestly evident in international law enforcement, teamwork—both within and between nations—is needed to combat the increasingly well-organized and well-financed criminal organizations operating on Colombian soil.<sup>117</sup> Further, opportunities for corruption in the new system should be reduced significantly, because the prosecutors will be subject to the close scrutiny of their superiors.<sup>118</sup>

Effective law enforcement should also be enhanced as the

113. See, e.g., Rudolph W. Giuliani, *Organizing Law Enforcement as Well as Organized Crime*, 45 U.S. PUBLIC ADMIN. REV. 712 (1985).

114. Casas, *supra* note 102.

115. *Id.*

116. F.G.N., *supra* note 56, art. 19.

117. See William Drozdiak, *World Crime Groups Expand Cooperation, Spheres of Influence*, WASH. POST, Oct. 5, 1992, at A12. As international crime groups have been working together rather than competing against each other, "cooperation among international police authorities [has become] much more vital." *Id.*

118. McGillis, *supra* note 42, at 17.

judicial police are now subordinate to the *Fiscalía*.<sup>119</sup> This is important for two main reasons. First, the prosecutorial units will now have a special corps of investigators working exclusively at their direction. As such, criminal investigations will be of national scope, with police investigations subject to the supervision of the *Fiscalía*.

Of equal importance, due to the history of human rights abuses by the Colombia police, it is necessary to have a central institution—such as the *Fiscalía*—to monitor and control police investigations. In the past, the police tended to extend their duties beyond being auxiliaries of the judicial system in the war against crime to being auxiliaries of the military in the war against guerrillas. The new constitution, by making the *Fiscalía* responsible for coordinating the judicial police, will help to ensure that the police are not soldiers with a policeman's badge. In part for this concern, Colombian police, while retaining some autonomy in the preliminary investigative stage,<sup>120</sup> may not order an arrest, search a dwelling or a person, intercept communications, or do any act which would violate a person's privacy without a prosecutorial order.<sup>121</sup> Indeed, once an investigation has begun, the police may act *only* at the direction of the prosecutor.<sup>122</sup> A "pure" prosecutorial system, such as in the United States, in which police generally have the complete responsibility for the development of investigations, acting more or less independently, would be a grave error in Colombia, given the history of the abuse of police power.<sup>123</sup>

It should be added that the use of prosecutorial units, as well as enhancing law enforcement, should have the salutary effect of protecting prosecutors. Although the secret court system already handles the cases typically associated with violence to the judiciary—drugs and terrorism—prosecutors are still exposed to threats (and bribery). However, the new system no longer has *individual* judges with *individual* responsibility for cases. Rather, prosecutorial *units* investigate and bring charges. Unless a criminal suspect tries to threaten or bribe an entire prosecutorial unit, individual prosecutors will be pro-

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119. See Pintura, *supra* note 32, at 18.

120. N.C.P.P., *supra* note 30, art. 312.

121. *Id.* art. 313.

122. *Id.*

123. See Pintura, *supra* note 32, at 19.

tected. Simply put, it is far easier to bribe or to intimidate a lone instruction judge, as in the past, than a nation-wide prosecutorial office.<sup>124</sup>

To illustrate this point by contrast, consider the U.S. system. In the United States, few judges and prosecutors receive threats, much less are assassinated, even though powerful criminal organizations such as the Mafia exist. Obviously, a facile comparison between Colombia and the United States should not be made. However, U.S. prosecutors and judges are protected in part because the determination of guilt or innocence is not vested in *individual actors in the criminal process*, but in *units or offices*. The individuals subject to intimidation in the United States tend to be those persons upon whom the case often rests, namely, witnesses.<sup>125</sup>

Accordingly, one of the most important changes in the new prosecutorial system is the protection of witnesses, victims, and intervenors in the criminal process.<sup>126</sup> With protection comes cooperation. By providing testimony, Colombians will not only work to lessen the impunity rate, but to fulfill their civic duty by helping to return the rule of law to their beleaguered country.

### C. *Fiscalía General or General Fiscal?*

While the above reforms should contribute to effective law enforcement, concern should be raised about the tremendous police powers which have been vested in the *Fiscalía*, with no warrant requirement. For example, the *Fiscalía* may give arrest orders,<sup>127</sup> order wire-taps,<sup>128</sup> and conduct searches and seizures,<sup>129</sup> without obtaining prior approval of a judge or magistrate. Furthermore, while the new constitution states that a person may not be arrested or detained without the writ-

124. McGillis, *supra* note 42, at 23.

125. As an illustration, consider the Mafia's alleged plan to kill the wife and children of Salvatore (Sammy the Bull) Gravano, chief witness in the trial of John Gotti, head of the Gambino family—the largest Mafia organization in the United States. Matthew Brelis, *Code Betrayal Seen as Sign of Mafia Erosion*, BOSTON GLOBE, Mar. 20, 1992, at 17.

126. See Pintura, *supra* note 32.

127. See N.C.P.P., *supra* note 30, arts. 37(4), 40(4).

128. *Id.*

129. *Id.*



ten order of a "judicial authority,"<sup>130</sup> this authority has been interpreted to be the *Fiscalía*, not a neutral judge. In the U.S. system, by contrast, the Fourth Amendment of the U.S. Constitution provides that search and seizures, such as those undertaken by the *Fiscalía*, may only be conducted under a warrant issued by a neutral magistrate, upon probable cause, particularly describing the place to be searched, and the person or things to be seized.<sup>131</sup> Wire-taps as well are subject to the warrant requirement.<sup>132</sup>

During the constitutional reform period, the fear expressed by many that the *Fiscalía* presented the potential to convert itself into an extremely powerful entity appears to have been proven correct.<sup>133</sup> During the constitutional convention, some felt that the *Fiscalía* should be part of the executive branch, appointed and removed at will by the president, as fighting crime is an executive function. As an office of the executive branch, the *Fiscalía* would have sufficient power to nip crime in the bud, and not just react after the fact, as judges did.<sup>134</sup>

Others expressed concern, however, about placing increased power in the executive branch in a country with a long history of authoritative abuse of presidential power.<sup>135</sup> From this perspective, independent instruction judges in the judicial branch had been a force *against* arbitrary executive power, and this separation should be retained in the new constitution.<sup>136</sup> However, placing the *Fiscalía* in the judicial branch has not checked its power, as supporters had hoped, for Medusa-like, power unchecked in one branch will grow anew unchecked in another.

The reason that this placing of such unchecked investigative powers in the *Fiscalía* is of such concern is that Colombia has violated a fundamental principle of the prosecutorial sys-

130. CONSTITUCIÓN POLÍTICA DE COLOMBIA [Constitution], art. 28.

131. U.S. CONST. amend. IV.

132. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 prescribes the procedures for obtaining and execution of electronic surveillance activities by federal and state law enforcement authorities. 18 U.S.C. §§ 2510-2521 (1992).

133. See Giraldo & Yepes, *supra* note 5, at 41.

134. See Flores, *supra* note 10, at 13.

135. See Giraldo & Yepes, *supra* note 5, at 41.

136. *Id.*

tem, namely, the separation of the prosecutorial and the judicial function.<sup>137</sup> According to the New Code of Criminal Procedure, the *Fiscalía* both directs and decides the legality of the criminal investigation. Simultaneously playing the role of prosecutor and judge, however, with the consequent unchecked power, is impermissible, even unimaginable, in a prosecutorial system.

While the judge in the prosecutorial system is passive in the investigative stage, she *must* be vigilant in relation to the detention of persons, mail covers, wire-tips, search and seizure, etc., for the judge is the sole protector of a person's liberty in the prosecutorial scheme.<sup>138</sup> From the Anglo-American perspective, the new Colombian system represents less a Lockean system of minimal government respecting the rights of citizens, and more a Hobbesian Leviathan capable of probing into the most intimate and private areas of a person's life, all in the name of law and order and investigative efficiency. While the Colombian reformers, although looking to foreign models, sought to create a system reflective of Colombia's existing legal system, values, and legal history,<sup>139</sup> and not to replicate foreign models,<sup>140</sup> they appear to have overlooked the provision of constitutional limits on the state's investigative power adopted in prosecutorial systems generally, a troubling scotoma in the reformers' vision.

Colombians defend this relatively unbridled power of the *Fiscalía* in several ways. One, since the system is a labelled a mixed inquisitorial/prosecutorial one, some feel this unchecked power in the *Fiscalía* is simply an outgrowth of the greater powers invested in the state in inquisitorial systems generally. Furthermore, some argue, the new Fiscales can call upon their previous experience as dual prosecutors/judges and thereby exercise self-restraint in exercising the powerful and probing criminal investigative techniques they have recently been given.

For those skeptical of the "self-restraint" or "self-polic-

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137. Reinaldo Botero Bedoya, *Derecho de Defenso, Sistema Acusatorio, y Fiscalía*, 8 (unpublished paper on file at the Andean Commission of Jurists, Colombian Section, Bogotá, Colombia).

138. *Id.*

139. See Cavalier, *supra* note 17, at 283.

140. See Flores, *supra* note 10.

ing" argument, especially in light of Colombia's history of abuse of state power, others argue that the new institutions of the *Oficina de Veeduría* and the *Procuraduría* provide sufficient mechanisms to control the *Fiscalía*.<sup>141</sup> However, it appears that these agencies will fail to adequately prevent the abuse of the power of the *Fiscalía* for two central reasons. First, neither institution works to *prevent* the violation of a citizen's constitutional rights before it occurs. Rather, both agencies are *reactive*, only working *after* a citizen's rights have been violated. In the U.S. system, by contrast, the role of the neutral magistrate in limiting and controlling criminal investigations works to nip violations of constitutional rights in the bud, rather than react after the fact.

Second, in the U.S. system, each and every citizen is protected from the intrusive power of the state through the procedural guarantees enacted in the Fourth Amendment. The danger in Colombia is that the inequality in material conditions will be replicated in the enforcement of constitutional and human rights. Stated differently, because the *Oficina de Veeduría* and the *Procuraduría* are *reactive* rather than *proactive* institutions, the potential exists that actions designed to protect individual, constitutional, and human rights will be limited to those with power in the system. The U.S. system, by providing a review of the government's decision to investigate or arrest any citizen, rich or poor, presents less possibility for governmental indifference or inaction.

#### *RECOMMENDATIONS AND CONCLUSIONS*

Colombia has embarked on an ambitious, some say revolutionary, project to reform its criminal justice system. The thoughtfulness and respect shown for the rule of law by the Colombian reformers should serve as a source of pride for all Colombians, as well as for those intimately concerned with her future.

In order to make the dream of returning the rule of law to this country a reality, however, certain reforms and changes should be undertaken. The optimal reform would be at the constitutional level, eliminating the *Fiscalía*'s power to autono-

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141. See Casas, *supra* note 102.

mously order actions which affect the fundamental rights of citizens: capture orders, detentions, search and seizures, etc. The potential for abuse by an uncontrolled *Fiscalía* is too great to go ignored for long. Americans learned from their treatment by the British government during the colonial period of the potential for abuse of governmental power. Only after a bloody revolution and a constitutional convention were Americans finally provided with a Bill of Rights ensuring them minimal guarantees and protection from the power of the state. The problem in Colombia is that the high rate of impunity and the consequent need to bring criminals to justice may blind some to the necessity of providing protection mechanisms ensuring citizens of fundamental rights of privacy and controlling the tentacular power of the state.<sup>142</sup> Colombia has recently served as a light to other nations in that judicial, not bloody, revolutions provide the path for peace and justice in this world. Hopefully this message will not go unheeded as Colombia contemplates further reforms in its criminal justice system.

Second, Colombia desperately needs aid, both monetary and educational, from countries using prosecutorial systems. Accordingly, programs recently initiated by the United States to train the new prosecutors should be maintained and strengthened. Furthermore, scientific help from the United States should continue to be given as well, because the technical know-how to commit crime is increasing faster than Colombia has the ability to fight it. And, above all, aid from the United States should be linked to human rights reforms. Any aid given must be well-monitored to ensure that it goes to help fight crime, not to kill guerrillas, as has occurred in the recent past.<sup>143</sup>

Third, assuming that constitutional reform does not provide for some judicial control of the *Fiscalía*, the *Oficina de*

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142. Indeed, recent polls indicate that a majority of Colombians would like to see the death penalty, whose prohibition is considered one of the most important human rights guarantees in the new constitution, instituted to fight guerrillas and narcotics traffickers. See Don Podesta, *Colombians Lash Out at Violence: Public Backs War on Cartels, Rebels*, WASH. POST, Dec. 6, 1992, at A33.

143. See Chris af Jochnik, *A Military Non-solution: U.S. Policy and the War on Drugs in Colombia* (unpublished paper on file at the Andean Commission of Jurists, Colombian Section, Bogotá, Colombia).

*Veeduría* and the *Procuraduría* should be closely monitored by human rights organizations to ensure that they adequately police the *Fiscalía* and that human rights violations in the criminal process do not go unpunished. With the increased power of the *Fiscalía* must come the increased power to question its actions, so that increased investigative powers are not abused.

Finally, it must be recognized that the crime plaguing Colombia has sources both structural and moral. The poverty of living conditions in Colombia has proved fertile ground for the growth of crime. Without change in socio-economic conditions, as well as in the criminal justice system, Colombia promises to continue to be unable to control its crime problem and return the rule of law to its citizens. Of equal importance, poverty in the United States—both material and spiritual—has produced a demand for drugs which Colombians and others are all too ready to supply. Changing criminal justice systems is a step in the right direction. Changing social conditions and values is a step exponentially more difficult, yet essential nonetheless.