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Justice Reform in Mexico: Change and Challenges in the Judicial Sector

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Brief Project Description

This Working Paper is the product of a joint project on U.S.-Mexico Security Cooperation coordinated by the Mexico Institute at the Woodrow Wilson Center and the Trans-Border Institute at the University of San Diego. As part of the project, a number of research papers have been commissioned that provide background on organized crime in Mexico, the United States, and Central America, and analyze specific challenges for cooperation between the United States and Mexico, including efforts to address the consumption of narcotics, money laundering, arms trafficking, intelligence sharing, police strengthening, judicial reform, and the protection of journalists. This paper is being released in a preliminary form to inform the public about key issues in the public and policy debate about the best way to confront drug trafficking and organized crime. Together the commissioned papers will form the basis of an edited volume to be released later in 2010. All papers, along with other background information and analysis, can be accessed online at the web pages of either the [Mexico Institute](#) or the [Trans-Border Institute](#) and are copyrighted to the author.

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Justice Reform in Mexico: Change & Challenges in the Judicial Sector

David A. Shirk

Overview: Judicial Reform in Mexico

As stories of crime and violence play out in the headlines, Mexico is in the midst of a major transformation of its judicial sector. Mexico has been gradually implementing a series of reforms that advocates hope will dramatically improve public security and the administration of justice over the next decade. Central to the process of judicial reform in Mexico is a package of ambitious legislative changes and constitutional amendments passed by the Mexican Congress in 2008, and to be implemented throughout the country by 2016. Together, these reforms touch virtually all aspects of the judicial sector, including police, prosecutors, public defenders, the courts, and the penitentiary system. The reforms include significant changes in Mexican criminal procedure, new measures to promote greater access to justice (for both criminal defendants and crime victims), new functions for law enforcement and public security agencies in the administration of justice, and tougher measures for combating organized crime.

Advocates of the reforms hope that they will help Mexico to achieve a more democratic rule of law by introducing greater transparency, accountability, and due process to Mexico's judicial sector. However, critics note that the reforms attempt to achieve too much in too little time, contain blatantly contradictory features, and fail to address persistent problems of institutionalized corruption. Meanwhile, although there has been substantial attention to Mexico's judicial sector reforms among Mexican scholars and legal experts, there has been remarkably little effort to outline these initiatives for a U.S. audience. As U.S. policy makers and experts contemplate renewed efforts to strengthen Mexican judicial sector institutions, there is great urgency to understand what progress has been made so far in Mexican judicial sector reform and what issues remain. This paper helps to fill the gap in our current understanding of these problems by explaining Mexico's justice sector challenges, the specific changes proposed under the 2008 reform package, and the challenges that lie in store for Mexico as it implements judicial sector reforms over the next decade.

Mexico's Public Security Crisis, Democratic Governance, and the Rule of Law

The Mexican criminal justice system has clearly faced critical challenges over the few last decades. While images of violence, lawlessness, and official corruption are often greatly exaggerated in stereotypes and media portrayals, Mexico has indeed experienced exceptionally high levels of criminal impunity and weak protections for the rights of accused criminals. A series of economic crises beginning in the mid-1970s contributed to elevated levels of violent crime —particularly robbery, property crime, and assault— which continued with the economic restructuring and currency devaluations in the 1980s and 1990s.¹ These

¹ An estimated one out of ten adults was a victim of a crime in Mexico in 2008, according to an annual crime victimization survey conducted by the Citizens' Institute for the Study of Insecurity (*Instituto Ciudadano de Estudios Sobre la Inseguridad*, ICESI). One major exception to the rising tide of crime in Mexico is found in

problems of “common crime” were accompanied by the corrupting effects and violent behavior of organized crime syndicates during this same period. Over the last decade, the problem of high-profile crime and violence reached new extremes, as exemplified by the more than 20,000 drug-related homicides from 2001-2009 (not including the nearly 3,800 from January to mid-May 2010), many of which have reached new levels of brutality and malice.² In recent years, especially, organized crime has had broader effects as drug trafficking organizations (DTOs) have diversified their activities to include arms smuggling, money laundering, kidnapping, bank robbery, and other forms of organized criminal activity.

In the face of these challenges, Mexico’s criminal justice system has exhibited significant dysfunctions, contributing to extraordinarily high levels of criminal impunity. This, in turn, has led to low public confidence in the judicial sector. In a 2007 Gallup poll, only 37% of Mexicans responded positively to the question, “do you have confidence in Mexico’s judicial system?,” while 58% said “no” and 4% “don’t know.”³ According to Mitofsky, a polling firm, police are ranked among the least respected Mexican institutions; just one in ten Mexicans has some or much confidence in police agencies.⁴ Mexican citizens distrust law enforcement officials not only because of the perception that authorities are unable to solve crimes, but because of the perception (and reality) that there is widespread corruption and criminal activity on the part of justice system operatives, most notably police.⁵ As a result, victimization surveys suggest, 25% or fewer crimes are even reported, making the true incidence of crime a “black statistic” (*cifra negra*).⁶

Much of the problem has to do with the fact that Mexico’s new democracy is still in the process of developing a “democratic” police force and a professional, independent judiciary. Historically, Mexican law enforcement agencies were an extension of autocratic or semi-authoritarian systems of control, and have long exhibited significant problems of institutional corruption. Police organizations were generally able to impose order, but were also used as instruments of patronage and political coercion.⁷ Mexico's transformation from a virtual one-

homicide rates, which have generally declined since the mid-20th century, despite rising levels of violent crime. Donnelly and Shirk (2009), ICESI (2009).

² Flores Pérez (2010), Shirk (2010).

³ Ray (2008).

⁴ To be sure, the only institutional actors in Mexico less well respected than police are unions, legislators, and political parties. Consulta Mitofsky (2010).

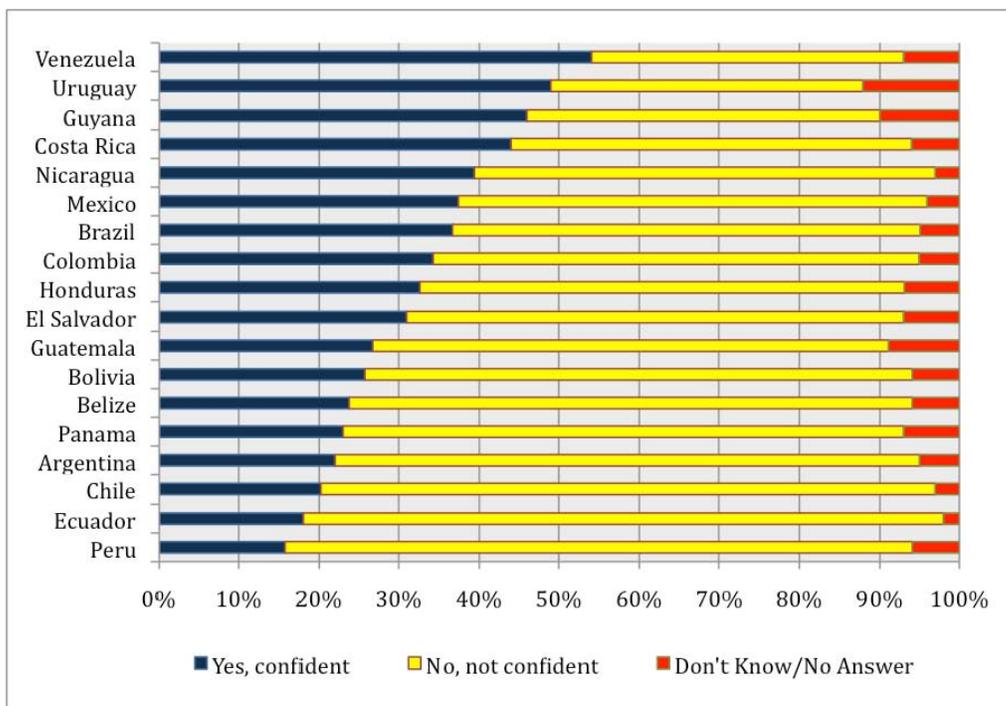
⁵ Indeed, according to a recent survey conducted by the *Justice in Mexico Project*, police themselves perceive a high degree of corruption on the force. Out of more than 5,400 municipal police officers surveyed, roughly a third described severe problems of corruption; 40% showed little trust in their superiors; and 68% said that corruption is concentrated at high levels within their department. Only about half (52%) felt that there are adequate mechanisms for investigating corruption. 32% indicated that the problem most concerning to citizens is drug trafficking; 29% indicated that the problem most difficult for local police to solve is drug trafficking; and 45% said that the illicit criminal activity in which local police are most likely to be involved is drug trafficking. Moloeznik, et al. (2009).

⁶ ICESI victimization surveys suggest that no more than a quarter of all crimes (roughly 22% in 2008) are actually reported. 39% of those who don’t report crimes indicate that it is a waste of time; the next largest proportion (16%) indicate that they do not trust the authorities, and 10% say that the process of reporting a crime is too cumbersome. A third (33%) of those who reported a crime said that there was no result from reporting the crime. See www.icesi.com.mx

⁷ Vanderwood (1970), Vanderwood (1992), Arteaga Botello and López Rivera (1998), Yáñez R (1999), Davis (2006), Davis (2008), Uildriks (2009).

party state into a multi-party democracy has brought significant changes with regard to the expectations for the nation's public security apparatus, making the use of traditional coercive tactics and accommodation of organized crime unacceptable. Partly as a result of their evolving role, police organizations not only lack the capacity to adequately enforce the law, but the degree of accountability that promotes greater effectiveness, professionalism, integrity, and adherence to due process.⁸ In other words, police reform has not kept pace with Mexico's democratic regime change.

Figure 1: Latin American Confidence in Judicial Institutions



Source: 2007 Gallup Poll. Responses to the question: "In your country, do you have confidence in each of the following institutions or not? Judicial system and courts." Ray, Julie. "Mexico's Citizens Ready for Improved Justice System," Gallup Poll, February 20, 2008. <http://www.gallup.com/poll/104455/Mexicos-Citizens-Ready-Improved-Justice-System.aspx>

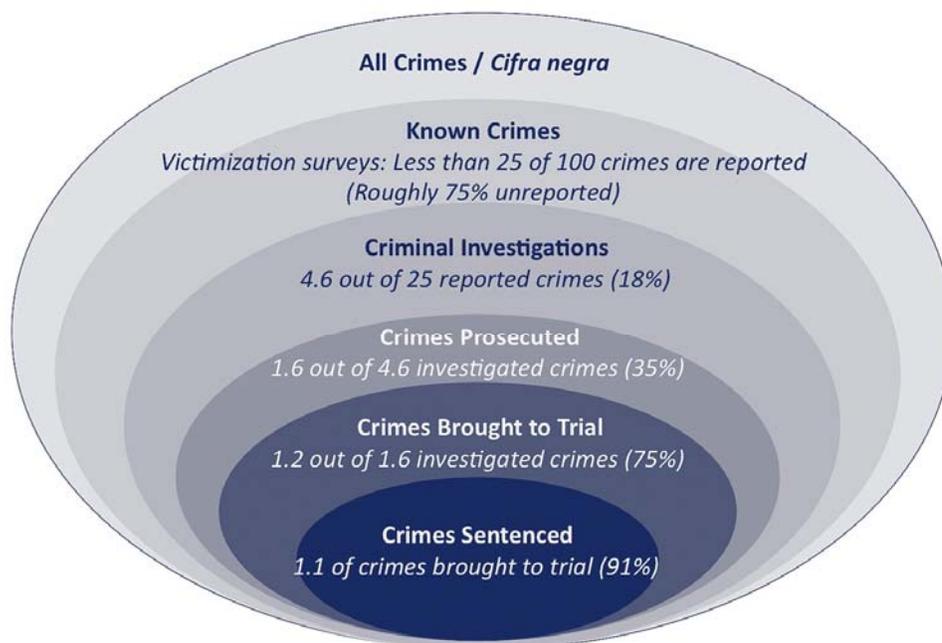
Meanwhile, by many accounts, the administration of justice through Mexico's court system has also proved woefully inadequate. As is common to other parts of Latin America, the problems faced by Mexican judiciary are largely attributable to the historical neglect if not outright subversion of the institution in the political system. Due to several factors that hindered democratic development in the 19th and 20th centuries, Mexico's judiciary has been far weaker than the legislature and (especially) the executive branch.⁹ In Mexico and most

⁸ Varenik (2003).

⁹ Post-independence political instability in the 19th century, the 34-year dictatorship of General Porfirio Díaz (1876-1910), and severely restricted terms of democratic competition during 71 years of uninterrupted rule by the Institutional Revolutionary Party (PRI) significantly impeded the development of judicial independence in Mexico. Under the PRI, for example, judicial appointments depended heavily on loyalty to the ruling party and judicial decisions only rarely contradicted the elected branches of government controlled by the party. Zamora, et al. (2005), Schatz, et al. (2007).

Latin American countries, large majorities express a lack of confidence in judicial sector institutions (Figure 1).¹⁰ In Mexico, these concerns owe partly to persistent and deeply engrained problems in the functioning of courts and penal institutions, which suffer from significant resource limitations and case backlogs. As a result, only about one in five reported crimes are fully investigated, and an even smaller fraction of these result in trial and sentencing. The net result is widespread criminal impunity, with perhaps one or two out of every 100 crimes resulting in a sentence (See Figure 2).¹¹ For the victims of crimes in Mexico, there is rarely any justice.

Figure 2: The Lifecycle of a Crime in Mexico



Source: Guillermo Zepeda Lecuona, "Criminal Investigation and Subversion of Justice System Principles," in *Reforming the Administration of Justice in Mexico*, 2007. Numbers rounded to nearest tenth.

Yet, there are also problems of access to justice for those accused of a crime. Those few cases in which a suspect is detained and brought to trial are hampered by lengthy, inefficient criminal proceedings that often lack an adherence to due process.¹² Police investigators are often poorly trained and inadequately equipped to employ modern investigative and forensic

¹⁰ After decades of irrelevance in Latin America, courts have played an increasingly important role in addressing issues of transitional justice, in constitutional deliberations, and in reforms to the administration of justice throughout the region. A central theme throughout much of the new literature on the judiciary in Latin America is the link between democracy and the rule of law, particularly the role of the courts in protecting a democratic society against abuses of authority in a context of political uncertainty. Fix-Zamudio (1986), Melgar Adalid (1995), Domingo (1996), Fix-Zamudio and Cossío Díaz (1996), Jarquín and Carillo Florez (1998), Prillaman (2000), Domingo and Sieder (2001), Ungar (2001), Biggar (2003), Magaloni (2003), Domingo (2004), Hilbink (2007).

¹¹ Zepeda Lecuona (2004).

¹² Human Rights First (2001).

techniques in the course of a criminal proceeding. State and federal investigative police agencies exhibit disturbing patterns of corruption and abuse, including the use of bribery and torture, according to surveys of prison inmates.¹³ Meanwhile, during the course of criminal proceedings, defendants are frequently held in “pre-trial detention,” with very limited access to bail even when the offense is relatively minor.¹⁴ During pre-trial detention and despite the “presumption of innocence,” the accused are frequently mixed with the general prison population while they await trial and sentencing. Because of lengthy delays in criminal proceedings, many defendants languish in jail for months or years without a sentence.¹⁵

Once a suspect has been identified, however, a guilty verdict is highly likely, particularly when a suspect is poor and the crime is petty. Indeed, although the probability of being arrested, investigated, and prosecuted for a crime is extremely low, as many as 85% of crime suspects arrested are found guilty.¹⁶ Recent studies suggest that nearly half of all prisoners in Mexico City were convicted for property crimes valued at less than 20 dollars.¹⁷ According to critics of Mexico’s criminal justice system, these patterns are attributable to the lack of an adequate defense, and the fact that there is ready acceptance of the prosecutor’s pre-trial investigations as evidence at trial. Also, in this context, a suspect’s guilty plea is often the sole cause for indictment and conviction, and a disturbingly high proportion of torture cases in Mexico involves forced confessions.¹⁸ Meanwhile, armed with superior resources, access to evidence, and procedural advantages, public prosecutors are often able to easily overpower the meager legal defense available to most accused criminals. Additionally, faced with overwhelming caseloads, the judge that rules on preliminary hearings is the same judge at trial and sentencing, and frequently delegates matters—including court appearances—to courtroom clerks. As a result, many inmates report that they never even had a chance to appear before the judge who sentenced them.

Once in prison—whether for pre-trial detention or final sentencing—inmates typically encounter severely overcrowded facilities, inadequate access to basic amenities, corrupt and abusive prison guards, violence and intimidation from other inmates, and ongoing criminal behavior (including rampant drug use).¹⁹ According to official statistics, on average Mexican

¹³ As discussed below, municipal police do not conduct investigations. However, patterns of corruption and abuse associated with police investigations collected at the federal and state level are indicated by prisoner responses to survey questions regarding the use of bribery and physical coercion in the criminal justice system. Azaola and Bergman (2007).

¹⁴ International Rehabilitation Council for Torture Victims (IRCT) (2006), Lara Klahr (2008), Human Rights Watch (2009), Luhnnow (2009).

¹⁵ Luhnnow (2009).

¹⁶ The fact that a preponderance of those found guilty are poor people charged with petty offenses suggests that some who can afford to do so may “buy” their way out of criminal charges. *Ibid.*

¹⁷ Tobar (2008).

¹⁸ According to the International Rehabilitation Council for Torture Victims (IRCT), a “majority of torture reports and other human rights violations continue to occur in the context of the administration of justice, particularly during the investigative and prosecutorial phases of criminal proceedings. Furthermore, there is a growing number of torture complaints of political detainees against the security forces.” Indeed, according to Mexico’s human rights ombudsman, as many as 90% of reported torture cases are the result of the forced confessions of prisoners. Hernández Forcada and Lugo Garfias (2004), p. 139; International Rehabilitation Council for Torture Victims (IRCT) (2006), p. 8.

¹⁹ Regarding drug use, Azaola and Bergman (2009) cite evidence that many inmates entered prison without prior drug use, but developed an addiction once in prison. This implies added social costs, Azaola and Bergman

prisons are overcrowded by more than 30% above capacity in 2009, and with continuously growing populations. Prisons in the Federal District and Mexico State, the two entities with the largest prison populations operated at 212% and 183% capacity, respectively. According to a survey conducted in those same states by Bergman and Azaola (2009), conditions inside prisons are very bad and getting worse; in 2009, over 70% of inmates reported that they did not have enough food, a dramatic increase from previous years.²⁰ In recent years, these conditions have contributed to serious problems of rioting and escapes that have plagued Mexican prisons.²¹ More important, these conditions illustrate the inadequacy of Mexico's current penal system—and perhaps the use of incarceration, in general—as a means of promoting the rehabilitation of convicted criminals.²²

In short, the overall picture is one where the “un-rule of law” prevails and there is a severe lack of access to justice, particularly for the indigent.²³ For Mexico and other Latin American countries that have undergone democratic transitions in recent decades, achieving the rule of law presents a major test of regime performance, since perceptions of the judicial system appear to be positively correlated with support for democratic governance.²⁴ In Mexico, concerns about the country's on-going public security crisis have led authorities to introduce major changes with the goal of modernizing the nation's law enforcement agencies and empowering the judiciary. Whether they are successful may have important implications for overall support for democratic governance, and significantly shape the decisions of the Mexican electorate in the coming years. To better evaluate the challenges that reformers face, the contours of the country's criminal justice system and the nature of recent reform initiatives are considered in more detail below.

What Kind of Reform? Oral Trials, Due Process, and More

The legal foundations of the Mexican criminal justice system are found in the country's post-independence constitutions, as well as both federal and state administrative laws, criminal codes, and criminal procedure laws (See Table 1).

argue, since addicted prisoners are more likely to become connected to other delinquents and develop full-fledged criminal careers. Azaola Garrido (1990), H. Bringas and Roldán Quiñones (1998).

²⁰ The Federal District and the State of Mexico account for a combined total of about 28% of Mexico's entire prison population. Azaola and Bergman (2009).

²¹ Twenty died and dozens were wounded in an August 2009 prison riot in which police later confiscated numerous makeshift weapons, guns, and a fragmentation grenade. Justice in Mexico Project (2009). <http://www.justiceinmexico.org/news/pdf/justiceinmexico-august2009news-report082109.pdf>. (Accessed March 1, 2010).

²² Mexico is not alone in this regard. A veritable “boom” in incarcerations in the United States has increasingly raised serious questions about the effectiveness of supposedly “modern” prison facilities with regard to either the prevention of crimes or the rehabilitation of those who commit them. Even worse, prisons appear to perpetuate and intensify social inequalities. Writing in 2009, Raphael and Stoll point out that, in the United States, “less-educated minority men are considerably more likely to be incarcerated currently than at any time in the past.” Raphael and Stoll (2009).

²³ Méndez, et al. (1999) Bailey and Godson (2000), Bailey and Chabat (2001), Cumaraswamy (2002), Zepeda Lecuona (2004), Davis (2006), Cornelius and Shirk (2007), Donnelly and Shirk (2009).

²⁴ There is a correlation coefficient of .5026 between country evaluations of democratic governance reported in the 2008 Latinobarómetro and perceptions of judicial system performance reported in the 2007 Gallup poll. This is suggestive of a relationship between citizen perceptions of democracy and the effectiveness of judicial institutions.

Table 1: Legal Foundations of the Mexican Criminal Justice System

| Source | Origins and Evolution | Key Provisions |
|--|--|--|
| Mexican Constitution (<i>Constitution de la República Mexicana</i>) | <ul style="list-style-type: none"> • 1917: reformulation of the Liberal, rights-based 1857 Constitution, with the incorporation of key Mexican revolutionary principles promoting social justice, municipal autonomy, and prohibitions on re-election | <ul style="list-style-type: none"> • Articles 14, 16, and 18-23: individual guarantees • Articles 94-107: role and function of the federal judiciary • Article 102: role of the federal attorney general, or <i>Ministerio Público Federal</i>) • Article 122: the role of the public prosecutor in the Federal District. • Article 103, 107: the right to a legal injunction (<i>amparo</i>) |
| Organic Law of the Federal Judicial Power (<i>Ley Orgánica del Poder Judicial de la Federación, LOPJF</i>) | <ul style="list-style-type: none"> • 1908, 1917, 1928, 1934, and 1935: LOPJF contained modifications to role of public prosecutor. • 1995: new LOPJF with provisions for judicial review and vetting of judiciary, and last modified in January 2009 | <ul style="list-style-type: none"> • Eleven separate titles and 251 articles establish the general regulations for federal court system including the Supreme Court, Federal Juridical Counsel, Circuit Courts, District Courts, and Federal Electoral Tribunal • Rules on jurisdiction and transfer cases from lower courts (<i>atracción</i>), professional advancement, and use of juries. |
| Organic Law of the Federal Attorney General (<i>Ley Orgánica de la Procuraduría General de la República, LOPGR</i>) | <ul style="list-style-type: none"> • 1908 and 1919: Organic laws established to regulate Federal Public Prosecutor • 1917: Article 21 of Constitution outlines functions of public prosecutors • 1983: LOPGR establishes Federal Attorney General's office | <ul style="list-style-type: none"> • Series of regulatory laws and modifications to the LOMPF in 1941 and 1955 and the LOPGR in 1984, 1985, 1987, 1988, 1993, and 1996 progressively strengthened prosecutorial autonomy and restructured federal law enforcement agencies in Mexico. |
| Federal Criminal Code (<i>Código Penal Federal, CPF</i>) | <ul style="list-style-type: none"> • 1835: first Mexican criminal code adopted in Veracruz; • 1860s: Emperor Maximilian adopts French criminal code; 1871: Juárez adopts CPF (following Spanish model) • 1931: Post-revolutionary government adopts new CPF • 2008: Judicial reform significantly modifies CPF | <ul style="list-style-type: none"> • Volume I of the CPF outlines general principles of criminal law (what constitutes a crime, types of criminal offenders, and principles of punishment). • Volume II of the CPF deals with specific crimes and their punishments. |
| Federal Code of Criminal Procedure (<i>Código Federal de Procedimientos Penales, CFPP</i>) | <ul style="list-style-type: none"> • 1934: post-revolutionary government enacts new CFPP • 2009: Most recent modification to CFPP • Further modifications are pending review by the Mexican Supreme Court to adapt federal criminal procedure to the 2008 judicial reforms. | <ul style="list-style-type: none"> • Thirteen titles and 576 articles regarding jurisdiction; search and seizure; court appearances; pre-trial proceedings; criminal actions; probable responsibility; presentation of evidence; concluding arguments; acquittals and judgments; post-trial phase; rehabilitation; special cases (mental illness, juvenile offenders, drug addiction). |
| State Organic Laws, Criminal Codes, and Criminal Procedural Codes | <ul style="list-style-type: none"> • 31 state codes • Federal District codes | <ul style="list-style-type: none"> • While there is considerable variation, state laws and codes generally adhere to standards established at the federal level. |

According to Zamora, *et. al.*, (2005), the first Mexican criminal code was introduced by the State of Veracruz in 1835. During the government of Emperor Maximilian (1864-67), Mexico briefly adopted the French criminal code. Later, following the example of Spain, Mexico adopted the 1871 Federal Criminal Code (*Código Penal Federal, CPF*) under President Benito Juárez. Generally speaking, these foundations placed Mexico within the civil law tradition, which typically relies on an inquisitorial model of criminal procedure where an instructional judge actively leads the investigation and process of determining a

suspect's guilt or innocence. It is important to note that there is enormous variation in the application of inquisitorial criminal procedures. Indeed, Mexico has developed a highly unique legal tradition that mixes elements of different systems and includes several unique features, such as a special writ of protection or injunction (*juicio de amparo*).²⁵

The advent of a new revolutionary constitution in 1917 brought further adaptations of Mexico's criminal justice system, and new efforts to reform the country's criminal codes over the next decade and a half.²⁶ First, the new constitution eliminated the Ministry of Justice and, importantly, the figure of the instructional judge; as discussed below in more detail, this placed prosecutors in a more central role in the investigation and prosecution of crimes, a move that set Mexico significantly apart from other inquisitorial systems. Second, a new criminal code—outlining both the principles of Mexican criminal law, and specific crimes and punishments—was finally enacted in 1931, and has remained the primary basis of Mexican criminal law throughout most of the post-revolutionary period. The formal procedures associated with the Federal Criminal Code (*Código Federal Penal*, CFP) are contained in the Federal Code of Criminal Procedure (*Código Federal de Procedimientos Penales*, CFPP) generated in 1934. The CFP and CFPP generally set the example for state-level criminal codes and procedures, though there is significant variation across different states (particularly with regard to criminal codes).

Over the last two decades, a series of reforms to the above structures have been implemented in Mexico, with substantial implications for the criminal justice system and democratic governance overall. The 1980s brought the dismantling of the nation's federal police agency, as well as new structures for coordinating national security policy, under President Miguel de la Madrid (1982-88).²⁷ In December 1994, under President Ernesto Zedillo (1994-2000), the federal government restructured the national public security system and reformed the

²⁵ A *juicio de amparo*, also simply referred to as an *amparo*, is literally a legal "writ of protection" that provides an injunction blocking government actions that would encroach on an individual's constitutional rights. An *amparo* grants individuals certain rights, including: (1) defending liberty, life and personal dignity; (2) defending individual rights against unconstitutional laws; (3) examining the legality of judicial decisions; (4) protecting against governmental actions; and (5) protecting against actions by *ejidos* (communal farms). A court's decision to grant an *amparo* effectively places an injunction for a given party to cease and desist an offending action. This injunction is only binding for the parties involved in that particular case case (i.e., *inter partes* effects).

²⁶ Speckman Guerra (2007).

²⁷ The Federal Security Directorate (*Dirección Federal de Seguridad*, DFS) oversaw domestic security matters from 1947 to 1985, and served as a primary instrument of social and political control for the federal government. The dissolution of the DFS, due to problems of rampant corruption, led to the creation and destruction of a series of new federal law enforcement agencies over the next two decades. The DFS was replaced by the (*Centro de Investigación y Seguridad Nacional*, CISEN). Later, indications of widespread corruption in another federal police agency, the Federal Judicial Police (*Policía Federal Judicial*, PFJ), led to its replacement by the Federal Investigative Agency (*Agencia Federal de Investigación*, AFI) by presidential decree in 2001, ostensibly to develop capabilities similar to the U.S. Federal Bureau of Investigation. However, in December 2005, the PGR announced that nearly one-fifth of AFI officers were under investigation for suspected involvement in organized crime; as discussed below, the agency was dissolved in 2009. Justice in Mexico Project, *Justice in Mexico News Report*, June 2009.

<http://www.justiceinmexico.org/news/pdf/justiceinmexico-june2009news-report062309.pdf> (Accessed February 22, 2010).

judiciary to promote higher professional standards,²⁸ stronger powers of judicial review,²⁹ new standards for judicial precedent,³⁰ and greater judicial independence.³¹ In November 1996, the Zedillo administration also introduced the Federal Organized Crime Law (*Ley Federal de Delincuencia Organizada*, LFDO) to address the expanded power and proliferation of organized crime syndicates in recent decades.

Arguably, the most substantial efforts to promote judicial sector reform began during the administration of Vicente Fox (2000-2006), the first president originating from the National Action Party (*Partido Acción Nacional*, PAN), a socially conservative, pro-business party founded in 1939. In April 2004, the Fox administration proposed a series of constitutional and legislative changes to modernize Mexico's criminal justice system.³² The 2004 proposal pressed for a comprehensive reform of including, among other major changes, a shift from Mexico's unique variation of the inquisitorial system toward a more adversarial model. Although the Fox administration was able to pass significant reforms to the juvenile justice system in 2003, the 2004 justice reform package met significant resistance and ultimately stalled in the legislature.³³ Despite failing to win congressional approval, the Fox administration's proposal triggered a national debate on the merits of a major judicial reform, and also signaled federal approval to Mexican states working to implement similar reforms at

²⁸ The reforms introduced in December 1994 created a new oversight mechanism, known as the Federal Judicial Council (*Consejo de la Judicatura Federal*, CJF), for vetting or evaluating the professional qualifications of judges prior to appointment. The CJF is a mixed body comprising seven individuals, including the Chief Justice of the Supreme Court, one other appointed judge, two district magistrates, two members chosen by the Senate, and one member appointed by the Mexican president. These members serve four-year, non-renewable terms. The creation of such councils is a regional phenomenon developed in Latin America during the 1990s. Ungar (2001).

²⁹ The reforms also expanded the Supreme Court's powers of judicial review by introducing "motions of unconstitutionality" (*acciones de inconstitucionalidad*). This innovation allowed key institutional actors—the executive branch, political parties, and a designated proportion of representatives from the Senate, the Chamber of Deputies, and the Mexico City legislature—to challenge the constitutionality of legislation or other government actions.

³⁰ While *amparo* decisions have *inter partes* effects, universally binding precedents (*erga omnes* effects) can only be established after the Supreme Court or collegiate circuit courts make five consecutive and identical majority rulings on the same topic in *amparo* cases, provided that the collegiate court decisions are not contradicted by the Supreme Court. In such cases, this establishes a legal precedent known as a *jurisprudencia*, in reference to the published summaries that compile and document modifications in Mexican law. In effect, precedents through *jurisprudencia* establish a very limited form of *stare decisis* in the Mexican legal system. Still, generally speaking, while decisions made by judges in other cases can be (and often are) informally consulted and found to be persuasive in determining the outcome in a case, they do not set binding precedents.

³¹ Recent decisions (such as the court's June 2007 verdict on the *Televisa Law*) signal a growing sense of autonomy on the part of the Mexican Supreme Court, which may constitute the beginning of a new era of judicial independence and activism in Mexico. Ultimately, though, the political factors that motivated the 1994 reform are the subject of some scholarly debate, with some scholars describing the reforms as an "insurance policy" for the PRI in anticipation of its electoral decline. See: Beer (2006), Begné Guerra (1995), Domingo (2000), Inclán Oseguera (2004), Finkel (2008), Inclán Oseguera (2009).

³² For a more complete discussion of the 2004 judicial reform package proposed by the Fox administration, see Shirk and Ríos Cázares (2007).

³³ In 2003, there were several significant modifications to the Federal Juvenile Delinquency Law (*Ley para el Tratamiento de Menores Infractores*, LTMI).

the sub-national level.³⁴ The states of Nuevo León, Chihuahua, and Oaxaca were among the earliest adopters of new adversarial procedures and other innovations.³⁵

While few concrete process indicators are available to gauge their impacts, the perception that these state-level reforms contributed to greater judicial efficiency and transparency helped build support for the adoption of federal level judicial reforms by the Mexican Congress in March 2008, during the current administration of PAN President Felipe Calderón (2006-2012). The reforms benefited from widespread support among jurists, academics, and human rights advocates favoring a greater emphasis on due process protections.³⁶ The reforms also gained broad political support in part because of elevated levels of violence from organized crime, which took sharp upswings in 2007 and 2008.

The 2008 reforms comprise **four main elements**: 1) changes to criminal procedure through the introduction of new oral, adversarial procedures, alternative sentencing, and alternative dispute resolution (ADR) mechanisms; 2) a greater emphasis on the rights of the accused (i.e., the presumption of innocence, due process, and an adequate legal defense); 3) modifications to police agencies and their role in criminal investigations; and 4) tougher measures for combating organized crime. Each of these elements is explored in more detail below.

1) “Oral Trials”: Changes in Mexican Criminal Procedure

Arguably, the most heralded aspect of the 2008 reforms is the introduction of “oral trials,” with live public proceedings to be held in open court. However, popular emphasis on the novelty of “oral” trial procedures is somewhat misleading for two reasons.³⁷ First, Mexican criminal courts have traditionally relied on the use of oral testimony, presentation of evidence, and argumentation, in at least some fashion.³⁸ Therefore, a more appropriate aspect of the reform to emphasize is the larger transition from Mexico’s unique inquisitorial model of criminal procedure to an adversarial model that draws elements from the United States, Germany, Chile, and other countries. A second reason that the emphasis on “orality” is somewhat over-played is that, with the transition to adversarial trial proceedings, live oral

³⁴ In 2005, the Justice in Mexico Project sponsored a briefing of the Mexican Senate to outline the arguments for and against the Fox reforms. The technical analysis generated by the project was then disseminated to inform debates occurring at the state and local level. Gonzalez Placencia, et al. (2005).

³⁵ Mangis and Szmania (2008), Márquez-Carrasquillo and Shirk (2008).

³⁶ Soon after the reforms were passed, Mexico’s National Human Rights Commission indicated the reforms were intended to “adjust the system to the principles of a democratic rule of law, such as guaranteeing the rights of victims and the accused and the impartiality of trials, to develop more effective practices against organized crime and in the functioning of prisons, as well as linking the National Public Security System to the protection of human rights, and obliging authorities at all three levels of government to coordinate broadly and truly share information on criminality and police personnel; to regulate the vetting, training and tenure of personnel, to certify competency, and open spaces for social participation in evaluation [of the system].” Comisión Nacional de Derechos Humanos (2008). Author’s translation.

³⁷ Advocates of judicial reform began to utilize the reference to “oral trials” in a deliberate manner, because the concept provided a simple visual for encapsulating the many changes entailed in the reform.

³⁸ Contrary to popular opinion, not all aspects of traditional Mexican criminal law are based on written affidavits (*expedientes*). In the evidentiary phase (*instrucción*) within the larger process of a criminal trial (*proceso penal*), judges frequently interview victims, suspects, witnesses, prosecutors, and defense attorneys “orally.” Certain portions of criminal proceedings, particularly at the pre-trial evidentiary (*pre-instrucción*) hearing, occur in live court sessions.

trials will be used in only a small fraction of the criminal cases managed by Mexican courts. This is because the reform involves other changes, notably alternative sentencing mechanisms and plea-bargaining (*juicio abreviado*). These procedural options will hopefully reduce the overall number of cases handled in court, and thereby relieve congestion in the criminal justice system. With sentences that contemplate alternatives to prison (such as mediation, community service, reparations to victims, etc.), the reforms are intended to achieve greater efficiency and restorative justice (*justicia restaurativa*).

It should be pointed out that, contrary to conventional wisdom, Mexico does not have a true inquisitorial system, in which the judge plays a leading role as the “inquisitor” overseeing the investigation and prosecution of a criminal case. Rather, Mexico has its own unique adaptation on that system, which evolved on its own trajectory after independence.³⁹ As illustrated in Figure 3, a criminal proceeding in Mexico begins when a criminal act is reported to the public prosecutor (*ministerio público*) in one of three ways: a) police must report all crimes they observe through investigation or *in flagrante*, b) a victim or a third party plaintiff (*ofendido*), may file a report (*denuncia*), or c) the victim may present a “private criminal charge,” or a *querrela*, in which the victim himself or herself stands as the accuser (*querellante*) of the suspect.⁴⁰

³⁹ As Hammergren notes, there is a significant degree of variation in the application of the inquisitorial model, also referred as the “Continental” model. Moreover, because they developed their own unique legal traditions after independence, most Latin American legal systems have gaps and idiosyncracies that make them quite distinctive from the inquisitorial model practiced in Europe (and greatly refined in the years after Latin American independence). Hammergren asserts that attempts to “fix” Latin American legal systems should focus on the flaws of those systems, rather than focusing on the differences between the accusatorial and inquisitorial models. Hammergren (1998), Hammergren (2007).

⁴⁰ This is not unique to Mexico, since the same methods are found in the inquisitorial systems used in Spain and Latin America.

Figure 3: Key Steps in Traditional Criminal Procedure in Mexico

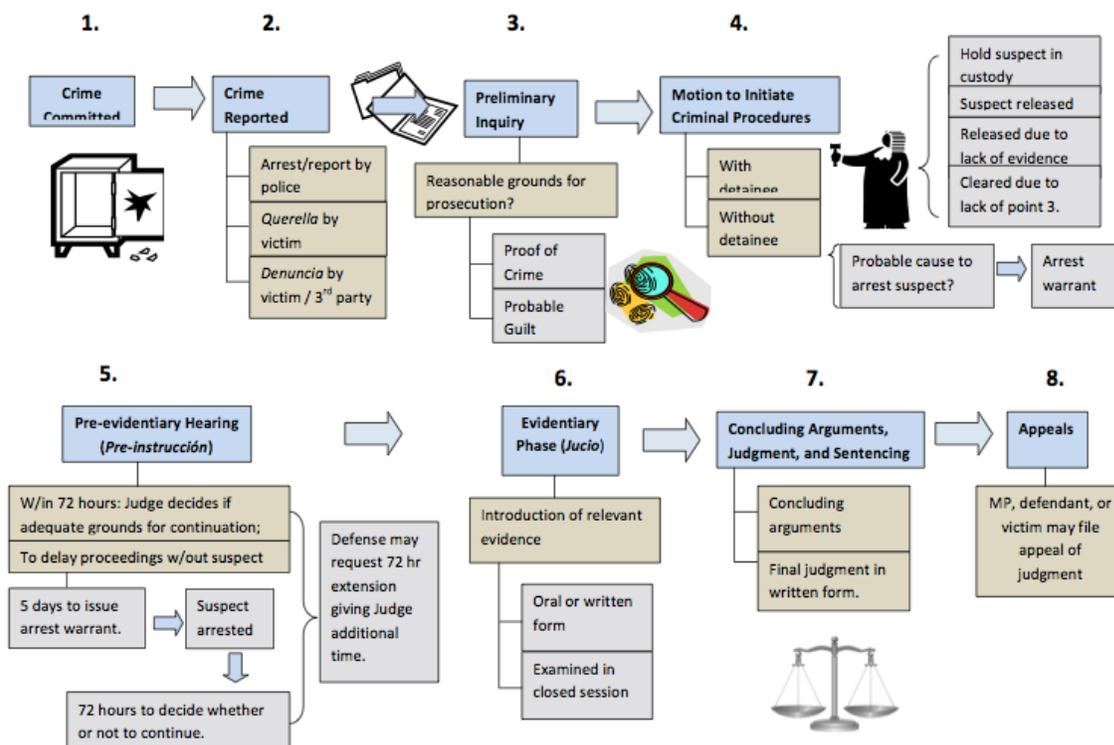


Figure prepared with assistance from Nicole Ramos, drawing on the description of Mexican criminal procedure developed by Zamora, et al. (2005), p. 346-7.

The unique features of Mexican criminal procedure become evident after a crime has been reported, because Mexico’s system lacks an instructional judge (*juez de instrucción*), who would directly lead the investigation in a “typical” inquisitorial system. Instead, in Mexico, the public prosecutor plays a central role in Mexico’s accusatory process, and has a relatively high degree of autonomy.⁴¹ Prosecutorial independence is especially notable during the preliminary inquiry (*averiguación previa*), in which a suspect is investigated and formally indicted for a crime. Indeed, critics charge that the power and autonomy of the public prosecutor at this stage of preliminary inquiry is one of the major contributors to the abuses found in the traditional Mexican system, including forced confessions and mishandling of evidence.⁴²

⁴¹ This significant departure from traditional inquisitorial systems dates back to reforms initially proposed in the early 20th century, under the 1908 Organic Law of the Federal Public Prosecutor (*Ley Organica del Ministerio Público Federal y Reglamentación de Sus Funciones*), the 1909 Organic Law of the Federal Judicial Power (*Ley Orgánica del Poder Judicial Federal*), Article 21 of the 1917 Constitution, the 1919 Law of Organization of the Federal Public Prosecutor (*Ley de Organización del Ministerio Público Federal, LOMPF*), and the 1934 Reglimentary Law for Article 102 of the Mexican Constitution (*Ley Reglamentaria del Artículo 102 de la Constitución de la República*), and the 1983 Organic Law of the Federal Attorney General (*Ley Orgánica de la Procuraduría General de la República*). Subsequent modifications to the LOMPF in 1941 and 1955 and the LOPGR in 1984, 1985, 1987, 1988, 1993, and 1996 progressively strengthened prosecutorial autonomy and restructured federal law enforcement agencies in Mexico.

⁴² Zepeda Lecuona (2004), Zamora, et al. (2005), Naval (2006).

That said, Mexican judges do work closely with the prosecutor to continue to compile evidence and testimony during the preliminary hearing to formally indict the suspect (*pre-instrucción*) and the evidentiary phase (*instrucción*). They also have the authority to seek out evidence on their own, and frequently do so, in the manner of an instructional judge found in other systems. Also, as in other inquisitorial systems, there is some adversarial presentation of arguments during the last phase of the process leading to a final judgment (*juicio*), since the judge receives final arguments (*conclusiones*) from both the prosecution and the defense. In the end, it is left to the judge to make a determination as to the guilt or innocence of the accused and to identify the appropriate sentence (*sentencia*) for the crime.⁴³ After the verdict has been delivered in the court of first jurisdiction (*primera instancia*), either the prosecutor or the accused may contest this decision at a court of appeals (*segunda instancia*).

While not necessarily attributable to its roots in the inquisitorial model per se, the functioning of Mexican criminal procedure exhibits important liabilities.⁴⁴ The fact that much evidence is presented in the form of written affidavits (*actas* or *actuaciones*) often contributes to a fairly cumbersome process, particularly where there are significant bureaucratic inefficiencies. As a result, the processing of criminal cases in Mexico often takes place over an unusually lengthy period, with many suspects waiting in jail for years before they are issued a sentence. Moreover, because the evidentiary phase takes place largely outside of public view, this lack of transparency contributes to widespread allegations that Mexican judges are neglectful or even corrupt.⁴⁵ Meanwhile, some legal scholars have expressed concerns about the powerful and decisive role of Mexican public prosecutors, and the potential for abuse that this allows. Finally, due to the infrequent release of suspects on their own recognizance or on bail in Mexico, a person accused of a crime is typically held in “preventive prison” (*prisión preventiva*), even for relatively minor crimes. This often leads to the mischaracterization that a suspect is “guilty until proven innocent” in Mexico.⁴⁶

In contrast to the inquisitorial model, the adversarial model—more typically associated with common law systems like the United States or the United Kingdom— involves a different set

⁴³ Inquisitorial systems only rarely use juries to determine guilt or innocence; in Mexico the use of juries has been historically limited, primarily in cases involving treason in the early 20th century. Zamora, et al. (2005), p. 363.

⁴⁴ As Jensen and Heller point out, there is an enormous need for comparative, empirically driven research to evaluate judicial system performance. Indeed, there is surprisingly little research comparing systems derived from the inquisitorial and adversarial models. One notable exception is Fullerton Joireman, who compares judicial systems in Africa on a range of different performance indicators. Her analysis suggests that inquisitorial systems exhibit somewhat worse performance in contexts where bureaucratic structures are inefficient. Fullerton Joireman (2002), Jensen and Heller (2003).

⁴⁵ One of the most damning and wide ranging indictments of Mexican judicial corruption came in 2002 from a report from the United Nations Special Rapporteur on the Independence of Judges and Lawyers. Cumaraswamy (2002).

⁴⁶ As in the United States, Mexican criminal law presumes the innocence of the suspect, even if they are unable to make bail. In practice, though, the proportion of defendants who are released on bail or on their own recognizance in Mexico is very small, given the strong emphasis on establishing probable cause prior to indictment and the large proportion of indigent defendants (who may be considered a flight risk). Thus, the issue of “guilty until innocent” has more to do with the relatively inflexible criteria for pre-trial release in Mexico. Zamora, et al. (2005), p. 358.

of procedures and roles for the main protagonists. One of the primary characteristics of adversarial systems is that the judge functions as an impartial mediator between two opposing “adversaries” —the prosecution and the defense— as they present competing evidence and arguments in open court. This lends to certain perceived advantages and disadvantages of adversarial systems. Among the advantages are the checks and balances built in to the criminal proceeding, as well as both efficiency and transparency in the presentation of evidence in court. However, adversarial systems also place at least one of the adversaries in the uncomfortable position of actively advocating for the “wrong” side, and sometimes winning.⁴⁷

Meanwhile, in adversarial systems, the judge is often less directly involved in other phases outside of the trial, such as the preliminary hearing to indict the suspect (the equivalent of Mexico’s *pre-instrucción*), the determination of guilt (which is often left to a jury in a full-blown trial), and the oversight of final sentencing (which is generally administrated by parole boards). Also, more commonly in adversarial systems, the final sentence in a criminal case is often the result of a negotiated agreement between the prosecutor and the accused, who accepts a guilty plea in exchange for a lesser sentence (*juicio abreviado*). Finally, in adversarial systems, there is generally a more active role of the defense counsel in representing the defendant throughout the criminal proceedings, and in presenting evidence and arguments in court.⁴⁸

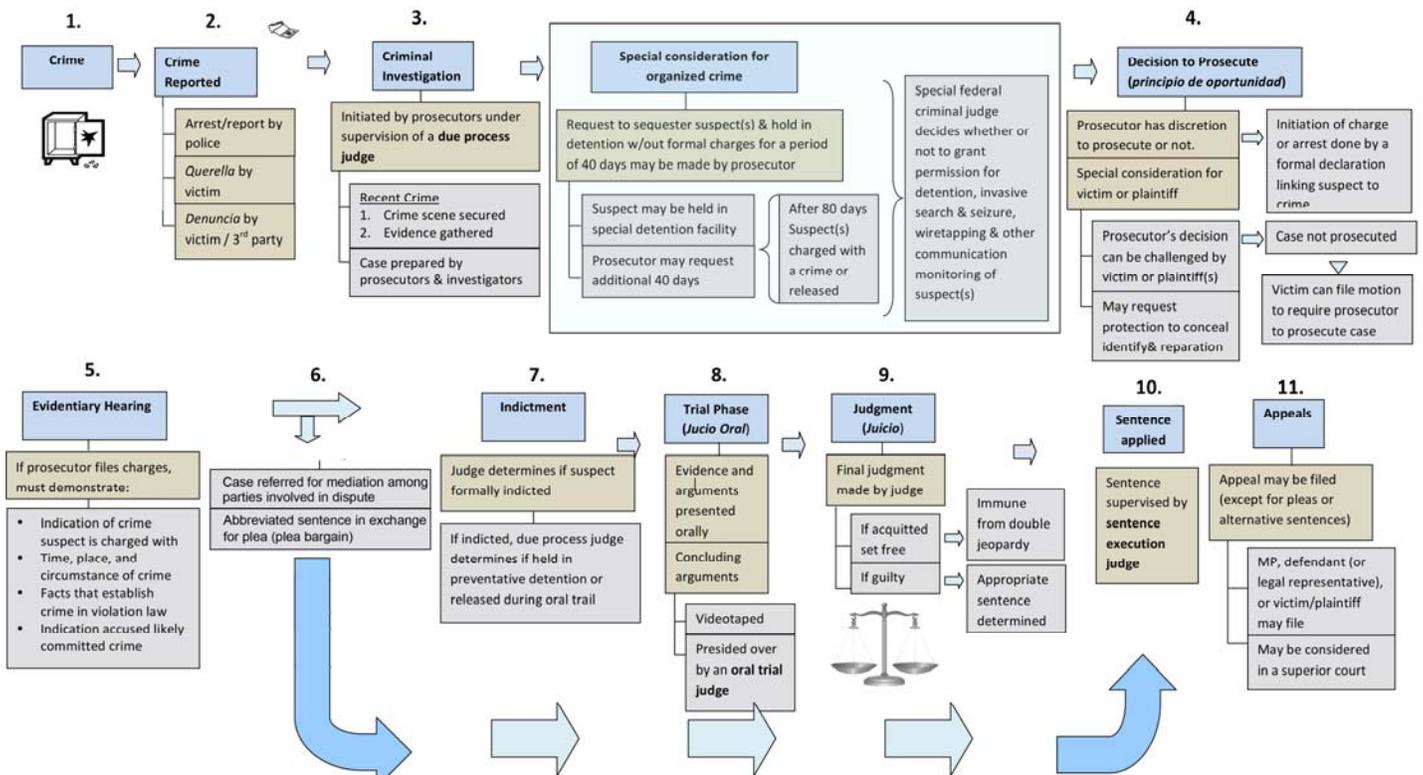
Under the reforms approved in 2008, the Mexican federal government, and eventually all state governments, will adopt many aspects of the adversarial model over the coming years. This shift implies many significant changes to the roles of key players and the legal structures that regulate the criminal justice system (See Figure 4). The implications for criminal legal procedure include a more abbreviated and less formalized preliminary investigative phase, and a greater reliance on presentation of testimony and evidence during live, public trials that are recorded for subsequent review or appeal.⁴⁹ The reforms also include several additional innovations intended to promote a more efficient division of labor, relieve congestion and case backlogs, and provide greater checks and balances throughout the process. As noted above, these changes will have significant implications for each of the major players in Mexican law enforcement and administration of justice: the defendant, police, judges, prosecutors, defense attorneys, and the victim.

⁴⁷ According to one recent critique of the use of the adversarial system in the United States, “Meant to facilitate the search for truth, our adversarial justice system often degenerates into a battlefield where winning, rather than doing the right thing, becomes the goal. Mistrust on both sides, egos and personal and agency agendas can get in the way of justice.” Trainum (2010).

⁴⁸ While inquisitorial systems also have defense counsel for the accused, their interaction with judges and prosecutors tends to focus primarily on assuring adherence to proper criminal procedure.

⁴⁹ This moves away from the primarily written presentation of affidavits that are transcribed by the public prosecutor, which are known as *expedientes* or *actuaciones*.

Figure 4: Key Steps in the New Adversarial Criminal Procedure Model in Mexico



First, in keeping with the design of the adversarial model, Mexican judges will now play more of a moderating role during the trial phase, while prosecutors and defense counselors present arguments and evidence in live, recorded, oral hearings. An equally important innovation is that the reforms also create special judgeships for different phases of the criminal proceedings, ostensibly promoting an efficient division of labor and fewer conflicts of interest. A due process judge, or *juez de garantía*, will preside over the pre-trial phase (investigation, preliminary hearing, indictment, and plea-bargaining). As discussed in greater detail below, the creation of the new due process judge is primarily intended to ensure due process prior to the trial phase. Meanwhile, a sentencing judge, or *juez de sentencia* (also called the *juez de juicio oral*) will preside over the trial phase (during the presentation of oral arguments) and the final verdict. A sentence implementation judge (*juez de ejecución de sentencia*), will ensure that sentences are properly applied and monitor processes of restorative justice (e.g., repayment of damages).⁵⁰

Meanwhile, the public prosecutor (*ministerio público*) will lose some of the traditional power vested in that office. With the introduction of “probable cause” as a basis for criminal indictment, the preliminary investigation (*averiguación previa*) is no longer as central to the process. This means that the role of the public prosecutor is less decisive in determining the probable guilt of the accused (*probable responsable*), but also that the public prosecutor has a

⁵⁰ The oral trial judge (*juez de tribunal oral*) will preside over the trial phase of a criminal proceeding, working in an open courtroom, considering evidence presented by the prosecution and the defense, and ultimately making a determination regarding the guilt or innocence of the suspect.

lower threshold to initiate a charge or arrest (Article 19, Paragraph 1). The public prosecutor will still have substantial discretion about whether or not to seek prosecution, under a provision known as “the principle of opportunity” (*principio de oportunidad*) which allows the prosecutor to strategically weigh his or her decision against the resource limitations and priorities of law enforcement.

One possible concern, however, is that prosecutors will neglect to take a case for political, personal, or other reasons. Hence under Article 20, Section C of the Mexican Constitution, the reforms also allow crime victims to file a criminal motion before a judge in certain cases, with the goal of creating pressure on public prosecutors to investigate cases. The reforms also include privacy protections to conceal the identity of the victim, plaintiff, and witnesses, and a system of reparations for harms resulting from the crime. This includes an emphasis on the restitution or restoration of damages (*reparación de daño*), the terms of which can be determined by a judge through mediation or other solutions.

2) The Rights of the Accused: Guarantees for the Presumption of Innocence, Due Process, and an Adequate Legal Defense

Also included in the 2008 reforms are stronger constitutional protections for the presumption of innocence, a more substantial role for judges in distinct phases of the criminal proceeding (including the physical presence of a judge during all hearings involving the defendant), specific provisions banning the use of torture, new measures to provide a quality legal defense for the accused, and other procedural safeguards intended to bolster due process. This new emphasis on the protections for the rights of the accused is frequently described as creating a “system of guarantees” or a *sistema garantista*.⁵¹

First, as part of the presumption of innocence, the 2008 reforms seek to limit the use of preventative detention, or “pre-trial” detention. In recent years, because of case backlogs and inefficiencies, more than 40% of Mexico’s prison population (some 90,000 prisoners) has consisted of prisoners waiting in jail for a final verdict.⁵² Many suspects are detained even when charged with relatively minor offenses, such as shoplifting or an automobile accident.⁵³ Moreover, pre-trial detainees are frequently mixed with the general prison population, and in many instances their cases are not adjudicated for exceedingly long periods of time. Under the new reforms, pre-trial detention are intended to apply only in cases of violent or serious crimes, and for suspects who are considered a flight risk or a danger to society. Also, the new reforms require those held in pre-trial detention to be housed in separate prison facilities (away from convicted criminals), and to be held only for a maximum of two years without a

⁵¹ “Garantismo” is a loaded term in Mexico. On the one hand, it is used in a positive sense by progressive jurists concerned about the real effect of civil rights. On the other hand, it is used disparagingly by more conservative jurists who think judges and the state should be more concerned about the form and procedures of the law than with protecting particular interests. This tension resonates with discussions about legal or judicial “activism” in the United States.

⁵² Ciudadano (2006), El Porvenir (2006), Reforma (2006), Salazar (2006).

⁵³ The consequences of mixing pre-trial and convicted prisoners can be dangerous. In September 2008, two prison riots broke out in the La Mesa prison facility known as “La Peni,” killing nearly two dozen people. The La Mesa prison is intended to house accused criminals who are ineligible for release before trial and sentencing, but also contained convicted criminals. Justice in Mexico Project (2008).

sentence.

Second, as noted earlier, the 2008 reforms created a new due process judge (*juez de garantía*, or *juez de control*), whose role is to ensure that a criminal case moves forward properly during its investigation, preliminary hearing, and indictment. The due process judge is responsible for determining whether a suspect's rights should be limited during the trial phase (e.g., pre-trial detention, house arrest, restraining order) or whether they should be released on bail or on their own recognizance until a guilty verdict has been delivered. The due process judge will also issue the final sentence in cases where the defendant accepts a plea bargain (*juicio abreviado*), in which all parties accept that the accused will receive a lesser sentence in exchange for a guilty plea. The due process judge will also oversee other alternative dispute resolution processes, such as the use of mediation.

The creation of the new judicial roles will have several major implications. First, it implies a greater role for judges the pre- and post-trial phases. During the pre-trial phase, the due process judge will strive to protect the rights and interests of all parties—including the accused, the victim, and witnesses—as the case moves forward toward a public oral trial.⁵⁴ During the post-trial phase, the sentencing implementation judge will effectively play the role of U.S. parole board, monitoring the proper application of a sentence and any violations of mediation agreements.⁵⁵ Second, as noted above, the creation of the due process judge implies a certain degree of separation of powers in the judiciary: the judge who determines whether a suspect is indictable will not be the same individual who must make a final determination of guilt. Theoretically, this will allow both judges to specialize to a greater degree, thereby ostensibly allowing greater efficiency in the processing of criminal cases.⁵⁶ Finally, the separation of powers will theoretically reduce conflicts of interest and provide checks and balances, since the oral trial judge will make a final decision without having made prior conclusions about the defendant's "probable guilt."⁵⁷

Another important change included in the new reforms is the emphasis on the physical presence of the judge during all hearings involving the defendant. Under Mexico's traditional system, criminal proceedings do not take place primarily during live audiences in a condensed timeframe, and hearings are sometimes conducted by court clerks without the presence of the actual judge. The result is that many criminal defendants attest that they never had direct interaction with the judge who handled their case. Indeed, in surveys with Mexican inmates, Azaola and Bergman (2009) report that 80% of inmates interviewed in the

⁵⁴ As such, the due process judge must: "strike a balance between two legitimate, but conflicting interests: on the one hand, the guarantee of due process for the person under investigation and, secondly, the effective application of criminal law. While seeking to protect a person investigated for a crime from any violation of their rights in the process of arrest, searches, seizures and interception of communications, [the juez de control] also attempts to safeguard the proper unfolding of important investigatory proceedings." Valls Hernández (2008).

⁵⁵ There is cause for concern, of course, that neglect or corruption in the implementation of a sentence could lead to excessively permissive administration of sentences and continued problems of criminal impunity.

⁵⁶ Zepeda Lecuona (2008).

⁵⁷ Under the old system, a judge who determined that there was probable cause to try a suspect in the pre-trial phase might, theoretically, be disinclined to reverse his prior decision on the merits of the case during the trial phase. This conflict of interest is presumably eliminated by the separation of judicial decisions in the pre-trial and trial phases.

Federal District and the State of Mexico were not able to speak to the judge who tried their case.⁵⁸ With the shift to an emphasis on the physical presence of the judge throughout the criminal proceeding, crime suspects and their legal defense counsel will presumably have a greater ability to make direct appeals to the individual who will decide their case.

Third, the reforms also include specific provisions, under Article 20 of the Mexican Constitution, admonishing against the use of torture. In response to the aforementioned problems of torture-based confessions in the Mexican criminal justice system, the reforms make it unlawful to present a suspect's confession as evidence in court (unless obtained in the presence of the suspect's defense attorney). In theory, this means that the prosecutor will have to rely on other evidence to obtain a conviction, and thereby conduct more thorough investigations. This also means that the accused will theoretically have the benefit of good legal counsel and a more informed understanding of the consequences prior to implicating themselves in a crime.

Finally, with regard to the rights of the accused, the reforms aim to strengthen and raise the bar for a suspect's defense counsel. All criminal defendants will be required to have professional legal representation. Under the reforms, any third party serving as the defense counsel for the accused must be a lawyer, a change from the prior system, which allowed any trusted person (*persona de confianza*) to represent the accused. Under constitutional amendments to Article 17, the reform requires that there be a strong system of public defenders to protect the rights of the poor and indigent. This provision is extremely important, given that the vast majority of defendants rely on a public defender (*defensor de oficio*). Indeed, the same prisoner survey noted above found that 75% of inmates were represented by a public defender, and 60% of these switched from their first public defender because of the attorney's perceived indifference.⁵⁹

3) Police Reform: Merging Preventive and Investigative Capacity

The main criticisms of the Mexican criminal justice system reside less with judges and courtroom procedure than with law enforcement, particularly prosecutors (*ministerios públicos*) and police officers.⁶⁰ While most attention to the 2008 judicial reforms has focused on the shift in courtroom procedures, equally important changes are in store for police investigations and law enforcement agencies. Specifically, the reforms aim toward a greater integration of police into the administration of justice. Under Mexico's traditional system, most police were ostensibly dedicated to preventive functions, and —aside from detaining individuals *in flagrante delicto*— not considered central to the work of prosecutors and judges. Under the new system, police will need to develop the capacity and skills to protect and gather evidence to help prosecutors, judges, and even defense attorneys determine the facts of a case and ensure that justice is done. As police become more critical to criminal

⁵⁸ Azaola and Bergman (2009).

⁵⁹ Ibid.

⁶⁰ As Zamora, et. al. note, "Mexican criminal penalties are harsh, but the combination of harsh penalties and 'flexible' enforcement gives a great deal of power to police officers to exact bribes in exchange for overlooking an infraction, large or small." Zamora, et al. (2005), p. 359.

investigations and proceedings, it is essential and urgent that they be adequately prepared to carry out these responsibilities properly. Under Mexico's 2008 reforms, the Constitution (Article 21, Paragraphs 1-10) underscores the need to modernize Mexican police forces, which are now expected to demonstrate greater professionalism, objectivity, and respect for human rights. While the reforms provide an eight-year period for the transition to the new adversarial system, many of the reforms affecting police have already entered into effect.

The most significant change is that the reforms strengthen the formal investigative capacity of police to gather evidence and investigate criminal activity, in collaboration with the public prosecutor, or *ministerio público*. For example, under reforms to Article 21, Paragraph 1 of the Mexican Constitution, along with public prosecutors and investigators, police will now share responsibility for the protection of the crime scene and the gathering of evidence. This is significant because, until recently, as many as 75% of Mexico's more than 400,000 police lacked investigative capacity, were deployed primarily for patrol and crime prevention, and were largely absolved of responsibilities to protect or gather evidence. Given that evidence collected by the reporting officer is often a primary tool for the prosecution in other criminal justice system, the limited capacity of Mexican police in this regard seriously limits and sometimes even interferes with the successful resolution of criminal cases.

The 2008 reforms now open the door to greater police cooperation with criminal investigators, and even the reorganization of police agencies to facilitate more effective police investigations. At the federal level, thanks to supporting legislation passed in May 2009, the Attorney General's Office (*Procuraduría General de la República*, PGR) and the Secretary of Public Security (*Secretaría de Seguridad Pública*, SSP) have already reorganized their respective police agencies. Under the Federal Attorney General Law (*Ley Orgánica de la Procuradora General de la República*), the PGR effectively dissolved the Federal Agency of Investigations (*Agencia Federal de Investigaciones*, AFI) and created the new Federal Ministerial Police (*Policía Federal Ministerial*, PFM). Agents of the Attorney General's police forces will now have greater powers to investigate crimes, but will also be subjected to more rigorous confidence tests (*control de confianza*). For example, included under the new legislation are provisions that expand the ability of the Assistant Attorney General for Special Investigation of Organized Crime (*Subprocurador de Investigación Especializada de Delincuencia Organizada*, SIEDO) to assume responsibility for crimes that are normally reserved for local jurisdiction (*fuero común*). This procedure, known as "attraction" (*atracción*), will enable—and presumably compel—the federal government to step in to investigate severe crimes that are beyond the capacity of state and local law enforcement.

Even more significant, the 2008 reforms allow for a blending of crime prevention and investigative functions that were formerly performed by separate law enforcement agencies: the preventive police and the investigative police. Under supporting legislation for these reforms, the 2009 Federal Police Law (*Ley de la Policía Federal*), the SSP replaced its Federal Preventive Police (*Policía Federal Preventiva*, PFP), creating the new Federal Police (*Policía Federal*).⁶¹ The new law effectively bestows investigative powers upon what was

⁶¹ The AFI was created by presidential decree in 2001 to bolster the investigative capacity of the Federal Attorney General's Office (PGR). At that time, the AFI replaced the corruption-plagued Federal Judicial Police

previously the Federal Preventive Police (PFP), which formerly carried out a strictly preventive function. Under the new law, Federal Police officers will ultimately be able to collaborate with the PGR on its investigations, though it is not yet clear what protocols will be developed to manage this coordination. Other new functions include securing crime scenes, executing arrest orders, and processing evidence, all formerly functions of the AFI.⁶² Federal Police agents also now have authorization to operate undercover to infiltrate criminal organizations.

It is somewhat unclear what implications the 2008 reforms will have for the investigation of crimes of local jurisdiction (*fuero comun*) at the sub-national level. However, the reforms presumably open the door for the participation of state and municipal preventive police forces in criminal investigations. Moreover, in light of the 2008 reforms, proposals have already been made at both the federal and state level to fuse state and local law enforcement, effectively dismantling all municipal police forces. Under Article 115, Frac. VII, governors have long had the power to take command of local police forces to address severe public security problems affecting their states.⁶³ The 2008 reforms further specify that specify that the State Law of Public Security will regulate municipal police forces, and federal and state authorities have been increasingly advocating the elimination of local police forces as a solution to Mexico's public security concerns.⁶⁴ It remains to be seen, however, whether the federal government will require all states to unify their police forces.

A separate aspect of the 2008 reforms that is intended to promote police professionalism has mixed implications. Under the reforms, police are now subject to special labor provisions that give administrators greater discretion to dismiss law enforcement personnel. Specifically, Article 123 allows authorities to dismiss police more easily, weakening their labor rights protections. While the amendment of Article 123 is intended to ensure that administrators can remove ineffective or corrupt officers, Zepeda (2008) notes that it could have the unintended effect of further undermining civil service protections that help to ensure

in order to bring about a more professional, scientific, and comprehensive investigative process that would take aim at the operational foundations of organized crime – similar to the stated goals of the new Federal Ministerial Police. The agency came under fire in 2005 under widespread allegations of corruption, and in December of that year the PGR announced that nearly one-fifth of its officers were under investigation for suspected involvement in organized crime. Agents of the AFI took to the streets in April 2009 to demand that the PGR and Congress not allow the agency to disappear. Nonetheless, the measure was approved by congress, and Pres. Calderón signed it into law on May 29, 2009. From the date the new law went into effect, the PGR had thirty days to purge its rosters of undesirable personnel. Former AFI agents able to pass toxicology, medical, psychological, and background checks were given priority in the new agency. Economista (2005), Castillo and Mendez (2006), El Financiero (2009).

⁶² As discussed below, the reforms also grant expanded permission for authorities to monitor telephone, satellite, and internet communications in the investigations of organized crime activity, provided permission is granted through a judicial order.

⁶³ There is already some variation in terms of how states already exert control over local police forces: some state capitals are protected by state police forces in lieu of locals (e.g., Morelia), some state governors formally appoint the local police chiefs (e.g., Sonora), and the state of Durango has already initiated efforts to fuse all municipal and state police agencies. Cárdenas (2009), Cárdenas (2010).

⁶⁴ It is worth noting, given recent debates about police reform, that Article 115, Section VII of the Mexican Constitution indicates that “The police will follow the orders of the governor of the State, in those cases where he or she judges that it needs extra force, or that there is a serious disturbance of the public order.”

an officer's professional development and protect him from undue pressure or persecution.⁶⁵ Police already face unpredictable career advancement and deplorable working conditions, as illustrated by the results of a recent Justice in Mexico Project survey of police in Guadalajara, Mexico's second largest city.⁶⁶ That survey found that nearly 70% of officers feel that promotions are not based on merit, and most (60%) think that personal connections drive one's career advancement on the force. If that is indeed the case, the new reforms will likely make police officers even more dependent on the whims of their superiors.

Finally, the mandate to promote police professionalism has been supported by recent efforts of the Mexican federal government to increase investments in training, equipment, infrastructure, standardization, and integrity (*control de confianza*) for law enforcement. The two major sources of government grants to aid states and municipalities in strengthening law enforcement are the Municipal Public Security Subsidy (*Subsidio para la Seguridad Pública Municipal*, SUBSEMUN) and the Public Security Assistance Fund (*Fondo de Aportaciones para la Seguridad Pública*, FASP).⁶⁷ Both funds have directed millions of dollars in direct financial assistance to improve local and state level police agencies, respectively. However, the effectiveness of these funding mechanisms has been questioned, given that large amounts of money have gone unspent in recent years.⁶⁸

In the end, successful police reform will ultimately hinge not only on directing more resources to law enforcement agencies, but on the introduction of new checks and balances for police and prosecutors. In this regard, the shift to adversarial procedures will have a significant impact on law enforcement professionalism because, by placing greater emphasis on due process and the rights of the accused, it will necessarily raise the standards for police conduct. Hence, it will be important to make sure that police and prosecutors are carefully vetted, well prepared and equipped, and properly supported by superiors to do their jobs effectively.

4) Organized Crime: Providing New Tools to Combat Crime Syndicates

Finally, the 2008 reforms also significantly target organized crime, defined in accordance with the United Nations Convention Against Organized Crime, signed in Palermo, Italy in 2000. That convention broadly defines an organized crime syndicate as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences [with a maximum sentence of four or more years in prison]... in order to obtain, directly or indirectly, a financial or other material

⁶⁵ Zepeda Lecuona (2008).

⁶⁶ More than 80% of the more than 5,400 participants in the study reported earning less than \$800 USD per month, relatively low compared to other public sector employment. Moreover, despite civil service protections in the law, over two thirds felt that the procedures used by police departments for raises and promotions are unfair and not based on merit. Many officers reported excessively long working hours (70% work more than 50 hours a week with no overtime pay); a fifth of the force reported extremely extended shifts (a 24-hour shift for every two days off); and 68% reported 30 minutes or less for meals and breaks. Moloznik, et al. (2009).

⁶⁷ FASP was formerly known as the Public Security Funds (*Fondos de Seguridad Pública*, FOSEG). FASP is also sometimes listed under a slightly different name: *Fondo de Apoyo en Seguridad Pública*. Otero (2006).

⁶⁸ For example, in 2009, the Federal District and the states of Guanajuato, Jalisco, and Quintana Roo did not spend nearly 90% of their allocated FASP funds. Seminario (2009), Mejía (2010).

benefit.”

In cases involving organized crime, the Mexican constitution has now been amended to allow for the sequestering of suspects under “*arraigo*” (literally, to “root” someone, i.e., to hold firmly) for up to 40 days without criminal charges (with possible extension of an additional 40 days, up to a total of 80 days).⁶⁹ Under *arraigo*, prisoners may be held in solitary confinement and placed under arrest in special detention centers created explicitly for this purpose. Furthermore, in order to facilitate extradition, the reforms also allow for the suspension of judicial proceedings in criminal cases. Prosecutors may use the 40 day period to question the suspect and obtain evidence to build a case for prosecution. Because formal charges have not been levied, they are not entitled to legal representation and they are not eligible to receive credit for time served if convicted.

The *arraigo* procedure was first introduced in Mexico in 1983, as a measure to combat organized crime. However, in 2006, the Supreme Court ruled that the procedure was unconstitutional, citing violations of the habeas corpus rights of individuals held without charge. The 2008 reforms raised the *arraigo* procedure to the level of a constitutional provision, thereby eliminating charges of unconstitutionality. Because *arraigo* applies to serious crimes, and especially organized crime, it is used primarily by federal prosecutors. However, some states —like Nuevo León— have their own provisions for the use of *arraigo* within their jurisdictions.⁷⁰ Critics highlight the inherent tension of accepting such an exceptional custody regime within a democratic society, and the potential abuses that it may bring. Meanwhile, how broadly, frequently, and effectively the procedure has been utilized since 2008 is not clear, in large part because access to information about *arraigo* cases is difficult to obtain.

In addition to special mechanisms for the detention of organized crime suspects, the 2008 reforms also paved the way for new uses of wiretapping and other tools for fighting organized crime. Also, following from the 2008 reforms, new supporting legislation on asset forfeiture (*extinción de dominio*) was passed in 2009 to define the terms for seizing property in cases related to drug trafficking, human trafficking, and auto theft.⁷¹ Under the new law, the Federal Attorney General’s office has discretion to determine when a particular suspect is involved in organized crime, and whether or not assets related to those crimes are eligible for forfeiture.⁷²

⁶⁹ Currently, the Federal Code of Criminal Procedure does not have clear criteria for how a judge should make a determination regarding the application of *arraigo*, or what is the necessary burden of proof that prosecutors must met (e.g., probable cause). As stated under Article 133 of the CFPP, “The judicial authority may, at the request of the public prosecutor, impose preventive measures on the person against whom a criminal action is being introduced, in so far as these measures are necessary to prevent flight from judicial action; the destruction, alteration, or hiding of evidence; intimidation, threats, or improper influence over witnesses to the crime.” Deaton (2010), p. 17.

⁷⁰ Interview with Nuevo León Assistant Attorney General Javier Enrique Flores Saldivar on March 4, 2010.

⁷¹ Becerril and Ballinas (2009), Villamil (2009).

⁷² “Assets falling subject to the law are defined as: instruments, objects, or products of crimes; those used to hide, disguise, or transform criminal proceeds; properties of third parties used to aid in the commission of crimes; and goods belonging to third parties deemed by the PGR to be the product of criminal activity... Under the law, the PGR must submit an annual report to Congress of asset seizures. Moreover, if a judge deems that a

More recently, in February 2010, President Felipe Calderón proposed a new General Law to Prevent and Sanction Crimes of Kidnappings, also known as the “Anti-Kidnapping Law” (*Ley Anti-Secuestro*).⁷³ In addition to the use of wiretapping, the bill also proposes the use of undercover operations to infiltrate kidnapping organizations, anonymous informants, witness protection programs, and asset forfeiture. If passed, the law would also apply higher penalties (30 years to life in prison) when the perpetrator poses as a government official, or kidnaps especially vulnerable individuals (minors, pregnant women, elderly persons, or mentally disabled persons); the minimum sentence for a kidnapping resulting in the victim's death would be 40 years in prison.⁷⁴ The reform also proposes special prison facilities for kidnappers to serve their sentences, as well as requiring that electronic tracking devices be placed on kidnappers released from prison after serving their sentence.

Implementing Judicial Reform at the Federal and State Level

As noted above, a similar reform package was proposed in April 2004 by the Fox administration, but failed to gain legislative support. The 2008 judicial reform package came primarily from a bill passed in the Chamber of Deputies, with some significant modifications introduced in the Senate in December 2007.⁷⁵ The bill was approved with broad, multi-party support in the Chamber of Deputies by 462 out of 468 legislators present, and by a vote in the Senate by a 71-25 vote of members present on March 6, 2008.⁷⁶ Because the reform package included constitutional amendments—including revisions to ten articles (16-22, 73, 115, and 123)—final passage of the reforms required approval by a majority of the country's 32 state legislatures. The reforms came into effect with the publication of the federal government's official publication, the *Diario Oficial*, on June 18, 2008.

The scope and scale of change contemplated under the 2008 judicial reforms is enormous. Existing legal codes and procedures need to be radically revised at the federal and state level; courtrooms need to be remodeled and outfitted with recording equipment; judges, court staffs, and lawyers need to be retrained; police need to be professionalized and prepared to assist with criminal investigations; and citizens need to be prepared to understand the purpose and implications of the new procedures. After the reforms passed in 2008, the federal and state governments were given until 2016—a period of up to eight years—to adopt the reforms.

seizure was performed unjustly the assets must be returned with interest within six months.” Justice in Mexico Project (2009).

⁷³ Gómez and Michel (2010), Informador (2010), Notimex (2010).

⁷⁴ The reform contemplates even harsher penalties for public officials involved in kidnapping.

⁷⁵ One of the earliest Calderón-era legislative proposals to modify the judicial system came from Federal Deputy Jesús de León Tello, from the National Action Party (PAN). However, the bill that became the basis for the 2008 reforms was championed by the head of the Judicial Committee in the Chamber of Deputies, former-Mexico governor and then-Federal Deputy César Camacho Quiroz, from the PRI. After the bill passed in the Chamber of Deputies key provisions (having to do with the use of search and seizure without a warrant) were removed by the Senate in December 2007.

⁷⁶ There are 500 members total in the Chamber of Deputies and 128 members total in the Senate. Members of the PRD supported the reforms, though the PRD was the party most divided on the vote. Tobar (2008).

The Secretary of the Interior (*Secretaría de Gobernación*, SEGOB) chairs the 11-member Coordinating Council for the Implementation of the Criminal Justice System (*Consejo de Coordinación para la Implementación del Sistema de Justicia Penal*, CCISJP), which is aided by a technical secretary who oversees the reform process within SEGOB.⁷⁷ The council also has nominal representation from academia and civil society.⁷⁸ Although the reforms were passed in mid-2008, the CCISJP was not formally inaugurated until its first convocation in June 2009, which was followed by additional meetings in August 2009 and January 2010.⁷⁹ This initial delay was partly attributable to the death of the former technical coordinator of the council, Assistant Secretary of the Interior José Luis Santiago Vasconcelos, in a plane crash in Mexico City in April 2008, alongside then-Secretary of the Interior Juan Camilo Mouriño. The new technical coordinator for the council, Assistant-Secretary of the Interior Felipe Borrego Estrada, was appointed in December 2008.⁸⁰

The role of the CCISJP is to: 1) serve as the liaison between the various members of the council and other entities working to promote judicial reform, 2) monitor advances in the implementation of federal reforms at the state level, 3) provide technical assistance to states working to implement the reforms (e.g., courtroom design, software, etc.), 4) provide training for judicial system operatives (e.g., judges, lawyers, legal experts), and 5) manage administrative and financial aspects of the reform (e.g., guiding legislative budget requests). The goal of the CCISJP is to have reforms approved in all Mexican states and implemented

⁷⁷ In addition to the Secretary of the Interior, this council includes representatives from the Chamber of Deputies, the Senate, the Supreme Court, the Federal Attorney General (*Procuraduría Federal de la República*, PGR), the Public Security Secretary (*Secretaría de Seguridad Pública*), the Federal Judicial Council (*Consejo de la Judicatura Federal*), the National Public Security Conference (*Conferencia Nacional de Secretarios de Seguridad Pública*), the Legal Counsel of the Federal Executive Branch (*Consejería Jurídica del Ejecutivo Federal*), the National Commission of State Supreme Courts (*Comisión Nacional de Tribunales Superiores de Justicia*, CONATRIJ), and the National Conference of Attorneys General (*Conferencia Nacional de Procuración de Justicia*).

⁷⁸ Professor Miguel Sarre Iguíniz, of the Technical Autonomous Institute of Mexico (Instituto Tecnológico Autónomo de México, ITAM) was approved as the academic representative in January 2010. Businessman and NGO activist Alejandro Martí García, whose son was kidnapped and killed, was appointed as the representative for civic organizations on the council. *Secretaría de Gobernación* (2010).

⁷⁹ The inaugural meeting of the council took place on June 18, 2009, one year after the reforms were first approved. Deputy Carlos Navarro Sugich represented the Chamber of Deputies, Senator Mario López Valdez represented the Senate, Counselor Oscar Vázquez Marín represented the Consejo de la Judicatura Federal, Minister José de Jesús Gudiño Pelayo represented the Supreme Court. The second and third meetings took place on August 13, 2009 and January 8, 2010, respectively. *Secretaría de Gobernación* (2009).

⁸⁰ At the time of the crash, Santiago Vasconcelos, 51, was a long time federal prosecutor who had recently joined Pres. Calderón's staff as a top legal advisor. As a former drug prosecutor, Santiago Vasconcelos previously headed the Special Office for the Investigation of Organized Crime (*Subprocurador de Investigación Especializada de Delincuencia Organizada*, SIEDO), was subject to frequent threats on his life. Beginning his service with the Attorney General's office in 1993, Santiago Vasconcelos was appointed assistant attorney general for Judicial and International Affairs in 2007. Santiago Vasconcelos had helped oversee a dramatic increase in cross-border extraditions, including that of Gulf cartel leader Osiel Cardenas. His replacement, Borrego Estrada, was previously a member of the National Action Party (PAN), served as president of the Supreme Court of Zacatecas from 1998 to 2004, and at the time of his appointment was secretary of the Justice Committee in the Chamber of Deputies and PAN representative for the Committee for the Reform of the State. *El Universal* (2008), *Milenio* (2008).

in 19 of 32 federal entities (31 states and the Federal District) by 2012, when the current administration leaves office.⁸¹

Efforts to implement these reforms will require resources, time, and some coaxing at both the federal and state level. Foremost is the problem of funds. While there is widespread recognition of the need for a massive investment of funds to the judicial sector, there is no estimate for the total cost of implementing the reforms. However, the commitment of governmental resources at the federal and state level will likely need to be greatly increased from their present levels.⁸² A second challenge is the effort to generate momentum and political will at both the federal and state level. At the federal level, the Supreme Court has made little progress in developing a new Federal Code of Criminal Procedure (*Código Federal de Procedimientos Penales*, CFPP). This has left states with little guidance on the federal procedures that will ultimately have important bearing on their own criminal codes. While there are some notable advocates for the reform on the Supreme Court, it is not clear how or when it will begin to demonstrate leadership on the generation of the new code of criminal procedure.

Meanwhile, at the state level, there has been some significant progress. Indeed, six states — Chihuahua, Mexico State, Morelos, Oaxaca, Nuevo León, and Zacatecas— had already adopted and implemented similar reforms prior to 2008, providing important precedents that informed the federal initiative. Indeed, in June 2007, the state of Chihuahua had already held its first oral trial.⁸³ Meanwhile, several other states —Baja California, Durango, and Hidalgo— had approved but not yet implemented state-level initiatives prior to the federal reforms. According to a January 2010 report from the CCISJP, several other states are currently working to revise their constitutions and criminal codes to achieve compliance with the 2008 reform.⁸⁴ Still, some states lag significantly behind, with no significant signs of activity toward adopting the reforms.⁸⁵ To be sure, with a total of 18 state-level elections in 2009 and 2010, there have been significant political distractions that make it difficult to mobilize reform initiatives. However, some states will need to either pick up the pace or eventually lobby for an extension of the current 2016 deadline for passage of the reforms.

There are certainly real prospects for the 2008 reforms to be successful. Proponents of Mexico's judicial sector reforms point to seemingly successful transitions from inquisitorial

⁸¹ Interview with Felipe Borrego Estrada in Mexico City on March 17, 2010.

⁸² One indicator of the low prioritization of resources for justice reform implementation is that the 2009 federal budget failed to include any funding for the CCISJP itself, which then required a special allocation to cover the activities of the technical secretary's office.

⁸³ Anselmo Chávez Rivero, an indigenous man of Tarahumara descent, was charged with the rape of two minors; he and other witnesses testified in their native language before Judge Francisco Manuel Sáenz Moreno, who found the defendant guilty. Fierro (2007).

⁸⁴ According to CCISJP, in several states, one or more branches of government have demonstrated significant activity or political will to advance the reforms. These include Guanajuato, Tabasco, Tlaxcala, and Yucatán. Secretaría de Gobernación (2010).

⁸⁵ According to CCISJP, these states include Aguascalientes, Baja California Sur, Campeche, Chiapas, Coahuila, Colima, the Federal District, Guerrero, Jalisco, Michoacán, Nayarit, Puebla, Querétaro, San Luis Potosí, Sinaloa, Sonora, Tamaulipas, and Veracruz. Ibid.

to accusatory systems elsewhere in Latin America, most notably Chile.⁸⁶ Indeed, the Mexican government has established an international agreement with the government of Chile to share experiences and training in order to facilitate Mexico's transition to the adversarial model of criminal procedure. The experience of Chile appears to suggest that the use of adversarial trial proceedings and alternative sentencing measures reduces paperwork, increases efficiency, and helps to eliminate case backlogs by concentrating procedures in a way that facilitates judicial decisions. Meanwhile, the emphasis on rights—for both the victim and the accused—is believed to strengthen the rule of law, promoting not only “law and order” but also governmental accountability and equal access to justice.

Still, despite these much-touted benefits, Mexico's judicial reforms have faced serious and merited criticism, both from traditionalists and from advocates of more substantial reform. Some initially bristled at the perception that the reforms were being actively promoted by outside forces, particularly from the United States.⁸⁷ On a related note, given troubling gaps and inconsistencies riddled in the reforms themselves, some critics expressed concerns that the reform constituted an ill-conceived, costly, and potentially dangerous attempt to impose a new model without consideration of the intricacies, nuances, and benefits of Mexico's existing system. Indeed, even now, despite widespread agreement that massive investments in the judicial sector will be needed, there is no concrete estimate of the reforms' anticipated financial costs on which to base budgetary allocations. In short, critics tend to fear that Mexico's sweeping judicial reforms may be trying to do too much, too fast, with too few resources, with too little preparation, and with little promise of success.⁸⁸

Meanwhile, others worry that the reforms have not gone far enough. In the eyes of some critics, the reforms ultimately fail to address the major institutional weaknesses of the judicial sector.⁸⁹ Indeed, in other countries where similar reforms have been implemented, such as Honduras, problems of corruption and inadequate professional capacity have continued to undermine the effective administration of justice. At the same time, as noted above, the 2008 reforms introduced new measures that may actually undermine fundamental rights and due process of law. The use of *arraigo*—sequestering of suspects without charge—is widely criticized for undermining *habeas corpus* rights and creating an “exceptional legal regime” for individuals accused of organized crime.⁹⁰ Although not usable as evidence in trial, confessions extracted (without legal representation) under *arraigo* can still be submitted as supporting evidence for an indictment.⁹¹ Also of concern to due process advocates is the

⁸⁶ Chile, of course, has had the advantage of a strong judiciary, low levels of institutional corruption in the judicial sector (including its national police force), and a relatively strong economy. Even so, on the aforementioned 2007 Gallup poll, Chileans rated the performance of their judicial system far more critically than Mexicans.

⁸⁷ Proceso (2008).

⁸⁸ Pelayo and Solorio (2010).

⁸⁹ Corcoran (2008).

⁹⁰ As Zepeda (2008) argues, the worst miscarriage of justice is when the coercive apparatus of a democratic state deprives an innocent person of their liberty; without a formal charge against an individual, the presumption of innocence should prevail. Zepeda Lecuona (2008).

⁹¹ One concern about the *arraigo* is that it undermines the reforms' torture prohibitions. According to Deaton (2010), “The detaining authorities have a powerful incentive to torture a detainee in order to get them to make false confessions so that they may then have the “evidence” to file charges against them. Not only do they have the incentive, but given the secret nature of *arraigo* and its placement of detainees incommunicado, without

introduction of the use of the plea bargain (*juicio abreviado*), since unscrupulous prosecutors could try to use plea agreements as a means to pressure innocent persons into incriminating themselves.

Having strong rights for the accused helps to ensure that the government is itself bound by the law, and that all citizens have access to justice. Respecting the presumption of innocence and the due process of law ultimately imposes the burden of proof on police and prosecutors, who must demonstrate the credibility of their charges against a suspect. However, in Chile and elsewhere, concerns about pretrial release and the risk of flight by the accused has led to backsliding on reforms that provided important protections for the presumption of innocence.⁹² Given the proliferation of violent crime, many Mexicans are understandably reluctant to place greater emphasis on the presumption of innocence and pre-trial release, as this rights-based approach may excessively favor criminals to the detriment of the rest of society. To be sure, protecting the legal rights of crime suspects is often unsavory to the public, and some have come to the cynical conclusion that “oral trials only protect the criminals.”⁹³ As a result, there is some concern among reform advocates that Mexican authorities may give in to practical and public pressures that will undermine the rights-focused aspects of the reforms. In short, the road ahead for Mexico’s 2008 judicial reforms will likely be long, difficult, and of uncertain destination.

Concluding Observations: Prospects for the Future

Mexico’s recent justice sector reforms are much more involved than the mere introduction of “oral trials.” They involve sweeping changes to Mexican criminal procedure, greater due process protections, new roles for judicial system operators, and tougher measures against organized crime. Advocates hope that the reforms will bring greater transparency, accountability, and efficiency to Mexico’s ailing justice system. However, by no means do recent reforms guarantee that Mexico will overcome its current challenges and develop a better criminal justice system. Whether this effort to reform the criminal justice system will succeed may depend less on these procedural changes than on efforts to address other long-standing problems by shoring up traditionally weak and corrupt institutions.

The ultimate legacy of these reforms will depend largely on how they are implemented, and by whom. There will need to be enormous investments in the training and professional oversight of the estimated 40,000 practicing lawyers in Mexico, many of whom will operate within the criminal justice system’s new legal framework.⁹⁴ Enabling Mexico’s legal

adequate access to their attorney, *arraigo* is an invitation to torture. That is, it is an invitation to commit the very abuse that the constitutional prohibition against torture is designed to prevent.” Alcántara (2006), Deaton (2010), p. 16.

⁹² Indeed, there are some concerns that reform efforts in Chile have not shown as much progress as advocates would like, and has even experienced a significant counter-reform movement that has reversed some key aspects of their reforms. Venegas and Vial (2008).

⁹³ Blake and Blake Bohne (2009).

⁹⁴ Since there are no requirements that lawyers maintain active bar membership or registration to practice law, the total number of practicing lawyers is unknown. Fix Fierro (2007) estimates this number to be around 40,000. There is no clear indication exactly how many of these practice criminal law. Fix Fierro suggests that,

profession to meet these higher standards will require a significant revision of educational requirements, greater emphasis on vetting and continuing education to practice law, better mechanisms to sanction dishonest and unscrupulous lawyers, and much stronger and more active professional bar associations.⁹⁵ At the same time, more than 400,000 federal, state, and local law enforcement officers have been given a much larger role in promoting the administration of justice. If they are to develop into a professional, democratic, and community-oriented police force, they will need to be properly vetted, held to higher standards of accountability, given the training and equipment they need to do their jobs, and treated like the professionals they are expected to be.

For comparative perspective, it is worth noting that in the United States several key reforms to professionalize the administration of justice and promote a rights-based criminal justice system only took effect in the post-war era. Also around the same time period, the development of professional standards and oversight mechanisms for actors in the U.S. judicial system took place sporadically and over the course of several decades. In the 1960s and 1970s, the United States established key provisions to ensure access to a publicly funded legal defense (1963 *Gideon v. Wainwright*), due process for criminal defendants (1967 *Miranda v. Arizona*), and other standards and practices to promote “professional” policing. In effect, this due process revolution—as well as other changes in the profession—helped raise the bar for police, prosecutors, and public defenders, and thereby promoted the overall improvement of the U.S. criminal justice system.⁹⁶

Moreover, it took at least a generation and major, targeted investments to truly professionalize the U.S. law enforcement and judicial sectors. The Safe Streets Act of 1968 mandated the creation of the Law Enforcement Assistance Administration (LEAA), which helped fund criminal justice education programs. LEAA also supported judicial sector research through the National Institute of Law Enforcement and Criminal Justice, the precursor to the National Institute of Justice. Mexico will likely need to make similarly large investments in the judicial sector, and will require a similarly long-term time horizon as it ventures forward.

One possible accelerator for Mexico is that many domestic and international organizations have been working actively to assist with the transformation. The National Fund for the Strengthening and Modernization of Justice Promotion (*Fondo Nacional para el*

given the proliferation of Mexican law schools in recent years, Mexico’s legal profession suffers from a problem of quantity-over-quality. Fix Fierro and Jiménez Gómez (1997).

⁹⁵ Efforts to promote professionalism among lawyers are needed, as they will be primarily responsible for “quality control” in the Mexican criminal justice system. Although Mexico has recently adopted a new code of ethics, Mexican lawyers are not presently required to receive post-graduate studies, take a bar exam, maintain good standing in a professional bar association, or seek continuing education in order to practice law. All of these are elements of legal professionalism that developed gradually and in a somewhat ad hoc manner in the United States, and mostly in the post-war era.

⁹⁶ At the same time, lawyers were building new standards for professional conduct, including its Model Code of Ethics first developed by the American Bar Association (ABA) in 1969 and used in most states. This code was preceded in 1908 by the Canons of Professional Ethics. An ABA Commission on Evaluation of Professional Standards was first appointed in 1977, and the ABA developed its Model Rules of Professional Conduct in 1983. Only one state, California, does not formally adhere to the model rules, though it does have its own rules of professional conduct. See: www.aba.org.

Fortalecimiento y Modernización de la Impartición de la Justicia, Fondo Jurica) has sponsored the development of a model procedural code and new training programs. Meanwhile, U.S. government agencies and non-governmental professional associations have offered various forms of assistance, including financial assistance and legal training. Notably, the Rule of Law Initiative of the American Bar Association (ABA), the National Center for State Courts, and U.S. government-funded consulting agencies, like Management Systems International, have also worked to promote reform and provide training and assistance. Also, from 2007-2008, the Justice in Mexico Project organized a nine-part series of forums hosted in Mexico and the United States in collaboration with the Center for Development Research (*Centro de Investigación para el Desarrollo, A.C.*, or CIDAC) to promote analysis and public dialogue about judicial reform.⁹⁷

Of critical importance for all of these efforts will be the development of quantitative and qualitative metrics to evaluate the actual performance of the new system. Are cases handled more efficiently by the criminal justice system than in the past? Are all parties satisfied when their cases are handled through mediation? Have police, prosecutors, public defenders, and judges demonstrated significant improvements in capacity and service delivery? Does the new criminal justice system adequately prepare convicts (and communities) for their ultimate re-entry to society? Unfortunately, on many of these questions, there are few adequate baseline indicators available.⁹⁸

The enormity of the challenges confronted by Mexico's judicial sector is not to be underestimated. Mexico is working to make major progress in a relatively short period, attempting to radically alter hundreds of years of unique, independent legal tradition in less than a decade. The reality is that the reform effort will take decades, will require massive resources and effort, and will involve a great deal of trial and error. Also, given the dramatic changes proposed, there may be significant and legitimate resistance to some aspects of the reforms. In working through these issues, Mexico can certainly look to and learn from both the positive and negative experiences of other Latin American countries that have adopted legal reforms in recent years (e.g., Chile, Colombia, Costa Rica, El Salvador, Honduras, and Venezuela). However, like Mexico itself, the Mexican model of criminal justice is quite unique. Any effort to change the Mexican system will undoubtedly develop along its own course, at its own pace, and with sometimes unexpected results. In the end, the success of these efforts will rest on the shoulders a new generation of citizens and professionals within the criminal justice system, who will be both the stewards and beneficiaries of Mexico's ongoing judicial sector reforms.

⁹⁷ This series of forums, known as the "Justice Network / *Red de Justicia*," brought together hundreds of U.S. and Mexican law students, legal practitioners, businesspeople, academics, journalists, and NGO representatives in Aguascalientes (September 2007), Baja California (May 2007), Chihuahua (March 2008), Coahuila (March 2007), Jalisco (July 2007), Nuevo León (January 2008), Oaxaca (November 2007), and Zacatecas (September 2007). In 2009, the project also worked to establish a bi-national legal education program between the University of San Diego and the Universidad Autónoma de Baja California (UABC) with assistance from Higher Education for Development (HED).

⁹⁸ Recent efforts by the Justice in Mexico Project to interview lawyers and police through an instrument known as the "Justiciabárometro," constitute some of the first independent surveys on the profile, operational capacity, and professional opinions of judicial system operators. However, other process indicators are sorely needed to measure the real implications of the reforms.

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