Mexican Law Review

New Series

VOLUME III

Number 2

January - June 2011

UNIVERSIDAD NACIONAL
AUTÓNOMA DE MÉXICO

INSTITUTO DE INVESTIGACIONES
JURÍDICAS

Mexican Law Review

New Series

January-June 2011 Volume III, Number 2

INSTITUTO DE INVESTIGACIONES JURÍDICAS

Héctor Fix-Fierro
Director

Pedro Salazar
Secretario Académico

Elvia Flores
Jefa del Departamento de Publicaciones

MEXICAN LAW REVIEW

New Series

January-June 2011 Volume III, Number 2

ARTICLES

NOTES

ARTICLES

Mexican Law Review
New Series
VOLUME III
Number 2

CRIMINAL JUSTICE REFORM IN MEXICO: AN OVERVIEW

David A. SHIRK*

ABSTRACT: *This article examines the package of constitutional and legislative reforms approved in 2008 with the goal of improving the Mexican criminal justice system. These reforms included new criminal procedures (oral adversarial trials, alternative sentencing, and alternative dispute resolution mechanisms), stronger due process protections for the accused, police and prosecutorial reforms to strengthen public security, criminal investigations, and new measures to combat organized crime. The author explains the procedural and institutional changes involved in the reforms. He argues that, while there has been significant progress in several states, there are several challenges for judicial reform in Mexico over the short-term, medium-term, and longer term. These challenges include the need to better coordinate across branches of government to establish new regulations and statutes; the need to properly prepare a wide array of judicial sector personnel to implement the new system; the need to construct new physical infrastructure for live, video-recorded court proceedings; and the need to properly monitor and evaluate the performance of the new system.*

KEY WORDS: *Judicial reform, criminal justice, oral trials, police reform, criminal procedure, criminal investigations, organized crime, Mexico*.

---

* Director of the Trans-Border Institute and Associate Professor of Political Science at the University of San Diego. Ph.D. in Political Science, University of California-San Diego. Principal investigator for the Justice in Mexico project (*www.justicein mexico.org*), a research initiative on public security and rule of law issues in Mexico. This article benefited from the research assistance and collaboration of Carlos Castañeda, Anna Cearley, Judith Davila, Janice Deaton, Robert Donnelly, Theresa Firestine, Elisse Larouche, Cory Molzahn, Charles Pope, Nicole Ramos, and Octavio Rodríguez. Marcelo Bergman, Francisco Gorjon, Linn Hammergren, Matt Ingram, Eric Olson, María Candelaria Pelayo Torres, Miguel Sarre, Allen Snyder, Daniel Solorio, and Andrew Selee also provided valuable comments and critiques. This research benefited from the generous financial and institutional support of The William and Flora Hewlett Foundation, The Tinker Foundation, The Smith-Richardson Foundation and the Woodrow Wilson International Center for Scholars. The article is based on the following working paper: "Criminal Justice Reform in Mexico: Change and Challenges in the Judicial Sector", Working Paper Series on U.S.-Mexico Security Cooperation, University of San Diego-Trans-Border Institute/Woodrow Wilson International Center for Scholars-Mexico Institute, April 2010.

RESUMEN. *Este artículo examina la serie de reformas constitucionales y legislativas federales aprobadas en 2008 con el objetivo de mejorar el sistema de justicia penal en México. Estas reformas incluyen nuevos procedimientos penales (juicios orales, penas alternativas, así como métodos alternos de resolución de controversias), una mayor protección del debido proceso para el acusado, y reformas para fortalecer la seguridad pública y la procuración de la justicia. En la reforma también se incluyen nuevas medidas para luchar contra la delincuencia organizada. El autor explica los nuevos procedimientos y cambios institucionales incluidos en la reforma. Argumenta que si bien ha habido avances significativos en varios estados, aún hay varios desafíos para la reforma judicial en México en el corto, mediano y largo plazo. Estos desafíos incluyen la necesidad de una mejor coordinación a nivel federal; establecer nuevas normas y estatutos; preparar adecuadamente el personal del sector judicial para aplicar el nuevo sistema; construir nueva infraestructura física, y garantizar una vigilancia adecuada para evaluar el desempeño del nuevo sistema.*

PALABRAS CLAVE: *Reforma judicial, justicia penal, juicios orales, reforma policial, proceso penal, investigación penal, crimen organizado, México.*

TABLE OF CONTENTS

I. CRIMINAL JUSTICE 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. In recent years, 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 virtually touch upon 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 fighting 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 an international audience. As 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 to be improved. This article 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.

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

While images of violence, lawlessness and official corruption are often greatly exaggerated in stereotypes and media portrayals, the Mexican criminal justice system has clearly faced critical challenges over the few last decades. 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 problems of "common

[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

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 28,000 drug-related homicides from 2001-2010, 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.

The weaknesses of Mexico's criminal justice system contribute to extraordinarily high levels of criminal impunity and weak protections for the rights of the accused. 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 the Mitofsky 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 the police.[5] As a result, victimization surveys suggest 25% or fewer crimes

---

exception to the rising tide of crime in Mexico is found in homicide rates, which have generally declined since the mid-20th century despite rising levels of violent crime. ROBERT DONNELLY & DAVID SHIRK, POLICE AND PUBLIC SECURITY IN MEXICO (Trans-Border Institute, 2009); Encuesta Nacional sobre la Inseguridad (ENSI). Mexico City, Instituto Ciudadano de Estudios sobre la Inseguridad (ICESI, 2009).

2 Carlos Antonio Flores Pérez, *De falacias que no lo parecen y mitos que no lo son*, ESTE PAÍS 226 (enero-febrero de 2010); DAVID SHIRK, DRUG VIOLENCE IN MEXICO: DATA AND ANALYSIS FROM 2001- 2009 (Trans-Border Institute, 2010).

3 JULIE RAY, MEXICO'S CITIZENS READY FOR IMPROVED JUSTICE SYSTEM (Gallup, 2008).

4 To be sure, the only institutional actors in Mexico less well respected than police are unions, legislators and political parties. Consulta Mitofsky, Economía, gobierno y política, Mexico City (2010), *www.consultamitofsky.com.mx*.

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 most difficult problem for local police to solve is drug trafficking; and 45% said that the criminal activity in which local police are most likely to be involved is drug trafficking. MARCOS PABLO MOLOEZNIK ET AL., JUSTICIABAROMETRO: ZONA METROPOLITANA DE GUADALAJARA (Trans-Border Institute, 2009).

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-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.

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 the Mexican judiciary are largely attributable to the historical neglect —if not outright sub-

---

[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 do not 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 no result was obtained from reporting the crime. See *www.icesi.com.mx*.

[7] PAUL VANDERWOOD, RURALES: MEXICO'S RURAL POLICE FORCE, 1861-1914 (University of Texas, 1970); PAUL VANDERWOOD, DISORDER AND PROGRESS: BANDITS, POLICE, AND MEXICAN DEVELOPMENT (SR Books, 1992); NELSON ARTEAGA BOTELLO & ADRIÁN LÓPEZ RIVERA, POLICÍA Y CORRUPCIÓN: EL CASO DE UN MUNICIPIO DE MÉXICO (México, 1998); JOSÉ ARTURO YÁÑEZ ROMERO, POLICÍA MEXICANA: CULTURA POLÍTICA, (IN)SEGURIDAD Y ÓRDEN PÚBLICO EN EL GOBIERNO DEL DISTRITO FEDERAL, 1821-1876 (Universidad Autónoma Metropolitana, Plaza y Valdés Editores, 1999); Diane Davis, *Undermining the Rule of Law: Democratization and the Dark Side of Police Reform in Mexico*, 48 (1) LATIN AMERICAN POLITICS AND SOCIETY 55-86 (2006); Diane Davis, *Who Polices the Police? The Challenges of Accountability in Democratic Mexico*, *in* POLICING DEVELOPING DEMOCRACIES 188-212 (Mercedes Hinton *et al.* eds., 2006); POLICING INSECURITY: POLICE REFORM, SECURITY, AND HUMAN RIGHTS IN LATIN AMERICA (Niels Uildriks ed., Lexington Books, 2009).

[8] Robert Varenik, *Exploring Roads to Police Reform: Six Recommendations*. Reforming the Administration of Justice in Mexico. Center for U.S.-Mexican Studies, eScholarship Repository.

version— 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 its legislature and (especially) its executive branch.[9] In Mexico and most Latin American countries, large majorities express a lack of confidence in judicial sector institutions.[10] In Mexico, these concerns owe partly to persistent and deeply ingrained 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 1).[11] For the victims of crimes in Mexico, there is rarely any justice.

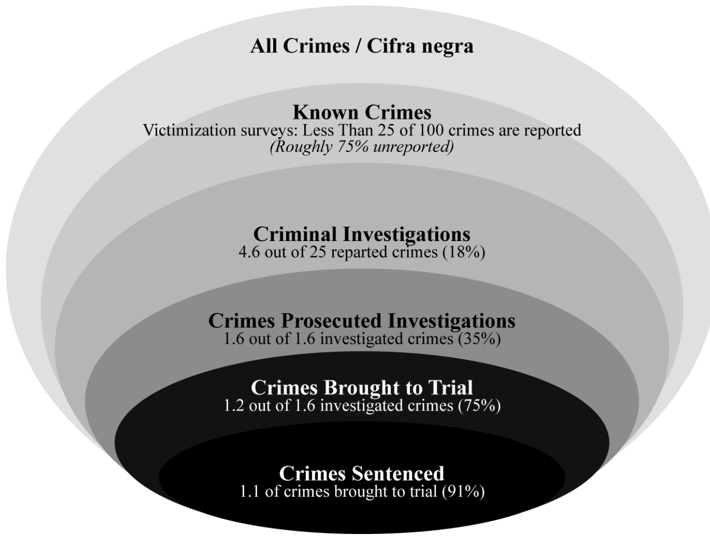
---

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. JOSÉ RAMÓN COSSÍO ET AL., MEXICAN LAW (Oxford University Press, 2005).

10 After decades of insignificance 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. HÉCTOR FIX-ZAMUDIO, LOS PROBLEMAS CONTEMPORÁNEOS DEL PODER JUDICIAL (UNAM, 1986); MARIO MELGAR ADALID, REFORMAS AL PODER JUDICIAL (UNAM, 1995); PILAR DOMINGO, RULE OF LAW, CITIZENSHIP AND ACCESS TO JUSTICE IN MEXICO (CIDE, 1996); HÉCTOR FIX-ZAMUDIO & JOSÉ RAMÓN COSSÍO DÍAZ, EL PODER JUDICIAL EN EL ORDENAMIENTO MEXICANO (FCE, 1996); EDMUNDO JARQUÍN & FERNANDO CARILLO FLOREZ, JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA (1998); WILLIAM C. PRILLAMAN, THE JUDICIARY AND DEMOCRATIC DECAY IN LATIN AMERICA: DECLINING CONFIDENCE IN THE RULE OF LAW (Westport, 2000); PILAR DOMINGO & RACHEL SIEDER, THE RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM (University of London, 2001); NIGEL BIGGAR, BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT (Georgetown University Press, 2003); Pilar Domingo, *Judicialization of Politics or Politicization of the Judiciary? Recent Trends in Latin America*, 11 DEMOCRATIZATION 104-127 (2004); LISA HILBINK, JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE (Cambridge University Press, 2007).

11 GUILLERMO ZEPEDA LECUONA, CRIMEN SIN CASTIGO: PROCURACIÓN DE JUSTICIA PENAL Y MINISTERIO PÚBLICO EN MÉXICO (Fondo de Cultura Económica, 2004).

FIGURE 1: LIFECYCLE OF A CRIME IN MEXICO



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 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.

---

[12] Human Rights First, *Legalized Injustice: Mexican Criminal Procedure and Human Rights* (2001).

[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. Elena Azaola & Marcelo Bergman, *The Mexican Prison System*, *in* REFORMING THE ADMINISTRATION OF JUSTICE IN MEXICO 91-114 (Cornelius Wasda ed., University of Notre Dame Press, 2007).

[14] International Rehabilitation Council for Torture Victims, Country Assessment Report: Mexico (2010); MARCO LARA KLAHR, PRISIÓN SIN CONDENA (Random House Mondadori, 2008); Human Rights Watch, Country Summary: Mexico (2009); David Luhnow, *Presumption of Guilt*, W. S. JOURNAL, Oct. 17, 2009.

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 formally charged 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 legal 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. This same judge 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, Mexican prisons are

---

15 Luhnow, *supra* note 14.

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. *Id*.

17 Héctor Tobar, *Judicial Overhaul in Mexico*, L. A. TIMES, Mar. 7, 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." According to Mexico's human rights ombudsman, as many as 90% of reported torture cases are the result of the forced confessions obtained from prisoners. RICARDO HERNÁNDEZ FORCADA & MARÍA ELENA LUGO GARFIAS, ALGUNAS NOTAS SOBRE LA TORTURA EN MÉXICO 139 (CNDH, 2004).

19 Regarding drug use, ELENA AZAOLA & MARCELO BERGMAN, DELINCUENCIA, MARGINALIDAD Y DESEMPEÑO INSTITUCIONAL: RESULTADOS DE LA TERCERA ENCUESTA A POBLACIÓN EN RECLUSIÓN EN EL DISTRITO FEDERAL Y EL ESTADO DE MÉXICO (CIDE, 2009) cite evidence that many inmates entered prison without prior drug use, but devel-

overcrowded on average by more than 30% above capacity in 2009 and with continuously growing populations. Prisons in the Federal District and the State of Mexico, the two entities with the largest prison populations operated at 212% and 183% capacity, respectively.[20] According to a survey conducted in those same states, 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. Such conditions help to explain the serious problems of rioting and escapes that have plagued Mexican prisons in recent years.[21] More important, these conditions illustrate the inadequacy of Mexico's 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 gover-

---

oped an addiction once in prison. This implies added social costs, Azaola and Bergman argue, since addicted prisoners are more likely to become connected to other delinquents and develop full-fledged criminal careers. ELENA AZAOLA GARRIDO, LA INSTITUCIÓN CORRECCIONAL EN MÉXICO: UNA MIRADA EXTRAVIADA (Siglo Veintiuno, 1990).

20 The Federal District and the State of Mexico account for a combined total of about 28% of Mexico's entire prison population. Azaola, *supra* note 19.

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. *Reos federales iniciaron el motín en Durango*, DIARIO DE YUCATÁN, Aug. 15, 2009.

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." STEVEN RAPHAEL & MICHAEL A. STOLL, DO PRISONS MAKE US SAFER?: THE BENEFITS AND COSTS OF THE PRISON BOOM (Russell Sage Foundation, 2009).

23 JUAN E. MÉNDEZ ET AL., THE (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA (University of Notre Dame Press, 1999); JOHN BAILEY & ROY GODSON, ORGANIZED CRIME AND DEMOCRATIC GOVERNABILITY: MEXICO AND THE U.S.-MEXICAN BORDERLANDS (University of Pittsburgh Press, 2000); Param Cumaraswamy, *Independence of the Judiciary, Administration of Justice, Impunity: Report on the Mission to Mexico*. Report of the Special Rapporteur on the Independence of Judges and Lawyers, Economic and Social Council of the United Nations. Submitted in accordance with Commission on Human Rights resolution 2001/39 (January 24, 2002); WAYNE A. CORNELIUS & DAVID A. SHIRK, REFORMING THE ADMINISTRATION OF JUSTICE IN MEXICO (2007).

nance.[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.

III. 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 in both federal and state administrative laws, criminal codes and criminal procedure laws (See Table 1, next page). According to Cossio *et al.*, 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.[25] 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 around the world. 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 (*jucio de amparo*) introduced in the 19th century.[26]

---

24 There is a significant correlation 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.

25 José Ramón Cossío et al., Mexican Law (Oxford University Press, 2005).

26 A *jucio de amparo*, commonly known as simply 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

The advent of a new revolutionary constitution in 1917 brought further adaptations to Mexico's criminal justice system and new efforts to reform the country's criminal (or penal) codes over the next decade and a half.[27] First, the new constitution eliminated the Ministry of Justice and, significantly, the figure of the instructional judge. As discussed below in more detail, this has given prosecutors a more central role in the investigation and prosecution of crimes, a move that has 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 Penal Federal*, CPF) are contained in the Federal Code of Criminal Procedure (*Código Federal de Procedimientos Penales*, CFPP) generated in 1934. The CPF 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).

TABLE 1: LEGAL FOUNDATIONS OF THE MEXICAN CRIMINAL JUSTICE SYSTEM

Source	*Origins and Evolution*	*Key Provisions*
Mexican Constitution (*Constitución de la República Mexicana*)	• 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.	• Articles 14, 16, and 18-23: individual guarantees • Articles 94-107: function of the federal judiciary • Article 102: role of the federal attorney general, or *Ministerio Público Federal* • Article 122: the role of the public prosecutor in the Federal District. • Article 103, 107: the right to a legal injunction *(amparo)*
Organic Law of the Federal Judicial Power (*Ley Orgánica del Poder Judicial de la Federación*, LOPJF)	• 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.	• 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 for the transfer of jurisdiction from lower to higher courts (*atracción*), professional advancement and the use of juries.

---

cease and desist an offending action. This injunction is only binding for the parties involved in that particular case (*i. e.*, *inter partes* effects).

27 Elisa Speckman Guerra, *Justice Reform and Legal Opinion: The Mexican Criminal Codes of 1871, 1929, and 1931*, *in* REFORMING THE ADMINISTRATION OF JUSTICE IN MEXICO (Wayne A. Cornelius & David A. Shirk eds., University of Notre Dame Press; Center for U.S.-Mexican Studies, 2007).

Organic Law of the Federal Attorney General (*Ley Orgánica de la Procuraduría General de la República*, LOPGR)	• 1908 and 1919: Organic laws established to regulate the Federal Public Prosecutor. • 1917: Article 21 of Constitution outlines functions of public prosecutors. • 1983: LOPGR establishes Federal Attorney General's office.	• A series of regulatory laws and modifications to the LOMPF in 1941 and 1955 and the LOPGR in 1984, 1985, 1987, 1988, 1993, 1996 and last modified May 29, 2009 progressively strengthened prosecutorial autonomy and restructured federal law enforcement agencies in Mexico.
Federal Criminal Code (*Código Penal Federal*, CPF)	• 1835: first Mexican criminal code adopted in Veracruz. • 1860s: Emperor Maximilian adopts the French criminal code. • 1871: Juárez adopts CPF (following the Spanish model). • 1931: Post-revolutionary government adopts the new CPF. • 2008: Judicial reform significantly modifies CPF.	• 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 (*Código Federal de Procedimientos Penales*, CFPP)	• 1934: post-revolutionary government enacts the new CFPP. • 2009: Most recent modification to the CFPP. • Further modifications are pending review by the Mexican Supreme Court to adapt the federal criminal procedure to the 2008 judicial reforms.	• Thirteen titles and 576 articles on 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	• 31 state codes • Federal District codes	• While there is considerable variation, state laws and codes generally adhere to standards established at the federal level.

SOURCE: Cossío et al., *supra* note 25.

Over the last two decades, a series of reforms to the above structures have been implemented in Mexico, leading to substantial implications for the criminal justice system and democratic governance overall. Under President Miguel de la Madrid (1982-88), the 1980s brought the dismantling of the nation's federal police agency, as well as new structures for coordinating national security policy.[28] In December 1994, under President Ernesto Zedillo

[28] The Federal Security Directorate (*Dirección Federal de Seguridad*, DFS) oversaw domestic security matters from 1947 to 1985, and served as one of the federal government's primary instrument of social and political control. 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 Center for Investigation and National Security (*Centro de Investigación y Seguridad Nacional*, CISEN). Later, another federal police agency, the Federal Judicial Police (*Policía Federal Judicial*, PFJ), widely regarded as corrupt, was replaced 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 investiga-

(1994-2000), the federal government restructured the national public security system and reformed the judiciary to promote higher professional standards,[29] stronger powers of judicial review,[30] new standards for judicial precedent[31] and greater judicial independence.[32] In November 1996, the Zedillo administration also introduced the Federal Organized Crime Law (*Ley Federal contra la Delincuencia Organizada*, LFDO) to address the expanded power and proliferation of organized crime syndicates in recent decades.

---

tion 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* (last visited February 22, 2010).

29 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, three federal circuit judges, appointed by the Court, two members chosen by the Senate and one member appointed by the Mexican president. These members serve non-renewable five-year terms. The creation of such councils is a regional phenomenon developed in Latin America during the 1990s. MARK UNGAR, ELUSIVE REFORM: DEMOCRACY AND THE RULE OF LAW IN LATIN AMERICA (Lynne Rienner Publisher, 2001).

30 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 Federal Attorney General, political parties and a designated proportion of representatives from the Senate, the Chamber of Deputies and the Mexico City and state legislatures— to challenge the constitutionality of legislation or other government actions.

31 While *amparo* decisions have *inter partes* effects, binding precedents can only be established after the Supreme Court or collegiate circuit courts make five consecutive and identical majority rulings on the same issue 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. 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.

32 Recent decisions (such as the Court's June 2007 verdict on the so-called "*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: Caroline C. Beer, *Judicial Performance and the Rule of Law in the Mexican States,* 48 (3) LATIN AMERICAN POLITICS AND SOCIETY 33-61 (2006); Alberto Begné Guerra, *La reforma del Poder Judicial federal*, 18 (205) NEXOS 16-18 (1995); Pilar Domingo, *Judicial Independence: The Politics of the Supreme Court in Mexico*, 32 JOURNAL OF LATIN AMERICAN STUDIES 705-735 (2000); JODI S. FINKEL, JUDICIAL REFORM AS POLITICAL INSURANCE: ARGENTINA, PERU, AND MEXICO IN THE 1990S (University of Notre Dame Press, 2008).

Arguably, the most substantial efforts to promote judicial sector reform began during the administration of Vicente Fox (2000-2006).[33] In April 2004, the Fox administration proposed a series of constitutional and legislative changes to modernize Mexico's criminal justice system.[34] 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.[35] 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 of Mexican states working to implement similar reforms at a sub-national level.[36] The states of Nuevo León, Chihuahua and Oaxaca were among the earliest to adopt new adversarial procedures and other innovations.[37]

While few concrete process indicators are available to gauge the impact of these changes, the perception that these state-level reforms have contributed to greater judicial efficiency and transparency helped build support for the Mexican Congress to adopt federal level judicial reforms in March 2008, during the current administration of PAN President Felipe Calderón (2006-2012). The reforms benefited from the widespread support of jurists, academics and human rights advocates favoring a greater emphasis on due process protections.[38] The reforms also gained broad political support in

---

33 In 2000, Fox, of the National Action Party (PAN), was the first opposition presidential candidate to defeat the Institutional Revolutionary Party (PRI), the organization that had dominated electoral politics since its creation in 1929.

34 For a more complete discussion of the 2004 judicial reform package proposed by the Fox administration, See David A. Shirk & Alejandra Ríos Cázares, *Introduction: Reforming the Administration of Justice in Mexico*, *in* REFORMING THE ADMINISTRATION OF JUSTICE IN MEXICO (Wayne A. Cornelius & David A. Shirk eds., University of Notre Dame Press, 2007).

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

36 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 state and local level. LUIS L. GONZÁLEZ PLACENCIA ET AL., ANÁLISIS TÉCNICO DE LA PROPUESTA DE REFORMA AL SISTEMA DE JUSTICIA MEXICANO (2005).

37 Daniel Mangis & Susan Szmania, *Oral Trials in the Mexican Legal System: Communicating 'Transparency' in a Legal Bureaucracy*. International Communication Association Conference. Montreal, (2008); LORNA MÁRQUEZ-CARRASQUILLO & DAVID A. SHIRK, STATE LEVEL JUSTICE REFORM INITIATIVES IN MEXICO (Trans-Border Institute, 2008).

38 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 impartial-

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 adequate legal defense); 3) modifications to police agencies and their role in criminal investigations; and 4) tougher measures for fighting 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.[39] First, Mexican criminal courts have traditionally relied on the use of oral testimony, the presentation of evidence and argumentation, in at least some fashion.[40] Therefore, a more appropriate aspect of the reform to emphasis 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 trials will be used in only a small fraction of the criminal cases brought before Mexican courts. This is because the reform involves

---

ity 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 LOS DERECHOS HUMANOS (2008). SEGUNDO INFORME ESPECIAL DE LA COMISIÓN NACIONAL DE LOS DERECHOS HUMANOS SOBRE EL EJERCICIO EFECTIVO DEL DERECHO FUNDAMENTAL A LA SEGURIDAD PÚBLICA EN NUESTRO PAÍS (Mexico, 2008).

39 Advocates of judicial reform began to deliberately use the reference to "oral trials" because the concept provided a simple visual for encapsulating the many changes entailed in the reform.

40 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.

other changes, notably alternative sentencing (*e. g.*, plea-bargaining or *juicio abreviado*) and alternative dispute resolution mechanisms (ADRs). These procedural innovations are intended to reduce the overall number of cases handled in court to 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.[41] As illustrated in Figure 2, 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 *querella*, in which the victim himself or herself stands as the accuser (*querellante*) of the suspect.[42]

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 directly leads 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.[43] Prosecutorial independence is especially notable during the

---

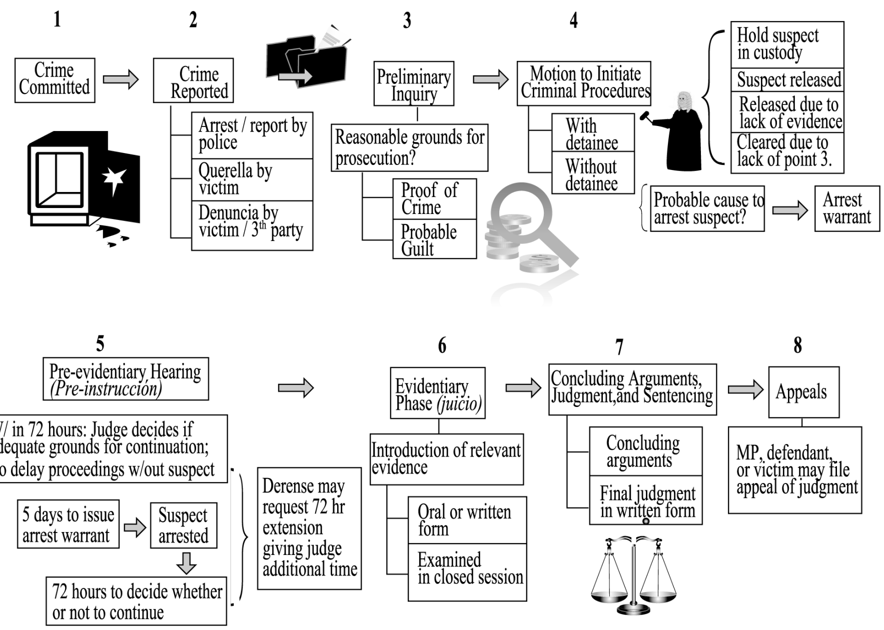
41 As Hammergren notes, there is a significant degree of variation in the application of the inquisitorial model, also referred as the "Continental" model. Moreover, because they developed their own unique legal traditions after independence, most Latin American legal systems have gaps and idiosyncrasies 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. LINN A. HAMMERGREN, ENVISIONING REFORM: IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA (Pennsylvania State University Press, 2007).

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

43 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 Orgánica del Ministerio Público Federal y Reglamentación de sus Funciones), the 1908 and 1917 Organic Law of the Federal Judicial Branch (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 Regulatory Law for Article 102 of the Mexican Constitution (*Ley*

preliminary inquiry (*averiguación previa*), during which a suspect is investigated and formally indicted of a crime.[44]

FIGURE 3: KEY STEPS IN THE TRADITIONAL CRIMINAL PROCEDURE IN MEXICO[45]



Indeed, critics contend 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 the mishandling of evidence.[46]

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.

[44] The *Ministerio Público* is a public prosecutor that also oversees the functions of police detective work. Thus, there are two kinds of *ministerios públicos*: the public prosecutor for preliminary inquiry (*ministerio de averiguaciones previas*) who conducts investigations and charges the suspect, and the public prosecutor for procedural control (*ministerio público de control de procesos*) who is the one that prosecutes the case.

[45] Figure prepared with assistance from Nicole Ramos, drawing on the description of Mexican criminal procedure developed by Cossío et al., *supra* note 25, at 346-347.

[46] Zepeda, *supra* note 11. Cossío et al., *supra* note 25; CLAIRE NAVAL, IRREGULARITIES, ABUSES OF POWER, AND ILLTREATMENT IN THE FEDERAL DISTRICT: THE RELATION BETWEEN POLICE AND MINISTERIO PÚBLICO AGENTS, AND THE POPULATION (Fundar, Center for Analysis and Research, 2006).

That said, Mexican judges do work closely with the prosecutor to continue to compile evidence and testimony during the preliminary hearing for formally indicting 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. As in other inquisitorial systems, there is also some adversarial presentation of arguments during the last phase of the process that leads 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 determine the guilt or innocence of the accused and decide on the appropriate sentence (*sentencia*) for the crime.[47] 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 Mexican criminal procedure in operation exhibits important liabilities.[48] 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 receive 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.[49] 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

---

47 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. Cossío et al., *supra* note 25, at 363.

48 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, *Inherited Legal Systems and Effective Rule of Law*, 39 JOURNAL OF MODERN AMERICAN STUDIES 571-96 (2002), E. G. Jensen and T. C. Heller, *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, STAN. L. & POL'Y REV 456 (2003).

49 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, *supra* note 23.

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.[50]

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 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.[51]

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 in adversarial systems, the final sentence in a criminal case is more commonly 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.[52]

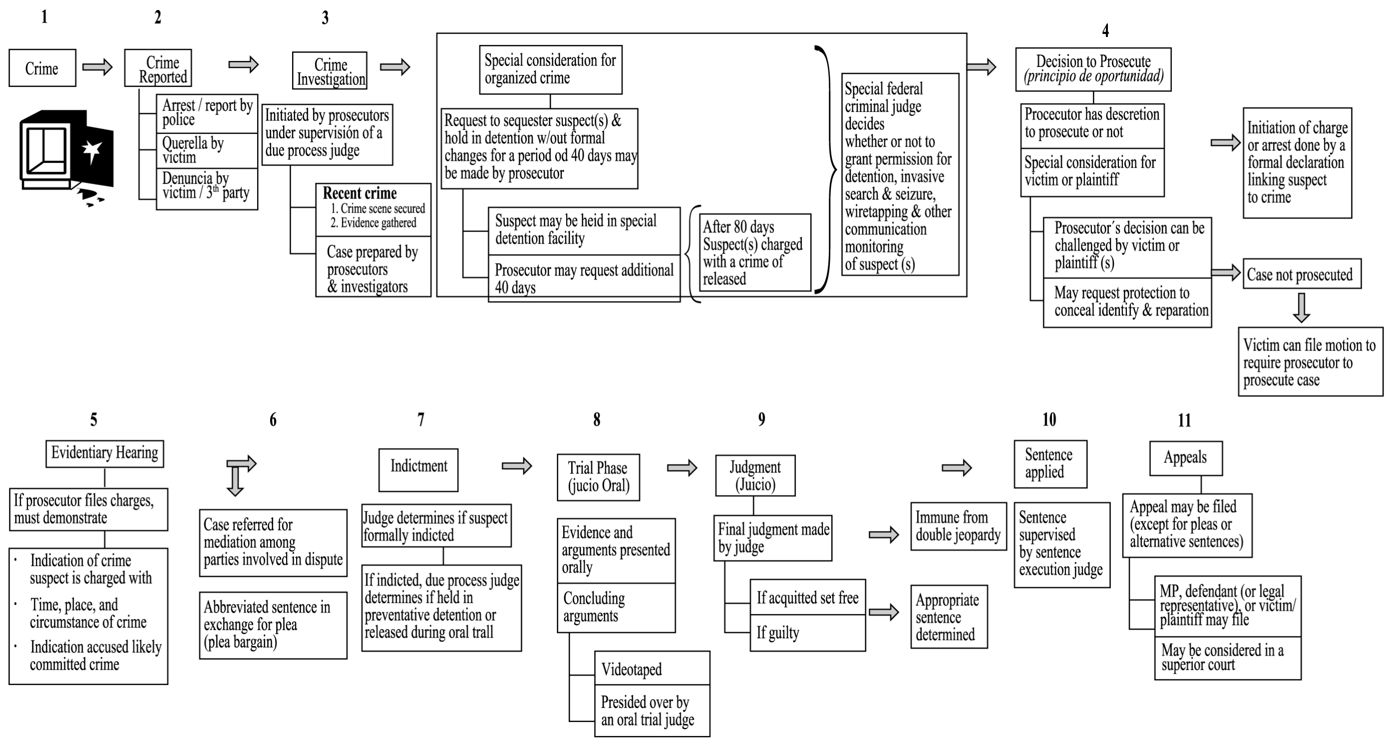
---

[50] 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 proven innocent" has more to do with the relatively inflexible criteria for pre-trial release in Mexico. Cossío *et al.*, *supra* note 25, at 358.

[51] According to one recent critique 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." James Trainum, *A Safety Net for the Innocent*, THE WASHINGTON POST, Mar. 28, 2010.

[52] 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.

FIGURE 4: KEY STEPS IN THE NEW ADVERSARIAL CRIMINAL PROCEDURE MODEL IN MEXICO



SOURCE: Figure prepared with assistance from Nicole Ramos.

Under the 2008 reforms, 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 greater reliance on the presentation of testimony and evidence during live, public trials that are recorded for subsequent review or appeal.[53] 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.

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 garantías*, 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. A sentencing judge, or *juez de sentencia* (also called the *juez de juicio oral*), will preside over the trial phase, the presentation of oral arguments and the final verdict. A sentencing implementation judge (*juez de ejecución de sentencia*) ensures that sentences are properly applied and monitors processes of restorative justice (*e. g.*, redress of damages).[54]

Meanwhile, the public prosecutor (*Ministerio Público*) will lose some of the power traditionally 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 responsabilidad*), but also that the public prosecutor requires less immediate evidence to initiate a charge or arrest than under the old system (due to modifications to Article 19, Paragraph 1). The

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

54 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 determining the suspect's guilt.

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 facing law enforcement.

One possible concern, however, is that prosecutors could avoid taking 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, which will exert 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 for the redress of grievances (*reparación del daño*) 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 during distinct phases of the criminal proceeding (including requirements for 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*.[55]

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.[56] Many suspects are detained even when charged with relatively minor offenses, such as shoplifting or an automobile

---

[55] "*Garantismo*" is a loaded term in Mexico. One 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.

[56] Juan Ciudadano, *La propuesta Carbonell*, EL NORTE, Nov. 27, 2006; *Necesaria la reforma judicial: Azuela*, EL PORVENIR, Nov. 27, 2006; *Urgen a reformar sistema de justicia*, REFORMA, Nov. 17, 2006; Claudia Salazar, *Proponen limitar prisión preventiva*, REFORMA, Nov. 26, 2006.

accident.[57] 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 is only to be applied 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 only for a maximum of two years without a sentence.

Second, as noted earlier, the 2008 reforms created a new due process judge, the *juez de garantías* 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 the suspect should be released on bail or on his or her own recognizance until a guilty verdict has been delivered. The due process judge will also issue the final sentence in cases in which 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 a number major implications. It implies a greater role for judges during 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.[58] 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.[59] As noted

---

57 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 it also contained convicted criminals. Justice in Mexico Project, *Tijuana prison riots kill at least 23 people*, JUSTICE IN MEXICO NEWS REPORT (Trans-Border Institute, 2008).

58 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." Sergio Valls Hernández, *El juez de control en México*, MILENIO, Dec. 9, 2008.

59 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.

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.[60] 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."[61]

Another important change included in the new reforms is the emphasis on the judge's physical presence at all the hearings involving the defendant. Under Mexico's traditional system, criminal proceedings do not primarily take place at live audiences within 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 report that 80% of inmates interviewed in the Federal District and the State of Mexico were not able to speak to the judge who tried their case.[62] 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 that admonish 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

---

60 GUILLERMO ZEPEDA LECUONA, LA REFORMA CONSTITUCIONAL EN MATERIA PENAL DE JUNIO DE 2008: CLAROSCUROS DE UNA OPORTUNIDAD HISTÓRICA PARA TRANSFORMAR EL SISTEMA PENAL MEXICANO. ANÁLISIS PLURAL (2008).

61 Under the old system, a judge who determined 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.

62 Azaola & Bergman, *supra* note 19.

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 changed attorneys because of the indifference they perceived in their first public defender.[63]

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.[64] 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 their 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 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 Consti-

---

63 *Id.*

64 As Cossío *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." Cossío et al., *supra* note 25, at 359.

tution, along with public prosecutors and investigators, police will now share responsibility for securing the crime scene and gathering 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 any responsibilities to secure or gather evidence. Given that evidence collected by the reporting officer is often a primary tool for the prosecution in other criminal justice systems, 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 Ministry of Public Security (*Secretaría de Seguridad Pública*, SSP) have already reorganized their respective police agencies. Under the Organic Law of the Federal Attorney General (*Ley Orgánica de la Procuraduría 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 "trust" 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 assume a greater role in investigating severe crimes that are beyond the capacity of state and local law enforcement.

Even more significant, the 2008 reforms allow for combining 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*).[65] The new law effectively bestows investigative powers upon what

---

[65] 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 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

was previously the Federal Preventive Police (PFP), which formerly carried out a strictly preventive function. Under the new law, Federal Police officers will be able to collaborate with the PGR on its investigations, though it is not yet clear what protocols will be ultimately developed to manage this coordination. Other new functions include securing crime scenes, executing arrest orders and processing evidence, all formerly functions of the AFI.[66] 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 común*) 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, Section VII, governors have long had the power to take command of local police forces to address severe public security problems affecting their states.[67] The 2008 reforms further 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.[68] It remains to be seen,

---

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. AFI agents took to the streets in April 2009 to demand that the PGR and Congress not allow the agency to disappear. Nonetheless, Congress approved the PGR-backed measure to close the agency and President 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. *AFI, entre la corrupción y la eficacia*, EL ECONOMISTA, Dec. 6, 2005. Gustavo Castillo & Alfredo Méndez, *Con la restructuración de la PGR inicia la reforma del sistema de seguridad*, LA JORNADA, Dec. 26, 2006; *Desaparece la AFI*, EL FINANCIERO, May 29, 2009.

66 As discussed below, the reforms also grant expanded permission for authorities to monitor telephone, satellite, and internet communications in investigations involving organized crime activity, provided permission has been granted in a judicial order.

67 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. Luis Cárdenas, *Útil y factible la unificación de todas las policías: Andriano Morales,* EL SOL DE DURANGO, Nov. 10, 2009; José María Cárdenas, *En marcha la unificación de corporaciones*, EL SIGLO DE DURANGO, Feb. 22, 2010.

68 Given recent debates about police reform, it is worth noting that Article 115, Section VII of the Mexican Constitution indicates that "The police will follow the orders of the

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 notes that it could have the unintended effect of further undermining civil service protections that help to ensure an officer's professional development and protect him from undue pressure or persecution.[69] 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.[70] 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).[71] Both funds have channeled millions of dollars in direct financial assistance to improve local and state level police agencies, respectively. However, the effectiveness of these

---

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."

69 Zepeda Lecuona, *supra* note 11.

70 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 were 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. MARCOS PABLO MOLOEZNIK ET AL., JUSTICIABARÓMETRO: ZONA METROPOLITANA DE GUADALAJARA (Trans-Border Institute, 2009).

71 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*. Sebastián Otero, *Destinarán 2 mil 100 mdp para combatir narcomenudeo*, EL UNIVERSAL, Apr. 18, 2006.

funding mechanisms has been questioned, given that large amounts of money have gone unspent in recent years.[72]

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 performance and conduct.

4. *Organized Crime: Providing New Tools to Fight 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 sentence of four or more years in prison]… in order to obtain, directly or indirectly, a financial or other material benefit."

In cases involving organized crime, the Mexican Constitution has now been amended to allow sequestering suspects under "*arraigo*" (literally, to "root" someone, *i.e.*, to hold firmly) for up to 40 days without criminal charges (with the possibility of extending it an additional 40 days, up to a total of 80 days).[73] 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 evi-

---

[72] 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. E. Seminario, *Chihuahua ocupa 4º lugar en recibir apoyo del FASP*, EL SEMANARIO SIN LÍMITES, Feb. 19, 2010; Gerardo Mejía, *Firman estados convenio para fondo de seguridad*, EL UNIVERSAL, Feb. 28, 2010.

[73] Currently, the Federal Code of Criminal Procedure does not have clear criteria on how a judge should determine the application of *arraigo*, or the necessary burden of proof prosecutors must bear out (*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." Janice Deaton, *Arraigo and the Fight Against Organized Crime in Mexico*. Working paper presented at the NDIC-TBI Bi-national Security Conference hosted at the University of Guadalajara (Trans-Border Institute, 2009).

dence 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 designed to fight 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 having been charged with a criminal offense. 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.[74] 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 used since 2008 is not clear, in large part because access to information on *arraigo* cases is difficult to obtain.

In addition to special mechanisms for detaining organized crime suspects, the 2008 reforms also paved the way for new uses of wiretapping and other tools for fighting organized crime. 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.[75] 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 assets related to those crimes are eligible for forfeiture.[76]

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*).[77] In addition to

74 Interview with Nuevo León Assistant Attorney General Javier Enrique Flores Saldívar (Mar. 4, 2010).

75 Andrea Becerril & Victor Ballinas, *Aprueban la Ley de Extinción de Dominio*, LA JORNADA, Apr. 3, 2009; Jenaro Villamil, *Ley de Extinción de Dominio, apenas la primera prueba*, PROCESO, Apr. 3, 2009.

76 "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 seizure was performed unjustly the assets must be returned with interest within six months." Justice in Mexico Project, *Mexican Senate Approves Asset-Forfeiture Law for Properties Related to Organized Crime,* NEWS REPORT (Trans-Border Institute, April 2009).

77 Ricardo Gómez & Elena Michel, *FCH envía propuesta de ley antisecuestro*, EL UNIVERSAL, Feb. 18, 2010; *Discutirá Senado propuesta de Ley Antisecuestro*, INFORMADOR, Feb. 18, 2010.

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.[78] 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.

IV. Implementing Judicial Reform in Mexico

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.[79] 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 of 71-25 in the Senate on March 6, 2008.[80] 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 video-recording equipment; judges, court staffs and lawyers need to be retrained; police need to be professionalized and prepared to as-

---

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

79 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 (dealing with the use of search and seizure without a warrant) were removed by the Senate in December 2007.

80 There are 500 members of the Chamber of Deputies and 128 members of the Senate. Members of the PRD supported the reforms, though the PRD was the party most divided on the vote See Tobar, *supra* note 17.

sist 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 eight years— to adopt the reforms.

The Ministry 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.[81] The council also has nominal representation from academia and civil society.[82] Although the reforms were passed in mid-2008, the CCISJP was not formally inaugurated until it first convened in June 2009, which was followed by additional meetings in August 2009 and January 2010.[83] This initial delay was partly attributable to the death of the former technical coordinator of the council, 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, Felipe Borrego Estrada, was appointed in December 2008.[84]

---

81 In addition to the Ministry of the Interior, this council includes representatives from the Chamber of Deputies, the Senate, the Supreme Court, the Federal Attorney General (*Procuraduría General de la República*, PGR), the Public Security Ministry (*Secretaría de Seguridad Pública, SSP*), 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, CONATRIB*), and the National Conference of Attorneys General (*Conferencia Nacional de Procuración de Justicia*).

82 Professor Miguel Sarre Íguiniz, of the Autonomous Technological 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 counsel.

83 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 Aug. 13, 2009, and Jan. 8, 2010, respectively. Secretaría de Gobernación. http://www.setec.gob.mx (Last accessed Sep. 15, 2010).

84 At the time of the crash, Santiago Vasconcelos, 51, was a long time federal prosecutor who had recently joined President 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) and was subject to frequent threats on his life. Having begun 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

The role of the CCISJP is to: 1) serve as a liaison between the various members of the council and other entities working to promote judicial reform, 2) monitor progress made in implementing federal reforms at the state level, 3) provide technical assistance to states working to implement the reforms (*e. g.*, courtroom design, software, etc.), 4) assist in training judicial system operatives (*e. g.*, judges, lawyers, legal experts) and 5) manage the administrative and financial aspects of the reform (*e. g.*, guiding legislative budget requests). However, the CCISJP faces some significant challenges. As technical secretary (SETEC) for the CCISJP, Assistant Secretary Borrego has substantial visibility, but limited authority; an enormous mandate, but insufficient resources; and a current administration that ends in 2012, an implementation deadline that ends in 2016. Also important is the challenge of funds, since the commitment of government resources at federal and state levels will likely need to be greatly increased from their present levels to provide adequate infrastructure and training.[85]

With these challenges in mind, the goal of the CCISJP is to have reforms approved in all Mexican states and implemented in 19 of 32 federal entities (31 states and the Federal District) by 2012 when the current administration leaves office.[86] In late-2010, the CCISJP made some important progress toward these goals, including establishment of interagency processes and internal regulations for CCISJP; efforts to promote public education and awareness about the reforms, including media promotion and new official publication; proposed legislation developed by the Secretary of Public Security to unify state and local police commands, tabled to the Fall 2010 legislative session; proposed legislation developed by the Secretary of the Interior for a new Federal Code of Criminal Procedure (CFPP) introduced in the Fall 2010 legislative session.[87] The new proposed CFPP drew elements from the model code that was developed by state courts in 2008, and therefore benefits from past experience and political support in the states.[88]

---

helped oversee a dramatic increase in cross-border extraditions, including that of Gulf cartel leader Osiel Cárdenas. His replacement, Borrego Estrada, was 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. Editorial, *Perfil de José Luis Santiago Vasconcelos*, EL UNIVERSAL, Nov. 4, 2008, http://www.eluniversal.com.mx/notas/552698.html; *Se encargará Borrego Estrada de la reforma penal*, MILENIO, Dec. 8, 2008.

85 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.

86 Interview with Felipe Borrego Estrada in Mexico City (Mar. 17, 2010).

87 http://www.setec.gob.mx/sesioncc-5a.htm.

88 Comisión Nacional de Tribunales Superiores de los Estados Unidos Mexicanos (2008), www.poderjudicialcoahuila.gob.mx/pag/4foro/consideraciones_23_10_08.pdf.

Meanwhile, at the state level, there has been some significant progress. Indeed, six states —Chihuahua, State of Mexico, Morelos, Oaxaca, Nuevo León and Zacatecas— had already adopted and implemented similar reforms prior to 2008, providing important precedents that influenced the federal initiative. Indeed, the states of Nuevo León and Chihuahua had already held their first oral criminal trials.[89] 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.[90] Still, some states are lagging well behind, with no significant signs of activity aimed at adopting the reforms.[91] 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 accelerate the pace or eventually lobby for an extension of the current 2016 deadline to implement the reforms.

Thus, coordination among federal government branches and agencies has accelerated significantly since mid-2009, and federal efforts to reach out to states have also increased with the goal of advancing the implementation of the reforms. Among the most important elements of federal assistance at the state level are the distribution of 266 million pesos in federal subsidies in 2010 for projects to promote the implementation of state level judicial reforms (total of 19 recipient states); the development of a national training program on new oral, adversarial criminal justice system coordinated by the Comisión Nacional de Tribunales Superiores de Justicia (CONATRIB); the development of new federally coordinated training and materials for prosecutors, public defenders and judges, and efforts to support changes to curricula in criminal law in higher educational programs; and a preliminary performance evaluation and cost assessment of state level judicial reform in the state of Chihuahua.

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

---

89 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. Luis Alonso Fierro, *Dictan primera sentencia en juicio oral*, EL DIARIO DE CHIHUAHUA, 2007.

90 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), http://www.reformajusticiapenal.gob.mx/docs/INFORME_Secretaria_Tecnica_2009-2010.pdf.

91 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.

transitions from inquisitorial to accusatory systems elsewhere in Latin America, most notably Chile.[92] 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 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 government accountability and equal access to justice.

Still, despite these much-touted benefits, Mexico's judicial reforms have faced serious and merited criticism, from both traditionalists and 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.[93] 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 considering the intricacies, nuances and benefits of Mexico's existing system.

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. However, some estimates suggest that the initial investment needed to implement reform in Mexico's two most successful states exceed $750 million pesos (roughly $70 million USD) each. Had similar investments been made in the pre-existing system, it is likely that some significant improvements would have resulted. Finally, 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-focused approach may excessively favor criminals to the detriment of the rest of society. Counter-reform currents in Mexico express the view that "oral trials only protect the criminals."[94] In short, traditionalist 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, with little probability of

---

92 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.

93 *Reforma judicial con sello gringo*, PROCESO, Feb. 17, 2008.

94 Nancy J. Blake and Kathleen Blake Bohne, *The Judicial System in Mexico (Part 3)*, OPEN DEMOCRACY, Aug. 8, 2009. *www.opendemocracy.net* (Last accessed Oct. 13, 2010).

success, and without a real need for such a massive reorganization of the existing system.[95]

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.[96] 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 having been charged with a crime— is widely criticized for undermining *habeas corpus* rights and creating an "exceptional legal regime" for individuals accused of organized crime.[97] Although not usable as evidence in trial, confessions extracted (without legal representation) under *arraigo* can still be submitted as supporting evidence for an indictment.[98] Also of concern to due process advocates is the 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 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.[99] Given the proliferation of

---

95 María Candelaría C. Pelayo & Daniel Solorio, *La justicia penal que viene. El caso Baja California*, 127 BOLETÍN MEXICANO DE DERECHO COMPARADO 347 (2010).

96 Patrick Corcoran, *Corruption Could Be Undoing of Mexico's Judicial Reforms*, MEXIDATA, Mar. 17, 2008.

97 As Zepeda argues, the worst miscarriage of justice is when the coercive apparatus of a democratic State deprives an innocent person of his or her liberty; without a formal charge against an individual, the presumption of innocence should prevail. Zepeda Lecuona, *supra* note 11.

98 One concern about the *arraigo* is that it undermines the torture prohibitions included in the reforms. According to Deaton, "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 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." Deaton, *supra* note 73, at 16; Liliana Alcántara, *Naciones Unidas urge a desaparecer la figura del arraigo*, EL UNIVERSAL, Dec. 01, 2006.

99 Indeed, there are some concerns that reform efforts in Chile have not shown as

violent crime, many Mexicans are understandably reluctant to place greater emphasis on the presumption of innocence and pre-trial release, as this rights-focused 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 people have come to the cynical conclusion that "oral trials only protect the criminals."[100] 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-based aspects of the reforms. In short, the road ahead for Mexico's 2008 judicial reforms will likely be long, difficult and of uncertain destination.

V. Concluding Observations: Prospects for the Future

Mexico's recent justice sector reforms are much more complex 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.[101] Enabling Mexico's legal profession to meet

---

much progress as advocates would like. Chile has even experienced a significant counter-reform movement that has reversed some key aspects of these reforms. Verónica Venegas & Luis Vial, *Boomerang*: *Seeking to Reform Pretrial Detention Practices in Chile*, JUSTICE INITIATIVES (2008).

100 Nancy J. Blake & Kathleen Blake Bohne, *The Judicial System in Mexico*, 3 OPEN DEMOCRACY (2009).

101 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 estimates this number to be around 40,000, but there is no clear indication exactly how many of these practice criminal law. Fix-Fierro suggests that, given the proliferation of Mexican law schools in recent years, Mexico's legal profession suffers from a problem of quantity-over-quality. *La administración de la justicia en México*, REVISTA AMEINAPE (Héctor Fix-Fierro & Juan Ricardo Jiménez Gómez eds., 1997).

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.[102] 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. Around the same time, professional standards and oversight mechanisms for actors in the U.S. judicial system were developed 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.[103]

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

---

102 Efforts to promote professionalism among lawyers are needed, as lawyers 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.

103 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.

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 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. 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., CIDAC) to promote analysis and public dialogue about judicial reform.[104]

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 today than they were 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 reintegration into society? Unfortunately, there are few adequate baseline indicators available to answer many of these questions.[105]

---

104 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).

105 Recent efforts by the Justice in Mexico Project to interview lawyers and police through an instrument known as the "Justiciabarómetro," 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.

The enormity of the challenges confronted by Mexico's judicial sector is not to be under-estimated. Mexico is working to make major progress in a relatively short period, attempting to radically alter hundreds of years of a 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. Moreover, 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 on-going judicial sector reforms.

Recibido el 16 de junio de 2010 y aceptado
para su publicación el 18 de agosto de 2010.

Mexican Law Review
New Series
VOLUME III
Number 2

CARTELS IN THE COURTROOM: CRIMINAL JUSTICE REFORM AND ITS ROLE IN THE MEXICAN DRUG WAR

Gillian REED HORTON*

To stop crime, we have to get rid of it in our own house.

Mexican President Felipe Calderón,
Oct. 25, 2008[1]

ABSTRACT. *In recent years Mexico has experienced an increase in drug-related violence as the government seeks to eradicate organized criminal elements behind the drug trade. In order to accomplish this Mexico has passed major new criminal justice reforms, as well as to the military and police. In June 2008, the Constitution was amended to move the country's criminal justice system closer to the accusatory (adversarial and oral) model most closely associated with common law systems, particularly that of the United States. Mexican officials hope that by making criminal justice a more transparent, participatory experience the system will be better equipped to handle the effects of the drug war. However, judicial reform is far from simple even under the most favorable circumstances, and presents an especially daunting challenge when undertaken within the context of escalating violence. While Mexico hopes these changes will help address the broader effects of cartel violence on society, observers of the process fear that the reforms will suffer from the traditional obstacles presented by the pursuit of justice in transitioning countries, such as corruption, lack of real independence for criminal justice actors and limited educational and financial resources. It remains to be seen whether the 2008 reforms will strike the right balance and help propel the country towards security, stability and a stronger Rule of Law.*

KEY WORDS: *Criminal justice reform, accusatory procedure, rule of law, Mexico, drug war.*

* BA from the College of William & Mary (double major) in Latin American Studies and International Relations (received May 2008), JD from Columbia Law School (expected May 2011), LLM in International Criminal Law from the University of Amsterdam (expected May 2011).

1 David Brennan, *Mexico's Twin Challenges: Reforming its Criminal Justice System and Combating Drug Cartel Violence*, 51 ORANGE COUNTY LAWYER 41 (2009).

RESUMEN. *Durante los últimos años, conforme el gobierno ha buscado erradicar aquellos elementos del crimen organizado que están detrás del tráfico de drogas, México ha visto un aumento significativo en la violencia relacionada con el narcotráfico. Para lograr tal objetivo, además de hacer uso del ejército y elementos policiacos, México ha ido diseñando importantes reformas a su sistema judicial. En junio de 2008, la Constitución fue enmendada para acercar al sistema judicial mexicano al modelo acusatorio (adversarial y oral) asociado con los sistemas de derecho común, particularmente el de los Estados Unidos. Los funcionarios y agentes públicos esperan que el sistema judicial esté mejor equipado para manejar los efectos de la guerra contra el narcotráfico conforme el sistema se haga más transparente y más participativo. Sin embargo, aun bajo condiciones favorables, la reforma judicial es todo, menos sencilla, y presenta un reto particularmente complejo cuando los niveles de violencia siguen en aumento. Mientras que México espera que estos cambios le ayuden a atender los efectos colaterales de la violencia entre los carteles y las autoridades, algunos observadores temen que dichas reformas se verán con aquellos obstáculos a la aplicación de las leyes que tradicionalmente enfrentan los países en transición, tales como corrupción, la falta de independencia de los actores judiciales, así como la falta de recursos educativos y financieros. Estará por verse si las reformas de 2008 son las adecuadas y si llevarán a México a una nueva era de seguridad, estabilidad y de fortaleza al Estado de derecho*.

PALABRAS CLAVE: *Reforma penal, procedimiento acusatorio, Estado de derecho, México, guerra contra el narcotráfico*.

TABLE OF CONTENTS

I. Introduction

This article counts itself among a handful of scholarly articles on Mexico's recent Constitutional reform that are available in English, a strange deficit in light of the close ties between Mexico and the United States. Until very recently, the U.S. and its academic community has paid little attention to the emerging security threat in Mexico, though the recent rise in violence may precipitate greater interest. Mexico is the world's 14th largest economy and the 3rd most substantial trading partner of the United States, but more than clothes, toys and food cross the nearly 2,000 miles of border separating the two countries. The United States Drug Enforcement Administration estimates that over 90% of the cocaine and 80% of methamphetamines sold and consumed in the United States travel through Mexico,[2] while 2,000 weapons enter the Mexico from the United States each day.[3] Mexico is at war, but this is not a war that can be won using conventional tactics, and if the government wants a long-lasting solution to its conflict with the drug cartels, it will have to employ a multi-faceted strategy that backs up the use of force with flexible, innovative legal reform. Fortunately, the country's leadership has recognized the need for a comprehensive strategy that seeks to build up the Rule of Law through the implementation of ambitious legal reforms. Constitutional changes to the Mexican justice system were approved in June 2008 for implementation over an 8-year period and are intended to serve as the primary legal element of the country's war on organized crime and the drug trade. The objective of this paper is to present and analyze a few of these significant reforms, as well as the staggering obstacles to implementing them and the preliminary chances of success. Though my primary goal is to convey a sense of the institutional reforms that have now begun, it is important to read these changes with a strong understanding of the history which necessitated them, including the current climate of violence and corruption, the evolution of Mexico's legal system and a view of law, country, and society that is uniquely Mexican. I will begin with a basic tenet that lies at the heart of my argument and will proceed with this understanding in mind: the use of force and the use of law must go hand in hand; standing alone, each must fail.

---

[2] Steven E. Hendrix, *The Mérida Initiative for Mexico and Central America: The New Paradigm for Security Cooperation, Attacking Organized Crime, Corruption and Violence*, 5 (2) LOY. INT'L. L. REV. 108 (2008).

[3] U.S. Rep. Henry Cuellar, *Keynote Address at the American Enterprise Institute for Public Policy Research on Battling the Deadly Drug Cartels in Mexico: A Shared Responsibility* (Nov. 8, 2007). Available at: http://www.aei.org/events/filter.,eventID.1584/transcript.asp.

Balancing Force and the Rule of Law: Why the Army Cannot Go It Alone

> *It is clear that public security and an effective justice system are inseparable aspects of a single concept. History has demonstrated that efforts to increase security are made sustainable by the Rule of Law, and that the Rule of Law flourishes in a climate of security.*
>
> Stephen E. HENDRIX[4]

In the 21st century, the use of force without legal backing is no longer tenable. This is not simply a moral imperative but a practical one, which must recognize that force alone does not address the complexities of any modern situation. Conversely, attempts to bring the Rule of Law to bear on a situation of widespread criminal violence without the use of targeted force will not be effective. Mexico needs the army, but the army ultimately needs the Rule of Law, and for the Rule of Law to flourish, it must enjoy the protection of effective criminal justice mechanisms.[5]

A consultant working with justice reform in Mexico recently described the use of the army to combat drug violence as a "Band-Aid," implying that the necessary measures must go deeper, resulting in permanent institutional reform. [6] It is easy to see why this is the case: with twenty-three billion dollars of income each year, the cartels can afford to replace much of what the government destroys.[7] For every cartel member killed or captured, another will step up to fill the space; and for each weapon seized, another dozen will find their way across the porous border. Therefore, any successful strategy must incorporate more than the element of force. From one perspective, it might appear that the Calderón administration began a war without first reforming the institutions needed to carry it through to a successful conclusion, compounding the difficulties inherent in the process of legal change. However, some observers of Mexican institutions note that nothing short of a war or a revolution can change the country's entrenched legal institutions, as historically, periods of violent upheaval have sparked drastic changes to institutional structures that have been unthinkable dur-

---

4 Hendrix, *supra* note 2, at 123.

5 *Strengthening the Technical Cooperation Capacity of the United Nations Crime Prevention and Criminal Justice Programme in the Area of the Rule of Law and Criminal Justice Reform.* United Nations Economic and Social Council resolution 2005/21, July 22, 2005. Available at: http://www.un.org/en/ecosoc/docs/2005/resolution%202005-21.pdf..

6 Sara Miller Llana, *Rough Border Town Leads Reform of Mexico's Legal System*, CHRISTIAN SCIENCE MONITOR, at W1, Apr. 3, 2008.

7 Hendrix, *supra* note 2, at 106.

ing times of peace and security.[8] Therefore, such a period of conflict may not only require institutional adjustments, but provide the vehicle by which they are accomplished. This legacy has demonstrated that when paired with legal institutions, military force has proven to be a catalyst in the uphill battle for reform, one of the few tools that has successfully altered a system which is resistant to change. However, force alone can create additional problems such as governmental abuse of power, violations of human rights and weakening of the Rule of Law. In addition, as the use of force increases the numbers of arrests, the justice system must be able to cope with the greater load and if it is unable to do so, it runs the risk of operating outside of the Rule of Law and suffering a crisis of legitimacy. Thus, using force without legal backing creates an obstacle to constructive institutional change, but using it in conjunction with the law can strengthen, transform and develop institutions of justice if done properly.[9] The country now stands at a crossroads: it can revert to a system dominated by single party rule and old institutions as citizens trade democratic progress for security, or worse, it can become a "narco state," in which the government no longer holds a monopoly on violence and the cartels possess the power to levy taxes, control the media and directly influence the political structure and the daily lives of citizens. Alternatively, the government can undertake a committed strategy designed to eradicate organized crime in its territory by using a combination of military firepower and democratic institutions to deal with the corruption that allows crime to flourish.

Mexico has vehemently denied the claims of a Pentagon report that it, along with Pakistan, runs the risk of becoming a "failed state," and has also rejected comparisons with Colombia which were offered by U.S. Secretary of State Hilary Clinton.[10] However, President Calderón and his government have frequently spoken of the cartel's attempts to engage in behavior typically reserved to sovereign nations, including the *de facto* control of certain areas of the country.[11] Recognizing the imminent danger posed by organized crime, the federal government has demonstrated a commitment to fight the cartels on both the martial and the legal fronts, combining aggressive military action with reforms to the Constitution and the country's criminal procedure mechanisms. The necessity of such a two-pronged approach has been widely recognized, with law enforcement officials on both

---

8 Boris Kozolchyk, *Mexico's Living Law: An Insider's View, interview with Professor Raúl Cervantes Ahumada*, ARIZ. J. OF INT. & COMP. LAW, 159 (1988).

9 Hendrix, *supra* note 2, at 116.

10 David Brooks, *Crece en México "insurgencia" de cárteles: Clinton*, LA JORNADA, Sep. 8, 2010, at P2.

11 Mark Lacey, *In an Escalating Drug War, Mexico Fights the Cartels, and Itself*, N.Y. TIMES, Mar. 30, 2009 at A1.

sides of the border maintaining that the cartel's ability to flourish depends in large part on the presence of a dysfunctional criminal justice system that can be easily manipulated through corruption and violence.[12] According to David Brennan,

> This upsurge in violence is occurring simultaneously with Mexico's efforts to make major reforms of the country's criminal justice systems at both state and federal levels… Though these two programs might seem unrelated, they are inextricably intertwined because the goal of combating the drug cartels' criminal activity cannot be addressed without the concurrent reform of the criminal justice system.[13]

Law enforcement officials, academics and the Mexican government have all recognized the need for such a dual strategy, and the principles behind this approach have been enshrined in the U.S. foreign assistance package known as the Mérida Initiative, through which the United States has pledged more than forty million dollars in training, technical assistance and equipment to help Mexico fight organized crime. Goal Three of the Initiative lays out the desire to "improve the capacity of justice systems in the region to conduct investigations and prosecutions; implement the Rule of Law; protect human rights; and sever the influence of incarcerated criminals with outside criminal organizations," all goals which directly address elements of cartel influence.[14] In pursuit of this goal, in June 2008 the government managed to win approval for innovative Constitutional changes intended to move the country's criminal procedure towards an oral accusatorial model by 2016. These ambitious reforms, which seek to shift the country's mixed inquisitorial system towards a more accusatory process, are designed to improve the efficient administration of justice, increase transparency, protect rights, stamp out impunity and rein in corruption.[15] However, much stands in the way of such a system, and its success will depend on timing, training and real commitment by those charged with implementing reforms, as well as other victories in the fight against organized crime. The country now faces two major problems: powerful criminal organizations and the weak, corrupt institutions that facilitate their existence and allow them to behave with impunity.

---

12 Brennan, *supra* note 1, at 41.

13 *Id.* at 38.

14 Hendrix, *supra* note 2, at 106.

15 David A. Shirk, *Justice Reform in Mexico: An Overview*, III (2) MEXICAN LAW REVIEW 189-228 (2011).

II. Background

1. *The Violence Escalates*

> *I would say that Mexico is a State with a parallel power in its drug cartels. It's not a narco state yet; we still have a government. But they have true power, beginning with the right to tax [through protection money].*
>
> Victor Clark Alfaro, drug trade expert from San Diego State University[16]

It is no secret that Mexico is at war. Despite such a notorious designation, the facts speak for themselves: more than 6,200 drug-related killings occurred in 2008,[17] up more than one hundred percent from the previous year, and in August 2010 the country's national security director estimated that 28,000 casualties have occurred since President Felipe Calderón took office in 2006.[18] Though most of those murdered maintained some connection with the cartels, an increasing number of uninvolved victims have been caught in the crossfire.[19] Backed into a corner by the government's offensive, the cartels have fought back with increasingly brutal tactics designed to intimidate and to win at any cost. The cartels of today bear little resemblance to the churchgoing community benefactors once glorified in the traditional "*narco corridos*," folk songs written about the exploits of the central figures of drug trafficking.

The cartels have fought back not only in the streets and in the countryside, but also through the press. Reporters without Borders estimates that Mexico is one of the most dangerous countries on earth to be a journalist, after Iraq, with 92% of reported crimes against journalists going unpunished in a country where the majority of incidents are not even brought to the attention of the police.[20] Assassinations of journalists covering the drug war have become routine, and it is not uncommon for newspaper offices to be attacked with bombs, grenades and high-powered assault rifles smuggled in across the U.S. border. Such attacks further the culture of silence and impunity surrounding the drug war, a fact which was demonstrated by a

---

16 Linda Diebel, *Everybody Knows Who Really Runs Mexico; Lethal Connections: Who's Winning?*, THE TORONTO STAR, Jun. 5, 2009, at A14.

17 Lacey, *supra* note 11.

18 Jorge Ramos Pérez, *Cisen: 28 mil muertos por Guerra a narco*, EL UNIVERSAL, Aug. 3th, 2010, http://www.eluniversal.com.mx/notas/699304.html.

19 Andrew Selee *et al.*, *Editorial: Five Myths about Mexico's Drug War*, WASHINGTON POST, Mar. 28, 2010.

20 Hendrix, *supra* note 2, at 119.

September 19, 2010 editorial published on the front page of El Diario de Juárez, entitled "What do you want from us?"[21] The editorial appeared on the day of the funeral of Luis Carlos Santiago Orozco, a photographer for the paper who was shot to death days beforehand, and highlighted the difficult position of Mexico's press.

Military-grade weapons, including anti-tank rockets and armor-piercing munitions of the type seen in Afghanistan and Iraq, provide further evidence of war.[22] In the face of this escalating violence, President Calderón has opted to use the army which has traditionally enjoyed a high level of trust among Mexicans. Polls show that a majority of citizens support the deployment of 45,000 troops on domestic soil, despite the President's admission that he would prefer to use civilian law enforcement whenever possible.[23]

Despite the difficulties of measuring corruption, almost everyone agrees that the military is less corrupt than the police, who have long been encouraged to make up a substantial part of their salary through the "*mordida*" —the common bribe that is extracted during most interactions with law enforcement. However, the military has not been without its problems. In December 2008, Major Arturo González Rodríguez, a member of the Presidential Guard unit, was arrested for cooperating with the Beltrán Leyva brothers and the Sinaloa Cartel for US$100,000 in cash each month.[24] His arrest shocked even close observers of the drug war, providing a dramatic demonstration of the enemy's resources and its ability to infiltrate the system at the highest levels –up to the halls of the presidential mansion at Los Pinos. Even worse, González's arrest was not an isolated incident; defense authorities now estimate that more than 10,000 soldiers have quit the military to join the cartels over the past seven years.[25] These ex-soldiers have swelled the ranks of organized criminals, replacing those apprehended or killed in conflicts with the Mexican army, and even forming their own violent paramilitary groups, such as the Zetas, the former enforcers for the Gulf Cartel and now a criminal organization in their own right. The Zetas, founded by thirty-one elite anti-narcotics commandos who defected to work for the other side in the 1990s, turned on their former comrades-in-arms, employing military tactics with great efficacy against both government forces and their rivals in the drug business.[26] Indeed, the

21 "*El Diario*" *de Juárez pide* "*tregua*" *a narcos en editorial inédita*, EL UNIVERSAL, Sep. 20, 2010, http://www.eluniversal.com.mx/notas/709958.html.

22 Lacey, *supra* note 11.

23 Hendrix, *supra* note 2, at 114.

24 Gabriel Zendejas, *Arraigado el mayor militar Arturo González Rodríguez*, LA PRENSA, Dec. 27, 2008, http://www.oem.com.mx/laprensa/notas/n985009.htm.

25 Lacey, *supra* note 11.

26 George W. Grayson, *Los Zetas: The Ruthless Army Spawned by a Mexican Drug Cartel*,

group, which frequently decapitates its victims as a method of intimidation, takes its name from the military radio code letter 'Z'.[27]

Such displays of savagery serve a specific purpose and give an edge to the cartels, which do not operate within the confines of the law. Many of the numerous soldiers and police seen in the streets now cover their faces while on duty to avoid retaliation by the cartels they fight. Fearing retaliation, the military recently approved plans that allow soldiers to grow their hair out beyond the standard crew cut, as the style put off-duty soldiers at risk.[28] By proving their ability to infiltrate the highest levels of government and kidnap, kill and intimidate members of the Mexican army, the cartels have proven their reach[29] and reinforce the national refrain of "I didn't see anything."[30] Just a few days before Christmas, on December 21, 2009, members of the Beltrán Leyva cartel entered the home of Mexican naval commander Melquisedet Angulo, who had been killed in a raid on the cartel which took the life of one of its leaders, Arturo Beltrán Leyva, and shot to death four members of his family in an unprecedented act of retribution. Several hours before the murder the family had returned from the memorial service, in which Angulo had posthumously been declared a national hero by President Calderón.[31] Though the government expected the Beltrán Leyva cartel to extract vengeance, even a nation accustomed to extreme cartel violence was shocked by this act. For any soldiers and police who had missed the message, the events of December 21, 2009, made it very clear.

Mexico is fighting to remain a stable democracy against the real possibility of a narco state. This fighting has taken place in the streets, the prisons, the schools, the countryside and even in front of Chihuahua state's town hall, where a Chief Prosecutor was recently gunned down in broad daylight. The organized criminals are sophisticated and operate across borders, outspending and frequently outgunning the government security forces. It is not a fight that can be won using conventional tactics, and if Mexico's government wants a long-lasting solution to its conflict with the drug cartels, it will have to do more than shoot back: it will have to complement the use of force with flexible legal reforms that are capable of picking up the pieces.

FOREIGN POLICY RESEARCH INSTITUTION (2008). http://www.fpri.org/enotes/200805.grayson.loszetas.html.

27 John Burnett, *Mexico's Ferocious Zetas Cartel Reins through Fear*. National Public Radio (2009), http://www.npr.org/templates/story/story.php?storyId=113388071.

28 Lacey, *supra* note 11.

29 Grayson, *supra* note 26.

30 Lacey, *supra* note 11.

31 Rory Carroll, *Mexican Marine's Family Gunned Down by Drug Cartel*, THE GUARDIAN, Dec. 23, 2009. http://www.guardian.co.uk/world/2009/dec/23/mexican-marines-family-gunned-down.

2. *The "Cancer" of Corruption*

> *Over the past year, the country's top organized crime prosecutor has been arrested for receiving cartel cash, as was the director of Interpol in Mexico. Those in important positions who have resisted taking cartel money are often shot to death, a powerful incentive to others who might be wavering.*
>
> Mark LACEY, reporter for the New York Times[32]

Unfortunately, the judicial system that President Calderón inherited came ill equipped to handle such a task, with certain elements of the system proving intractable. Chief amongst these elements is the widespread corruption that former President Miguel de la Madrid referred to as a "cancer," blighting the system and impairing its ability to reform itself. Moreover, levels of corruption and the damage done by organized crime are intimately linked. The problem has been recognized at least since the 1980s, when General Paul Gorman, the Chief of the U.S. Command in Panama, told a U.S. Senate Committee that Mexico had one of the most corrupt governments in the region and predicted that this would result in a major security problem for the United States.[33] However, even with widespread recognition of the problem the entrenched mechanisms of corruption have proven difficult to eradicate.

As Senator Trible explained before the U.S. Senate Committee on Foreign Relations, the commitment of those at the top of the political hierarchy does not ensure the success of a reform.[34] Many officials at lower levels of the federal government, as well as those operating within the state system, are susceptible to bribery and may turn a blind eye to illegal activities or even participate directly. This corruption is widespread, with Transparency International placing the country in 72nd place worldwide.[35] In this climate, legal reforms are vulnerable; orders may meet with resistance from those tasked with carrying them out, whose significant extra income would be forfeit in the event of success. The reasons behind the culture of corruption are complex; however, existing social structures place pressure on officials to engage in corrupt behavior, even mandating such action as part of a

---

32 Lacey, *supra* note 11.

33 Boris Kozolchyk, *Political Change and Stability: Mexico's Political Stability, Economic Growth, and the Fairness of its Legal System*, 18 CAL. W. INT'L L. J. 105 (1988).

34 *Situation in Mexico: Hearings before the Subcommittee on Western Hemisphere Affairs of the Committee on Foreign Relations*, 99th Congress, 2d Sess. 9, 98 (1986).

35 Transparency International, *Corruption Perceptions Index*, (2008), available at: http://www.transparency.org/news_room/in_focus/2008/cpi2008/cpi_2008_table.

higher code of ethics. In a climate where personal and family ties may impose a duty to bend the law, adherence to what is on the books may actually be regarded as wrong, fueling widespread acceptance and even approval of such practices.[36] Of course, wealthy criminal organizations with cash at their disposal have been quick to take advantage of those in positions of authority, offering bribes far in excess of a government salary. In this high-stakes environment, holdouts are not tolerated; for honest officials or those on the edge, threats and violence provide an incentive to fall in line.

Though corruption is notoriously difficult to quantify, most Mexicans point to the police as one of the most corrupt institutions in the country, and only 3.3% of citizens trust the police to provide protection from cartel violence.[37] This distrust of the police force demonstrates the direct benefit afforded to the cartels by corrupt and derelict institutions, and has resulted in a culture of silence where criminals may function with impunity because their communities trust them more than they trust the police. In fact, this distaste for corrupt law enforcement has resulted in more than a simple failure to report crimes. Prior to the bloodshed of the past three years, many Mexicans saw drug traffickers as legitimate businesspeople, benefactors of the community and even heroes. Evidence of this abounds in the "*narco corrido*," composed in honor of notorious criminals who make their living smuggling drugs along the border, and in the proliferation of copycat crimes that have cropped up since 2006. This climate of approbation resulted in almost complete infiltration of local governments in the state of Michoacán, where more than a dozen mayors and other civil servants were arrested in 2008, accused of affiliation with the local La Familia cartel. This news surprised few people in the state, where in addition to throwing grenades into an Independence Day celebration in the city of Morelia, La Familia has funded churches, schools and political campaigns for more than a decade.[38] Even worse, the acceptance and glorification of cartel members has served as an effective recruiting tool for many young Mexicans, and as one more factor contributing to the wall of silence confronting the criminal justice system.

The current government has begun to combat this culture of silence by offering rewards for information leading to the capture of those involved in organized crime, and has also established anonymous tip lines, a simple but revolutionary step allowing unprecedented interaction between citizens and

---

[36] Keith S. Rosenn, *Brazil's Legal Culture: The Jeito Revisited*, 1 FLA. INT'L L. J. 1, 4 95 (1984).

[37] Gabinete de Comunicación Estratégica (GCE), Mar. 22, 2010, http://www.gabinetece.com.mx.

[38] Stephen Gibbs, *Family Values of Mexican Drug Gang*, BBC NEWS ONLINE (2009), available at: http://news.bbc.co.uk/2/hi/americas/8319924.stm.

authorities.[39] However, the process of dismantling corrupt institutions and winning back the trust of the population requires patience, and in the meantime the cycle of corruption and organized crime continues.

3. *Living Law: A Mexican View of Justice*

Unfortunately, corruption is not the only obstacle that stands in the way of the new system, and implementing changes in the law is just the first step towards successful reform. "Mexican legal compilations are pregnant with ineffective, never-obeyed legislative enactments often reflecting nothing more than the legislators' 'lyrical declarations of intent,' intended to make the legislator feel good and accomplished by the mere act of solemn statement," explains Professor Raúl Cervantes, a professor of law at the National Autonomous University of Mexico (UNAM).[40] There is a wide gap between the legislature's original intent and the practical application of new laws. The country's "official law" is found in books while its "living law" is found in the courtrooms and prisons, and directly impacts citizens through the behavior of government officials and the interpretations provided by the courts.[41] This chasm between *de jure* and *de facto* law has been blamed for much of the country's social injustice, with many scholars pointing to the disconnect between the liberal provisions of the Constitution and the alternate reality that exists in practice.[42] In fact, the revolutionary Constitution of 1917 contained groundbreaking provisions on social welfare and the right to strike while the Civil Code of 1928 permitted the rescission of contracts on the grounds of "excess profit or unfairness," a liberal interpretation of contract law that is found primarily in the socially conscious democracies of western Europe. Indeed, this document appears to contain full due process rights, modeled closely after the system in the United States that heavily influenced its drafters, including the future President Venustiano Carranza.[43] However, the intent behind such trailblazing legislation failed to translate into reality, with modern Mexico showing high rates of income and social inequality and citizens failing to receive the full benefits provided for by the Constitution.[44]

---

[39] Lacey, *supra* note 11.

[40] Kozolchyk, *supra* note 8, at 159.

[41] Kozolchyk, *supra* note 33, at 105.

[42] *Id.* at 107.

[43] JORGE A. VARGAS, MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS, 39-40 (West Group, 1998).

[44] Rodolfo Aguirre Reveles, *Mexico: Among the Most Unequal*, available at: http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan002359.pdf.

The same disconnect has been evident in the Mexican legal system, especially within the criminal process. Prior to the June 2008 amendments, the Constitution provided numerous guarantees of rights for victims, the accused and others who might come into contact with or operate inside the criminal justice system. These rights included the prohibition of intimidation and torture, unnecessary preventive detention, and holding any person for more than 72 hours without a formal writ of imprisonment. In addition, Article 20 guaranteed a hearing before a judge within 48-hours' time, the provision of information about the charges and all facts relevant for a defense, and a chance to answer any allegations in front of a judicial authority. In addition, judgment was required within 4 months to a year, based on the nature and length of the proposed penalty.

However, the judicial reality bears little resemblance to the original constitutional design; though the Constitution originally provided for something resembling accusatory procedure, the failure to pass legislation at the federal level that would have implemented such practices effectively rendered them nonexistent.[45] Because Mexico operates as a federalist system, it is within the states' mandate to establish their own judicial structures, appointing judges, prosecutors and various types of police forces. Many of the states simply never implemented many of the Constitutional guarantees, while in others the pressures of crime and corruption have gradually eroded the rights contained within the judicial process. The federal system, too, has failed to implement many of the intended provisions; a striking example is provided by the 1917 Constitution's provision for jury trials and the presumption of innocence, the latter of which was implemented for the first time by the 2008 reforms while juries have still not been widely accepted and remain for many an inconceivable aspect of legal procedure.[46] The result of this divide is that, prior to the implementation of the reforms, Mexico operated with a strange hybrid system that was partially inquisitorial, but lacking many of the rights and protections guaranteed by other civil systems, and partially based on a written Constitution with accusatory aspects. This created a sharp disparity between existing constitutional principles and criminal procedure legislation, and a gap between the *de facto* and de *jure law* that has continued to plague the criminal justice system up to the present[47] as reflected in citizens' confidence in their judiciary.[48]

In contrast to the common law approach used in the United States, Mexico's criminal justice system prior to the reforms operated through

---

45 Carlos Ríos Espinoza, *Redesigning Mexico's Criminal Procedure: The States' Turning Point*, 15 SW. J.L. & TRADE AM. 57 (2008).

46 Brennan, *supra* note 1, at 39.

47 Ríos, *supra* note 45, at 57.

48 Julie Ray, *Mexico's Citizens Ready for Improved Justice System*. Gallup Poll. Feb. 20, 2008, available at http://www.gallup.com/poll/104455/Mexicos-Citizens-Ready-Improved-Justice-System.aspx.

written judicial decisions, based on provisions contained in the civil code. Such opinions followed written submissions of the facts from the prosecutor and defense counsel, who operated within an inquisitorial process with roots dating to the time of the Spanish Conquest. Though many civil systems incorporate active participation of both the accused and the victim, and many proceedings are conducted orally with multiple chances to prove or refute statements, the practice in Mexico centered around a judicial decision based almost entirely on written presentation. The judge in charge of conducting the trial and writing a decision arrived at conclusions based on this evidence alone, and trials would frequently conclude without any of the affected parties making an appearance before the decision-maker.[49] Decisions were reached in an office, with little opportunity to present exculpatory evidence or, despite the due process guarantees contained in Article 20, to attempt to refute arguments made by the other side. Within this context, the defense rarely had the opportunity to confront either accusers or witnesses in the presence of the trial judge, creating a substantial problem for the constitutional guarantee of due process.

Prior to the June 2008 revisions, Article 21 of the 1917 Constitution had been read to place almost complete authority for criminal justice proceedings in the hands of the Public Prosecutors, the Magistrates and the Trial Judges. The Mexican Public Prosecutor evolved as a unique public figure, functioning as a "super prosecutor," empowered not only to bring charges against the accused, but also to oversee the investigatory police units and individual investigations. The Public Prosecutor's unchecked power even included the discretion to disregard exculpatory evidence at will, with little to no external accountability.[50] Furthermore, institutional limitations on the ability to challenge disputed evidence, combined with allegations of abuse and even torture while in police custody, cast doubt on the entire process. Human Rights Watch, the U.S. State Department and numerous NGOs have long pointed to the frequent use of coerced confessions and the general lack of transparency throughout the criminal process.[51] An examination of the criminal justice system during this long period shows a visible gap between the constitutional protections that appear on paper and the actual rights afforded to the accused, with violations of these rights as the norm.

Research shows that the bulk of crimes in Mexico are never reported, with some sources placing this number as high as 90%.[52] Foreign companies and university programs operating in the country advise their employ-

---

49 Brennan, *supra* note 1, at 39.

50 U.S. Department of State (DOS), *Mexico: Country Reports on Human Rights Practices*, (Feb. 28, 2005), available at: http://www.state.gov/g/drl/rls/hrrpt/2004/41767.htm.

51 *Id.*

52 Lacey, *supra* note 11.

ees and students not to go to the police, who in the worst areas cannot be distinguished from the criminals they are supposed to apprehend. A study of conviction rates found that only 4 out of 100 arrests typically resulted in a determination of guilt, while even fewer individuals ever served a sentence; a second study conducted by Enrique Díaz-Aranda, of the National University (UNAM), put the conviction rate at 3.8%.[53] Possible factors that may contribute to this extremely low number are the lack of funding for the criminal justice system, a shortage of qualified public defenders, huge caseloads for judges and magistrates, the inability of the police to collect effective and legally viable evidence, the inefficiency of procedure and the corruption of public officials.

Ironically, despite the low conviction rate, Public Prosecutors are able to obtain convictions in those cases where they want them. David Brennan describes the Public Prosecutor's "almost unfettered access" to obtaining convictions, due in part to the close working relationship with judges and the police, as well as disproportionate power, prestige and training compared to that of the defense counsel, who suffers the effects of inequality throughout the process. In addition, the law prior to 2008 allowed for criminal convictions based on a relaxed evidentiary standard, requiring only "substantial evidence of the crime."[54] This position contrasts sharply with the underpaid, understaffed public defenders, who, in addition to receiving a low salary, also suffer a low level of prestige and must present cases from an unequal starting point, representing the accused under a presumption of guilt with little opportunity to rebut proffered evidence. This leads to questions about what accounts for the low rate of convictions for reported crimes. One possible answer stems from the widely-reported practice of arresting suspects, informing the press and then releasing the suspects without a charge against them.[55] This method wins some temporary attention from the public and the media, but does little to fight crime, especially when the bulk of arrests made consist of petty criminals and cartel underlings who are released out the back door of prisons without ever setting foot before a judge. It is easy to see why such a practice, detrimental at the best of times, can prove extremely dangerous in the context of cartel activity. These releases without explanation occur when the mandated holding period expires, or more commonly, when the Public Prosecutor does not take steps to pursue prosecution. However, there are numerous cases in which suspects have been held far beyond this time period, waiting for a judge to determine if they are guilty.[56] Though the pre-amendment Constitution ap-

---

53 *Id.*

54 Brennan, *supra* note 1, at 40.

55 Lacey, *supra* note 11.

56 James C. McKinley Jr., *Mexico's Congress Passes Overhaul of Justice Laws*, N. Y. TIMES, Mar. 7, 2008, at A3.

proved of pre-trial detention only for specific and serious crimes and mandated holding such prisoners in separate facilities, the practice of holding people for long periods of time without access to a judge or to counsel has been widespread, regardless of the law on the books.

The flaws in this process have played directly into the hands of the country's organized criminals. A police force that is underpaid and encouraged to supplement insufficient salaries with bribe money, the great power concentrated in the hands of the Public Prosecutor, and the lack of transparent proceedings has created a climate in which corruption can flourish and in many places "justice" can be bought and sold. Within this system, officials and their families are put at risk for the act of doing their jobs, and witnesses are too intimidated to come forward, fearing that the police will be unable or unwilling to protect them. In this context, the legal system has been manipulated, infiltrated and used as another pawn of organized criminal elements, as opposed to an effective weapon against them.

Recognizing the vulnerable position of the criminal justice system, the Mexican government began to promote drastic and sweeping reforms as early as 2006, and both houses of Congress debated the issue in March 2008. While this debate proceeded in the Federal District, several states began to actively pursue their own reforms, and would soon prove to be a testing ground for those to follow. After a battle in the press and the legislature in which a clause permitting police to enter one's home without a warrant was stricken from the government's proposals, the Chamber of Deputies voted to adopt the constitutional amendments to the criminal law. The following week the Senate voted overwhelmingly to approve the amendments, with 71 senators voting in favor and only 25 voting against, a vote that gained notable support from beyond the President's own National Action Party (PAN).[57] Within three months, 17 of the country's 31 states had ratified the changes to the Constitution and President Calderón signed them into law on June 18, 2008.

III. The 2008 Reforms

1. *Setting the Stage for Reform*

The stated goals behind the new system are the creation and maintenance of an independent judiciary, transparency in the administration of justice, the training of those involved in the administration and application of justice, efforts to streamline the system, and boosting citizen's confidence in the system as well as their access to the courts. Amended Article 20, Section A provides insight into the motivations for reform, stating: "[t]he penal

---

57 *Id.*

process shall have as its objective the clarification of the facts, protection of the innocent, preventing the guilty from acting with impunity, and the reparation of damages caused by the crime," demonstrating a multifaceted approach to criminal law that incorporates broader notions of justice than those contained in the previous linear system of punishment.[58] While many believe the main goal of the reforms is to place more cartel members behind bars, those behind the amendments have attempted to demonstrate that the changes are much more complex and that victories against the cartels must be the indirect result of a system that is no longer broken and corrupt. Indeed, the language in places forgoes all talk of punishment in favor of the language of rehabilitation. However, reformers have stressed that, particularly in light of the longstanding gap between the law on paper and the "living law," the success or failure of the reforms will depend heavily on their implementation.

Therefore, the moderate language of rehabilitation is not a nicety; it must be viewed as a complement to mechanisms of punishment that rely on prisons that are already filled beyond capacity. Because the reforms billed as part of the government's strategy to combat the cartels, they may face the greatest danger from those wishing to enforce them as an expedient means of achieving such punishment. Carlos Ríos Espinoza has stressed that reforming states should not view the new procedures as merely a faster, smoother road to more criminal convictions.[59] Rather, states should view the changes as part of a broader plan to strengthen faltering institutions and make the system work, thereby promoting justice instead of vengeance and rebuilding the shattered trust of the citizenry. Such an outlook is vital to the success of reforms, as it will prevent them from becoming part of the abuse, and therefore self-defeating. By emphasizing justice and stressing the positive rights contained in the amendments, including those enjoyed by the accused, states can win back citizens' trust and will thereby secure more cooperation with authorities during investigations, on the witness stand and at the other end of the newly established tip lines. Only through an interpretation that respects such rights and places their exercise within the context of democracy, the Rule of Law and the Constitution, will the new reforms meet with success, becoming part of the solution instead of contributing to the problem.

2. *Increasing Transparency*

To characterize the 2008 amendments as a mere transition from an inquisitorial model to an accusatorial one oversimplifies the changes that

---

58 Mex. Const. Art. 20, see Appendix.

59 Ríos, *supra* note 45, at 55.

have taken place and neglects the full context in which they have occurred. Discussions of judicial reform in Latin America often assume the superiority of the accusatory framework over other approaches, when in reality the most constructive method depends on the individual situation.[60] The accusatory process can involve many negative elements and the truth may be obscured by the quality of legal argument, aggressive cross-examination of witnesses and procedural nuance while inquisitorial procedure may allow for a more thoughtful means of arriving at a decision, ideally governed by reason rather than emotion. However, for countries facing problems of corruption and lack of transparency, the accusatory process offers distinct advantages.[61] The introduction of oral proceedings, greater equality of prosecution and defense counsel, cross-examination of witnesses, participation of victims, separation of prosecution from judgment and allowing members of the public and the press to attend court proceedings in many instances will increase the transparency of the judicial process and decrease the chances of impunity.

The transition from written to oral, and from inquisitorial to accusatorial is situation-specific and need not incorporate every element of a full accusatory proceeding in order to be effective. It is the introduction of certain elements that increases transparency, protects individual rights, limits opportunities for corruption and impunity, attempts to bolster confidence in the judiciary and ultimately supports the Rule of Law if implemented constructively.

Perhaps the most striking change to Mexico's new criminal procedure has come in the form of oral trials, whose live courtroom proceedings will replace the written dossier upon which judges previously relied when making determinations of guilt. In a complete break with the past, the new system substitutes the private office with the public courtroom and written files with live arguments and cross-examinations. According to Article 20 of the amended Constitution, proceedings will now be accusatory and oral, and the principles of public access, confrontation and cross-examination, concentration, continuity and immediacy will govern the trial process.[62]

The new system does not depart entirely from the civil law, giving judges a free hand in the presentation of the evidence and in the questioning of the witnesses, as is the case in other civil systems. The previous stages of investigation are still handled by the Public Prosecutor working with the police in their new investigative role, and a pre-trial magistrate still handles the preliminary proceedings in an informal manner. However, it differs signifi-

---

60 Leonard Cavise, *The Transition from the Inquisitorial to the Accusatorial System of Trial Procedure: Why Some Latin American Lawyers Hesitate*, 53 (2) WAYNE L. REV. (2007).

61 Luz Nagle, *Process Issues of Colombia's New Accusatory System*, 14 SW. J.L. AND TRADE AM. 223 (2008).

62 Ríos, *supra* note 45, at 63.

cantly from the closed, almost entirely written proceedings of the old system by requiring a high level of transparency, violable only through a separate, public judicial determination.[63] Article 20, Section IV of the Constitution now requires that a separate judge or panel of judges, unfamiliar with the facts of the case, give an independent and in-depth review of the evidence and mediate arguments and cross-examination by the parties in an open courtroom.[64] This corresponding principle of concentration requires the judge to review all relevant facts, and to watch the evidence unfold in the courtroom, as opposed to receiving only a summary of the evidence, prepared and presented by the Public Prosecutor.[65]

Such oral proceedings are expected to provide greater transparency, protect the rights of all parties involved and decrease the potential for corruption and miscarriages of justice. However, there are several possible downsides to the switch from written to oral proceedings, the greatest of which is the need for education of those involved in implementing the changes. The foreign nature of the oral proceedings to the Mexican justice system is both a benefit and a detriment. Judges, trained and experienced with the interpretation of general written dossiers, will have to quickly learn the new procedure. Lack of training and poor administration of the rules runs the risk of appearing at best inefficient and at worst arbitrary and unfair. Therefore, successful oral proceedings necessitate radical changes in education for students and continuing education for sitting judges accustomed to the previous system. In addition, both the Public Prosecutors and defense attorneys will have to adjust to their new roles. Public defenders in particular will have to become accustomed to presenting arguments in public, to cross-examining witnesses and to standing up to the Public Prosecutor in a courtroom setting.[66] The amendments require equal financial compensation for both public defenders and their Public Prosecutor counterparts, but it will take more than financial parity for the underpaid, marginalized public defenders to present a worthy opposition in the courtroom.[67]

The principle of "publicity" has also been incorporated into the new procedures. In fact, of all the changes, the broad notion of public access to justice and transparency of proceedings may do more to deter corruption and raise standards than any single procedural rule. Under Article 20, those accused have the right to be judged in a public hearing by either a judge or a jury, meaning that all trial proceedings must be open to the public, the defense must have access to all relevant documents, and closed pro-

63 *Id.* at 80.

64 *Id.* at 63.

65 *Id.* at 80.

66 Mex. Const. Art. 17.

67 Ríos, *supra* note 45, at 81.

ceedings can only occur by exception in very specific cases, as limited by law.[68] Article 17 further provides that sentences that result from oral procedures must be explained to the public audience, and that all interested parties must be notified in advance so that they are able to be present for the judge's explanation.[69]

Mexican judges will find themselves in the public eye and in the press; their decisions and their performance will be subject to greater scrutiny than ever before. Not only should such openness deter corrupt practices like the fabrication of evidence and bribery, it should also encourage judges to learn their new role in a timely fashion and seek to bring their proceedings up to acceptable standards sooner rather than later. Moreover, once judges have become public arbiters of the public good, rather than faceless civil servants operating behind the scenes, both the character and the quality of the profession are likely to improve. Such openness both internally and externally facilitates the control of the judiciary, allowing for regulation by the public and the media, as well as internal and peer policing.[70]

Thorough participation of the press can help facilitate such openness, as can technology.[71] Gonzalo Reyes Salas suggests there is a need for such technology, pointing to the clumsy paper filing system still in use in most areas, and the need for technological support in the context of fast paced oral proceedings, which may rely in part on electronically stored information as evidence.[72] When pursuing technological transparency, states may wish to follow the bold example set by Chihuahua that records proceedings on discs or even DVDs. The creation of such a record would allow easy review and facilitate oversight of criminal proceedings, and the very presence of such mechanisms would discourage corrupt practices and encourage judges to adhere to correct procedures. The principle of publicity during the trial phase is a stark departure from the previous behavior of judges and represents a very real change in their role and status within society. Judges who have been trained as civil servants and have come to regard themselves as such will likely be forced to reevaluate their position in the criminal justice system and in society, rendering life-changing verdicts before the public and the press for the very first time. With this transparency will come scrutiny —from the media, from the public and from the victims— and such openness can serve as a strong check against corruption, impunity and inefficiency.

---

[68] *Id.* at 80.

[69] Mex. Const. Art. 17.

[70] Ríos, *supra* note 45, at 80.

[71] Gonzalo Reyes Salas, *Guidelines to Reform Mexican Criminal Procedure*, 15 SW. J.L. & TRADE AM. 86 (2008).

[72] *Id.* at 87.

3. *Presuming Innocence*

The new system is, at its core, intended to combat serious violent crime while simultaneously protecting rights. This follows from the recognition that the previous system did not do an adequate job of safeguarding the rights of the parties involved or of guaranteeing its own provisions, and that if the new system is going to enjoy legitimacy and success, it must not fail to do this. Following this line of reason, the amendments not only enumerate the rights of all those involved, but also attempt to actively spell out how those rights should function and provide effective mechanisms for safeguarding them from erosion. However, critics have attacked some of the new procedures as liberal, unrealistic, naïve and unsuited to the reality of a country currently confronting a desperate, violent conflict.

The new reforms are also remarkable for their underlying philosophy, which is in many instances affirmative, progressive and even creative. The majority of the rights they contain apply to the accused, but several also benefit the victim. Previously, crimes were seen as being committed against the State: the object of criminal proceedings was justice for the injury done to that institution and victim concerns were peripheral. As a result of such thinking, victims were not encouraged or even permitted to take part in many of the proceedings against the accused, and remedies did not typically take into account the idea of redress for the victim.[73] However, under the new system victim's rights are accorded much greater importance, and those who have suffered at the hands of the accused are encouraged to take an active role in the proceedings, ensuring that their interests are protected and that any solution will redress their injury instead of focusing on the perceived slight to the State.[74] As a direct intervenor in the process, the victim not only attempts to ensure his or her own satisfaction, but serves as one more check in a system that is, for the first time, truly adversarial. Article 20, Section C guarantees an active role for the victim by specifying means of participation in the investigation and the preliminary stages, as well as the right to intervene in the trial. In addition, Section C, IV defines the victim of the crime as the individual who has suffered directly from the actions of the accused, by providing the right to receive damages and obligating the Public Prosecutor to pursue damages whenever possible. Finally, a Public Prosecutor who decides not to prosecute, fails to present certain evidence or drops a criminal proceeding may be challenged by the victim before a judicial authority, allowing the victim unprecedented power to control the circumstances of the criminal proceedings in which he or she is involved. Interestingly, despite the U.S.-style nature of many of the reforms, this strong

73 Ríos, *supra* note 45, at 70.
74 *Id.* at 54.

emphasis on the victim's right to participation more closely resembles western European concepts of redress and is only one of several examples in which the Mexican reforms can be seen as asserting their independence.

However, despite the new emphasis on victim participation, most of the new provisions attempt to guarantee rights and preserve due process for the accused. The amendments require that the accused be presumed innocent until guilt has been determined by the judicial process, the burden of proof is firmly shifted to the prosecution and the level of the standard of proof is raised to require "certainty" of guilt for a conviction to take place, another area in which its language reaches beyond that employed by U.S. procedure.[75] The reforms leave no doubt of their intention in this regard, and speak in unequivocal language. In addition, evidence presented outside of the trial process and before parties other than the judge is no longer admissible in criminal proceedings under Article 20, Section A, III. The change states that "[f]or the purposes of the sentence [the Court] shall only consider those pieces of evidence that were presented before the trial's audience. The law shall establish those exceptions and the requisites to admit in court the anticipated evidence, which by nature is required to be presented previously." If obeyed by the courts, this will go a long way towards protecting evidence and statements from manipulation by the Public Prosecutor.

An important new right is the presumption of innocence contained in Article 20, Section B, forbidding the criminal justice system from passing judgment on the guilt of the accused before the legal process has unfolded and that person has been convicted by a judge's sentence. Introduced for the first time in the 2008 reforms, the principle of presumption of innocence has the potential to radically change the criminal justice landscape. Under the new procedure, a suspect who has been arrested is just that —a suspect— and cannot be considered guilty until a trial has taken place before an impartial judge in an open courtroom and sentencing has occurred. This concept, so familiar to those in the United States (though it has not always been honored) represents a radical change in Mexican legal thinking —and in the landscape of rights and the relation between the citizen and the State. Furthermore, no longer will Public Prosecutors have to show only "sufficient" evidence of the crime —its acceptability determined by the judge— but will be required to meet a rigorous standard of proof to determine the guilt of the suspect. Article 20, Section A, VIII now provides that "the judge will only condemn when there is certainty of the culpability of the accused," an elevated standard of proof that goes beyond the familiar notion of "guilty beyond a reasonable doubt" used in the United States and elsewhere. The new provision proposes a strict standard, to be adhered to

[75] Mex. Const. Art. 20, Section A.

as a right. Perhaps this is necessary, given the numerous instances of Mexican justice officials who have bent the rules at every turn and treated them more like guidelines.

However, there is also the concern that such black and white provisions set a high bar for those individuals and institutions accustomed to investigating, prosecuting and passing judgment under the previous standards, providing temptation to the prosecutor who cannot convict the suspect that he or she knows is involved with the cartels, but cannot lawfully convict the suspect.

In sum, though encouraging, the presumption of innocence and the elevated standard of proof in cases of criminal guilt run the risk of being ignored or bypassed by a system that is unable to meet the burden they impose. In order to avoid such a fate, these provisions must be carefully monitored and sustained, and their protections insisted upon by government, civil society, the public and the legal profession. If they are actually sustained over the long term, such changes will represent a tangible shift in the landscape of not only criminal justice, but the greater sphere of rights.

Further evidence of the progressive streak found in the reforms is the idea of rehabilitation instead of punishment. One of the underlying principles of the new system is that of rehabilitation, or the recognition that judicial proceedings should have as their intent not only satisfaction of the victim and "justice" for the crime committed, but also rehabilitation for the offender, particularly in cases where the crime committed is minor or the perpetrator is a juvenile. While the system does not mandate rehabilitation for all crimes, it seeks to create a legitimate avenue for returning young people and those who have committed minor and nonviolent offenses to their communities instead of keeping them incarcerated in the prisons, which are essentially recruiting posts for the cartels.

Article 18 of the amended Constitution provides that "People under the age of 12 that have committed a crime under the law will only be subject to rehabilitation and social welfare... and shall be aimed at the adolescent's reintegration into society and his/her family, as well as the full development of his/her person and capabilities."[76] The amendments also mandate incarceration only under the severest circumstances and embrace the principles of rehabilitation for all but the worst offenders. Article 18 extends these goals to adults as well, allowing "sentenced individuals, in those cases and conditions stipulated by the law, [to] serve their sentences at those penitentiary centers closest to their domicile, so as to facilitate their reintegration into the community as a form of social reinsertion."[77] This progressive approach is remarkable not only for its willingness to embrace alternative dispute resolu-

---

76 Mex. Const. Art. 18.

77 *Id.*

tion mechanisms and to decrease the controversial but widespread use of preventative detention, but also for its stated goals of educating offenders and reincorporating them as productive members of society.

Such an approach is extremely important in Mexico because, if implemented successfully, it could cut the human supply lines to the cartels and deprive them of new recruits. Currently, young Mexicans who have been incarcerated for a few years for minor crimes have little education, fewer prospects and no choice but to turn to organized crime groups with the skills they have acquired in the country's violent, gang-run prisons. According to Paul Collier, international experience demonstrates that the decision to meet violent crime with sanctioned state force often exacerbates violence, with those countries that fail to develop strong institutions that can deal with the aftermath much more likely to relapse into conflict.[78] Offenders in this context must either be returned to the streets or kept in prison indefinitely; if they are released without successful rehabilitation and lack opportunities for legal pursuits, they will flood the ranks of the violent criminal organizations, bringing with them the gang connections made in prison and the destructive skills learned there. Therefore, a justice system that can efficiently resolve cases and is able to effectively deal with offenders is crucial for both system legitimacy and the prevention of further crime.[79]

Admittedly, rehabilitation is not an easy goal. Rehabilitation and non-rehabilitation programs in the United States have been traditionally characterized by high rates of recidivism. However, the decision to become involved in organized crime in Mexico is distinct from some other types of crime. Young Mexicans who join cartels cite a complete lack of economic, educational and social opportunities as primary reasons for their descent into crime. While similar motivations influence criminals in the United States, as a developing country with high levels of corruption, a non-functioning public school system and an average GDP of USD$10,000, Mexico provides an extreme case. Therefore, if the country could correct some of these deficits by providing opportunities and continuing support, as well as successful reintegration into society and the community, it might be able to cut down on the flow of foot soldiers serving the cartels. By providing vocational training, support mechanisms and alternatives to detention, and separating those involved in organized crime from the general prison population, Mexico may be able to reduce the number of young people who leave the judicial system as little more than trained recruits for the cartels.

A final major innovation on the list of progressive reforms is that of alternative dispute resolution (ADR). Among the most innovative —and highly

---

78 Paul Collier, The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done about It (Oxford University Press, 2007).

79 Hendrix, *supra* note 2, at 117.

criticized— of the reforms is the introduction of alternative means to end criminal cases, using restorative justice and other mechanisms for the early termination of cases.[80] In keeping with the principles of satisfaction of the victim, rehabilitation of offenders and efficiency, Article 17 of the Constitution provides the opportunity for states to implement processes for alternative dispute resolution, even extending in some cases in criminal matters. The Article provides that for criminal cases, "the laws will regulate the application of these procedures, ensure the reparation of damages, and establish those cases in which judicial supervision will be required." While other forms of resolution in civil matters might not be surprising, the incorporation of these procedures within the criminal justice system is revolutionary. However, they are consistent with both rehabilitation and restorative justice principles, and may help counteract the inevitable adverse social effects generated by standard methods of punishment and incarceration.[81]

The idea of using an alternative procedure to deal with crime has been widely attacked, with critics describing it as completely unrealistic and destined to fail in a system in which justice is frequently absent even in traditional, established proceedings. Worse, some fear that such mechanisms are likely to return more criminals to the streets where they are likely to commit the same crimes again. Many citizens in Chihuahua, where alternative resolution mechanisms have helped the state resolve huge numbers of backlogged cases, still say that the new system makes them feel insecure.[82] However, state justice officials say that much of this backlash comes from a lack of understanding and that the alternative mechanisms are meant to deal with minor crimes, allowing the justice system to investigate, prosecute and convict those responsible for the violence and instability in the state.[83] These officials hope that in time, citizens will come to appreciate the effects of ADR, which justice officials say is making headway in the country's most crime-ridden city.

Since the new amendments specify only that states may provide such mechanisms, in accordance with the law, jurisdictions implementing them may tailor the procedures to their specific needs. In states that have already begun the reform process, two frequently used methods for resolving cases have been conciliation and pre-trial diversion.[84] These methods allow a direct dialogue between the victim and the accused, and provide judicial oversight during the proceedings to ensure that intimidation and miscarriages of justice do not occur.[85] While critics have complained that ADR

---

80 Ríos, *supra* note 45, at 73.

81 *Id.* at 74.

82 Miller, *supra* note 6.

83 *Id.*

84 Ríos, *supra* note 45, at 74.

85 *Id.* at 73.

mechanisms are unlikely to work and do not do enough to address guilt,[86] the principles behind their application are consistent with the Constitution's broader criminal justice goals, and more importantly, practitioners who have begun to implement them in several states report a high level of satisfaction among both criminal justice officials and users of the system.[87]

4. *Obstacles to a Successful Transition*

Despite many positive indicators, the reforms face numerous internal and external threats to success. While some of these potential pitfalls are shared by other transitioning justice systems, others are unique to the Mexican experience.

Perhaps the most obvious internal criticism of the reforms is the unrealistic nature of some provisions, not the least of which is the eight year timetable in which states are required to thoroughly consider the amendments and then take concrete steps to implement them. For some, the idea that the country will create a drastically different legal system by the year 2016 and that this system will simultaneously serve to promulgate the Rule of Law and combat increasingly brazen organized crime may appear futile. While admirable, the desire to rehabilitate juveniles and lesser offenders appears unrealistic when viewed alongside assertions by the National Human Rights Commission (CNDH) that at least 100 of the 429 correctional facilities across the country are controlled by their inmates. [88] The chances for success may be slim where corruption is widespread, resources are stretched thin and the new amendments will require time, money, training for legal professionals and police, education for the public, and above all, discipline and commitment. The fear that the new reforms will fail to translate into action is very real.

Additionally, as David Shirk of the Woodrow Wilson Center's Mexico Institute points out, the reforms are not entirely consistent in content or goals, as they attempt to take a tough stance against organized criminal activity while simultaneously extending and ensuring rights.[89] While these two goals are not necessarily contradictory, and both are ultimately necessary for lasting stability, legitimacy and the Rule of Law, the reforms undertake an extremely difficult balancing act when they seek to implement both simultaneously. The reforms also embrace multiple theories of criminal justice, and express the desire to rehabilitate select offenders, remove and pun-

---

86 *Id.*

87 *Id.* at 74.

88 Comisión Nacional de Derechos Humanos (CNDH). Comunicación Social. Sep. 13, 2004. http://www.cndh.org.mx/comsoc/compre/2004/140.htm.

89 Shirk, *supra* note 15.

ish others, provide redress to victims and communicate social condemnation of criminal activity simultaneously.[90] Enacted within the context of the country's drug war, it is clear that the primary goal must be the preservation of the State, and that criminal justice serves this interest; however, the process ambitiously seeks to involve the victims as well. Such *ad hoc* composition may be necessary to effectively address the situation, but runs the risk of establishing multiple agendas rather than pursuing a strong and cohesive whole. It remains to be seen how the new process will weigh these interests and if it will suffer as a result of its inclusiveness.

Many of the changes to the Constitution are designed to address the rights of various parties, but the new provisions offer much more than declarations of affirmative rights. Behind the long list of protections that must be afforded to victims and the accused, there are other provisions that grant real power to the criminal justice institutions, a development that may have a mixture of positive and negative results. While some have criticized the new reforms for their lack of realistic expectations, many legislators, lawyers and human rights campaigners have pointed to a darker side to the law. These criticisms have focused primarily on the power accorded to the Public Prosecutor and what amounts to the establishment of a parallel regime for those accused of participation in organized crime.

One of the greatest concerns surrounding the new reforms has to do with this office. The Office of the Public Prosecutor had been, until recently, unique to Mexico, with more than a century of tradition behind it.[91] The 1917 Constitution could have been construed in different ways, but the interpretation that prevailed placed immense power in the hands of this figure, twisting the office of the prosecutor into something nearly unrecognizable to observers from other jurisdictions.

The Office of the Public Prosecutor has long been a cornerstone of criminal justice in the country. However, it has also been seen as dangerous and corrupt, an office whose abuse of power has stood in the way of truth and the rights of those who come into contact with the criminal justice system for the better part of a century. [92] Along with the police and judges, prosecutors have traditionally been among the least trusted government officials, and torture, manipulation of evidence, arbitrary detentions and holding suspects without access to counsel have been described as routine practice for Public Prosecutors.[93] The public has long believed that prosecutors

---

90 BETH VAN SCHAAK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT, 15-20 (Foundation Press, 2010).

91 Reyes, *supra* note 71, at 99.

92 *Id*.

93 Laws Without Justice: Human Rights Violations and Impunity in the Public Security and Criminal Justice System (2007), http://asiapacific.amnesty.org/library/Index/ENGAMR410022007?open &of=ENG-MEX.

would rarely expend effort for a conviction, but that when they decided to seek one, it was practically rubber stamped. [94] Máximo Langer described the broad powers enjoyed by the Public Prosecutors under the previous system as follows:

> The investigative authority —Ministerio Público— that had decision- making power over the weight of the evidence that would be considered at the proceeding's guilt stage, carried out the investigative or inquisitorial stage. That determination was made during the investigation, without the opportunity for the defense to challenge and cross-examine the witnesses. A written dossier was created instead, and the prosecutor himself decided the value of the evidence beforehand, with little opportunity for rebuttal or an effective defense before a judge.[95]

Though the new reforms seek to protect the rights of the accused and implement a system of checks-and-balances, some fear that the Public Prosecutor, far from being restrained by the presumption of innocence and the need to prove facts opposite the defense, will be strengthened by the power to detain those accused of organized crime and supported in this endeavor by the new investigatory powers granted to the police. In addition, by allowing states great discretion to interpret the constitutional amendments, and essentially placing the authority for reform within the hands of the Office of the Public Prosecutor itself, corrupt or incompetent officials may be able to ensure that very little changes. Amended Article 21 declares only that "The Office of the Public Prosecutor and police institutions from the three orders of government shall coordinate amongst themselves to fulfill their objectives on public security and will make up the National System of Public Security (Sistema Nacional de Seguridad Pública)," a broad mandate for two of the country's least-trusted institutions. The article goes on to add responsibility for "the drafting of public policies aimed at preventing crime," and states that "the Federal Government will provide funds to states and municipalities for public security."[96] However, in light of the past behavior, it seems strange to entrust large sums of money to such an amorphous distribution mechanism, which will necessarily involve institutions where corruption is an established fact.

Critics have pointed out that the new reforms essentially place the wolf in charge of guarding the sheep, and that, faced with a choice, Public Prosecutors will choose to stay exactly the way they are. The language of the previous Constitutional articles did not restrain the development of this

---

94 Reyes, *supra* note 71, at 87.

95 Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 629 (2005).

96 Mex. Const. Art. 21.

powerful office, so it is unlikely that broad new language will do any better. Indeed, if anything, the new reforms may place tools in the hands of the Office of the Public Prosecutor to pursue unrestrained power and in the context of the current violent conflict, few have high hopes that the other nascent structures, including those that seek to elevate defense counsel to an equal place in the justice system, will have any restraining effect.

Another area of concern has been the establishment of special provisions for organized crime, which combined with the expansive powers enjoyed by Public Prosecutors, creates what some have referred to as a blank check for human rights violations. Critics of the new reforms have accused the government of attempting to establish a "parallel system" for organized crime, guaranteeing a litany of rights to "normal" criminals but suspending them for anyone suspected of cartel involvement. Such a system is arguably necessary, given the methods of communication, recruitment, and retribution employed by the cartels both in and outside of the criminal justice machinery; however, a cursory glance at the relevant provisions shows them to be overly broad —and dangerously so.

"Organized crime" is broadly defined to include any criminal activity that involves three or more people, regardless of other circumstances. Under this definition which begins to operate upon the accused even before conviction —in contravention of the new principle of "innocent until proven guilty—" countless individuals with no connection to the cartels can potentially be ensnared. While clearly intended to target those involved in actual cartel crime, there is little present in the language to restrict its interpretation. It is feared that the result, intended or not, will be to strip citizens of the protections which should be at the heart of the amendments and may allow the Public Prosecutors to seize complete control of the system to an even greater extent than before. There is concern that the organized crime exceptions will be interpreted to remove the recently granted presumption of innocence for anyone who falls under the shadow of organized criminal activity, effectively rendering that person outside the protections of the law and stripping the suspect of constitutional guarantees. While some of these provisions will only apply to those who have been convicted of organized criminal activity, others apply to those who have been accused or are simply being investigated prior to being officially charged. Though this is done at the behest of a judge, such a safeguard is little consolation in light of the record of judicial and prosecutorial misconduct. This subjective standard creates the potential for abuse and for holding those designated as suspects in extensive and automatic pre-trial detention under Article 19.[97]

The exceptions for organized crime also affect the evidence that can be considered in determining guilt. Article 20, Section A, V, allows the use of

---

[97] Mex. Const. Art. 19.

evidence from the investigation phase, which has not been presented before a judge, when it may be difficult to reproduce in court or there may be a high risk to witnesses. Despite the danger organized crime poses to those who testify against its perpetrators, other jurisdictions have dealt with witness protection through means other than the elimination of such witnesses from open proceedings. Though the provision insists that the accused retains the right to challenge evidence presented in such a manner, this is not comparable to the opportunity to challenge a witness in open court and essentially returns the proceedings to their pre-reform state.

Finally, in addition to establishing different procedures during the process of determining guilt, the amendments also establish differences after guilt has been decided. These are based on the power wielded by organized crime within the prisons themselves, on the ability of the cartels to recruit within the penal system, and the facility with which cartel leaders such as Joaquín Guzmán, aka "El Chapo," the country's most wanted man, have carried on cartel business from behind bars. Article 18 establishes "special centers" for both the preventive incarceration of those accused of organized crime and those who have been convicted. In addition, it allows "competent authorities" to restrict communication from those incarcerated in such facilities to anyone other than their defense attorneys and to impose "special means of surveillance." Finally, the article extends these provisions to "other inmates that may require special security measures," effectively allowing communication to be restricted by a large range of authorities without establishing a duration for these restrictions or supplying a mechanism for their appeal.[98] While isolating the cartels and cutting off pathways of communication are necessary objectives, the lack of a safety mechanism that ensures due process is extremely problematic.

Given the emphasis on establishing a body of rights and building institutional legitimacy, the creation of this parallel system is worrisome. Though the government argues that each exception is clearly delineated and intended to target specific groups that threaten to destroy the State, it is easy to imagine the potential for abuse inherent in such a double standard and viewed in light of the criminal justice system's history, the prospects look even worse. In implementing the reforms, the government must be extremely careful to ensure that the greater, rights-based system does not suffer a crisis of legitimacy as a result of the organized crime exceptions, and that these are not interpreted broadly, or used to target those with no cartel affiliation. It remains to be seen if the checks and balances written into the system will be strong enough to prevent abuse, and if the new reforms will signal real improvement to the criminal justice system, or simply exacerbate the existing injustice. At the end of the day, written reforms must be carried out by human officials, and only time will tell if the present reforms

98 Mex. Const. Art. 18.

have struck the correct balance between the protection of rights and the enforcement of the law.

While the concern that human rights may be compromised is real, there is also danger that the reforms will fall victim to external factors including inertia, lack of commitment, corruption, improper influence and lack of financial and educational resources. Despite the ease with which the reforms, stripped of their most controversial points, passed federal and state legislature and became law, there is a major gap between their enactment and their subsequent acceptance, application and productive development. The reforms may be largely ignored, victims of the "living law" phenomenon, if a "pro-reform environment" is not successfully established. As the 11th United Nations Congress in Crime Prevention and Criminal Justice recognized, laying the groundwork for such acceptance is often the most difficult task faced by transitioning countries.[99]

Reforms may also be deliberately sabotaged by those who have an interest in preserving the loopholes and inefficiencies of the current system. Such actors might include current justice officials who find it easier to maintain the status quo, as well as those who profit from the lack of transparency in the current process and have established profitable relationships with others. Apart from such officials, organized criminal elements also have a stake in the process and may expend effort to see it fail. The cartels do not look to bring down the State, but rather to preserve and profit from its useful structures.

Reforms that target organized crime networks and seek to create transparency will not be viewed as a welcome development in these quarters. Even if the reforms enjoy excellent draftsmanship and theoretically provide strong solutions, their chances for success are diminished when corruption is systemic, permeating nearly every sector of government and society. It is questionable whether new legal processes can succeed if the underlying structures remain the same and the reforms contain no provisions to change them.

Beyond corruption, another threat to a transitioning legal system comes from those who attempt to exert influence on its development. This problem of influence is particularly acute in Latin America where the judiciary has traditionally been subordinate to other areas of government and the law has taken a back seat to political interests.[100] If such interference in the legal process occurs, the new system may fall victim to a crisis of legitimacy

---

99 Eleventh UN Congress on Crime Prevention and Criminal Justice, *Workshop on Criminal Justice Reform Highlights Need for Restorative Justice as Alternative to Prison*. Press Release BKK/CP/18. Apr. 22, 2005, available at: http://www.un.org/events/11thcongress/docs/bkkcp18e.pdf.

100 Organization of American States Office of the Assistant Secretary for Legal Affairs, *Judicial Reform of Criminal Justice in Latin America*. www.oas.org/legal/english/osla/judicial_reform.doc.

in which subsequent proceedings are seen as a thinly veiled exercise of the government's will rather than an instrument of justice. In order to avoid self-sabotage, judges, attorneys, police and political figures must resist the temptation to influence outcomes and accept that in some cases the natural result of legal procedures will be the release of undesirable individuals back into the community. Under these circumstances, actors are likely to face pressure from superiors, colleagues and citizens, and must exercise discipline to prioritize the system above individual outcomes.

Even with the benefit of the best circumstances legal reform does not come easily. The law is heavily reliant on tradition to support both procedure and legitimacy, and change inevitably requires a high level of commitment, as well as financial and intellectual resources. Even well-meaning judges, prosecutors and defense attorneys have trained and practiced under an established system for years and can hardly be expected to transition smoothly to a system of diametrically opposed proceedings. Law schools, too, must adapt to a new method of teaching and will need to find educators capable of training a new generation of legal professionals. Training requirements for police and civil servants will also change, and there will be an inevitable gap in knowledge as the system adjusts.

Additionally, such structural changes require financing, and such commitment will inevitably vary between states. Converting a criminal process from a written procedure conducted in an office to a public trial taking place in a courtroom requires resources in the form of additional personnel for security and administrative duties, as well as technical equipment for recording purposes. Salaries too will need to be adjusted, for if the roles of the prosecution and the defense are equalized and competence is demanded from both parties, their compensation must be adjusted to reflect such changes.

In short, few see the new system as a cure for the country's ills, but those behind the reforms hope that, combined with other policies, they can help address some of the fundamental problems underlying organized crime in Mexico. Despite acknowledged obstacles, these reformers remain convinced that such reforms are a necessary and legitimate component of the fight against the cartels. The reforms, like the use of the army, are necessary but not sufficient, and while they should not be viewed as a panacea, they may yet prove to be a step in the right direction and an effective tool in the fight against organized crime.

5. *Ciudad Juárez: A Brief Case Study in Reform*

In theory, the amendments to the criminal procedure face numerous and potentially insurmountable obstacles. However, many of those involved in the administration of criminal justice take a surprisingly positive view. Though Ciudad Juárez and the surrounding state of Chihuahua typically stand out for all the wrong reasons, in the context of criminal justice reform, a few courageous reformers have offered the rest of the country an example —and hope. Chihuahua, which along with the states of Oaxaca, Baja California, Zacatecas and Nuevo León, chose to pioneer radical changes to the criminal law and to begin their implementation several years ahead of the reforms occurring at the federal level. Patricia González, the former Chihuahua state attorney general, dismisses concerns that the new procedures place too much power in the hands of prosecutors and may increase police and prosecutorial misconduct. "The new model's goal is to respect human rights and impart more efficient justice," says González.[101] She strongly believes that the new procedures will allow the justice system to pursue faster, more effective resolutions of cases, and do so through transparent proceedings that will ultimately serve both the interests of efficiency and fair procedure. Lawyers, judges and law enforcement officials in Chihuahua understand the need for streamlined criminal procedures that can effectively administer justice, especially since the state's largest city, Ciudad Juárez, has one of the highest rates of violent crime in Mexico.[102] A major trafficking point for cocaine and methamphetamines, the city has seen turf warfare between rival drug gangs, fighting between the military and organized crime and a largely unexplained spate of murders in which at least 400 young women have been killed over the course of the last decade. According to the Mexican watchdog Citizen's Council for Public Security (CCSP), the city had the highest murder rate in the world in 2008, with 130 killings per 100,000 inhabitants, or an average of 7 murders per day.[103]

Though the goal of Chihuahua's reforms was the pursuit of efficient, transparent, and more equitable justice in an effort to deal with overwhelming numbers of cases, officials believe it may have other benefits as well. Many believe that faster resolution of the city's minor cases, many of which took months or even years to cycle through the old inquisitorial proceedings, will free up government resources to tackle more serious crimes. This shift in priorities may have the effect of reducing crime —and the nearly complete freedom enjoyed by many of those who engage in it. "With faster-solved cases and a more agile system, I believe it will be a model for reducing impunity," said Roberto Siqueiros, one of the city's criminal magistrates.[104] Despite the assassinations of several local justice officials in the past few years, he and his colleagues remain cautiously optimistic, citing the

---

101 Miller, *supra* note 6.

102 Andrew Malone, *Thousands of Mexican Soldiers Pour into the Country's Most Violent City in Crackdown on Drug Gangs*, DAILY MAIL (2009). http://www.dailymail.co.uk/news/world news/article-1158779/Thousands-Mexican-soldiers-pour-countrys-violent-city-crack-down-drug-gangs.html.

103 *Mexican City World's Murder Capital*, PressTV.com (2009), http://www.presstv.ir/de tail.aspx?id=104593&sectionid=351020705.

104 Miller, *supra* note 6.

positive track record of the state's new Center for Alternative Justice, which has used mediation to resolve 80% of its cases since it began. For those who have cited the provisions for alternative dispute resolution in the 2008 reforms as evidence of naïve and unrealistic drafting which will never be effectively implemented, such successes pose a problem. The overall system, too, has enjoyed noteworthy results: addressing cases through both public oral trials and ADR mechanisms, the state has ruled on nearly 50% of all criminal complaints, an impressive showing alongside nationwide averages of 3.8% to 5%.[105]

State officials are proud of their success, despite the accompanying realization that reforms to the criminal procedure are only part of the solution and transforming a civil law inquisitorial system to an essentially common law accusatory one will not be a straight and narrow path. Still, those who have seen the new system in action speak highly of the oral trials, which are conducted before a panel of three judges, are open to the press and the public for the first time, and are now recorded on DVDs. Judges, who previously decided cases based on written dossiers, speak of the new insights they find in the faces of live witnesses. "They say that if it can work in Ciudad Juárez, it can work anywhere in the country," says Jorge González Nicolás, a practicing lawyer and coordinator for criminal defense attorneys under the new system.[106] Those familiar with the city's many ills will likely agree, and, in many ways, Chihuahua's decision to pioneer the new adversarial system has provided proof that changing the system is possible. Though often written off by the rest of the country, its modest success has provided a model for other states seeking to implement the new constitutional reforms.

IV. In Conclusion

On June 19, 2008, Mexico took a major step in its efforts to create lasting reform and pursue a successful resolution to its fight against organized crime. However, significant challenges remain, and it is still to be seen if the changes to the Constitution will be effective. Those who are tasked with implementing change must be fully committed, and the new system will have to contend with widespread corruption across sectors. Training must be provided for members of the legal profession and law enforcement, including those who have been practicing for many years under the previous system. Old prejudices must be overcome to ensure that defense attorneys can stand up to their opponents during adversarial proceedings and that

---

105 Sean Mattson, *Chihuahua Pioneers Judicial Reform*, Express-News (2009), http://www.justiceinmexico.org/news/pdf/chihuahua_mar8_08.pdf.

106 Miller, *supra* note 6.

Public Prosecutors use their expansive powers in the interest of the entire system. In addition, reforms that appear sound on paper and under the lens of legislative debate can take on new qualities once they are put into practice. Legal transplantation and foreign practices come with their own set of problems and laws that work in one cultural, legal and political setting may prove ineffective or even disastrous when put to work in another. Most importantly, those involved in the process of reform must possess a strong commitment to create real change. Lucy Tacher of PRODERECHO, a Mexico City group heavily involved in drafting and implementing the reforms, admitted that the country has a difficult road ahead of it. "Implementing the codes and procedures will require a substantial transformation of the entire criminal justice system. Extensive public information and education programs are required [during the transformation]."[107] Such words are, if anything, an understatement of the challenges the Mexican criminal justice system now faces.

However, Mexico's new procedure did not develop in a vacuum; many of the changes were born from the country's conflict and gained acceptance in the context of past mistakes and failures. Designed as one half of a larger strategy, the new reforms seek to strike a balance between the use of force and the equally potent use of the law. Further, the Constitution's recognition of the need to rehabilitate offenders and reintegrate them into society demonstrates that at least in theory, Mexico is prepared to take on this challenge. It has moved beyond theories of vengeance, to pursue a more sophisticated strategy that can build up what has been torn down.

Finally, the experiences of other civil law countries that have undertaken reform, as well as those of the states of Chihuahua, Oaxaca, Baja California, Zacatecas and Nuevo León, can provide perspective. As other states undertake their required preliminary assessments and begin to implement changes, these pioneers can provide both cautionary tales and examples of success. In Ciudad Juárez, judicial reform has occurred alongside a reevaluation of the police force and the deployment of more than 2,000 military troops, a combined strategy that has yielded modest success. The city represents a trial by fire in the streets of the country's most dangerous, crime-plagued city; it is also an opportunity to address Mexico's primary security concern while creating lasting institutional change. It provides first-hand experience of the interaction between force and the law, demonstrating that intelligent use of force must meet committed institutional change in order to achieve a real solution. Mexico's national security, political stability and democratic institutions depend on such a meeting.

107 Address by Lucy Tacher, PRODERECHO, to judges and attorneys at a U.S. courthouse, San Diego, CA (Jan. 22, 2008).

Recibido el 15 de febrero de 2010 y aceptado
para su publicación el 15 de septiembre de 2010.

Mexican Law Review
New Series
VOLUME III
Number 2

GENDER STEREOTYPING AND THE FEDERAL JUDICIARY IN MEXICO

Denise GONZÁLEZ NÚÑEZ*

ABSTRACT. *Despite many and important changes that have taken place in Mexican society in recent decades, women still face several obstacles to enjoying their rights effectively. Discrimination due to gender stereotyping is one of these obstacles. According to psychological research, stereotyping is part of individuals' cognition and socialization process, but it can be negative in certain circumstances. The main hypothesis of this article is that there is a lack of gender perspective and an inadequate application of international human rights standards by Collegiate Circuit Courts of the federal judicial branch in Mexico, since the use of gender stereotypes persists in the process of judicial argumentation. This situation prevents women from fully exercising their rights and constitutes a violation of International Human Rights Law. Therefore, the State, and specifically the federal judicial branch, should adopt the necessary measures to fulfill its international obligations*.

KEY WORDS: *Gender stereotypes, categorization or classification processes, right to non-discrimination, international obligations*.

RESUMEN. *A pesar de que en décadas recientes la sociedad mexicana ha sufrido cambios importantes, las mujeres aún enfrentan una serie de retos para el efectivo goce de sus derechos. Entre dichos retos está la discriminación basada en estereotipos de género. De acuerdo con investigaciones realizadas en el campo de la psicología, el acto de estereotipar es parte del proceso humano de socialización y cognición; sin embargo, puede ser negativo en circunstancias específicas. La hipótesis central de este artículo es que existe una falta de perspectiva de género y una inadecuada implementación de los estándares interna-*

* B.A. in International Relations from Universidad Iberoamericana, Mexico City (2009). Member of the International Area of the Miguel Agustín Pro Juárez Human Rights Center. The author has specialized in International Human Rights Law and gender issues through courses taken in Washington College of Law (American University), Irish Centre for Human Rights (National University of Ireland), Grotius Centre for International Legal Studies, T.M.C. Asser Institute, Leiden University, and El Colegio de México.

cionales en materia de derechos humanos por parte de los tribunales colegiados de circuito del Poder Judicial de la Federación, puesto que la utilización de estereotipos de género persiste en el proceso de argumentación jurídica. Esta situación impide que las mujeres ejerzan plenamente sus derechos y constituye una violación al derecho internacional de los derechos humanos. Por lo tanto, el Estado, incluyendo el Poder Judicial de la Federación, debe adoptar las medidas necesarias para cumplir con sus obligaciones internacionales.

PALABRAS CLAVE: *Estereotipos de género, procesos de categorización o clasificación, derecho a la no discriminación, obligaciones internacionales*.

TABLE OF CONTENTS

I. INTRODUCTION

Despite significant social and legal progress, women in Mexico still face several challenges to effectively exercise their rights. One of such obstacles is discrimination caused by gender stereotyping. The elimination of this kind of discrimination is a key challenge.[1]

The main hypothesis of this article is that there is a lack of gender perspective and an inadequate application of international human rights stan-

---

[1] Brief prepared by the International Reproductive and Sexual Health Law Programme (IRSHLP) & the Center for Justice and International Law (CEJIL) as Amici Curiae, Case of González et al. ("Cotton Field") v. Mexico, I/A Court H.R. (2008), p. 2; bibliographic references quoted in the Amicus Brief: Organization of American States, Inter-American Commission on Human Rights, Access to Justice for Women Victims of Violence in the Americas. OEA/Ser.L/V/II. Doc. 68 (2007), par. 150 ["Access to Justice"]; Yakin Ertürk, *Considering the Role of Men in Gender Agenda Setting: Conceptual and Policy Issues*, 78 FEMINIST REVIEW 3 (2004), SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 75 (Chicago Series in Law and Society, 2006).

dards by Collegiate Circuit Courts of the judicial branch as evidenced in the use of gender stereotypes that persists in the process of judicial argumentation, contributing to a situation that prevents women from fully exercising their rights. Discrimination can only be effectively suppressed and significant gender equality among individuals can only be reached insofar as we identify stereotypes, see how they materialize, analyze their implications and adopt measures to change them.[2] With this in mind, the primary goal of this article is to analyze the failure to apply international standards of the right to non-discrimination, expressly in the case of the State's obligation to adopt measures to modify gender stereotyping[3] in the Federal Judicial Branch's construction of the law. In particular, I will analyze resolutions from multiple civil law Collegiate Circuit Courts and demonstrate the reasons why women are adversely affected by stereotypes that recur in these courts.

II. Terminology

Before embarking on the formal analysis of the subject of this essay, I will define the main concepts. First, *gender* is an analytical category employed by a wide variety of theories and used in several ways and under various aspects.[4] Therefore, it is very difficult to create a single, comprehensive definition. The concept of gender may be understood as a way to analyze or study sexual differences or as a rank that classifies social structures.[5] According to Marta Lamas, "gender provides a way of decoding the meaning cultures confer to sexual differences and a way of understanding the complex connections among several types of human interaction."[6] It has also been defined as the meaning societies have historically attributed to the biological traits associated with sex.[7] Similarly, the United Nations (UN)

---

2 Rebecca J. Cook & Simone Cusack, Gender Stereotyping Women: Transnational Legal Perspectives 18 (2009); Kwame Anthony Appiah, *Stereotypes and the Shaping of Identity*, 88 Cal. L. Rev. 47, 52 (2000); Michelle O'Sullivan, Stereotyping and Male Identification: Keeping Women in their Place 185-201 (Christina Murray ed., Juta, 1994).

3 Although gender stereotypes affect both women and men, my analysis will be mainly focused on the adverse effects to women.

4 Mercedes Barquet, *Reflexiones sobre teorías de género. Hoy*, 11 Umbrales 9, 23-31 (2002).

5 *Id.* at 1.

6 Marta Lamas, *Usos, dificultades y posibilidades de la categoría género*, 21 Papeles de población 147-149 (1999).

7 Luis Ortiz-Hernández, *La opresión de minorías sexuales desde la inequidad de género*, 22 Política y cultura 161-164 (2004); Irina Lazarevich *et al.*, *Tipologías de roles de género en estudiantes de la Universidad Autónoma Metropolitana Unidad Xochimilco*, 7 Revista de Ciencias Clínicas 152-153 (2006).

has understood gender as "the social meanings given to biological sex differences. It is an ideological and cultural construct but is also reproduced within the realm of material practices; in turn, it influences the outcomes of such practices."[8] It should be noted that while "gender" has continuously been used to refer to women, the terms are not synonymous and should not be used as such. In this article, I will use the term gender without intending it as a synonym of woman.[9]

According to experts, *gender stereotyping* "is an overarching term that refers to a generalized view or preconception of attributes or characteristics possessed by, or the roles that are or should be performed by, men and women respectively. It is a term that encompasses sex, sexual, sex-role, compounded and other forms of gender stereotypes."[10] Various psychologists have classified stereotypes differently. Glick and Fiske categorize them into two groups: descriptive and prescriptive,[11] while Appiah catalogues them in three groups:[12]

a) Statistical or descriptive stereotypes: those assigning one or several characteristics to an individual believing the trait(s) inherent to the group to which he/she belongs, having statistical correspondence, but not applicable to a specific, concrete case.
b) False stereotypes, also known as prejudices.
c) Normative or prescriptive stereotypes: those based on social ideas on how people should behave according to the social standards established for his/her gender.[13]

Stereotypes tend to easily reproduce themselves because their origin is both cultural and collective.[14] Research has shown that stereotypes are part

---

8 The Secretary-General, Report of the Secretary-General on 1999 World Survey on the Role of Women in Development: Globalization, Gender and Work, submitted to the General Assembly, U.N. Doc. A/54/227 (Aug. 18, 1999), para. 16.

9 The terms "gender" and "sex" are also used as synonyms, which is incorrect.

10 Brief prepared by IRSHLP & CEJIL, *supra* note 1.

11 Peter Glick & Susan T. Fiske, *Sex Discrimination: The Psychological Approach*, *in* SEX DISCRIMINATION IN THE WORKPLACE 159 (Faye J. Crosby et al. eds., Blackwell Publishing 2007).

12 Appiah, *supra* note 2, at 47-48.

13 Without calling them normative, many researchers specify that gender stereotypes are the "*should be's"* societies create surrounding the sexes. These include a number of rules, beliefs and expectations for each gender. Ortiz-Hernández, *supra* note 7, at 165; Lazarevich *et al.*, *supra* note 7, at 153.

14 Claire L'Heureux-Dubé, *Beyond the Myths: Equality, Impartiality and Justice*, 10 JOURNAL OF SOCIAL DISTRESS AND THE HOMELESS 89 (2001). On this point, Marta Lamas mentions that the origin of stereotypes is both collective *and* individual. *See* Marta Lamas, *La perspectiva de género*, REVISTA DE EDUCACIÓN Y CULTURA DE LA SECCIÓN 47 DEL SNTE 1, available at: http://www.latarea.com.mx/articu/articu8/lamas8.htm.

of the cognitive process of classification or categorization that helps deal with "the social complexity of the world;"[15] and therefore, they may surface unconsciously.[16] In addition, stereotypes are said to have another important role in an individual's socialization processes: that of facilitating social identity, so that a person can feel that he or she is part of a group.[17]

An inherent characteristic of a stereotype is that it may lead to inaccurate or non-applicable generalizations to a group of people:[18] (1) when there is no analysis of individual characteristics to establish whether they correspond to the people they are attributed to,[19] (2) when the information at hand has been oversimplified[20] or (3) when the facts or their relevance have been wrongly interpreted.[21] Because it is clearly visible, sex is an easy way to classify people, thus explaining why these stereotypes are so common.[22] On the other hand, visual conceptions of people commonly arise from classifications from a mainly masculine perspective. For example, women are often classified as "fragile," "soft," dressed with care, exuding a moderate image, etc.

However, in general, stereotypes may prevent individuals from developing their potential as human beings.[23] Stereotypes may become discriminatory and negative under certain circumstances if they impose an unjustified burden on one or several individuals,[24] deny people benefits based on a consideration that does not apply to them, limit people's ability to decide and lead their own lives,[25] or use distinctions, exclusion or restrictions to avoid recognizing or assuming rights and freedoms.[26]

With this in mind, the concept of *gender perspective* means recognizing that sexual difference is one thing and the set of established attributes, ideas, images and social prescriptions based on that sexual difference is another.[27]

---

15 Brief prepared by IRSHLP & CEJIL, *supra* note 1, at 3; Blanca González Gabaldón, *Los estereotipos como factor de socialización en el género*, 12 COMUNICAR 79-80 (1999).

16 Glick & Fiske, *supra* note 11, at 157.

17 González Gabaldón, *supra* note 15, at 81; Ortiz-Hernández, *supra* note 7, at 167.

18 Sophia R. Moreau, *The Wrongs of Unequal Treatment*, 54 U. TORONTO L. J. 291-298 (2004); American Psychological Association, In the Supreme Court of the United States: Price Waterhouse v. Ann B. Hopkins. *Amicus Curiae* Brief for the American Psychological Association, 46 AMERICAN PSYCHOLOGIST 1061, 1062-1064 (1991).

19 Alice H. Eagly, *Few Women at the Top: How Role Incongruity Produces Prejudice and the Glass Ceiling*, *in* IDENTITY, LEADERSHIP AND POWER 81 (Daan van Knippenberg & Michael A. Hogg eds., SAGE 2003).

20 American Psychological Association, *supra* note 18, at 1064.

21 *Id.*

22 *Id.*

23 Ortiz-Hernández, *supra* note 7, at 168.

24 Appiah, *supra* note 2, at 47-48.

25 Moreau, *supra* note 18, at 298-299.

26 Brief prepared by IRSHLP & CEJIL, *supra* note 1, at 3.

27 Lamas, *supra* note 14.

Having a gender perspective entails incorporating gender criteria[28] and the social demands for gender equality into "the routines and rules of public institutions."[29] "A gender perspective looks at the impact of gender on people's opportunities, social roles and interactions."[30]

III. Case Analysis: The Reproduction of Gender Stereotypes in Collegiate Circuit Court Resolutions

In 1991, the First Collegiate Court in Civil Matters for the First Circuit issued a judgment on writ of *amparo* 3536/88, by issuing an Opinion on "Sustenance. The Obligation of Women. An Interpretation of Article 164[31] of the Civil Code for the Federal District," which states the following:

> Although Article 164 of the Civil Code for the Federal District, […] consistent with the constitutional principle of equality between men and women, establishes the rule that both spouses shall contribute financially to the upkeep of the home, their sustenance and that of their children; this provision shall be interpreted as meaning that a woman is only obligated to give a monetary contribution when it is proven that she receives compensation for her work or an income from her assets. If this is not the case, there is a presumption that she needs alimony, because it is a well-known fact that in today's Mexican family she is the one in charge of keeping house and taking care of children, while the male is the one who works to provide the financial resources.[32]

---

[28] Observatorio Ciudadano de Políticas de Niñez, Adolescencia y Familias, A. C., Materiales y Herramientas Conceptuales para la Transversalidad de Género 49 (Teresa Incháustegui & Yamileth Ugalde coord., Instituto de las Mujeres del Distrito Federal, 2004).

[29] *Id*. at 17.

[30] United Nations, Food and Agriculture Organization. Agricultural Censuses and Gender Considerations - Concept and Methodology, Chapter II *The Gender Perspective* (FAO 2001), available at: http://www.fao.org/docrep/003/x2919e/x2919e00.htm#Contents.

[31] Article 164 of Civil Code for the Federal District states: "Spouses shall financially contribute to the upkeep of the home, their sustenance and that of their children, as well as the education of their children, under the terms established by law, with no prejudice of dividing the burden in the form and in the proportion the spouses agree upon for this purpose, and according to their possibilities. The above does not apply to the spouse who is unable to work or has no assets of his or her own, in which case the other spouse will be fully responsible for these expenses". Código Civil para el Distrito Federal [C.C.D.F.] [Civil Code for the Federal District], as amended, Federal Official Gazette [Gaceta Oficial, G.O.], January 22, 2010 (Mex.).

[32] The judicial decision is not fully published and the archives were not preserved by the Court. Alimentos. Obligación de la mujer. Interpretación del artículo 164 reformado del Código Civil. Tribunales Colegiados de Circuito [T.C.C.] [Collegiate Circuit Courts], Semanario Judicial de la Federación VIII [Weekly Federal Court

Collegiate Courts have brought up similar arguments many times. In 1996, the Eighth Collegiate Circuit Court in Civil Matters for the First Circuit rendered a decision on spouses' obligation to contribute to providing for the home. In this specific case, the Court stated that even before the 1974 amendment, the Civil Codes of 1870, 1884 and 1928 established that the husband should be the economic provider of the household and the wife was responsible for taking care of it and their children. The Eighth Collegiate Court declared that although the 1974 amendment aimed at equality between men and women, "those provisions shall be interpreted as meaning that the male is the spouse who works and is obligated to provide the financial resources for the support of the household and the woman is only obligated to provide an economic contribution when it is proven that she receives monetary compensation for her work [...]." Similarly, the Court reiterated the following in the resolution entitled "Sustenance. Under Article 164 of the Civil Code, a woman fulfills her obligation of contributing to sustaining a home by keeping house:"

> […] Regarding this the Supreme Court of Justice of the Nation believes that it is widely known that as a general rule in a Mexican family, the man provides the financial resources to sustain all the household expenses, while the woman contributes by keeping house, taking care of the children and managing the home. This situation originated in the limitations historically imposed on women in terms of their social, economic and cultural development, consequences of which may not be eradicated in all sectors of society but only over time even though the principle of equality between men and women before the law has been elevated to a constitutional level; that is, as long as equality, formally established by law, does not translate into a widespread practice. However, as the presumption derives from this, it shall persist until that situation no longer exists, provided there is no legal provision that states otherwise.[33]

Report], Eighth Epoch, December 1991, Registry No. 220994, page 152(Mex.). Original text in Spanish: "Aunque el Código Civil para el Distrito Federal en su artículo 164, reformado por decreto publicado el treinta y uno de diciembre de mil novecientos setenta y cuatro, acorde con el principio constitucional de igualdad entre el varón y la mujer, establece la regla de que ambos cónyuges contribuirán económicamente al sostenimiento del hogar, a su alimentación y a la de sus hijos; tal disposición debe interpretarse en el sentido de que la mujer sólo está obligada a la contribución monetaria cuando se comprueba que obtiene remuneración por su trabajo o ingresos de sus bienes; de no ser así, existe la presunción de que necesita alimentos por ser hecho notorio que dentro de la familia mexicana actual, es ella la que se encarga del hogar y del cuidado de los hijos, mientras que el varón es el que trabaja para allegar los medios económicos".

33 ALIMENTOS. DE ACUERDO CON LO DISPUESTO POR EL ARTÍCULO 164 DEL CÓDIGO CIVIL LA MUJER CUMPLE CON EL DEBER DE CONTRIBUIR CON EL SOSTENIMIENTO DEL HOGAR CUIDANDO DE ÉL. Tribunales Colegiados de Circuito [T.C.C] [Collegiate Circuit Courts], Semanario Judicial de la Federación y su Gaceta IV [Weekly Federal Court Report and its Gazette], Ninth Epoch, August 1996, Registry No. 201634, page

In my opinion and *irrespective* of the dispute, the First Collegiate Court's 1991 resolution raises the first question: If the legal provision in question (Article 164 of the Civil Code for the Federal District) establishes a shared economic obligation for *both spouses*, why did the Court only refer to *the woman*? In other words, why did the Court interpret the rule in such a way that *a woman* shall only be obligated to contribute financially when she can prove she receives monetary compensation for her work, and not that *both spouses* shall only be obligated to contribute financially when they can prove they receive monetary compensation for their work? While it is true that at least one spouse must work to support a household, except in the case of special circumstances, why did the Court associate the *woman* as the spouse that does not receive monetary compensation for her work? For me, the answer lies in the existence of gender stereotypes.

The second question that arises is whether it is truly "a well-known fact that in today's Mexican family, the woman is the one in charge of keeping house and taking care of the children while the male is the one who works to provide the financial resources?" What happens in the case of single-parent families? What about families in which the woman is the only person receiving payment for her work? Are there not homes made up of homosexual, transsexual, etc. couples? Ignoring this social diversity implies perpetuating traditional gender roles, which, as seen below, goes against the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

With regard to the interpretation given in the Eighth Collegiate Court's resolution of Article 164 of the Civil Code for the Federal District (1996), I believe it did nothing but return to the opinions held in the Civil Codes of the late 19th and early 20th centuries since after making mention of the 1974 amendment and its rationale, the Court issued a completely regressive interpretation by asserting that "the male is the one who works" and that "today's Mexican family, [the woman] is the one in charge of keeping house;" therefore, the presumption that she "needs sustenance" prevails,

625 (Mex.). Original text in Spanish: "[…] Al respecto, la Suprema Corte de Justicia de la Nación ha considerado que es de sobra conocido que en la familia mexicana, por regla general, el hombre aporta los medios económicos para sufragar los gastos del hogar, en tanto que la mujer contribuye con el trabajo y el cuidado de la casa, la atención de los hijos y la administración doméstica. Esta situación se originó por las limitaciones que se han impuesto históricamente a la mujer para su desarrollo social, económico y cultural, cuyas consecuencias no pueden erradicarse en toda la sociedad sino con el transcurso del tiempo a pesar de haberse elevado a rango constitucional el principio de igualdad del hombre y la mujer ante la ley, es decir, mientras esa igualdad establecida formalmente en la ley no se traduzca en una realidad generalizada. Ahora bien, como la presunción emana de este hecho, debe subsistir hasta que esa situación real desaparezca, siempre que no exista alguna disposición legal expresa en contrario."

leaving the cases in which it is proven that the woman is compensated for her work as an exception.

In January 1999, the Fifth Collegiate Circuit Court in Civil Matters for the First Circuit issued a resolution entitled "Sustenance. The presumption of need it does not pertain exclusively to the female spouse" in which the court declared that the need of sustenance is not exclusive to women, but also benefits men.[34] Unfortunately, the Court's interpretation did not overcome the stereotype of "today's Mexican family" by observing that "as a general rule in the Mexican family, the man provides the financial resources to sustain all the household expenses."[35]

The same court issued another resolution entitled "Sustenance. Is inadmissible when the husband claims it from his wife if, in addition to not being physically or mentally impaired to work, there is evidence that shows his lack of exertion to apply for a job," the text of which is as follows:

> It is true that one of the objects of marriage, as well as the basis for its preservation, is that regarding mutual support between spouses; an object that is closely related to the principle of the reciprocity of sustenance that implies that the spouse that provides sustenance also has the right to receive it; however, in the case in which there is evidence that the husband claiming sustenance does so because since they got married his wife had been the one providing it for both of them, that he is not physically or mentally impaired, that he is a professional having completed a university degree and is a relatively young person (34 years of age), the plaintiff's claim is inadmissible because his object is to live or keep living at expense of his wife, which clearly contravenes the established schemes and warrants an exception to the obligation set forth in Article 302 of the Civil Code for the Federal District, which establishes that "spouses shall provide sustenance for each other" because in this case, it would not be fair to impose the obligation of providing sustenance to someone who has had the opportunity to do so through effort and work[,] and to benefit those who lack financial resources due to laziness or lack of exertion to look for a job for no justified reason. Additionally, it should be taken into account that there are no children in the marriage in question. Therefore, the excuse that he is in charge of keep-

34 ALIMENTOS. LA PRESUNCIÓN DE NECESITARLOS NO ES EXCLUSIVA DE LA CÓNYUGE MUJER. Tribunales Colegiados de Circuito [T.C.C.] [Collegiate Circuit Courts], Semanario Judicial de la Federación y su Gaceta IX [Weekly Federal Court Report and its Gazette], Ninth Epoch, January 1999, Registry No. 194864, page 824 (Mex.). Original text in Spanish: "[…] actualmente ya no se deja a cargo del marido la carga alimentaria, sino que se solidariza con la obligación de la mujer si ésta tiene posibilidades económicas. Por tanto, si bien sigue rigiendo la presunción de que la esposa necesita alimentos porque ordinariamente en la familia mexicana el hombre es quien aporta los medios económicos para sufragar los gastos del hogar, ello no excluye al hombre quien también tiene en su favor esa presunción de necesitar alimentos cuando precisamente los demanda […]."

35 *Id.*

> ing house and educating the children and she is responsible for the financial issues cannot be accepted [...].[36]

According to the Fifth Court's reasoning, the plaintiff's claim was inadmissible since the husband "is not physically or mentally impaired [...], is a professional having completed a university degree and [...] is a relatively young person (34 years of age)." In contrast, the resolutions from the First and Eighth Courts did not state that the criteria to determine the wife's need for sustenance included her age, the existence of children, her level of education and any impairment to work (as the Fifth Court did with the non-working man); they simply justified their reasoning by basing it on characteristics that according to them pertained to "today's Mexican family;" namely "the man works" and "the woman is responsible for keeping house and taking care of the children."

From my perspective, instead of performing an individualized analysis to substantiate their decisions, the First and Eighth Courts relied on descriptive and potentially normative gender stereotypes of women and men; namely that men work and women keep house and take care of children.[37] The First and Eighth Courts based themselves on the premise that, unlike men, women do not work and are therefore not compelled to provide fi-

---

[36] ALIMENTOS. SON IMPROCEDENTES LOS QUE DEMANDA EL MARIDO A CARGO DE SU ESPOSA, SI ADEMÁS DE NO ESTAR IMPEDIDO FÍSICA NI MENTALMENTE PARA TRABAJAR, EXISTEN PRUEBAS QUE EVIDENCIAN SU FALTA DE APLICACIÓN AL TRABAJO. Tribunales Colegiados de Circuito [T.C.C.] [Collegiate Circuit Courts], Semanario Judicial de la Federación y su Gaceta IX [Weekly Federal Court Report and its Gazette], Ninth Epoch, Jauary 1999, Registry No. 194865, page 825 (Mex.). Original text in Spanish: "Es verdad que uno de los fines del matrimonio que además es base para su conservación, es el relativo al socorro mutuo entre los cónyuges; finalidad que se encuentra íntimamente relacionada con el principio de reciprocidad alimentaria que implica que el cónyuge que da alimentos tiene a su vez derecho a recibirlos; sin embargo, en el caso, donde hay evidencia de que el marido que demanda alimentos, lo hace porque desde que contrajeron matrimonio su esposa es la que había venido soportando la carga alimentaria de ambos; que no está incapacitado física ni mentalmente; que es profesionista por haber cursado una licenciatura y que es una persona relativamente joven (34 años), la pretensión del demandante es improcedente pues su intención es vivir o continuar viviendo a expensas de la esposa, lo cual evidentemente rompe los esquemas establecidos y amerita una excepción a la obligación derivada del artículo 302 del Código Civil para el Distrito Federal en el sentido de que «los cónyuges deben darse alimentos», pues en tal evento, no sería justo imponer la carga alimentaria a quien tenga posibilidades logradas gracias a su esfuerzo y trabajo y beneficiar a quienes carecen de posibilidades económicas debido a su pereza o falta de aplicación al trabajo sin razón fundada. A lo anterior debe agregarse el hecho de que en el matrimonio de que se trata no hay hijos, por lo que no puede afirmarse como pretexto que él se hace cargo de las labores domésticas y educacional de los hijos del matrimonio y ella de la cuestión económica […]."

[37] There are also descriptive and potentially normative stereotypes of the family —a married heterosexual couple— not subject to analysis in this essay.

nancial support for the household. The ideas contained in the premise arise from the stereotype that women are housekeepers and men are breadwinners, which the Fifth Court advanced even further by reprimanding the husband who lives "at expense of his wife" if the couple had no children.[38]

I also believe there is an underlying prejudice subtly worded in the clause that establishes the exemption of contributing financially in the First and Eighth Courts' resolutions. While the clause is absolutely unnecessary —since regardless of the nature of the dispute, there was no reason or justification to declare a relationship between gender and the lack of economic capacity for a monetary contribution— the presence of prejudice is observed in the answer to the following question: Why was the clause drafted to read "a woman is only obligated to give a monetary contribution when it is proven that she receives compensation for her work or an income from her assets" and not that "when it is proven that she works?" In my opinion, this wording points toward a paternalist view of women. Thus, she is considered to be in a passive position or with less authority vis-à-vis the words

[38] Another resolution that illustrates the previous arguments comes from the Second Collegiate Circuit Court of the Sixth Circuit in 1994: "If it is not justified during the trial that the female spouse is engaged in a profession, a trade or in commerce, this leads us to think that she is in charge of keeping house and bringing up the children; therefore, financial support for sustenance cannot be imposed on her nor can the defendant's income be distributed at a lower percentage since it is widely known that as a general rule in the Mexican family, men provide the financial resources to support the household, while women contribute to it by keeping house, managing the home and taking care of the children, even though the principle of equality between men and women before the law has been elevated to a constitutional level; that is, until this equality formally established by law does not become a reality, acknowledging that the married woman works and therefore receives compensation for her services or she has assets of her own, it cannot be assumed that a woman has the obligation of contributing to defray the costs of sustenance because this responsibility devolves upon the husband". ALIMENTOS. MUJER CASADA NO DEBE PRESUMIRSE SU OBLIGACIÓN DE PROPORCIONARLOS, Tribunales Colegiados de Circuito [T.C.C.] [Collegiate Circuit Courts], Semanario Judicial de la Federación [Weekly Federal Court Report], Eighth Epoch, July 1994, Registry No. 211068, page 417 (Mex.). Original text in Spanish: "Si en el juicio no se justifica que la cónyuge ejerce una profesión, oficio o comercio, ello conduce a considerar que se dedica al manejo del hogar conyugal y a la educación de los hijos, por lo que no puede imponérsele la carga económica alimentaria, ni distribuir en menor porcentaje los ingresos del demandado; pues es de sobra conocido que en la familia mexicana, por regla general, el hombre aporta los medios económicos para sufragar los gastos del hogar, en tanto que la mujer contribuye con el cuidado de la casa, la administración doméstica y la atención de los hijos, pues a pesar de haberse elevado a rango constitucional el principio de igualdad del hombre y la mujer ante la ley, es decir, mientras esa igualdad establecida formalmente en la ley no se traduzca en realidad, acreditando que la mujer casada labora y por ende percibe como contraprestación a sus servicios un ingreso, o bien que tiene bienes propios, no se puede deducir que ésta tenga obligación de contribuir a sufragar las necesidades alimenticias pues esta obligación recae en el esposo."

used to refer to a man's economic activity ("the male works"), since the man is considered as having an active and dominant position, which in turn suggests greater authority.

Additionally, the Eighth Court alleged that consequences of the limitations historically imposed on women "may not be eradicated in all sectors of society but only over time" and thus the presumption that women need sustenance "shall persist until that situation no longer exists." In my analysis, this assertion reflects a lack of knowledge of the State's international obligations under signed and ratified treaties (ratified even at the time of rendering this decision) because, as will be demonstrated, the State is obligated to adopt necessary measures to achieve gender equality and not simply restrict itself to the social changes that take place over time.

In the Appendix of 2000, the statements contained in the resolution of the First and Eighth Courts were again cited under the title of "Sustenance. Under Article 164 of the Civil Code, the woman fulfills her obligation of contributing to the support of a home by keeping house."[39]

---

39 ALIMENTOS. DE ACUERDO CON LO DISPUESTO POR EL ARTÍCULO 164 DEL CÓDIGO CIVIL LA MUJER CUMPLE CON EL DEBER DE CONTRIBUIR CON EL SOSTENIMIENTO DEL HOGAR CUIDANDO DE ÉL, Tribunales Colegiados de Circuito [T.C.C.] [Collegiate Circuit Courts], Addendum/Apéndice 2000, Vol. IC, Ninth Epoch, Registry No. 914214, page 411 (Mex.). Original text in Spanish: "El matrimonio es una institución de orden público por lo que la sociedad está interesada en su mantenimiento y sólo por excepción la ley permite que se rompa el vínculo matrimonial; de ahí que en los juicios de divorcio necesario sea preciso que la causal invocada quede plenamente demostrada a fin de que el tribunal pueda apreciar la gravedad del incumplimiento alegado que ponga de manifiesto el desprecio, desapego, abandono o desestimación del cónyuge actor o a sus hijos, y que haga imposible la vida en común. Según el artículo 162 del Código Civil los cónyuges están obligados a contribuir cada uno por su parte a los fines del matrimonio y a socorrerse mutuamente. Los efectos del matrimonio no son únicamente patrimoniales, sino que existen derechos y obligaciones de ambos cónyuges que se manifiestan en los deberes íntimos de la relación: de cohabitación, débito conyugal y fidelidad; y los no necesariamente personalísimos como son los de ayuda mutua y de asistencia. En el matrimonio debe prevalecer el interés siempre superior de la familia, por lo que en el caso se trata no sólo de una función biológica sino también de una función jurídica para dar cumplimiento a los fines del matrimonio, de acuerdo con el imperativo impuesto por el artículo 162 del Código Civil para que cada cónyuge contribuya por su parte a tales fines. Cabe destacar que uno de los deberes que impone el matrimonio es el de socorro y ayuda mutua que descansa siempre en la solidaridad de la pareja y tiene por objeto realizar los fines superiores de la familia. Una de las manifestaciones del derecho-obligación que se analiza es la relativa a la ministración de alimentos que la ley impone a los cónyuges; pero no se concreta exclusivamente a ese aspecto patrimonial, sino también a la ayuda de carácter moral y material que mutuamente deben dispensarse. Ahora bien, la obligación de dar alimentos supone la posibilidad económica del cónyuge deudor, debiendo los alimentos estar proporcionados justamente a esa posibilidad económica del que debe darlos y a la necesidad del que debe recibirlos. Al respecto el artículo 311 del Código Civil dispone que los alimentos han de ser proporcionados a las posibilidades del que debe darlos y a la

Three years later, the Second Collegiate Court in Civil Matters for the Sixth Circuit issued the resolution entitled "Sustenance. The husband's obligation to provide sustenance does not cease if the woman works (Puebla State Law)," in which it was noted that, even though the female spouse works, the male spouse still has the obligation to provide sustenance:

> Under the terms of Article 324 of the Civil Code of the State of Puebla, before the reforms of nineteen ninety-eight [*sic*], when the woman works and earns a salary or wages, she should contribute to sustain the home, that is, she must share that responsibility with the husband; notwithstanding, the latter's obligation, stipulated in Article 323 of the same code, does not cease, but in any case is shared. Thus, it is incontrovertible that, even if the female

---

necesidad del que debe recibirlos. Originalmente en los Códigos Civiles de 1870 (artículos 200 a 202) y de 1884 (artículos 191 a 193) el marido debía proteger y dar alimentos a la mujer, aunque ésta no hubiera llevado bienes al matrimonio, y la mujer debía atender lo doméstico, la educación de los hijos y la administración de los bienes y cuando la mujer tuviera bienes propios debía dar alimentos al marido, cuando éste careciere de aquéllos y estuviere impedido de trabajar. Con diferente redacción pero del mismo perfil fue adaptado ese contenido en el artículo 42 de la Ley sobre Relaciones Familiares, señalando que el marido debía dar alimentos a la mujer y hacer todos los gastos necesarios para el sostenimiento del hogar. El Código Civil de 1928 siguió los mismos lineamientos en su artículo 164. En la reforma publicada en el Diario Oficial de la Federación de treinta y uno de diciembre de mil novecientos setenta y cuatro, se modificaron los textos que hemos citado y aun cuando se dejaron latentes los principios, su redacción tiene la inspiración de la igualdad jurídica, política, económica y social de la mujer con el hombre, pues se establece a cargo de los cónyuges (tanto de él, como de ella) la contribución económica para el sostenimiento del hogar, su propia alimentación y la de sus hijos; sin perjuicio de distribuirse esas cargas en la forma y proporción que ellos convengan y de acuerdo con sus propias posibilidades. La causal de divorcio prevista en la fracción XII del artículo 267 del Código Civil para el Distrito Federal en relación con el artículo 164 del mismo código, si bien es cierto que surgió para ajustar la legislación a la realidad social a efecto de regularizar la situación jurídica y fáctica de la pareja; tales disposiciones deben interpretarse en el sentido de que el varón es el que trabaja y está obligado a allegar los medios económicos para el sostenimiento del hogar y la mujer sólo está obligada a la contribución económica cuando se compruebe que obtiene remuneraciones por su trabajo o ingresos de sus bienes; de no ser así, existe la presunción de que necesita alimentos por ser hecho notorio que dentro de la familia mexicana actual, es ella la que se encarga del hogar y del cuidado de los hijos y de esta forma cumple con su obligación prevista por el artículo 164 del Código Civil. Al respecto, la Suprema Corte de Justicia de la Nación ha considerado que es de sobra conocido que en la familia mexicana, por regla general, el hombre aporta los medios económicos para sufragar los gastos del hogar, en tanto que la mujer contribuye con el trabajo y el cuidado de la casa, la atención de los hijos y la administración doméstica. Esta situación se originó por las limitaciones que se han impuesto históricamente a la mujer para su desarrollo social, económico y cultural, cuyas consecuencias no pueden erradicarse en toda la sociedad sino con el transcurso del tiempo a pesar de haberse elevado a rango constitucional el principio de igualdad del hombre y la mujer ante la ley, es decir, mientras esa igualdad establecida formalmente en la ley no se traduzca en una realidad generalizada. Ahora bien, como la presunción emana de este

> spouse earns an income by having a job, the husband continues to act as the person obligated to pay sustenance, as there is no legal provision that releases him from this obligation and, therefore, even though the female spouse performs a compensated activity, she is not excluded from the legal premise of requiring sustenance. Hence, the person obligated to pay sustenance must then justify by means of the evidence available to him that the salary paid is sufficient to meet [the obligation of providing sustenance].[40]

At first glance, one might think that the resolution shows a paternalistic view (and therefore a negative one) towards women, but in the search for an interpretation compatible with equality, we can also hypothesize that the obligation simply remains the same even when both spouses work in view of their duty to cooperate reciprocally and under equal conditions in sustaining the household and to mutually provide resources. However, I think the court was not clear enough in this respect. To reach its conclusion, the court merely mentioned "there is no legal provision that releases him from this obligation." So, even with the opportunity to present weighty arguments to advance the issue of gender equality, the court based its resolution on limited and even potentially harmful arguments, given the prevailing gender stereotypes that define women as housekeepers and men as workers.

In July 2006, the Third Collegiate Court in Civil Matters for the First Circuit noted the following in the resolution entitled "Community property. Case in which property acquired by the male spouse who abandons the home later becomes part of said type of property:"

> [...] when one of the spouses leaves the matrimonial domicile, ceases to contribute to the common funds and to collaborate in the household man-

---

hecho, debe subsistir hasta que esa situación real desaparezca, siempre que no exista alguna disposición legal expresa en contrario."

40 ALIMENTOS. NO CESA LA OBLIGACIÓN DEL MARIDO DE PROPORCIONARLOS, EN EL CASO DE QUE LA MUJER TRABAJE (LEGISLACIÓN DEL ESTADO DE PUEBLA). Tribunales Colegiados de Circuito [T.C.C.] [Collegiate Circuit Courts], Semanario Judicial de la Federación y su Gaceta XVII [Weekly Federal Court Report], Ninth Epoch, June 2003, Registry No. 184226, page 915 (Mex.). Original text in Spanish: "En términos del artículo 324 del Código Civil del Estado de Puebla, anterior a las reformas de mil novecientos noventa y ocho, cuando la mujer trabaja y obtiene un sueldo o ganancias, debe contribuir al sostenimiento del hogar, es decir, debe participar junto con el marido en dicha responsabilidad, por lo que la obligación de este último, que le da el diverso 323 del propio ordenamiento, no cesa, sino que en todo caso se comparte. Luego, es inconcuso que aun en el caso de que la cónyuge obtenga ingresos por contar con un trabajo, el marido mantiene el carácter de deudor alimentista, al no existir precepto legal que le libere de dicha obligación y, como consecuencia, la consorte, aunque desempeñe una actividad remunerada, no pierde la presunción legal de necesitar los alimentos, quedando a cargo del deudor, entonces, justificar con los elementos de prueba a su alcance que el salario devengado es suficiente para satisfacer el rubro de que se habla."

> agement, childcare, if any, and the administration of [household] assets, while the spouse who remains at the marital domicile, which in context of the Mexican social environment is usually the woman, continues to carry the burdens and expenses of providing for the home and the education of the children, if any [...].[41]

From my perspective, the comment "which in the context of the Mexican social environment is usually the woman" was absolutely unnecessary to the general argument and only contributes to reinforce potentially harmful gender stereotypes in the collective imagination. Fortunately, a month later, the Sixth Collegiate Court in Civil Law of the First Circuit took a step forward towards gender equality by stating that the roles or activities that spouses have in maintaining the home can no longer be understood from a traditional perspective. Specifically, the court held that the role of family caregiver "due to the very dynamics of life today can be attributed to both men and women interchangeably, since the devoting oneself to one's home cannot be regarded from the traditional perspective that has prevailed for years in Mexican society."

However, almost a year later (March 2007), there was an unfortunate setback when the Third Collegiate Court in Civil Matters for the First Circuit argued in writ of *amparo* 611/2006 that the burden of proof to refute the presumption that the female spouse requires sustenance falls upon the defendant because of the "social context" in which the wife is the one who takes care of the house and the children:

> According to that set forth in Article 281 of the Code of Civil Procedure for the Federal District, in a civil trial, the parties must bear the burden of proof of their own claims. However, in case of a divorce which claims the compensation referred to in Article 289 Bis of the Civil Code and to prove that the woman devoted herself primarily to doing housework and, where appropriate, caring for the children for the duration of the marriage, the [female] plaintiff's statement to this effect is sufficient evidence to constitute a presumption that requires a rebuttal by the [male] defendant since the social context cannot be overlooked and according to which it is a well-

41 SOCIEDAD CONYUGAL. HIPÓTESIS EN QUE FORMAN PARTE DE ELLA LOS BIENES ADQUIRIDOS POR EL CÓNYUGE QUE ABANDONA EL DOMICILIO CON POSTERIORIDAD A SU SALIDA. Tribunales Colegiados de Circuito [T.C.C.] [Collegiate Circuit Courts], Semanario Judicial de la Federación y su Gaceta XXIV [Weekly Federal Court Report and its Gazette], Ninth Epoch, July 2006, Registry No. 174594, page 1377 (Mex.). Original text in Spanish: "[…] cuando uno de los esposos abandona el domicilio conyugal, deja de contribuir a la formación del fondo social y de colaborar en la dirección conjunta del hogar, de los hijos, si los hay, y de los bienes, mientras que el cónyuge que permanece en el domicilio conyugal, que en el medio social mexicano suele ser con mayor frecuencia, la mujer, continúa con las cargas o gastos para lograr el mantenimiento y educación de los hijos, en caso de que los haya […]."

> known fact that as a general rule, the woman is the one who, regardless of engaging in other activities, also devotes herself to the housework and the care of the children, if any, as it is widely known that this is a real and prevalent practice in today's society.[42]

In other words, after disregarding the rule that stipulates that the burden of proof lies with the parties as to their own claims, the court based its conclusion on gender stereotypes as did other courts in presumably similar cases during the previous decade. Nevertheless, as a result of the same case (*Amparo* 611/2006), the court issued another resolution entitled "Divorce. The concept of 'primarily' as required in Section II of Article 289 Bis of the Civil Code in force in the Federal District for the claim for the redress of damages:"

> The use of the expression to devote oneself "primarily" to doing housework and, where appropriate, caring for the children to obtain the compensation referred to in Section II of Article 289 Bis, refers to housework carried out for longer periods and lengths of time than any other activity performed by the plaintiff spouse, which does not mean that the latter has only performed these activities, since the term "primarily" indicates a higher amount or percentage of one activity than another. Thus, said spouse may also devote part of her time to other activities, such as, among others, working to obtain a greater income, as it is a well-known fact that today's situation often requires that both spouses work to financially support the family.[43]

---

[42] DIVORCIO. CARGA DE LA PRUEBA PARA DEMOSTRAR QUE EL DEMANDANTE SE DEDICÓ EN EL LAPSO EN QUE DURÓ EL MATRIMONIO, PREPONDERANTEMENTE AL DESEMPEÑO DEL TRABAJO DEL HOGAR Y, EN SU CASO, AL CUIDADO DE LOS HIJOS (ARTÍCULO 289 BIS, FRACCIÓN II, DEL CÓDIGO CIVIL PARA EL DISTRITO FEDERAL). Tribunales Colegiados de Circuito [T.C.C.] [Collegiate Circuit Courts], Semanario Judicial de la Federación y su Gaceta XXV [Weekly Court Report], Ninth Epoch, March 2007, Registry No. 173035, page 1675 (Mex.). Original text in Spanish: "De conformidad con lo dispuesto en el artículo 281 del Código de Procedimientos Civiles para el Distrito Federal, en el juicio civil las partes deben asumir la carga de la prueba de sus pretensiones; sin embargo, en el caso de divorcio en que se demanda la indemnización a que se refiere el artículo 289 Bis del Código Civil y con el objeto de probar que en el lapso de duración del matrimonio la mujer se dedicó preponderantemente al desempeño del trabajo del hogar y, en su caso, al cuidado de los hijos, basta únicamente con la afirmación de la demandante en ese sentido para que constituya una presunción que requiere ser desvirtuada por el demandado, debido a que no puede pasar inadvertido el contexto social, conforme al cual es un hecho notorio que por regla general es la mujer quien, con independencia de que realice otra actividad, se dedique además a las labores del hogar, al cuidado de los hijos cuando los hay, pues es por todos conocido que ésta es una costumbre real y vigente en la sociedad actual."

[43] DIVORCIO. CONCEPTO DE ACTIVIDAD "PREPONDERANTEMENTE" QUE EXIGE LA FRACCIÓN II DEL ARTÍCULO 289 BIS DEL CÓDIGO CIVIL VIGENTE EN EL DISTRITO FEDERAL. PARA QUE PROCEDA LA ACCIÓN INDEMNIZATORIA. Tribunales Colegiados de

It can be observed that in the first resolution, the court stated it is "a well-known fact that as a general rule, the woman is the one who, regardless of engaging in other activities, also devotes herself to the housework and the care of the children, if any, as it is widely known that this is a real and prevalent practice in today's society," while in the second resolution, the same court argued that the well-known fact is that circumstances often require that both spouses work. In my point of view and despite the statement in the second resolution regarding both spouses' need to work, the fact that the court used a stereotypical argument in the first resolution, though not in the second one, is indicative of the courts' persistent lack of clarity and awareness of gender stereotypes and their consequences.

Therefore, it is not surprising that in February 2009, another court yet again included in its legal reasoning a stereotyped and unnecessary explanation of the supposed generalization that women spend most of their time and effort doing housework. Namely, the Fourth Collegiate Court in Civil Matters for the First Circuit pointed out the following in the resolution entitled "Compensation to the spouse primarily devoted to keeping house, or caring for the children. Elements that should be addressed to set the corresponding percentage:"

> Article 289 bis of the Civil Code for the Federal District […] is based on the premise of recognizing a well-known fact, namely, that when one spouse, usually the woman, dedicates most of her time and effort to housework, and where appropriate, to caring for the children, she contributes financially and substantially to the accumulation of wealth within the marriage by doing this work […].[44]

Circuito [T.C.C.] [Collegiate Circuit Courts], Semanario Judicial de la Federación y su Gaceta XXV [Weekly Court Report and its Gazette], Ninth Epoch, March 2007, Registry No. 173034, page 1676 (Mex.). Original text in Spanish: "La utilización del vocablo dedicarse «preponderantemente» al desempeño del trabajo del hogar y, en su caso, al cuidado de los hijos, para poder obtener la indemnización a que se refiere la fracción II del artículo 289 Bis, se refiere a que el trabajo del hogar se haya llevado a cabo con mayor temporalidad y duración de manera destacada o superior que otra actividad realizada por el cónyuge demandante, lo cual no significa que éste únicamente haya desempeñado esas actividades, pues el término «preponderante» es indicativo de una cantidad o porcentaje superior de una actividad respecto de otra; por ende, dicho cónyuge puede, además, dedicar parte de su tiempo a otra actividad, como puede ser, entre otras, a trabajar para obtener ingresos mayores, pues es un hecho notorio que la realidad actual en muchas ocasiones exige que ambos cónyuges laboren para poder sostener económicamente a la familia."

44 Indemnización al cónyuge dedicado preponderantemente al hogar, o al cuidado de los hijos. Elementos que deben atenderse para fijar su porcentaje. Tribunales Colegiados de Circuito [T.C.C.] [Collegiate Circuit Courts], Semanario Judicial de la Federación y su Gaceta XXIX [Weekly Federal Court Report and its Gazette], Ninth Epoch, February 2009, Registry No. 167914, page 1892 (Mex.). Original text in Spanish: "El artículo 289 Bis del Código Civil para el Distrito Federal, donde se

IV. The Recurrence of Gender Stereotypes Affects Women

Stereotypes determine perceptions about typical and acceptable roles for men and women in a society.[45] From birth, individuals are placed under the constant pressure of conforming to these roles.[46] Men and women are commonly perceived as opposite poles and each "pole" is associated with certain profiles and activities in such a way that there are more desirable features in one or another person depending on his/her sex.[47] In Mexico and the rest of Latin America, the social process of dichotomization of the sexes is clearly captured in two concepts: *machismo* and *marianismo*.[48] In general terms, the first one is related to the assumed expectation for men to be socially dominant while the second one alludes to women "being framed as self-sacrificing, submissive to her man, and a 'good' mother and wife," in a clear reference to the religious figure of Mary.[49]

Men are commonly associated with professional success; they are assumed and expected to be competent, independent, active, competitive and very self-confident.[50] Meanwhile, women are usually associated with the home and family; they are considered dependent, delicate, weak, passive, emotional, incompetent and/or incapable of making decisions.[51] Moreover, when any psychopathological manifestation appears it is usually explained as a result of women's reproductive function, that is, premenstrual syndrome, post-partum depression, menopause, etc.[52]

---

otorga el derecho a cobrar tal indemnización (actualmente contenido en la fracción VI del artículo 267 del código citado), tiene como presupuesto el reconocimiento de un hecho notorio, consistente en que cuando uno de los cónyuges, generalmente la mujer, emplea la mayor parte de su tiempo y esfuerzos al cuidado y labores del hogar, y en su caso, de los hijos, con este trabajo contribuye económicamente y de manera importante a la acumulación de riqueza en el seno del matrimonio […]."

45 American Psychological Association, *supra* note 18, at 1065; Marta Lamas, *supra* note 14, at 1. *For additional reference see* Marcela Lagarde, Los cautiverios de las mujeres: madresposas, monjas, putas, presas y locas (UNAM, 2007).

46 Ortiz-Hernández, *supra* note 7, at 169.

47 American Psychological Association, *supra* note 18, at 1064.

48 DeSouza et al., *A Latin American Perspective on the Study of Gender*, *in* Praeger Guide to the Psychology of Gender 41 (Michelle Antoinette Paludi ed., Praeger Publishers 2004).

49 *Id*. DeSouza, Baldwin, Koller and Narvaz state that there are some difficulties in defining *machismo* and *marianismo*. However, it is not the object of this essay to discuss them in depth, but rather to point out that gender stereotypes persist in Mexico and to identify their negative effects on women. *See also* Lagarde, *supra* note 45.

50 *Id.*; Luis Ortiz-Hernández, *supra* note 7, at 165; Lazarevich et al., *supra* note 7, at 154.

51 American Psychological Association, *supra* note 18, at 1064; González Gabaldón, *supra* note 15, at 80; Ortiz-Hernández, *supra* note 7, p. 165; Lazarevich et al., *supra* note 7, at 154; DeSouza et al., *supra* note 48, at 43; Lamas, *supra* note 14, at 1.

52 María Asunción Lara, *Introducción*, *in* Cálmese, son sus nervios, tómese un

In many social contexts, women are still expected to perform in the domestic area; thus, the binomial of women-home is often the "ideal" against which they are judged by society as well as by courts; if they fulfill this ideal, they are treated paternalistically and if not, they are treated with hostility.[53] As a result, women are subject to double or ambivalent sexism: on the one hand, they are treated benevolently if they are believed to have the characteristics "they should have" and perform in a context traditionally assigned or associated with women.[54]

However, if they intend to gain access to a space socially assigned to men, they may receive a different treatment or even be denied administrative positions with a high power for decision making,[55] since characteristics related to women or femininity are not favorable for success[56] and do not correspond to the characteristics that are socially identified with women.[57] If, on the contrary, they are perceived as women with manly features or apart from the traditionally feminine, even being successful leaders and recognized as such, they are considered as not adapted, aggressive, hostile or unpleasant.[58]

Consequently, stereotypes have been a recurrent reason for discrimination in human resources selection processes,[59] especially when women are candidates for positions usually held by men, even when they are equally or better qualified.[60] Many times, women are relegated to positions with lower salaries or those considered appropriate for their gender[61] or else they have to face harder evaluations than a man would in the same position, which in the medium and long term impedes their professional growth.[62] If a woman is professionally successful, there may be social explanations such as "good

---

TECITO... LA SALUD MENTAL DE LAS MUJERES MEXICANAS (María Asunción Lara & V. Nelly Salgado de Synder eds., Editorial Pax 2002).

53 American Psychological Association, *supra* note 18, at 1062 & 1065; Michelle O'Sullivan, *supra* note 2, at 190.

54 Glick & Fiske, *supra* note 11, at 162; Deborah L. Rhode & Joan C. Williams, *Legal Perspectives on Employment Discrimination*, *in* SEX DISCRIMINATION IN THE WORKPLACE 246 (Faye J. Crosby et al. eds., Blackwell Publishing 2007); American Psychological Association, *supra* note 18, at 1066; Eagly, *supra* note 16, at 85.

55 Rhode et al., *supra* note 54, at 246; American Psychological Association, *supra* note 18, at 1066; Eagly, *supra* note 19, at 85.

56 Eagly, *supra* note 19, at 82.

57 Glick & Fiske, *supra* note 11, at 162.

58 *Id.*; Rhode et al., *supra* note 54, at 246; American Psychological Association, *supra* note 18, at 1066; Eagly, *supra* note 19, at 85.

59 González Gabaldón, *supra* note 15, at 80.

60 American Psychological Association, *supra* note 18, at 1066.

61 O'Sullivan, *supra* note 2, at 189.

62 Rhode et al., *supra* note 54, at 246; American Psychological Association, *supra* note 18, at 1066.

luck" or "hard work," instead of acknowledging her success or the capabilities she has.[63]

According to psychological studies, ambivalent treatment is even more accentuated in pregnant women, who are seen as vulnerable creatures.[64] The fact that a working woman gets pregnant may generate negative perceptions about her professional performance since she is associated to emotional and irrational issues,[65] and is seen as a person that needs assistance.[66] Studies have shown that a pregnant working woman is not commonly perceived as someone eligible for promotion.[67] On the contrary, she may be subject to even higher evaluation standards than her non-pregnant colleagues or male partners —no matter if they are parents or not— or to other types of hostile treatment derived from negative reactions arising from her coworkers.[68] Finally, the work of a mother is considered ineffective since she is perceived as delicate, incompetent and out of her traditional role.[69]

In the area of reproductive health, women are also subject to stereotypes. One of the most evident and common stereotypes is the idea that motherhood is the supreme ideal for a woman and as such, will always be a priority over other matters, such as education, work or her own well-being.[70] Additionally, motherhood is socially perceived as a "natural" or intrinsic work for women,[71] which does not necessarily occur in the case of fatherhood. Procreation, motherhood and domestic life are considered the products of women's instincts.[72] Along these same lines, the way children grow and develop is socially related to a woman's success or failure; it is a standard

---

63 *Id.*

64 Lamas, *supra* note 14, at 1.

65 Rhode et al., *supra* note 54, at 246.

66 Michelle R. Hebl et al., *Hostile and Benevolent Reactions Toward Pregnant Women: Complementary Interpersonal Punishments and Rewards that Maintain Traditional Roles*, 92 JOURNAL OF APPLIED PSYCHOLOGY 1499 (2007).

67 *Id.* at 1499.

68 Rhode et al., *supra* note 54, at 247; Hebl et al., *supra* note 66, at 1500.

69 Rhode et al., *supra* note 54, at 248; Hebl et al., *supra* note 66, at 1500.

70 Rebecca J. Cook & Susannah Howard, *Accomodating Women's Differences under the Women's Anti-Discrimination Convention*, 56 EMORY LAW JOURNAL 1043-1044 (2007); Karen March & Charlene E. Miall, *Reinforcing the Motherhood Ideal: Public Perceptions of Biological Mothers Who Make an Adoption Plan*, 43 CANADIAN REVIEW OF SOCIOLOGY & ANTHROPOLOGY 367, 367 (2006).

71 Cook & Howard, *supra* note 70, at 1044; P. Choi et al., *Supermum, Superwife, Supereverything: Performing Feminity in the Transition to Motherhood*, 23 JOURNAL OF REPRODUCTIVE AND INFANT PSYCHOLOGY 167-168 (2005).

72 Marcela Lagarde, *Identidad de género y derechos humanos. La construcción de las humanas*, available at http://www.derechoshumanos.unlp.edu.ar/ddhh/areas.php?modulo=maestria&categ=128, at 7.

measurement: if children grow and perform "positively," then the woman is "successful," thus fulfilling her role of a "good mother."[73]

However, the stereotype of motherhood as a maximum ideal is detrimental for women insofar as it limits their capacity for making decisions that may conflict with the socially assigned role of mothers or future mothers,[74] while this stereotype of motherhood as "natural" work minimizes the effort involved in having and taking care of children.[75] Therefore, women experiencing the process of becoming mothers and who realize how difficult motherhood is, far from being the image represented by society, are susceptible of feelings of guilt and depression.[76] Likewise, women who decide to have children without being married, those who decide not to have children at all, those who give their child in adoption, those who have an abortion and those who are considered "bad mothers" are stigmatized by society,[77] probably even more harshly than in the case of men who are considered "bad fathers."

Gender stereotypes may then turn into factors that prevent a woman from enjoying and exercising her rights and freedoms, starting with the right to equality and non-discrimination —Article 24 of the American Convention on Human Rights (ACHR),[78] Article 3 of the Protocol of San Salvador (PSS)[79] and Article 3 of the International Covenant on Civil and Political Rights (ICCPR)[80] —and the right to live free from violence (Article 6 of the Convention of Belem do Para).[81]

Gender stereotypes may also prevent an individual's right to privacy —Article 11 of the ACHR and Article 17 of the ICCPR— if her capacity to decide her sexuality is limited. Regarding this point, the Human Rights Committee has upheld that the right to privacy "protects women's control over their sexuality and reproductive functions."[82]

---

73 March & Miall, *supra* note 70, at 368; P. Choi et al., *supra* note 71, at 168.

74 Cook & Howard, *supra* note 70, at 1044.

75 *Id*.

76 P. Choi et al., *supra* note 71, at 168.

77 March & Miall, *supra* note 70, at 367; P. Choi et al., *supra* note 71, at 168; Cook & Howard, *supra* note 70, at 1047.

78 Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

79 Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", Nov. 17, 1988, O.A.S.T.S. No. 69.

80 United Nations, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

81 Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belem Do Para", June 9, 1994, 33 I.L.M. 1534.

82 Daniel O'Donnell, DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS. NORMATIVA, JURISPRUDENCIA Y DOCTRINA DE LOS SISTEMAS UNIVERSAL E INTERAME-

The effective exercise of the right to health -Article 10 of the PSS and Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[83] —may also be adversely affected if women do not have access to quality health care services, particularly, but not limited to, in matters related to sexual and reproductive life. Using the World Health Organization (WHO) definition of health —"Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity,"[84] this negative effect spreads. According to the National Council for the Prevention of Discrimination (CONAPRED, based on its Spanish acronym): "Stigmas towards women, generated by gender roles and the annulment of rights and freedoms, significantly undermine the right to sexual and reproductive health, lead to harassment, sexual abuse, exploitation, violation and femicides, this latter being the maximum expression of violence against women."[85]

Gender stereotypes at work may be limiting factors for exercising the right to work and to just, equitable and satisfactory conditions of work —Articles 6 and 7, both of the PSS and of the ICESCR— which include "the right of every worker to promotion" and the right to "fair and equal wages for equal work, without distinction" (See Article 7 of the PSS).

At certain times, gender stereotypes may be factors that prevent women from exercising their right to judicial protection (Article 25 of the ACHR). For example, the Center for Justice and International Law and the International Reproductive and Sexual Health Law Programme of the Faculty of Law of the University of Toronto declared in the *Amicus* brief submitted to the Inter-American Court of Human Rights in the Case of González et al. ("Cotton Field") v. Mexico that the inadequate response of state authorities had been influenced by stereotypes that placed women in a lower and subordinated position because they are young, poor and mostly migrants.[86] This was confirmed by the Inter-American Court as follows: "Bearing in mind the statements made by the State, the subordination of women can be associated with practices based on persistent socially-dominant gender stereotypes, a situation that is exacerbated when the stereotypes are reflected, implicitly or explicitly, in policies and practices and, particularly, in the rea-

---

RICANO 968 (2007). *See also* UN. Human Rights Committee. CCPR/C/21/Rev.1/Add. 10, General Comment No. 28 Article 3 - The equality of rights between men and women, (29 March 2000) par. 20.

83 United Nations, International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

84 Rebecca J. Cook, *Gender, Health and Human Rights*, 1 HEALTH AND HUMAN RIGHTS 350, 351 (1995).

85 CONAPRED. Press release 083, Sexismos. Detonante de violencia contra las mujeres (2009), http://www.conapred.org.mx/boletines1.html.

86 Brief prepared by IRSHLP & CEJIL, *supra* note 1, at 27 & 28.

soning and language of the judicial police authorities…"[87] In view of the above, the Court declared that Mexico had violated, among other rights, the right to access to justice as enshrined in Articles 8.1 and 25.1 of the ACHR to the detriment of the victims' next of kin.[88]

V. The Obligations of the Mexican State to Eliminate Gender Stereotypes

Several international human rights instruments like the International Covenant on Civil and Political Rights and the American Convention on Human Rights guarantee the right to equality of all people. According to the Inter-American Court of Human Rights the right to equality and non-discrimination is a *jus cogens* norm, since "the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws."[89]

There are international treaties focused on protecting women's rights, including the right to non-discrimination, which address the issue of stereotypes throughout their texts. In the universal system of human rights we find the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Declaration on the Elimination of Violence against Women.

As the Committee on the Elimination of Discrimination against Women states, the general interpretative framework of the CEDAW is included in Articles 1 to 5 and 24,[90] since the definition of discrimination and the core of States' obligations is therein.[91] The CEDAW specifically mentions the obligation to modify stereotypes and traditional roles in Article 5 clause a) and Article 19 clause c):[92]

> Article 5
>
> States Parties shall take all appropriate measures:
>
> (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and custom-

87 I/A Court H.R., Case of González et al. ("Cotton Field") v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 401.

88 *Id*., para. 402.

89 I/A Court H.R., Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, para. 101.

90 United Nations, Committee on the Elimination of Discrimination against Women, General Recommendation No. 25: Article 4, Paragraph 1, of the Convention (Temporary Special Measures), Thirtieth session (2004), para. 7.

91 Cook & Cusack, *supra* note 2, at 205.

92 United Nations, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Dec. 18, 1979, 1249 U.N.T.S. 13.

> ary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
>
> Article 10
>
> States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:
>
> c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;

Besides this, CEDAW recognizes a series of rights applicable to different aspects of life (education, employment, health, family, etc.) that States are obligated to protect and enforce to achieve not only formal equality, but also substantive equality between men and women. In the context of labor, in particular on the ways women may be stereotyped, the following article is essential:[93]

> Article 11
>
> 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:
>
> a) The right to work as an inalienable right of all human beings;
>
> b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
>
> c) […] the right to promotion, job security and all benefits and conditions of service […]
>
> The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

CEDAW also includes a series of obligations associated with non-discrimination in the areas of health and reproduction, for example:[94]

> Article 11
>
> 2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:
>
> c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities

93 United Nations, CEDAW, *supra* note 92.

94 *Id.*

> and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
>
> Article 12
>
> 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

To achieve widespread equality between men and women, through the CEDAW States committed themselves to guarantee the right to equality in their laws, to adopt all the necessary measures to eliminate discrimination, to establish the legal protection of women's rights, to abstain from engaging in discriminatory acts or practices, to take measures to eliminate discrimination from individuals or entities and modify or derogate discriminatory laws (See Article 2 of CEDAW). In the same way, Article 24 states:[95] "*States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention*."

The Committee on the Elimination of Discrimination against Women interpreted the obligations of States under the Convention as follows:[96]

> 1. […] ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination —committed by public authorities, the judiciary, organizations, enterprises or private individuals —in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies.
>
> 2. […] improve the de facto position of women through concrete and effective policies and programmes.
>
> 3. […] address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.

The Declaration on the Elimination of Violence against Women establishes that one of the measures to design a policy focused on eliminating violence against women is to adopt "all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women" (See Article 4).[97]

---

95 *Id.*

96 United Nations, Committee on the Elimination of Discrimination against Women, *supra* note 90.

97 United Nations, Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, U.N. Doc A/Res/48/104 (Dec. 20, 1993).

Likewise, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, the "Convention of Belem do Para," establishes that the right of all women to live free of violence includes the right "to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination" (See Article 6).[98] To this end, the above-mentioned Inter-American Convention obligates States through its Article 8:[99]

> b) to modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women;

From my perspective, in spite of the existence of these international treaties, Mexican legislation seems to have been unaffected by international legal principles that require the adoption of measures to modify gender stereotypes, social and cultural patterns of behavior and designation of traditional roles according to sex. Although Mexico signed and ratified CEDAW and the Convention of Belem do Para over a decade ago, it was not until recently that legal measures were adopted to modify gender stereotypes. In fact, the CEDAW was signed in 1980 and ratified in 1981, and the Convention of Belem do Para was signed in 1995 and ratified in 1998. However, it was not until 2006 that the only national legal provision referring to stereotypes was included in the General Education Law, in effect since 1993, in which Article 8 declares:[100]

> The criteria that will guide education provided by the State and its decentralized bodies —as well as all kindergarten, elementary and middle school education, teachers college and others offered by private schools for training basic education teachers— will be based on results of scientific advances; shall fight against ignorance and its effects, servitude, fanaticism, prejudices, stereotypes, discrimination and violence, especially [violence] against women, girls and boys, and shall implement State public policies aimed at ensuring analogous criteria among the three branches of government.

The General Act on Equality between Women and Men and the General Act on Women's Access to a Life Free from Violence mention gender

98 Organization of American States, "Convention of Belem do Para", *supra* note 81.

99 *Id.*

100 Ley General de Educación [L.G.E.] [Education Law], as amended, Diario Oficial de la Federación [Federal Official Gazette, D.O.], July 13, 1993 (Mex.).

stereotypes; the first in Articles 17, 26, 41 and 42,[101] and the second in Articles 8, 17, 38, 45 and 52.[102] These acts were passed just a few years ago (2006 and 2007, respectively).

As to the adoption of other measures focused on eliminating discrimination against women, various programs stand out, such as the National Program for Incorporating Women into Development (1980), the National Program for Women 1995-2000, the National Program for Equal Opportunity and Non-Discrimination against Women (PROEQUIDAD) 2001-2006 and the National Program on Equality between Men and Women (PROIGUALDAD) 2008-2010.

The National Program for Incorporating Women into Development (1980) was designed as a "set of specific initiatives to promote a better social condition for women."[103] Since this program was implemented 30 years ago and copies of it are unattainable, it is hard to determine whether the program mentioned gender stereotypes.

The National Program for Women (1995-2000) offered a diagnosis of women's situations in different fields, such as health, education, poverty, old age, family, etc. According to this program, one of the challenges was avoiding the "endorsement of images of women that ignore the different roles they have in society."[104] Therefore, it devoted an entire section to "Promoting the elimination of stereotyped images of women," but instead of making a broader analysis of the way stereotypes work and their consequences, it merely said that images shown in the media and in educational material are stereotyped.[105] One of the strategies the program mentioned to do away with stereotypes was to implement "priority actions," such as re-

---

101 Ley General para la Igualdad entre Mujeres y Hombres [L.G.I.M.H.] [Equality Law], Diario Oficial de la Federación [Federal Official Gazette, D.O.], August 2, 2006 (Mex.).

102 Ley General de Acceso de las Mujeres a una Vida Libre de Violencia [L.G.A.M.V.L.V.] [Women's Access to a Life Free From Violence Law], Diario Oficial de la Federación [Federal Official Gazette, D.O.], February 1, 2007 (Mex.).

103 Comisión Nacional de los Derechos Humanos, Informe Especial sobre el Derecho de Igualdad entre Mujeres y Hombres (2007), http://www.cndh.org.mx/lacndh/informes/espec/derIgualdad07/infEspec.htm (search chapter II "Antecedentes").

104 National Program for Women (1995-2000), available at: http://info4.juridicas.unam.mx/ijure/nrm/1/342/default.htm?s=iste (search "folio 6373" in "Capítulo II").

105 The text in the appendix is as follows: "Messages promoted by media and those in curricular contents of education are very important reproductive mechanisms in our society. Many of these messages show partial, negative or stereotyped images of women. These entities may perform significant contributions by showing plural, balanced and non discriminatory images, helping to promote changes in attitudes and cultural patterns that prevent the participation and full development of women". National Program for Women, *supra* note 104 (search "Numeral 10" in "Capítulo II").

viewing the educational content in books, awareness campaigns, the promotion of plural images in the media and in government campaigns, etc.[106]

One of the specific objectives of the National Program on Equal Opportunities and Non-Discrimination against Women (2001-2006) was to promote a "balanced image of women, respectful of their differences and without stereotypes in cultural, sports and communication areas."[107] The program recognized the importance of analyzing the "internal and external factors in schools that emerge from a social structure that excludes and discriminates against girls and women, and the indigenous population"[108] and that "elimination and rectification of differences are imperative to eliminate violence against women."[109] Again, the Program emphasized the recurrence of gender stereotypes in the media and the need to promote educational material free of stereotypes.

Finally, the National Program for Equality between Men and Women (2008-2010) states that "the presence of stereotypes and social limitations on women's autonomy and decision-making turn the issue of health care into an issue of gender."[110] Action plan proposed for eliminating stereotypes in these situations include actions to:[111]

> 1.2.7. Advocate the elimination of sexist and discriminatory stereotypes and the use of inclusive language in the practices and social communication of public bodies, as well as in the electronic media and the press.
>
> 4.1.3. Increase the number of actions and programs to prevent violence in the family and in dating relationships between teenagers and young people, by implementing information mechanisms and campaigns to eradicate authoritarianism in the family, sexist roles and stereotypes, the use of violent conflict resolution, machismo and the social validation of the use of violence.
>
> 5.2. Eliminate sexist and discriminatory stereotypes from textbooks, teaching methodology, teaching materials and educational practices, in addition to professionalizing teachers in gender perspective and women's human rights.

In June 2003, the Federal Government created the CONAPRED to "advocate policies and measures that contribute to cultural and social de-

---

106 National Program for Women, *supra* note 104 (search "Numeral 9" in "Capítulo V).

107 National Program on Equal Opportunities and Non-Discrimination against Women PROEQUIDAD (2001-2006), http://www.oei.es/genero/documentos/mex/Mexico_1.pdf (at 37 & 50).

108 PROEQUIDAD, *supra* note 107, at 35.

109 *Id.* at 36.

110 National Program on Equality between Men and Women PROIGUALDAD (2008-2010), available at: http://cedoc.inmujeres.gob.mx/documentos_download/100919.pdf (at 13).

111 *Id.*.

velopment and to increase social inclusion and guarantee the right to equality."[112] The person heading the Sexual Diversity, HIV and AIDS Program for that body has publicly stated that "models of sexism and machismo that are reproduced in education and in the family are the foundations of a violent and unequal culture."[113] One of the lines of action of CONAPRED's National Program to Prevent and Eliminate Discrimination (2006) is to ensure the access to health care services "without prejudices based on stigmas or stereotypes"[114] for people who are HIV positive, people from indigenous groups and people in general regardless of their sexual preferences. Although this program does mention measures to achieve gender equality, no explicit reference is made to gender stereotypes. In a very general way, the action plan states: "assuring the access, continuance, treatment and conclusion of the educational system are not offered based on prejudices, stereotypes or stigmas, allowing discrimination of any kind."[115]

In June 2009, the National Commission for the Prevention and Elimination of Violence against Women (CONAVIM) was created to design "an integrated and analogous policy for preventing, treating, punishing and eradicating violence against women, taking into account the political, legal, economic, social and cultural policies that give rise to violence, by means of implementing a Program that coordinates actions at the three levels of Government."[116] At the "Public Policy and Gender" forum, the commissioner herself, Laura Carrera Lugo, declared that it is necessary "to develop strategies that allow [women] to overcome obstacles, prejudices and stereotypes" and that the forum "is an extraordinary opportunity to begin a discussion, to undertake and promote a new culture of equality, free of prejudices and sexist stereotypes in our workplaces."[117] It is worth mentioning that by the time that this article was finished these strategies had not yet been disclosed.

In my opinion, in spite of the advances in International Human Rights Law and Mexico's adoption of certain legal measures and other types of measures to modify current gender stereotypes and eliminate discrimination against women, these efforts have not been enough to bring about a

---

112 CONAPRED. What is it?, available at: http://www.conapred.org.mx/acerca/acerca.html.

113 CONAPRED, *supra* note 85.

114 National Program to Prevent and Eliminate Discrimination (2006), http://www.catedradh.unesco.unam.mx/SeminarioCETis/Documentos/Doc_basicos/3_instrumentos_nacionales/18.pdf (at 60 & 61).

115 National Program to Prevent and Eliminate Discrimination, *supra* note 91, at 66.

116 CONAVIM. Who are we?, http://www.comisioncdjuarez.gob.mx/Portal/PtMain.php?nIdPanel=58.

117 CONAVIM. Press release No. 5-10/03/2010, http://www.conavim.gob.mx/Portal/PtMain.php?nIdPanel=121&d=37.

real change. Although changing social and cultural patterns is a task that is neither easy nor quickly accomplished, almost three decades after the CEDAW entered into force, gender stereotypes still prevail in many contexts and structural inequality still exists,[118] as seen in the resolutions discussed in the first part of this article and in the fact that stereotypical arguments or statements have not been overcome.

VI. Conclusions

Stereotypes form part of the psychological process of cognition and socialization of individuals, but under certain circumstances they can be negative. Stereotypes tend to replicate themselves over and over again in cultural and social contexts in which the link between stereotyping and discrimination is ignored, in which stereotypes are considered harmless or, even if the consequences of using stereotypes are known —especially when related to the way they affect the exercise of rights and freedoms— they are not carefully dealt with. In my analysis, gender stereotypes in Mexico still prevail despite some considerable and important social changes that have been made in terms of gender roles and women's rights[119] partly because the measures implemented to eliminate discrimination and violence against women have not sufficiently and strategically addressed the issue of gender stereotypes, such as those present in matters related to family law and family relations. Moreover, not enough attention has been paid to specific discriminatory situations in the daily lives of men and women.[120]

I believe the resolutions analyzed here show that the Collegiate Circuit Courts have apparently been unable to apply or incorporate international standards for women's rights nor an adequate gender perspective that includes interpretations that are free of stereotypes. This is perhaps due to a general lack of clarity on how to do so or a lack of awareness of the issue. Thus, it is important to carry out a careful review of the various resolutions

---

118 The First National Survey on Discrimination (2005) is an essential tool that explains how discrimination operates in the Mexican society. According to its results, stereotypes and *machista* attitudes prevail in Mexican society. For example, 40% of people think "women should work in 'fields appropriate for their gender' and one out of three believes it is normal for men to earn more money than women." CONAPRED, First National Survey on Discrimination (2005), available at: www.amdh.com.mx/ocpi_/documentos/docs/6/25.ppt. *See also CONAPRED, supra* note 85.

119 Lazarevich, Delgadillo, Mora and Méndez consider the feminist movement one of the elements of social change in terms of gender roles and cultural patterns. Lazarevich *et al.*, *supra* note 7, at 156.

120 Marta Lamas expresses the need of moving public policies from abstract concepts to concrete issues, addressing specific discriminatory situations of everyday life. Lamas, *supra* note 14, at 7.

analyzed in this article in the light of International Human Rights Law, so as to overcome legal reasoning based on gender stereotypes and arguments that reinforce them. Some could argue that the generalizations on women's participation in society or the explanations (such as housework "usually" being done by women) present in some of the resolutions are harmless, but two points should be highlighted. First, language is the first way of defining relationships between people,[121] and therefore courts should be very careful in building their arguments. Second, the State has the international obligation of fighting gender discrimination, which means, among other things, exposing prejudices and stereotypic expressions, including those that may seem to be "neutral,"[122] and incorporating a gender perspective in order to guarantee not only formal, but also substantive equality.[123]

In the light of this obligation and considering that jurisdictional activities are "the guarantee of all guarantees,"[124] I believe that the Federal Judicial Branch has an enormous responsibility. In my point of view, in order to eliminate gender stereotypes and incorporate a gender perspective in court resolutions, the Federal Judicial Branch should continue training and creating awareness among all its members, especially Clerks, Judges and Magistrates, on International Human Rights Law in general —not only on the contents of treaties, but on the interpretations of the Inter-American Court of Human Rights, other international courts and treaty bodies as well— and on women's rights in particular, focusing on gender stereotypes and their relation to discrimination. In addition, as has been noted by experts, in the degree that legislation is interpreted and applied from the perspective of International Human Rights Law, and not only from the principle of legality, we will be able to move towards a better protection of rights.[125] As Claire L'Heureux-Dubé, judge of the Supreme Court of Canada from 1987 to 2002, stated:

> […] it is imperative that all jurists go beyond myths and stereotypes in order to ensure that justice is done —we need to 'debunk' these myths. De-

---

121 CONAPRED. Press release 085 (2009) "Urgente eliminar lenguaje sexista del ámbito público y privado", http://www.conapred.org.mx/boletines1.html.

122 *Id.* at 8.

123 Particularly, the Inter-American Commission on Human Rights has highlighted States' international obligation "to ensure substantive equality in family law and family relations". *See* María Eugenia González de Sierra vs. Guatemala Case 11.625, IACHR, Report No. 4/01, OEA/Ser./L/V/II.111 (2001), para. 41.

124 Miguel Sarre, Instituto Tecnológico Autónomo de México (ITAM), Keynote Address at auditorium "José Vicente Aguinaco Alemán", alternative seat of the Supreme Court of Justice of the Nation (Bolívar & 16 de Septiembre, Centro Histórico): *Introducción a los derechos humanos y al derecho a la igualdad y a la no discriminación* (April 6, 2010).

125 *Id.*

bunking is more than simply being able to recognize myths and stereotypes. It is about exposing the ideological and cultural foundations of the myths and stereotypes prevalent in each culture and eradicating these fictions from the reasoning of all those who interpret our general culture, and, in particular, those in positions of power who contribute to their reinforcement.[126]

[126] L'Heureux-Dubé, *supra* note 14, at 91.

Recibido el 15 de abril de 2010 y aceptado
para su publicación el 18 de junio de 2010.

Mexican Law Review
New Series
VOLUME III
Number 2

FOREIGN DIRECT INVESTMENT, RESTRICTIONS AND PRIVATIZATION: THE MEXICAN REGULATORY EXPERIENCE

Antonio M. PRIDA
Mauricio FOETH*

ABSTRACT. *This article studies Mexico's evolution from a protected economy in the 1970s to the free market economy of today. It also presents the different political and economic stages of this process, as well as the important changes made to laws on foreign investment in preparing for the North American Free Trade Agreement (NAFTA), the Mexico-European Union free trade agreement and other bilateral agreements on investment promotion and protection. This has also led Mexico to privatize its economy, its banks and telecommunications in particular. This article also explains the legal framework for this privatization and presents an outline on the possible opening of the electricity sector.*

KEY WORDS: *Mexico, closed economy, free market, foreign investment, privatization, free trade agreements, NAFTA.*

RESUMEN. *El artículo estudia el desarrollo que México ha tomado desde los años setenta de una economía cerrada a una economía liberal y abierta. Además, el artículo presenta las reformas sustanciales hechas a las leyes sobre inversión extranjera en preparación al Tratado de Libre Comercio de América del Norte (NAFTA), el tratado entre México y la Unión Europea y acuerdos de promoción y protección recíproca de las inversiones. Este camino también*

* Antonio M. Prida is partner at Curtis, Mallet-Prevost, Colt & Mosle. He was appointed as the Minister in Europe, by ProMexico, the government-run institution responsible for strengthening Mexico's participation in the international economy, in March 2008. He has been a professor of Public International Law at the Escuela Libre de Derecho, of Securities Law at the Universidad Iberoamericana in Mexico City, and of Doing Business in Mexico at the Western State University of California. Mauricio Foeth is an associate at Curtis, Mallet-Prevost, Colt & Mosle in the Corporate and Latin America practice group. He is a member of the German-Mexican Jurist Association and admitted to practice in Mexico and in Germany. Mr. Foeth has published various articles about international business, Mexican corporate matters and international arbitration.

ha llevado a México a privatizar su economía, especialmente la banca y las telecomunicaciones. El artículo detalla el marco jurídico para dicha privatización y presenta una perspectiva sobre una posible apertura del sector eléctrico.

PALABRAS CLAVE: *México, economía cerrada, libre mercado, inversión extranjera, privatización, tratados de libre comercio, NAFTA.*

TABLE OF CONTENTS

I. INTRODUCTION

Since 1994, Mexico has been able to substantially attract foreign direct investment from many different industry sectors, especially the manufacturing and automotive industries. It enjoys a strategic geographical position situated between the United States and Canada and Central and South America. It is a country with great natural wealth and has the advantage of having a young and skilled population. In recent years, Mexico has been pursuing the objective of promoting certain industries it considers strategic, such as aerospace, agriculture and food, automotive, creative industries, electronics, fashion and decoration, IT and software services, life sciences, renewable energy, and second homes-vacation homes. Mexico aims to become a global player in these key industries. It is currently the 13th most important economy of the world and has signed international trade agreements with 49 countries.[1] For example, Mexican aerospace industry exports have grown 140% in the last five years. For 2010, the total amount of exports in this sector are expected to come to US$2 billion.[2] Mexico continues to grow in other strategic sectors: 1 of every 8 cars sold in the United States is made in Mexico; in 2008, it was the sixth largest exporter in the world of medical, surgical, dental and veterinary instruments and apparatuses; and it is the world's largest producer of organic coffee.[3] Mexico is committed to diversifying its trade relations with nations other than the United States.

In 2007, Mexico's foreign direct investment showed a 21% increase, amounting to US$23.2 billion,[4] the second highest amount recorded to date. The United States, the Netherlands and Spain are responsible for almost half of the foreign investment in Mexico.[5] However, this steady increase has suffered a setback in 2008 and 2009, due to the world economic crisis.[6]

These figures have not always been such. In fact, they are the result of a paradigmatic shift in economic policy over the last two decades. During this period, Mexico went from a closed, protected national economy[7] to an open market economy with nearly no restrictions on foreign investment. This economic shift was accompanied by a process of profound reform that aimed at introducing new economic mechanisms that would lead to less government involvement in the economy.[8] The purpose of this article is to provide a brief overview of Mexico's transition from a closed economy to an open market and of its efforts to reform the corresponding legal framework. Under the old economic model, the State and the national private

---

1 http://www.sre.gob.mx/tratados.

2 Massachusetts Office of International Investment, Mexican Aerospace Industry, December 2007, available at: http://www.moiti.State.ma.us/pdf/Mexican%20Aerospace%20Industry.pdf as of January 2010.

3 ProMéxico, *ProMéxico's Strategic Industries*, available at: http://www.promexico.gob.mx/wb/Promexico/sectors (last visited January 2010).

4 EconomyWatch, Economy, Investment & Finance Reports, *Foreign Direct Investment in Mexico*, available at: http://www.economywatch.com/foreign-direct-investment/countries/mexico.html (last visited January 2010).

5 EconomyWatch, Economy, Investment & Finance Reports, *Foreign Direct Investment in Mexico*, http://www.economywatch.com/foreign-direct-investment/countries/mexico.html (last visited January 2010).

6 Patrick Harrington & José Enrique Arrioja, *Mexico Foreign Investment to Fall in 2008* (Bloomberg) available at: http://www.bloomberg.com/apps/news?pid=20601086&refer=latin_america&sid=aqX49GYcA08s (last visited January 2010).

7 La Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera, published in the Official Gazette on March 9, 1973.

8 ECLAC, *Estudios y Perspectivas 10, Foreign Investment in Mexico after Economic Reform*, Jorge Máttar, Juan Carlos Moreno-Brid, Wilson Peres, July 2002, p. 5, http://www.network ideas.org/featart/sep2002/Mexico.pdf (last visited January 2010).

sector invested and directed investment. Direct foreign investment only served to complement those investments. The new liberal model stresses both national private and foreign investments, thus replacing that of the State. Today, the State's role is to provide the legal grounds for foreign investment.

II. Mexico Changes from a Protected Economy to a Free Market Economy

In 1982, as oil prices collapsed and international interest rates increased, the Mexican economy showed how its dependency on oil exports increased its vulnerability. These experiences prompted the government to rethink the prevailing economic model and begin reforming it to strengthen the private sector.[9] This section reviews the most important changes made to Mexico's economic policies towards foreign investment and the relevant regulatory framework.

From 1986 on, and as a reaction to the oil crisis in the late seventies and early eighties, the Mexican government started to modernize its economic relations with the world. It understood that it needed to open the Mexican market to foreign investment and actively encourage investment in Mexico.[10] That year, Mexico joined the General Agreement on Tariffs and Trade ("GATT").[11] In 1993, Mexico joined the Asian-Pacific Economic Cooperation ("APEC")[12] and in 1994 it became a member of the Organization for Economic Co-operation and Development ("OECD").[13] But joining international trade organizations and treaties was only one step. If

---

[9] Jorge Mattar et al., *Foreign Investment in Mexico after Economic Reform*,10 Estudios y Perspectivas 5 (2002), available at: http://www.networkideas.org/featart/sep2002/Mexico.pdf (last visited January 2010).

[10] Jesús Gerardo García Flores, Régimen jurídico de la inversión extranjera directa en México 11 (México, 2000).

[11] On July 15, 1986 the Meeting of the Council approved the adhesion of Mexico to the GATT and one month later, Mexico was incorporated as a contracting party to the GATT. Mexico participated in the Uruguay Rounds that took place in Punta del Este on September 15, 1986. The GATT was formed in 1947 and lasted until 1994, when it was replaced by the World Trade Organization in 1995. The original GATT text (GATT 1947) is still in effect under the WTO framework, subject to the modifications of GATT 1994.

[12] Mexico joined on November 17-19, 1993, http://www.apec.org/apec/member_economies.html as of January 2010.

[13] Mexico joined the OECD on May 18, 1994, becoming its 25th member State. The *Decreto de promulgación de la declaración del gobierno de los Estados Unidos Mexicanos sobre la aceptación de sus obligaciones como miembro de la Organización de Cooperación y Desarrollo Económicos* was published in the Official Gazette of the Federation on July 5, 1994.

foreign investment was to be attracted, Mexico had to open its local laws for foreign investment.

In 1990, the Mexican government reformed the foreign investment law of 1973,[14] opening certain sectors previously restricted to nationals or the State to foreign investment and foreign ownership. According to the 1973 law, certain industrial sectors were restricted to State ownership, such as oil and other hydrocarbons, basic petrochemical industries, uranium production and treatment, certain mining activities, electricity, rail transport and telegraphic communications.[15] Other industries only accepted national investment such as radio and television, road transport, domestic sea and air transport, forestry and gas distribution.[16] This law set maximum limits on the amount of foreign investment allowed in certain sectors like the secondary petrochemical industry, and the auto parts industry.[17] Foreigners were prohibited from owning property within 50 kilometers of the borders and coastlines. Inland investment had to be made through bank trusts.

In 1993, the Mexican government tackled the issue again, this time by publishing a new and completely revised foreign-investment law[18] that allows foreign investment in all industry sectors, except for those restricted by said law. This new law replaced the 1973 law and incorporated changes that had previously been made to the regulatory framework. This effort by the Mexican government to reform the national foreign investment regulations was made in preparation of the North American Free Trade Agreement ("NAFTA")[19] that was being negotiated between Mexico, the United States and Canada. According to this new foreign investment law, foreigners were allowed to invest in industrial, commercial, hotel and time-share developments along Mexico's coast and borderlines, although these investments had to be made through Mexican companies. However, the Mexi-

---

14 *Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera*, published in the Official Gazette of the Federation on March 9, 1973; early regulations of foreign investment can be found in Art. 27 I, IV of the Constitution of 1917, the legislation of 1942 known as "Law of 51%", minimum to be held by nationals, and the Mixed Inter-Secretarial Commission of 1947.

15 Sergio Ahrens Ibargüen & Antonio Azuela de la Cueva, *Breve análisis sistemático de Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera y algunas consideraciones respecto del concepto de Empresa*, 8 JURÍDICA. ANUARIO DEL DEPARTAMENTO DE DERECHO DE LA UNIVERSIDAD IBEROAMERICANA 269 (1976), http://www.juridicas.unam.mx/publica/librev/rev/jurid/cont/8/pr/pr9.pdf.

16 *Id*. at 295.

17 *Id*. at 296.

18 *Ley de Inversión Extranjera*, published in the Federal Official Gazette on December 27, 1993, entered into force on December 28, 1993, and was last amended on August 20, 2008.

19 NAFTA came into force on January 1, 1994, and superseded the Canada-United States Free Trade Agreement between the U.S. and Canada.

can government practically legalized what was already a common fact. Foreign investors had already been investing in restricted sectors through trusts and other structures.

The new Foreign Investment Law offers many NAFTA benefits, such as reducing the investors' risk by guaranteeing them the same legal rights as local investors, to the international business community since foreign investment is permitted and funds can be transferred. Nevertheless, there are still exceptions, especially in strategic activities reserved to the Mexican State, such as petroleum and other hydrocarbons; basic petrochemicals; the generation of electricity and nuclear energy; radioactive minerals; telegraph and radiotelegraphy and postal services; banknote issuing and coin minting; and the control, supervision and surveillance of ports, airports and heliports.[20] Also, some activities still remain restricted to Mexican nationals and companies such as ground transportation, retail distribution of gasoline, radio, television, development banks and certain professional services.[21]

Partial participation of foreign investment of up to 10 percent is allowed in cooperative production companies;[22] and up to 25 percent in domestic air, air taxi and specialized air transportation.[23] The new law allows foreign ownership of up to 49 percent in the following sectors: insurance and surety companies; money exchange offices; warehouses; retirement funds; the manufacture and distribution of explosives, firearms and ammunition; newspaper printing and publication for its exclusive circulation in Mexico; shares in companies that own agricultural, ranching and forestry lands; fresh water, coastal and exclusive fishing zones excluding fisheries; comprehensive port administration, port pilot services for inland navigation under the terms of the corresponding law, shipping companies engaged in the commercial exploitation of ships for inland and coastal navigation, excluding tourism cruises and the exploitation of marine dredges and devices for port construction; the conservation and operation, supply of fuel and lubricants for ships, airplanes and railway equipment; and telecommunications concessionaire companies with the exception of mobile phone companies.[24-25] It should be noted that this law has set the limit of foreign holdings at 49 percent by means of trusts and mechanisms to prevent complete foreign ownership of a company.[26]

---

20 Article 5 of the 1993 Foreign Investment Law.

21 Article 6 of the 1993 Foreign Investment Law.

22 Article 7 of the 1993 Foreign Investment Law.

23 *Id.*

24 Article 12 par. 2 of the Federal Telecommunications Law.

25 Article 7 of the 1993 Foreign Investment Law.

26 Article 7 last par. of the 1993 Foreign Investment Law.

Some activities are subject to prior authorization if the investment exceeds 49% as in the case of maritime services, oil pipeline construction, and drilling for oil and gas. Foreign investment exceeding 49% and a certain amount[27] determined each year by the National Commission of Foreign Investment[28] has to be approved by this same commission.

To better understand the analysis of NAFTA and other treaties Mexico has celebrated, it is important to describe the classification of international treaties within the hierarchy of Mexican law. In this respect, after a systematic analysis of the Constitution that was required in the 2007 "McCain Case,"[29] the Mexican Supreme Court of Justice of the Nation established that international treaties formed part of the Supreme Law of the Union (*Ley Suprema de la Unión*) and, thus were classified as being above federal laws. The Supreme Court established the following hierarchy: 1. Constitution, 2. general laws and treaties (that apply to the entire nation), 3. Federal and State laws, and 4. Municipal laws.

In the above-mentioned case, McCain had challenged Article 8 of the decree issued by the Mexican President that established an applicable tariff for the general import tax for the year 2001 (*Acuerdo General 5/2001*) regarding goods that originate in North America, the European Community, Colombia, Venezuela, Costa Rica, Bolivia, Chile, Nicaragua and Israel. The decree was published in the Official Gazette of the Federation on December 29, 2002.

The Supreme Court of Justice analyzed McCain's claim that Article 133 of the Constitution had been violated by this Decree since the regulations contained in the Decree stood in contrast to more favorable international treaties, which should have been be applied instead of the *Acuerdo General 5/2001*.

The Supreme Court partially modified its view on this issue in a decision dated November 1999, in which the Court had simply held that international treaties stood only below the Constitution and above all other legal norms.[30]

---

27 MXN$2,756,411,632.00, according to General Resolution Number 10 of the National Commission of Foreign Investment, published on April 24, 2009, in the Federal Official Gazette, http://www.economia.gob.mx/pics/pages/1233_base/rg10cnie.doc.pdf.

28 The National Commission of Foreign Investment is a federal agency in charge of overseeing the compliance to and application of rules on foreign investment.

29 Amparo en revisión 120/2002 McCain México, S. A. de C. V., February 13, 2007, http://www.scjn.gob.mx/SiteCollectionDocuments/PortalSCJN/Transparencia/InformacionAdicionalTransparencia/HistoricoInformacionOtorgadaParticulares/Juridica/SegundaSala/2002/AR_120_02.pdf.

30 Speech of Judge Olga Sánchez Cordero de García Villegas, Key note speaker at the Conference titled *La jerarquía de los tratados internacionales en el orden jurídico mexicano*, organized by the law department of the Tecnológico de Monterrey, Toluca Campus, on November 27, 2008, http://www2.scjn.gob.mx/Ministros/oscgv/Conf/tratados-internacionales-tolu

Since December 1993, most of the restrictions for foreigners to purchase real estate have been removed. The only restriction for foreigners remains on national territory within 60 miles to 100 km along the borders or 30 miles to 50 km along the shoreline.[31] If a foreigner wants to acquire real estate within the restricted areas for private residential purposes, this limitation may be overcome by setting up a trust ("*Fideicomiso*," see also for further detail "Trust") with a credit institution.[32] By law, all acquisitions must be authorized and registered with the Ministry of Foreign Relations. A trust fund allows the trustees to use and exploit this real estate without creating rights in favor of said trustees, and foreign investors must sign the "*Calvo Clause*."[33] However, the 1993 Foreign Investment Law allows Mexican corporations with a majority foreign capital to acquire properties within the restricted region if these lands are not destined for residential use. Outside the restricted zone, authorization from the Ministry of Foreign Relations is needed prior to its acquisition.

The 1993 Foreign Investment Law allows a trust to be used in certain cases as a vehicle for foreign investment to obtain ownership rights in certain industry sectors.[34] A trust in Mexico is similar to the one used for estate planning in the United States.[35] The trust is a form of ownership in which real property is transferred into a trust for the benefit of the real owner or beneficiary.[36] The contractual parties involved in a trust are the trustor, the trustee and the beneficiary. The trustor, the entity selling the land, sets up the trust. The trustee must be an institution (a bank) as stipulated by the General Law on Credit Institutions,[37] but may not be a beneficiary of the trust.[38] Trusts can be adapted to the specific need of the beneficiary. In this case, a foreign investor does not hold the deed to the property, but enjoys the property as if it were his or her own. This way, it is possible to ensure

ca.pdf; MANUEL BECERRA RAMÍREZ, LA JERARQUÍA DE LOS TRATADOS EN EL ORDEN JURÍDICO INTERNO. UNA VISIÓN DESDE LA PERSPECTIVA DEL DERECHO INTERNACIONAL 306 (2009), available at: http://info5.juridicas.unam.mx/libros/6/2740/22.pdf.

31 Article 10, 10A of the Foreign Investment Law from 1993.

32 Article 11 of the 1993 Foreign Investment Law.

33 The *Calvo Clause* is a provision requiring foreigners to consider themselves Mexican nationals with respect to real property and not to invoke the protection of their home governments. Provisions of this kind were widely enacted by Latin American countries in response to disruptive efforts of foreign governments to enforce foreign investors' claims against local governments.

34 Chapter II of the Foreign Investment Law from 1993.

35 Jorge Alfredo Domínguez Martínez, *El fideicomiso en México*, Conference, Podium Notarial, Actividades Instuitucionales, No. 32, December 2005, available at http://www.juridicas.unam.mx/publica/librev/rev/podium/cont/32/pr/pr32.pdf as of January 2010.

36 Article 381 of the General Law of Titles and Credit Operations.

37 Article 385 of the General Law of Titles and Credit Operations.

38 Article 383 par. 4 of the General Law of Titles and Credit Operations.

that the trust is in line with the objective of the foreign investment. A Mexican trust, however, is known for its great flexibility. It is used as a legal resource to structure diverse sorts of financial, real estate and industrial projects in Mexico. This mechanism that has made it possible to set up several businesses and projects which would have been difficult to establish under other structures. Moreover, banks can use trusts as a means to secure payment of debt.[39]

III. NAFTA

As mentioned above, the 1993 Foreign Investment Law was enacted in preparation for the North American Free Trade Agreement, which would open the Mexican economy so as to attract foreign investment. By then, foreign investment was clearly welcome and NAFTA meant an important step towards the liberalization of the Mexican economy. NAFTA provided clear long term rules, limiting the control and interference by the Mexican political system, which at that time was controlled by a single political party.

NAFTA established a single trade zone between Mexico, the United States and Canada. The aim of NAFTA is among other things to immediately eliminate certain tariff barriers, phase out others over a period of approximately 14 years, promote conditions of fair competition, substantially increase investment opportunities and provide adequate and effective protection of intellectual property rights. NAFTA is considered an international treaty and is therefore superior to national law, but below the Mexican constitution.[40] NAFTA strengthened the rules and procedures governing trade and investment in the region. As of January 1, 2008 all remaining tariffs part of NAFTA have been reduced to 0%.

Chapter XI of NAFTA contains substantive rules which ensure non-discrimination against foreign investors. Generally speaking, the rules aim at encouraging cross-border investment. For example, the rule of national treatment prohibits NAFTA member countries from treating a foreign investor worse than a national investor. Hence, a NAFTA member country cannot limit the percentage of equity owned by a foreign investor in a national entity to a lesser amount than that allowed to a national investor. Another instrument contained in Chapter XI is the most-favored-nation-treatment which means that a NAFTA member country may not treat a NAFTA investor worse than a non-NAFTA investor. For example, it is prohibited to require an investor to export a certain amount of goods as a

---

[39] Article 383 last par. of the General Law of Titles and Credit Operations.

[40] *Amparo* review 1475/98, May 11, 1999, 9ª Época, Pleno, Sem. Jud. de la Federación y su Gaceta, Tomo X (November 1999), Tesis P. LXXVII/99, p. 46.

condition to establish an investment. Furthermore, Chapter XI demands that member countries allow market-rate transfers of profits. Finally, investments can only be expropriated for public purpose upon prompt payment of the market value of the investment.

In order to ensure that NAFTA rules are followed, Chapter XI sets forth the rules for resolving conflicts. According to these provisions, an investor may summon a NAFTA country to arbitration for monetary damages alleging that it violated a Chapter 11 provision.

From Chapter XII to XVI, NAFTA establishes the rules for regulating services. These provisions are based on the aforementioned rules of national treatment and most-favored-nation treatment. These rules eliminate many barriers on providing services in the United States. Thus Canada could not demand that a Mexican or U.S. service provider charge a minimum price in order to be allowed to enter the Canadian market unless the same requirement is applied to non-NAFTA service providers. According to the EU-Mexico FTA, financial services, telecommunication, distribution, energy, tourism and environment services among others will be liberalized by 2011. Radio and television, maritime transport, and air services are excluded. The agreement guarantees that investors will not face restrictions on the number or kind of services¸ most favored nation rule or national treatment. NAFTA introduced rules to simplify the business people's entrance to member countries to enhance free market conditions. The basic rule is that the NAFTA countries must grant temporary entry to business people who are qualified for entry under that country's applicable law regarding public health, safety and national security. One aspect that has yet to be regulated is the situation of legal service providers. NAFTA establishes in Annex1210.5 Professional Services, Section B 1 that "[e]ach Party shall, in implementing its obligations and commitments regarding foreign legal consultants […] ensure that a national of another Party is permitted to practice or advise on the law of any country in which that national is authorized to practice as a lawyer." Until now, Mexico has not regulated this sector, possibly due to reasons of protectionism. However, reality has taken over in these situations as international law firms have opened offices in Mexico and foreign lawyers are providing consulting services in Mexico without needing to obtain a special license.

Investments in financial services is regulated in Chapter XIV of NAFTA. These provisions have influenced Mexico to change its banking regulations.[41] This chapter provides specific rules governing cross-border trade in financial services.

---

41 Héctor R. Nuñez Estrada, *Las reformas al sistema financiero mexicano en el inicio del gobierno de Clinton. Modificaciones requeridas para la aprobación y puesta en práctica del TLC*, available at http://www.azc.uam.mx/publicaciones/gestion/num3/doc06.htm.

Chapters III to VIII regulate trade between the NAFTA countries. These chapters state two important rules: NAFTA's rule of origin and tariff-elimination rules. Rules of origin govern which goods are eligible for NAFTA's preferential tariffs. Only goods which qualify under the NAFTA rules of origin may obtain a reduced or eliminated tariff. The NAFTA rules of origin take into consideration, among others, if the goods are produced in North America. The treaty parties want to ensure that only North American goods originating from the NAFTA Parties receive preferential tariff treatment.

These rules are designed to prevent a producer from just assembling the goods in a NAFTA country to later claim preferential treatment. The tariff-elimination rules governed the reduction of preferential tariffs on goods during a transition period that lasted until January 2008. Furthermore, NAFTA countries are prohibited from applying non-tariff barriers to circumvent the provisions in these chapters. These barriers usually consist of import licenses, taxes and quotas or standards. Through NAFTA rules, Mexico had to substantially lower its tariffs on imported goods.

Other aspects of the liberalization of Mexico's economy toward foreign investment are migration and visa regulations, which have changed significantly over the last two decades. For example, Chapter XVI of NAFTA has made temporary entry for business people to Mexico and other NAFTA countries easier. A NAFTA country may authorize temporary entrance to business people from another NAFTA party without the need of an employment permit. According to Chapter XVI, business people are defined as: business visitors, traders/investors, intra-company transferees and professionals. Business people entering as professionals may not incur in an activity that involves practicing their professions without prior authorization.

IV. Bilateral Investment Treaties

Mexico's opening to the global economy was further enhanced by celebrating Bilateral Investment Treaties ("BITs"). So far, Mexico has signed around thirty BITs with countries such as Argentina[42] and China.[43] For Mexico, negotiating international investment agreements is part of an economic policy that looks to diversify its inflows in view of the fact that the United States is still Mexico's most important trade partner. This policy also aims at stimulating business initiatives; improving the investment climate for foreign direct investment and promoting Mexican investments abroad.[44] To achieve these goals, Mexico has agreed to minimize certain

42 Executed on November 13, 1996, entered into force on June 22, 1998.

43 Executed on July 11, 2008, entered into force on June 6, 2009.

44 Alejandro Faya-Rodríguez, *Mexico Signs Two New Bilateral Investment Treaties*, 15 (16) North American Free Trade & Investment Report 6 (2005).

levels of non-commercial risks that can affect foreign investment and guarantee it will abide by specific standards in its treatment of foreign investors and their investments.

Although a BIT in itself may not increase foreign direct investment, it sets the legal basis for promoting investments of this kind since BITs increase the levels of investor confidence, predictability and legal certainty. In general, BITs obligate a host country to the non-discriminatory treatment of investors and their investments based on the treatment given to their own nationals (National Treatment) or to nationals of a third State (Most-Favored-Nation Treatment). The host country also guarantees that investments will be treated in accordance with international law, including fair and equitable treatment and full protection and security. Furthermore, BITs strive to prevent expropriations or nationalizations except when serving public purposes or on a non-discriminatory basis, and permit all transfers associated an investment.

V. EU-Mexico FTA

Another free trade agreement that marked an important step towards attracting foreign investment and that should be seen within the context of a change in Mexico's treatment of foreign investment is the free trade agreement between the European Union and Mexico ("EU-Mexico FTA") signed on December 8, 1997, and in force as of July 1, 2000. Also known as the "Global Agreement," it was the first free trade agreement signed between a Latin American country and the European Union. The EU-Mexico FTA goes beyond goods, trade and border issues to include services, investment, public procurement, intellectual property and competition. The trade provisions are contained in two Decisions of the EU-Mexico Joint Council. Decision 2/2000, which was adopted on March 23, 2000, and entered into force on July 1, 2000, contains the text of EU-Mexico FTA relating to goods. Its purpose was to liberalize over 96% of traded goods by 2007. Adopted on February 27, 2001, and entered into force on March 1, 2001, Decision 2/2001 regulates the liberalization of services, investment, the protection of intellectual property rights and establishes a dispute settlement mechanisms.

On the issue of tariffs on industrial goods, the European Union aimed at achieving equal status with NAFTA. Mexico agreed to abolish tariffs vis-à-vis the European Union on 52% of its industrial products by 2003 and on the remaining 48% by 2007. The European Union had provided duty-free access for all Mexican industrial products by 2003. In agricultural trade, which represents 7% of total bilateral trade, tariffs on approximately 60% of the parties' commodities will be removed over a period of up to 10 years. In all, the EU-Mexico FTA already freed most of the trade from tariffs. Nearly all services will be liberalized over a maximum ten-year period. This preferential trade agreement is complemented by the Economic Partnership, Political Co-ordination and Co-operation Agreement,[45] which promotes political dialogue and intensifies technical and economic co-operation between both Parties. The agreement is overseen by a Joint Committee and Special Committees that meet once a year. The closeness of the EU-Mexico trade partnership is reflected at a multilateral level, where the EU and Mexico have cooperated closely in WTO Doha Round negotiations. [46]

In terms of trade value, Mexico ranks 26th among EU trade partners and 16th amongst its export partners. The EU is Mexico's second biggest export market after the USA. As a result of signing the EU-Mexico FTA, total trade between Mexico and the EU grew by 28.3 percent in the first two years. In 2007 the EU imports of Mexican goods totaled €11.9 billion, and Mexican imports of EU goods totaled €20.9 billion.[47]

The EU's key imports from Mexico are mineral products (24%), machinery and electric equipment (21.7%), transport equipment (18.7%) and optic photo precision instruments (10.1%). Key EU exports to Mexico include machinery and electric equipment (28.7%), transport equipment (14.5%), chemical products (14.4%) and mineral products (11.6%).[48] The EU buys travel, sea transport, air transport and construction services from Mexico.[49]

However until now, the EU-Mexico FTA has not lived up to Mexico's expectations. By 2006, Mexico's trade deficit with the EU grew from US$9.4 billion to US$16.9 billion.[50] Most of the Mexican imports are intermediate goods, which are not produced in Mexico and in order to export, Mexico must import raw materials. At the same time, the goods have a rather small amount of domestically produced content, which inhibits the development of domestic small and medium-size industry, as it is that in-

---

45 Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other Part, Official Journal of the European Communities, L276/45, October 28, 2000.

46 Free Trade Agreement Mexico-European Union, available at http://economia-bruselas.gob.mx/sphp_pages/bruselas/business/ue_mexico_fta.htm.

47 European Commission, Bilateral Trade, Country: Mexico, available at: http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/mexico.

48 *Id*.

49 *Id*.

50 Rodolfo Aguirre Reveles & Manuel Pérez Rocha, *The EU-Mexico Free Trade Agreement Seven Years On, A Warning to the Global South*, Debate paper, Alternative Regionalisms, June 2007, Transnational Institute, Mexican Action Network on Free Trade (RMALC) ICCO, at 9.

dustry sector, which provides the domestic content through manufacturing.[51] Non-governmental organizations have thus requested rules of origin that would benefit domestic producers.[52]

Part of this deficit is, however, due to the lack of willingness of Mexican investors to refocus their investments from the United States to Europe. The US market is easier to manage. It is a market of approx. 200 million customers right across the border, it offers the same regulations for the entire country and its customers have the same taste from San Francisco to New York. The EU, on the other hand, is a patchwork of 27 countries with a highly divergent taste and many complicated legal frameworks.

The EU-Mexico FTA regulates, among other aspects, the free movement of goods. By the year 2007, customs duties for nearly all industrial goods were lowered to 0 percent. In 2000, the EU eliminated customs duties for 82 percent of Mexican industrial goods; Mexico liberalized customs duties for 48 percent of EU industrial goods and decreased customs duties on certain shoe products. Since 2003, the EU has liberalized customs duties on all Mexican industrial products and Mexico has lowered customs duties to 5 percent. As to the auto parts industry, EU exporters are no longer required to have a production site in Mexico to sell cars in Mexico. As of January 2007, all limitations such as import quotas on imports have been eliminated.

The EU-Mexico FTA also introduced a standard customs form called EUR.1, similar to the certificate of origin used in the NAFTA. Custom duties on imported Mexican agricultural products will be reduced to 0 percent in 2010 for approximately 74.14 percent of these goods and approximately 49.55 percent of EU products will be free of custom duties.

Public procurement is another important issue regulated by the EU-Mexico FTA. In general, it ensures that European companies will have the same access to public procurement for all goods and services as Mexican companies, like petrochemical and energy projects, and puts European companies on the same level as NAFTA companies.

To protect the rights of investors from both contract parties, the EU-Mexico FTA introduced dispute resolution mechanisms, including arbitration, based on the WTO Agreement, which do not affect investors' rights. However, arbitration does not apply to intellectual property disputes and anti-dumping measures, problems with balance payments and other issues covered in the WTO Agreement. Parties may not initiate proceedings for the same issue under the provisions of both the EU-Mexico FTA and the WTO Agreement.

Finally, another important aspects regulated by the EU-Mexico FTA are the rules of origin. According to that agreement, "originating goods"[53] are

---

[51] *Id.*

[52] *Id.*

[53] Article 401, Originating Goods.

those that have been completely produced in either Mexico or the EU, as well as goods that have been produced in Mexico or the EU and that contain less or the maximum amount of permitted materials from other economic regions, but have been sufficiently processed in Mexico or the EU. Assembling, packaging and labeling products are not considered sufficient processing.

EU investors should consider the advantage of profiting both from the EU-Mexico FTA and NAFTA by combining rules of origin. Investors should also bear in mind that goods with parts that originate in the EU or Mexico might enable them to obtain preferential customs treatment.

In general, both the NAFTA and EU-Mexico FTA rules of origin require that parts, which are not from Mexico or the EU, have to be sufficiently processed to be re-categorized under a new customs classification. In addition foreign content not coming from Mexico or the EU is limited to approximately 40 to 60 percent of the overall price of the final product. However, NAFTA and EU-Mexico FTA differ on how to determine "originating goods." While the EU-Mexico FTA uses customs classifications, NAFTA applies percentages on the price of the final product or on the costs of the non-"originating" parts. NAFTA requires Mexico to impose customs duties and a 16 percent value added tax on non-originating goods that will be imported to the NAFTA region. However, Mexico initiated special programs for certain industry sectors to compensate for this by providing lower customs duties for parts that will be exported to the NAFTA region after being processed. These programs eliminate import duties on certain components that originate from outside the NAFTA region and reduce the remaining duties to 5 percent. To benefit from these programs, investors need to set up a Mexican subsidiary or use a shelter company to manufacture in Mexico and register this company in the investment promotion programs.

VI. Mercosur and Japan FTA

At the Mercosur Presidential Summit Meeting in Buenos Aires, Argentina, on July 5, 2002, the Economic Complementation Agreement (ACE) No. 54 was signed between Mexico and Mercosur State members. This agreement proposes the establishment of a free trade area and is based on the treaties that have been signed or will be signed between the parties. These treaties will be subject to periodical renegotiations to eliminate tariffs, restrictions and other obstacles that affect free trade.

At that summit, the parties also concluded negotiations of a treaty on the automobile industry that will allow the effective integration of the sector. In

September 2002, Economic Complementation Agreement No. 55 was signed.[54]

The objectives of these treaties are to create a free trade area and eliminate trade restrictions, establish a legal framework that offers security and transparency, and promote mutual investment and economic cooperation.

Another important FTA is the Japan-Mexico Economic Partnership Agreement which was signed in 2004 and entered in force on April 1, 2005. The objectives of this treaty are to *(a)* liberalize and facilitate trade in goods and services between the Parties; *(b)* increase investment opportunities and strengthen protection for investments and investment activities by the Parties; *(c)* enhance opportunities for suppliers to participate in government procurement; *(d)* promote cooperation and coordination for the effective enforcement of competition laws; *(e)* create effective procedures to implement and enforce this Agreement and to settle disputes; and *(f)* create a framework for further bilateral cooperation and a better business environment. This treaty is the result of two years of intense negotiations between the parties and is the first treaty that has a bearing on the strongly protected Japanese agricultural market as it reduces tariffs for Mexican exports of pork, chicken and oranges.[55]

VII. Criticism of Mexico's Policy of Signing Numerous FTAs

Although the various FTAs Mexico has signed over the past years have had positive affects on its economic development overall, there are still many sectors of Mexican society that struggle and have not yet been able to grow or have developed slower than expected. When Mexico signed these FTAs, there were many hopes that, in retrospect, do not seem to have been fulfilled. However, some of the not-so-positive developments were due to factors that lie outside the FTAs and respond more to erroneous economic policies and international events, such as the the devaluation of the peso in December 1994 (the so-called "Tequila Crisis"). The struggle of Mexico's agriculture sector, which cannot yet be called an industry, is widely attributed to the negative effects of NAFTA, but this is due more to the fact that for decades the Mexican government has accustomed Mexican farmers to subsidies that are not linked to conditions, such as increase of productivity,

---

54 Signed on September 27, 2002, and entered into force on January 1, 2003, according to Article 1, the treaty between the Mercosur and Mexico remains in force until replaced by a FTA between the Mercosur and Mexico.

55 *Entra en vigor el TLC México-Japón*, International Center for Trade and Sustainable Development, Bridges Weekly Trade News Digest, Vol. 2, No. 7, April 14, 2005, http://ictsd.org/i/news/ puentesquincenal/10347.

accountability and market oriented production. Moreover, the agricultural sector has been politicized —used by political parties to gain votes and riding on national sentiments linked to crop and soil. Some of the factors that have kept Mexican farmers in a pre-industrial era are: *a)* small or micro parcels, *b)* production that is not based on consumer needs and requirements, *c)* a dependence on subsidies, *d)* the lack of financing and *e)* a lack of agricultural knowledge and technology. Unfortunately, for many farmers agriculture is not a way to make a living, but a necessity for survival. Farmers produce what they need to feed their families; any overproduction is sold at the local market.

Lederman, Maloney and Servén[56] have pointed out the positive effects of NAFTA, such as the fact that NAFTA has brought Mexico closer to the level of its commercial counterparts' development, and the treaty ensures economic convergence between the member States. Audley, Polaski, Papademetriou and Vaughan[57] state in their report that while NAFTA is neither a disaster nor a deliverance, it certainly does not generate sufficient jobs. More than 500,000 new jobs in the manufacturing sector partially counter the loss of about 1.3 million jobs in agriculture. Furthermore, NAFTA has not stopped immigration to the United States.

The challenge of free trade agreements and of economic opening in general lies in showing that there are more political and economic benefits than costs. This may legitimize the treaty before the population, but the benefits have to be measured not only in economic terms like commercial volume and the attraction of foreign investment, but also in associated costs and the creation of mechanisms that make it possible to pass on those benefits to parts of society that do not directly benefit from the treaties.

VIII. PRIVATIZATION

Finally, another aspect of Mexico's shift from a protected economy towards a free market economy is privatization. Over the past 25 years, privatization has improved companies' performance, increasing profitability by 24 percent. "From this increase, at most 5 percent can be attributed to higher prices and 31 percent to transfers from workers, with the remaining 64 percent representing productivity gains."[58] In the early 1980s, the Mexi-

---

56 DANIEL LEDERMAN ET AL., LESSONS FROM NAFTA FOR LATIN AMERICA AND THE CARIBBEAN, WORLD BANK (Stanford University Press, 2005).

57 DEMETRIOS PAPADEMETRIOU ET AL., NAFTA'S PROMISE AND REALITY: LESSONS FROM MEXICO FOR THE HEMISHPHERE (2003).

58 Alberto Chong & Florencio López-de-Silanes, *Privatization in Mexico*, 513 WORKING PAPER INTER-AMERICAN DEVELOPMENT BANK [BANCO INTERAMERICANO DE DESARROLLO (BID)], RESEARCH DEPARTMENT [DEPARTAMENTO DE INVESTIGACIÓN] 3.

can government owned 1,155[59] companies, which included *Petróleos Mexicanos* (Pemex), the Federal Commission of Electricity (*Comisión Federal de Electricidad*, CFE), National Railways of Mexico (*Ferrocarriles Nacionales*), and Sicartsa[60] in the steel industry. The government also operated mining firms, airlines, banks and hotels.[61] *Nacional Financiera*, S.N.C. (Nafin), the government development bank, provided the financing needed to uphold this system. The government believed that by controlling all kinds of industries, it could build up infrastructure and provide good service at reasonable prices. Moreover, the bloated apparatus of State-owned companies provided employment and subsidized bankrupt industries. But it had the opposite effect: service was lacking, the cost was extremely high and it created a number of unnecessary jobs to "demonstrate success at attracting and maintaining a support base, and to do so requires constant enterprise expansion in order to produce jobs and benefits for bureaucrats, union leaders, and workers and contracts for the private sector."[62]

As Teichman states,

> ...[i]ncentives in this system were skewed. With all the managers competing to expand their enterprises to please their supporters instead of competing in a free market to serve consumers, most of the State companies ran large deficits. The basic problem was lack of private property rights: because resources belonged to all Mexicans, they effectively belonged to no one.[63]

The government further distorted market conditions by introducing unions into the system. Some of the sectors that were privatized in the 1990s were the telecommunications and banking industry. In the following years, mining, and air and sea transportation followed. The subsidized system started to fall apart in 1982 when the economic crisis hit Mexico. Foreign loans were no longer available and oil prices fell. Inflation reached 100%, the GDP decreased, the foreign debt grew to US$87 billion, salaries dropped by around 12% and the Mexican Peso suffered a devaluation of 267%.[64]

---

59 Roberto Salinas, *Privatization in Mexico: Much Better, But Still Not Enough*, THE HERITAGE FOUNDATION, January 20, 1992 available at http://www.heritage.org/research/latinamerica/bu172.cfm.

60 Sicartsa was privatized in 1991 and bought by Arcelor Mittal, *see Arcelor Mittal Acquires Sicartsa*, *The Leading Mexican Long Steel Producer*, available at http://news.thomasnet.com/companystory/502596.

61 Horacio Lombardo Aburto & José de Jesús Orozco Henríquez, *Marco constitucional para la rectoría del Estado y la economía mixta. Régimen jurídico de las entidades paraestatales*, *in* CRISIS Y FUTURO DE LA EMPRESA PÚBLICA 369 (Macos Kaplan, coord., UNAM, 1994).

62 JUDITH TEICHMAN, PRIVATIZATION AND POLITICAL CHANGE IN MEXICO (Pittsburgh University Press, 1996).

63 *Id*.

64 Manuel Barquín Álvarez, *La privatización y el sector paraestatal en México (Un enfoque jurí-*

This prompted the Mexican government to start re-privatizing since it could no longer finance the system it had created. The beneficiaries of these privatizations were foreign companies and families with important ties to the government and who, in part, owned the companies that had been nationalized. This was partially due to the fact that the government had to obtain the best possible price for the companies to pay back the external debt; and only leading Mexican (family-owned) companies and foreign corporations could pay the requested amounts.

1. *Banking*

Approximately eight years after the banks were nationalized, the government privatized them again. In the relatively short period of fifteen months, "controlling shares of 18 banks with aggregate assets of $128 billion were auctioned for $12.4 billion."[65] "At the time of the nationalization of the Mexican commercial banking system in 1982, there had been 60 Mexican banks, of which 58 were nationalized. In order to capture perceived economies of scale, Mexico reorganized the commercial banking industry —merging the 58 commercial State-owned banks into just 18. Although the industry had been consolidating prior to 1982 in any case, these new mergers represented a significant increase in industry concentration. Indeed, at the time of privatization, the three largest banks accounted for nearly three-fifths of total assets in the commercial banking system, while the three largest U.S. banking organizations at that time held about one-seventh of U.S. commercial bank assets."[66] According to Unal and Navarro "Mexico's experience with bank privatization is considered to be very successful and stands as an example to other countries considering the privatization of their banking system."[67]

2. *Telecommunications*

Another example of the privatization procedure is found in the telecommunication industry. Before the privatization process, there was only one player on the field: Telmex, a State-owned company. For decades, only 5

---

dico-institucional), *in* REGULACIÓN DEL SECTOR ENERGÉTICO 162 (1997), available at http://www.bibliojuridica.org/libros/1/153/11.pdf.

65 Haluk Unal & Miguel Navarro, *The Technical Process of Bank Privatization in Mexico*, WHARTON WORKING PAPER 97-42 (1997), available at SSRN: http://ssrn.com/abstract=54460.

66 William Gruben & Robert McComb, *Privatization, Competition, and Supercompetition, in the Mexican Commercial Banking System*, 2 FEDERAL RESERVE BANK OF DALLAS AND TEXAS TECH UNIVERSITY (1999).

67 *Id.*

of 100 people had a telephone line because a private telephone connection cost approximately US$150.00. Carlos Slim Helú, a wealthy Mexican businessman who had close ties with then President Carlos Salinas de Gortari and the ruling Institutional Revolutionary Party (PRI), acquired Telmex in 1990, together with Southwestern Bell Corporation and France Télécom for approximately US$1.76 billion. France Télécom later left the business but Southwestern Bell Corporation worked closely with Carlos Slim Helú. According to Hughes,

> Telmex has experienced more capital spending after its privatization, which has speeded up the modernization of telecommunications in Mexico. Larger profits have also been seen after privatization occurred. For example in 1989 Telmex invested less than $500 million whereas in 1991 the year after privatization, investment was $2.75 billion. In fact the first six years after privatization, 1991-96, the total was $12 billion, including $1.3 billion for telephone equipment, $2.7billion for transmission equipment, $3.9 billion for switches and power equipment, and 3.7 billion for outside plant. Those investments were implemented in order to help satisfy some of the backorders for new service at the time of privatization and otherwise meet the requirements of the concession. Though more money had been invested for expansion and modernization since privatization, Telmex was able to achieve and even surpass the main performance criteria established by the Concession Title with 10.4 percent less than the $7.7 billion investment that had been planned for 1991-94. According to [Carlos] Slim Hel[ú], Telmex's Chairman and Mexican controlling shareholder, the decrease was due to a rationalization of the investment that allowed the company to meet the performance criteria established by the government for the period, obtaining at the same time savings through optimization. As [Carlos] Slim Hel[ú] Stated, they 'made more with less'. Telmex between 1991-96 spent $12 billion laying more than 18,000 miles of fiber-optic cable, increasing the number of telephone lines in the country by 66 percent, from 5.3 million lines to 8.8 million. However Telmex's new foreign owners reduced cable-laying process costs by 48 percent by providing expertise in fiber optics. 'By 1994, three years after privatization, Telmex had fulfilled and in some cases surpassed several of the goals in the Concession Title, particularly those related to network expansion and rural telephony' […] According to the data taken, in the years 1987-1990 teledensity experienced 21% growth.[68]

Unfortunately, Telmex remained a monopoly for a long time, only this time it was in private hands. This has led to much criticism, such as Denise

[68] Robert Hughes, *Privatization and Modernization of Telecommunications in Latin America*, Center for International Studies, University of St. Thomas, Houston, Texas, Prepared for Delivery at the 82nd Annual Meeting of the South-Western Social Science Association, New Orleans, Louisiana (March 27-31, 2002), http://www1.appstate.edu/~stefanov/proceedings/hughes.htm.

Dresser's open letter to Carlos Slim Helú criticizing that he says he welcomes competition in his public speeches but spares no effort to maintain his position as sole provider of telecommunication services. However by now, many foreign and national companies have entered the Mexican market and provide these services. The newest twist is that television companies have entered the telecommunications market by offering telephone services through cable television. Along with the government's intention to open the market for so called "triple play" services, this situation is reshuffling the market. International telecommunications companies have now entered the Mexican market especially to provide mobile telecommunication services.

3. *Legal framework*

What is the legal framework for privatization that has changed Mexico over the past decades? To understand the Mexican regulatory basis for privatization, it is important to define the mechanisms through which a State provides its citizens with public services. There are basically four structures: *(i)* a liberal system that allows the private sector to provide services without much interference from the State (so called "*laissez-faire* regime"), *(ii)* concessions, *(iii)* mixed companies in which both the government and private equity participate under different participation models, and *(iv)* absolute intervention.[69] All of the above structures have been implemented in Mexico. The legal framework is set forth in Articles 25, 28, 90 and 134 of the Mexican Constitution and in the Organic Law of Federal Public Administration and the Federal Law on State-Owned Companies and Their Regulation. In addition to this, the procedures established by the Inter-Ministerial Commission for Expenses, Financing and Disincorporation[70] must be taken into account.

The Law of State-Owned Companies establishes that if a State-owned entity no longer meets the objectives it was created for, if it does not focus on an area deemed a State priority or if the operation is no longer in the public interest of the national economy, then this entity may be dissolved.[71] The Ministry of Finance and Public Credit shall present a request to dissolve the company to the Executive and the corresponding ministry for consideration. If the State-owned company was established by a law or a

---

69 Hugo Manlio Huerta Díaz de León, *Privatización y concesiones*, 4 REVISTA JURÍDICA DE LA ESCUELA LIBRE DE DERECHO DE PUEBLA 55 (2003).

70 On December 31, 2009, the agreement was published in the Federal Official Gazette jointly with the Inter-Ministerial Commission on Expense, Financing and Disincorporation, which is a merger of the Commission on Expenses and Financing formed in August 1979 and the Commission for Disincorporation formed in April 1995.

71 Articles 16 and 32 of the Law of State-Owned Companies.

congressional decree, then the dissolution must follow the same procedure that was followed for the constitution of such entity. Decentralized entities such as Pemex or CFE may be dissolved, liquidated, extinguished or merged.[72] For entities in which the State has majority participation, the State may alienate its participation,[73] as it recently did. On October 11, 2009, the Executive published a decree in the Federal Official Gazette that, based on Article 16 of the Federal Law of State-Owned Companies, extinguished the decentralized *Luz y Fuerza del Centro* company since its operation was no longer convenient for the national economy or public interest.[74] According to an official press release,[75] *Luz y Fuerza del Centro* was facing unsustainable financial difficulties. For the past 9 years, it had not been able to generate profits and reduce costs. The annual subsidies it received increased substantially over the years to stand at $42 billion pesos by 2009. The operation of *Luz y Fuerza del Centro* was inefficient and unproductive. The service provided to homes and industries in the central region of the country was unsatisfactory, which limited the development of much needed projects that would have created[76] employment opportunities. If the operation had continued thus, the current administration (2007 to 2012) would have had to fund *Luz y Fuerza del Centro* with $300 billion Mexican pesos, equivalent to more than six times the annual budget of the social Opportunities Program, the most important program to fight poverty, or to one 1.2 million low-income houses.

In response to the economic crisis in the early 1980s, the Mexican government sent to Congress a bill to amend Articles 25, 26, 27, 28 and 73 of the Constitution to remedy the effects of the crisis. The bill resulted in the reforms that were published on February 3, 1983. The reforms were meant to modernize the principle of State economic leadership, a mixed economy regime, a planning system for democratic development, the identification of the strategic areas exclusively reserved to the State and the operation of State companies.[77] Article 25[78] of the Constitution establishes the principle

---

72 Article 16 of the Law of State-Owned Companies.

73 Article 32 of the Law of State-Owned Companies.

74 Decree that Extinguishes Luz y Fuerza del Centro (*Decreto de Extinción de Luz y Fuerza del Centro*), published in the Federal Official Gazette on Sunday, October 11, 2009, available at http://www.actualidadesmexico.com.mx/destacados/decreto-de-extincion-de-luz-y-fuerza-del-centro.

75 Ministry of Foreign Relations press release, dated October 13, 2009, available at http://portal.sre.gob.mx/japoni/pdf/LiquidationLuzFuerza.pdf.

76 Press conference offered by the Secretaries of State, Fernando Gómez Mont; Energy, Georgina Kessel; Labor, Javier Lozano; Finance, Agustín Carstens, and the director of the Federal Electricity Commission, Alfredo Elías Ayub, México City, October 11, 2009, http://www.lfc.gob.mx/index.php?option=com_content&view=article&id=4.

77 Lombardo & Orozco, *supra* note 61, at 27.

78 Article 25: "Corresponde al Estado la rectoría del desarrollo nacional para garan-

of State economic leadership, without defining it. According to the Constitution, this leadership must be comprehensive and aimed at strengthening State sovereignty and inure to the benefit of the people and provide an equitable distribution of wealth. The same article gives clues as to what has to be understood as State economic leadership, providing that the State shall plan, conduct, coordinate and orientate as well as regulate and promote.

The privatization process was implemented gradually. Between 1983 and 1985, the State extinguished non-viable State companies; between 1986 and 1989, the State extinguished smaller State companies; and from 1990 on, the State privatized major corporations in the telecommunications industry and the banking sector.[79]

Concessions are also suitable mechanisms to open a market to private investment. In Article 28, the Mexican Constitution sets forth the basis for granting concessions for public services, the exploitation of resources and use of goods owned by the nation. Article 28 of the Mexican Constitution states:

> […]
>
> The State shall have the necessary institutions and enterprises to manage the strategic areas in its charge effectively, and for priority activities where, according to the law, [it] participates by itself or with the social and private sectors.
>
> […]
>
> In cases of public interest, and abiding by the laws, the State may grant concessions for the rendering of public services or the exploitation, use or development of State-owned goods, subject to the exceptions provided by said laws. The laws will determine the methods and conditions to assure the effectiveness of the rendering of services and the social use of such goods, preventing any accumulation of goods in a few hands that could affect the public interest.
>
> Public service systems shall abide by the Constitution and can only operate by means of law.
>
> Subsidies may be granted to priority activities, as long as they are general, temporary, and do not affect the Country's finances significantly. The State will survey their use and evaluate their results.

---

tizar que éste sea integral y sustentable, que fortalezca la soberanía de la nación y su régimen democrático y que, mediante el fomento del crecimiento económico y el empleo y una más justa distribución del ingreso y la riqueza, permita el pleno ejercicio de la libertad y la dignidad de los individuos, grupos y clases sociales, cuya seguridad protege esta Constitución.

El Estado planeará, conducirá, coordinará y orientará la actividad económica nacional, y llevará al cabo la regulación y fomento de las actividades que demande el interés general en el marco de libertades que otorga esta Constitución […]"

79 Lombardo & Orozco, *supra* note 61, at 371.

Article 28 of the Constitution establishes that concessions shall be regulated by law and according to the Constitution.[80] However, the Constitution limits concessions to industry sectors that are not expressly excluded in the Constitution and, if granted, the concession must also serve a social objective. The Constitution does not define a concession, nor do the laws that have been enacted to regulate concessions. Some authors define it as an agreement granting an individual the right to exploit a public good; others define it as a unilateral administrative act granting rights under certain non-negotiable conditions and yet others, as a mixed figure, part agreement and part administrative act.[81]

IX. The Electricity Industry: The Next Sector to be Opened to Private Investment?

In 1960, Mexico nationalized the electrical industry through a constitutional amendment. Since then, the electric power supplied to the public is under the exclusive domain of the State, through CFE.[82] The constitutional principles regulating the electricity sector are established in Articles 25, 27 and 28 of the Constitution. The industry sector itself is regulated by the Public Utility Law for Electrical Power (*Ley del Servicio Público de Energía Eléctrica*) and the Regulation of the Electrical Power Public Utility Law (*Reglamento de la Ley del Servicio Público de Energía Eléctrica*).

Until the 1980s, private entities were only permitted to construct power plants for self-supply.[83] In 1992, as a result of a concern that the country would be confronted with an insufficient supply of electricity if private sector participation were not permitted, the Public Utility Law for Electrical Power was amended to allow the private sector to generate electricity that would be used by CFE to provide public electricity service while keeping this service in the hands of the State.

Private entities were then allowed to generate energy in areas not considered part of the "public service." The reform included two legal models referred to as "independent production of energy" and "small production," and redefined the concepts of self-supply and co-generation. It also made it possible to import energy for self-supply and to export the electric power produced at the plants owned by permit holders. Thus, electric power gen-

80 *Id*. at 56, 57.

81 Barquín, *supra* note 64, at 169.

82 This public service is provided principally by CFE and, to a lesser extent, the *Compañía de Luz y Fuerza de Centro* ("LFC").

83 Javier Jiménez Gutiérrez, La reforma eléctrica, análisis sobre la situación actual y las perspectivas futuras del régimen legal aplicable a la electricidad en México 2 (Curtis, Mallet-Prevost, Colt & Mosle, S. C., 1992).

eration by private entities could take any of the following forms or modalities:

(i) Self-supply: The permit holder is allowed to generate electric power for self-supply, as long as this power comes from plants set up to satisfy the joint needs of the co-owners or partners. The permit holder is obligated to put its surplus electric power at the disposal of CFE.
(ii) Co-generation: The permit holder is allowed to generate electricity using thermal energy or fuel produced as a by-product of the permit holder's production processes. The power generated must be set aside to satisfy the needs of the establishment(s) involved in the co-generation. As in the case of self-supply, permit holders are obligated to put their surplus electric power at the disposal of CFE.
(iii) Independent Production: The permit holder is allowed to generate electric power for sale exclusively to CFE. The plant production capacity of independent producers must be greater than 30 MW. These independent production projects must be included in CFE planning programs and the electricity with the lowest long-term economic cost will be used by CFE.
(iv) Small Production: The permit holder is allowed to generate electric power in areas designated by the Ministry of Energy and in plants with a capacity lower than 30 MW. As a form of self-supply, the permit holder is also permitted to set aside the energy for small rural communities or isolated areas without electricity, provided that the total generation of electricity does not exceed 1 MW.
(v) Importing or Exporting: The permit holder is allowed to import electric power for its own use or to export electric power generated under the modalities of cogeneration, independent production and small production.

On May 24, 2001, the Executive published a reform to the Regulations of the Public Utility Law for Electrical Power. This reform sought to increase the established capacity of electricity that CFE could purchase from self-suppliers and co-producers without having to hold a public bidding process. Prior to the reform, CFE could purchase up to 20 MW of energy without holding a public auction for electric power generation. After the reform, CFE could purchase up to 50% of the total installed capacity of self-suppliers with an installed capacity greater than 40 MW and the entire surplus generated by co-producers.

In April 2002, the Supreme Court of Justice of the Nation (*Suprema Corte de Justicia de la Nación*) published a decision which annulled a change the Executive Power had made to the Regulations of the Public Utility Law for Electrical Power. This change consisted of increasing the amount of energy that self-suppliers and co-producers could sell to CFE without a public bidding process. Even though the Court's ruling was limited to the constitutionality of the changes the President made to the Regulations, certain observations contained in the decision questioned the constitutionality of the 1992 amendments to the Public Utility Law for Electrical Power. Although these observations do not form part of the binding points of the Court's legal decision, they have introduced an element of legal uncertainty as to whether future expansion of the private sector's role in the electricity sector will be vulnerable to constitutional challenge.[84]

In recent years, political parties have made several proposals to reform the Public Utility Law for Electrical Power and the Regulations of the Public Utility Law for Electrical Power, but none of these bills has provided a detailed analysis of the issues that would be the object of future regulation, as in the case of issues that fall under Energy Regulation Commission (*Comisión Reguladora de Energía*) directives. In this respect, we agree with Jiménez that price rates is a central issue. Jiménez states that "[a]ssuming that the congressional group proposing to open the sector is able to obtain the consensus necessary to commence an analysis of its proposal so that it is not rejected *prima facie*, this position would still face the challenge of suggesting a price rate that on the one hand satisfies the members of Congress supporting the other position and on the other hand allows for economically attractive projects for private participation in the sector."[85]

X. Conclusion

It is evident that the privatization of many industry sectors was a reaction to economic restraints and pressure. Mexico was simply unable to uphold the level of subsidies needed to maintain the number of bloated State-owned companies. The results have been both applauded and criticized. For some,[86] privatization did not reach far enough and should have included strategic sectors, such as oil and gas that remained excluded, and others[87] were of the opinion that privatization only benefitted foreign corporations, wealthy Mexican families and leading companies, while ignoring the vast majority of Mexicans.

---

84 *Id*. at 3.

85 *Id*. at 5.

86 Roberto Salinas, *Privatization in Mexico: Much Better, But Still Not Enough*, The Heritage Foundation, January 20, 1992 available at http://www.heritage.org/research/latinamerica/bu172.cfm; Chong & López-de-Silanes, *supra* note 66, at 3.

87 Judith Teichman, Privatization and Political Change in Mexico (Pittsburgh University Press, 1996).

However, it remains a fact that the opening to foreign investment and privatization has allowed the Mexican government to focus on providing a stable economy, and the income obtained from privatization has helped Mexico lower the accumulated external debt. Mexico's change from a closed State-run economy to an open market economy has propelled Mexico into the group of promising emerging markets that compete for global investments.

Recibido el 5 de mayo de 2010 y aceptado
para su publicación el 25 de julio de 2010.

NOTES

Mexican Law Review
New Series
VOLUME III
Number 2

MEXICO'S POLITICAL CULTURE: THE UNRULE OF LAW AND CORRUPTION AS A FORM OF RESISTANCE

Stephen D. MORRIS*

> In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.
>
> James MADISON, FEDERALIST, No. 51.

ABSTRACT. *Mexico faces intense rule of law challenges vis-à-vis society (crime, informal markets, etc.) and the state (corruption, human rights abuses, etc.). One factor linking these two dimensions is the lack of legitimacy. Mexicans rarely trust the law, governmental institutions, or their politicians. This essay explores some of the implications, dimensions and challenges of this aspect of the dominant Mexican political discourse. Following a brief discussion of the Mexican political culture as it relates to questions of legitimacy and the rule of law, I argue that these factors generate an underlying assumption of corruption, an anti-state and hence pro-society bias, and an ambiguous political situation, and, in turn, craft an environment feeding corruption, and non-systemic behavior. The essay concludes by highlighting not only the im-*

* Ph.D. from the University of Arizona. He has taught at the Universidad de las Américas, Puebla, as a Fulbright lecturer at the Instituto de Estudios Económicos y Regionales at the Universidad de Guadalajara, and the University of South Alabama. He is currently professor and chair of political science at Middle Tennessee State University. Contact: *sdmorris@mtsu.edu*. Among his most recent works are *Gringolandia: Mexican Identify and Perceptions of the U.S.* (2005), *Political Corruption in Mexico: The Impact of Democratization* (2009), *Corruption and Democracy in Latin America* (co-edited with Charles Blake, 2009), and *Corruption and Politics in Latin America: National and Regional Dynamics* (co-edited with Charles Blake, 2010). This article is based on the presentation "La corrupción como resistencia: la política sin legitimidad y sin justicia," April 6, 2010, sponsored by the Instituto de Investigaciones Sociales and the Laboratorio de Documentación y Análisis de la Corrupción y la Transparencia of UNAM. Thanks to professor Irma Eréndira Sandoval for the original invitation and for her comments.

portance of establishing the legitimacy of the rule of law and the difficulties and challenges of doing so, but also the need to prioritize the application of the rule of law to the state and state officials based on a strategy of strengthening civil society.

KEY WORDS: *Rule of law, corruption, legitimacy, political culture*.

RESUMEN. *México enfrenta un problema serio de falta de Estado de derecho y respeto a la ley dentro de la sociedad (crimen, mercado informal) y el Estado (corrupción, abuso de los derechos humanos). La falta de legitimidad conecta estas dos dimensiones. Los mexicanos tienen poca confianza en la ley, las instituciones del gobierno, o los políticos. El trabajo examina algunas de las implicaciones y retos de este aspecto de la cultura política mexicana. Después de explorar brevemente esta cultura, planteo que estos factores generan una presunción de corrupción, una actitud anti-Estado y pro-sociedad, y una situación política ambigua, y por ende crean un ambiente que alimenta la corrupción y la conducta antisistémica. El ensayo concluye subrayando no sólo la importancia de establecer la legitimidad del Estado de derecho y los retos de hacerlo, sino también la necesidad de dar prioridad a la aplicación de la ley al Estado y los servidores públicos dentro de una estrategia que debe fortalecer a la sociedad civil*.

PALABRAS CLAVE: *Estado de derecho, corrupción, legitimidad, cultura política*.

TABLE OF CONTENTS

Mexico suffers widespread unlawful activities both within civil society (from organized crime and drug trafficking to the burgeoning informal market and business fraud) and within the state (from corruption, human rights abuses, and noncompliance with bureaucratic regulations and procedures to backroom deals). But this is really nothing new. According to Fernando

Escalante "The Mexican state has never been able to impose compliance with the law, not even among its own officials."[1] As Jorge Zepeda Patterson starkly concludes, "We do not live within the rule of law."[2] Beyond weak enforcement institutions —the topic of much analysis over the years— one key factor linking these two dimensions is a fundamental lack of legitimacy. Mexicans rarely trust the law, governmental institutions, or their politicians. This essay explores some of the implications, dimensions and challenges of this aspect of the dominant Mexican political discourse. Following a brief discussion of the Mexican political culture as it relates to questions of legitimacy and the rule of law, I argue that these factors generate an underlying assumption of corruption, an anti-state and hence pro-society bias, and an ambiguous political situation, and, in turn, craft an environment feeding corruption, and non-systemic behavior. The essay concludes by highlighting not only the importance of establishing the legitimacy of the rule of law and the difficulties and challenges of doing so, but also the need to prioritize the application of the rule of law to the state and state officials based on a strategy of strengthening civil society.

I. Mexican Political Culture

Whether referring to citizens or their servants, as Immanuel Kant recognized, compliance to rules and laws depends largely on individual notions of legitimacy. According to Tom Tyler, "authorities need for people to take the obligation to obey the law onto themselves, and to voluntarily act on that perceived obligation."[3] This occurs, he contends, when people believe the legal decision to be morally right, when they feel that decisions are made in a fair and impartial way, when they trust the motives of the decision makers, and when they feel they are being treated with dignity and respect. Stefan Voigt similarly posits that for there to be an effective opposition to crossing the line, individual attitudes must be compatible with the rule of law: "attitudes incompatible with the rule of law," he notes, "will make it less likely for a constitution based on the rule of law to be enforced effectively."[4] Viewed from a negative angle, this means that when the perception exists that the rules serve the interests of the powerful rather than

---

1 Fernando Escalante Gonzalbo, *México, fin de siglo*, *in* PENSAR EN MÉXICO 19-36 (José Antonio Aguilar Rivera et al. eds., FCE, 2006).

2 *Cited in* SARA SEFCHOVICH, PAÍS DE MENTIRAS: LA DISTANCIA ENTRE EL DISCURSO Y LA REALIDAD EN LA CULTURA MEXICANA 277 (Océano, 2008).

3 Tom Tyler, *Multiculturalism and the Willingness of Citizens to Defer To Law and to Legal Authorities*, 25 (4) LAW & SOC. INQUIRY 985 (2000).

4 Stefan Voigt, *Making Constitutions Work: Conditions for Maintaining the Rule of Law*, 18 (2) CATO JOURNAL 191-210 (1998).

the general interest or that the rules fail to apply equally to all, then compliance comes to rely more on the fear of punishment than on voluntary compliance. In this context, citizens or public servants may obey the law, but not comply (*obedezco pero no cumplo*): a clear bow to power differentials, but not to vested authority. Unfortunately, this is the prevailing pattern in Mexico.

Ample evidence points to weak respect for the rule of law and a fundamental lack of faith in politicians and public institutions in Mexico. The 2005 survey of Mexican political culture by the Secretaría de Gobernación, for instance, found 61 percent of respondents believing that officials use the law to defend the interests of those in power or to commit *arbitrariedades* (Encuesta Nacional de Cultural Política [ENCUP]).[5] As Carlos Elizondo Mayer-Serra contends, the perception is widespread among citizens that rather than promoting public order or wellbeing, the law serves as "a recourse at the disposal of politicians to combat enemies and protect their friends."[6] Consequently, as shown in surveys by Transparencia Mexicana and UNAM, most citizens abide by the law simply to avoid punishment, rather than because of the law's fairness or moral grounding. In fact, the UNAM study found that a majority of respondents did not consider violating the law a serious matter: the issue, instead, is getting caught.[7] This lack of legitimacy can be seen at various levels. Even among politicians and officials —individuals drawn from the same cultural milieu— state legality suffers when there is a sense that the law is used and abused by others for political ends. As Luis Rubio and Edna Jaime note, "many political actors, like a significant portion of society, see the legal framework not as a norm of conduct, but as an instrument that can be molded to the objectives of a case."[8]

Such low levels of legitimacy of the law, in turn, underlie perceptions of the institutions empowered by the law and charged with its implementation. In the 2005 ENCUP study, for instance, over 60 percent of respondents expressed little or no confidence in the Supreme Court and Congress, while more than 75 percent had little or no confidence in the police and political parties.[9] When asked about their image of judges and the courts,

---

5 Encuesta Nacional de Cultura Política, 2001, 2003, 2005. Mexico City: Secretaría de Gobernación, available at http://www.encup.gob.mx/encup.

6 Carlos Elizondo Mayer-Serra, *Constitutionalism and State Reform in México*, *in* REBUILDING THE MEXICAN STATE: MÉXICO AFTER SALINAS 45 (Mónica Serrano & Víctor Bulmer-Thomas eds., 1996).

7 Cited in Sefchovich, *supra* note 2, at 316.

8 LUIS RUBIO & EDNA JAIME, EL ACERTIJO DE LA LEGITIMIDAD: POR UNA DEMOCRACIA EFICAZ EN UN ENTORNO DE LEGALIDAD Y DESARROLLO 24 (FCE, 2007).

9 Tyler, *supra* note 3; See also Gustavo Fondevila, *Police Efficiency and Management: Citizen Confidence and Satisfaction*, 1 (1) MEX. L. REV. 109-118 (2008); Ben Brown et al., *Public Perception of the Police in Mexico: A Case Study*, 29 (1) POLICING: AN INTERNATIONAL JOURNAL OF POLICE STRATEGIES AND MANAGEMENT 158-175 (2006).

the critical rule of law institutions, 40 percent of those responding chose "mala" or "muy mala" ("bad" or "very bad") compared to a mere 17 percent selecting "muy buena" or "buena" ("very good" or "good"). When prodded as to why, 31 percent selected the option "don't work, there is no justice," while another 34 percent cited "corruption and impunity."[10] With respect to political parties, the key institution providing popular representation and accountability, a 2007 poll showed around 40 percent of those questioned did not believe that any party represented the interests of the people (*Milenio* December 3, 2007). It is not surprising then that in 2001 when asked the first word that comes to mind upon hearing the world politics, "corruption" ranked as the top response (selected as the first response by 21 percent of respondents and as a second choice by another 13 percent).[11]

Coupled with this rather cynical view of existing law and institutions, the Mexican political culture also incorporates a normative dimension that fully recognizes the virtues of and need for accountability, supports the ideal of democracy, acknowledges the differences between proper and improper conduct, and routinely condemns the latter. Few respondents in the Transparencia Mexicana polls, for instance, believe that any form of corruption is acceptable or even agree with the popular saying "el que no transa, no avanza" [a person who does not cheat, does not get ahead].[12] This suggests that the existence of corruption (and acknowledging its existence in public opinion polls) does not necessarily indicate a cultural acceptance of corruption *per se.*

In a similar manner, the fact that crime is rarely reported does not indicate an acceptance of crime, but rather a lack of faith in the police or the justice system to do anything about it. In the ICESI study, the main reason given for not reporting a crime was "waste of time" (39 percent). If you combine this with the 16 percent of respondents who attributed non-reporting to "lack of confidence in authorities," the 3 percent who blamed the "hostility of the authorities," and the 1 percent who failed to report crime out of "fear of being extorted," then almost 60 percent failed to denounce crime because of institutional factors.[13] In sum, corruption and other forms of state illegalities in Mexico are expected but not accepted forms of behavior; condemned but not denounced.

---

[10] *See also* Miguel Carbonell, *Judicial Corruption and Impunity in México*, *in* GLOBAL CORRUPTION REPORT 2007, 225-228 (Cambridge University Press, 2007).

[11] Encuesta Nacional de Cultura Política, *supra* note 5.

[12] STEPHEN D. MORRIS, POLITICAL CORRUPTION IN MÉXICO: THE IMPACT OF DEMOCRATIZATION (Boulder, 2009).

[13] Sexta Encuesta Nacional sobre Inseguridad. Instituto Ciudadano de Estudios sobre la Inseguridad, ICESI (August 2009); *see also* GUILLERMO ZEPEDA LECUONA, CRIMEN SIN CASTIGO: PROCURACIÓN DE JUSTICIA PENAL Y MINISTERIO PÚBLICO EN MÉXICO (CIDAC-FCE, 2004).

II. Attitudinal and Behavioral Dimensions

1. *Assumption of Corruption*

A wide range of attitudinal and behavioral consequences fasten onto this fundamental lack of legitimacy of the law and distrust of those making and enforcing it: all forging part of the broader political culture. Among these is a tendency on the part of the public to use this discourse as a tool to interpret everyday events. This includes the assumption of corrupt behavior and corrupt motives and hence a rejection of pro-systemic, normative-based interpretations of events. When one starts out from the assumption that the powerful abuse and manipulate the law, then one tends to interpret rhetorical promises to address corruption or even the occasional prosecution of a corrupt official not as a counterstrike against the dominant tendency, but rather as part of the same abusive pattern.[14] "Official versions are dismissed beforehand and the promises to follow an investigation to its ultimate consequences are received with general skepticism."[15] This means that speculations, accusations, rumors, etc., of corruption are oftentimes accepted as truth (unless targeted at partisans) regardless of the outcome of the investigation or the resolution of the case simply because they ring consistent with the dominant political narrative. The public then sees the subsequent failure to prosecute an official already tried in the court of public opinion as just further confirmation of the pattern of impunity —rather than as perhaps an indication of the effective pursuit of justice. Even when the system successfully prosecutes "corrupt" officials, it is often interpreted not as a conquest in the battle against corruption, but dismissed as a manipulation of the law orchestrated by those in authority to eliminate their opponents, consolidate their power, for public show, or to hide what they are really doing. Meanwhile, the public summarily dismisses accusations against partisans and allies as politically motivated, again as part of this narrative rather than an affront to it. In short, if impunity is the rule rather than the exception, then exceptions to that rule are not interpreted as examples of compliance with the rule of law; instead, they are seen as conforming in some

---

14 One prominent example of such an interpretation involves the attempted removal of the immunity of Mexico City Mayor Andrés Manuel López Obrador by the Fox government in response to the mayor´s temporary failure to abide by a judicial injunction. Had the move succeeded, it would have prevented the then front-runner in the polls —López Obrador— from running for president. The effort, however, was widely perceived not as the application of justice or the rule of law —as Fox initially claimed— but as political maneuver. José Antonio Crespo, Cultura política y consolidación democrática (1997-2006) 28 (2007).

15 Héctor Aguilar Camín, *Procuradores de injusticia*, 1216 Proceso, Feb. 20, 2000, at 49.

twisted way to the same political logic, motivated by personal ambition, political vengeance, or public show, not to promote the rule of law.

2. *Hierarchy of Legitimacy and Anti-State/Pro-Society Bias*

Not all notions of legitimacy are equal, of course. I would argue that subsumed within this framework separating state and social forms of illegalities there resides a hierarchy of legitimacy that privileges or positions the rule of law within the state above the rule of law within society. This means that if the rule of law does not seem to apply to those empowered by it (*i.e.* state officials), this spills over to undermine or tarnish the legitimacy of the rule of law within society. In short, it is easy for citizens to justify illegal conduct if they are convinced that state officials do not abide by the law. Indeed, why pay taxes if you are certain that the politicians are simply going to pocket the money? "The abuses by police, the corruption, the extortion and other arbitrary acts contribute to citizens considering taxes a confiscation of their income".[16] This is precisely how both the perception and the reality of corruption undermine the public's respect for the rule of law and thus contributes to illegal behavior. The implication here, of course, is that because of this hierarchy, rulers must set the example.[17]

Related to this hierarchy and drawn from repeated political experience lies an anti-state/pro-society bias. On one side of this equation, the lack of faith in the state and in authority weakens the ability of the state to deploy its instruments of coercion to enforce the rule of law. As noted earlier, citizens tend to reject official interpretations out of hand, seeing these as hiding rather than revealing the true motives of the political actors. Hence, the 2001 ENCUP found 68 percent of respondents disagreed with the use of public force to resolve conflicts, and only 18 percent agreed. President Fox not only acknowledged this widely held view, equating the use of repression to the old authoritarian *PRI-gobierno*, but more importantly, it prompted him to consciously shy away from the use force to handle certain problems within society. In an interview with the *Wall Street Journal* in October 2006 the president stated "When someone breaks the institutional order, even by taking the street or highway, the use of force is legitimate. However, in Mexican society a political culture to accept it does not exist. For this reason, it is not done."[18]

---

[16] José Antonio Aguilar Rivera, *El capital social y el Estado: algunas aproximaciones al problema*, *in* PENSAR EN MÉXICO 198-109 (José Antonio Aguilar Rivera et al. eds., FCE, 2006).

[17] Turning this equation around seems far less plausible. In other words, political leaders would seemingly be less likely to justify their corrupt conduct based on the high levels of illegality in society. Public officials, arguably, do not look for society to set the example to emulate.

[18] Cited in Crespo, *supra* note 14, at 24.

The flipside of this anti-state bias is a pro-society bias: the sense that "civil society was everything that politics had not contaminated."[19] Fernando Escalante characterizes this as "a new '*código de pureza*' that demands that one oppose the government, the party, and the State in order to demonstrate opposition to corruption and backwardness."[20] On the more positive side, seeing citizens as essentially pure (at least "purer" than politicians) and non-corrupt nurtures efforts to mobilize society to control and check government: to empower citizen counselors to staff accountability institutions like the electoral institute or to conduct oversight through *contralorías sociales*. Indeed, many in Mexico pin their democratic hopes on citizen-led social movements, which take control of the state from below or, in a word, *ciudadanización*. This pro-society bias, however, also feeds a tendency for people to side with societal actors in the streets, and to assume that their cause is just and that they suffer at the hands of repressive state authorities. Such a posture not only delegitimizes the use of state force, as President Fox noted, but also helps justify even the illegalities committed by such groups in asserting their demands in the name of justice: a point further explored later.

3. *Epistemological Dilemma*

Yet another consequence of this political narrative crystallizes an epistemological dilemma. Given the sense that politicians use and abuse the law for political ends, it becomes difficult to know whether a given reason for a particular act is indeed valid or not. Numerous cases or examples of this dilemma exist. We know the brother of the former president, Raúl Salinas, for instance, was found to have numerous false passports and multi-million dollar bank accounts under different names in the US and Switzerland. In the early days of the Zedillo administration, Salinas was arrested and convicted for the murder of the PRI legislative leader José Francisco Ruiz Massieu. Throughout this time, Salinas insisted on his innocence, claiming that the move was politically motivated and targeting his brother, the former president. Indeed, years later, after Zedillo left office, the courts turned around and exonerated Salinas, failing to find sufficient evidence for his original murder conviction or any firm evidence of money laundering or corruption. This turnabout leaves any observer questioning which of the two sets of contrasting legal actions and "evidence" was valid and which responded to political factors. With limited faith in political institutions, a person's determination of social truth often comes to rest, perhaps, more on partisan or political

---

19 Fernando Escalante Gonzalbo, *México, fin de siglo*, *in* PENSAR EN MÉXICO 33 (José Antonio Aguilar Rivera ed., FCE, 2006).

20 *Id*. at 27.

loyalties and attachments. This is consistent with the finding of Cleary and Stokes that associates a low level of trust in institutions, with trust in individual politicians and *vice versa*.[21] Similar cases abound. Even the more recent case of exiled mining union leader Napoleón Gómez Urrutia encompasses allegations of widespread corruption by the administration amidst rumors and speculations of political revenge from unionists.

4. *Compliance as Oppression: Corruption as Resistance*

Beyond these related attitudinal dimensions, this dominant political discourse also influences forms of social behavior. Foremost is the lack of compliance with the law. Simply put, viewing the operation of the law, the institutions and the officials empowered by it as oppressive makes abiding by the law —despite acknowledging its normative virtues— difficult. "Citizens do not feel the obligation or the desire to respect the law, the institutions, the authorities, or the people."[22] In fact, a narrative that envisions the law as oppressive makes compliance a form of submitting to that oppression. While this may mean obeying the law and authorities when it is necessary for both practical and instrumental reasons —to avoid punishment or to enjoy the benefits— it also means taking advantage of the system's flexibility and failures whenever possible to get ahead, just like everyone, particularly the powerful, presumably do. In this sense, avoiding the law, manipulating it, or getting around it (through bribery or any other means) becomes a form of protest, of political contestation, and of everyday resistance. Seeing bribery in this way fits within James Scott's description of resistance wherein subordinate groups use disguise, deception and indirection while maintaining an outward impression of willing consent.[23] So not only does corruption constitute a mechanism of everyday survival as often noted,[24] but it also becomes a way to get ahead and exploit the system's weaknesses for personal gain. Hence, while the public may condemn corruption, they nonetheless are quick to engage in it when the course lays open to them, justifying their actions by pointing to the fact that public officials and others engage in similar conduct. This interpretation helps the citizen guard his/her sense of personal integrity and assign blame to greedy politicians. From

---

21 MATTHEW R. CLEARY & SUSAN C. STOKES, DEMOCRACY AND THE CULTURE OF SKEPTICISM: POLITICAL TRUST IN ARGENTINA AND MEXICO (Russel Sage Foundation, 2006).

22 Sefchovich, *supra* note 2, at 316.

23 JAMES SCOTT, DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS 17 (Yale University Press, 1990).

24 Eric Uslaner *cited in* Gabriela Catterberg & Alejandro Moreno, *Particularized Trust, Private Politics, and Corruption in New Democracies: The Experiences of Argentina and Mexico*, paper presented at: WAPOR Latin American Congress (2007).

this perspective, even a degree of social tolerance toward corruption becomes a consequence of widespread corruption rather than a cause.

5. *Divorcing Law from Justice*

Particularly problematic, this lack of legitimacy in the rule of law also seemingly divorces the law from notions of justice. If the law itself or its implementation serve the interests of the powerful rather than some concept of justice, then not only does compliance become problematic, but it also justifies the use of other avenues in the pursuit of justice.[25] This feeds the use of alternative paths to pursue demands before the government. Just as individuals will employ illegal means for individual gain, this same factor also encourages the use of collective means to pressure the government for justice. Such actions range widely from the privatization of security measures (from lynching of police officers to gated communities),[26] public protests and sit-ins to demand the reinstatement of a union leader "wrongly" accused of corruption or to reverse a reform agreement signed by a corrupt union leader or a fraudulent election (drawing on recent examples), to even neo-populist government officials using extra-institutional means to pursue their political objectives.[27] This tendency, in which the paths to justice are divorced from the rule of law, greatly intensifies the degree of politicization within society and arguably further undermines compliance and the rule of law itself.

6. *Pessimism, Lack of Civic Behavior and Trade-Offs*

The lack of legitimacy, moreover, breeds pessimism regarding the potential for change, nurtures alienation and atomization, and suffocates the

25 In the 2001 ENCUP poll, when asked whether one should always abide by a law even if it is unjust, 72 percent said no. In a separate question, 56 percent agreed that people should disobey unjust laws. The notion that the law is flexible, in short, seems widespread both in thought and particularly in deed.

26 According to González Compeán, there were almost 100 cases of lynchings in Mexico between 1987 and 2001. He characterizes these as an alternative to the incapacity of the institutions to punish and guarantee justice. He also adds that no one was prosecuted for the lynchings. See Miguel González Compeán, *Justicia o legalidad: el discurso revolucionario y la descomposición de las reglas escritas*, *in* PENSAR EN MÉXICO 278-234 (José Antonio Aguilar Rivera ed., FCE, 2006).

27 According to Davis, López Obrador draws extensive support from lower-income citizens engaged in the informal sector with police complicity and linked to contraband and drug involvement of the police; Diane Davis, *Undermining Rule of Law: Democratization and the Dark Side of Police Reform in México*, 48 (1) LATIN AMERICAN POLITICS AND SOCIETY 55-86 (2006).

public's "commitment to collective projects [and] civic behavior." Polling data amply illustrate this pattern. Transparencia Mexicana polls, for example, show almost a third of respondents believing that it is simply impossible to curb corruption. Such perceptions and lack of faith in politicians makes it difficult to enlist the support of the public in fighting corruption or pursuing other social goals.[28]

Coming to grips with this political reality, finally, also informs tradeoffs in which people are willing to accept a certain level of corruption or illegality on the part of their officials as long as the officials address their needs or critical societal problems.[29] In one poll, 59 percent of those surveyed agreed with just such a statement.[30] This contrasts the huge majorities in the same poll who rejected specific types of corrupt conduct when asked directly. While again some might interpret this acceptance of corruption as a measure of social tolerance —considered a key cultural determinant of corruption— it can also be seen as a Hobbesian deal with reality.[31] If corruption is widespread, the norm, and one feels that little can be done to truly address it, then getting something along with it is better than nothing.[32] This notion of trade-offs, however, also point to a tendency to blame corruption for the failures of government (part of the dominant narrative), but when the government is doing something good, corruption becomes unimportant and in fact can be dismissed or excused.

III. Order without Law and Legitimacy

The high level of state and societal illegalities in Mexico may give the false impression of anarchy. It is not that no one complies with the law, that institutions never function as designed, or that Mexico suffers a breakdown of the state, nor is it the case that behavior is un-patterned or unregulated

28 Stephen D. Morris & Joseph L. Klesner, *Corruption and Trust: Theoretical Considerations and Evidence from Mexico*, COMPARATIVE LEGAL STUDIES (2010, forthcoming).

29 Luigi Manzetti & Carloe Wilson, *Why do Corrupt Governments Maintain Public Support?*, *in* CORRUPTION AND DEMOCRACY IN LATIN AMERICA (Charles H. Blake & Stephen D. Morris eds., University of Pittsburgh Press, 2009).

30 Encuesta Nacional de Corrupción y Buen Gobierno 2005, Transparencia Mexicana, results available at: www.transparenciamexicana.org.mx.

31 Uslaner, *supra* note 24.

32 This tradeoff coupled with the notion of resistance found in the ideas of *machismo* in the Mexican culture may relate to the manner in which drug traffickers are sometimes admired and emulated by the public See Mark Edberg, *Drug Traffickers as Social Bandits: Culture and Drug Trafficking in Northern México and the Border Region*, 17 (3) JOURNAL OF CONTEMPORARY CRIMINAL JUSTICE 259-277 (2001); ERIC HOBSBAWM, BANDITS (Delacorte, 1969).

by other, non-legal mechanisms. As documented by scores of analysts (particularly anthropologists, but also political scientists), an elaborate network of informal rules and institutions prevail in Mexico that are rooted in easily identifiable power relationships, friendships, and economic incentives, and that supplant or supplement the legal and institutional avenues.[33] The Mexican government, in short, may not always operate as a government of laws, but it does often operate as a government of friends; the legal system may not always function in accordance to the principle of innocent until proven guilty, but rather innocent until proven rich. Carlos Elizondo Mayer-Serra notes, for instance, that the Mexican system thrives on the ability to create ambiguity, competing legal claims and different hierarchies of power that in turn provide the space for negotiated solutions.[34] Indeed the real operation of the system attaches to the normative order of the state with key intermediaries operating between the two. Intermediaries operate within the normative context to negotiate exceptions, and justify them in the name of the state and the normative order. They are able to produce order without undermining the state or threatening its legitimacy directly. "Whatever formally sanctioned law exists is applied intermittently, if at all […]"[35] and is encompassed within the informal law determined by the "privatized —patrimonial, sultanistic, or simply gangster-like— powers that actually rule those places." Guillermo O'Donnell calls these "brown areas."[36]

Anthropologists Chris Kyle and William Yaworsky detail how rights in Mexico relate primarily to one's socioeconomic standing within the community. They explain this pattern in the following manner:

> Life in Mexico has traditionally been, and to a great extent remains, regulated not with reference to constitutional rights and by means of universally applied legal procedures but through participation in hierarchically structured and sharply stratified patronage networks. [The study also finds that] instead of equitable treatment and dispassionate justice, government functionaries dispense *mercedes* in accordance with rules that rarely have much relationship to codifications and that instead accord a decided advantage to

---

33 What analysts refer to as privatism arises from particularized trust or sense of obligation to family or friends. This includes a strong sense of solidarity with the extended family and hostility to the outsider, See Seymour Lipset & Gabriel Lenz, *Corruption, Culture and Markets*, *in* CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS 112-124 (Samuel Huntington & Lawrence Harrison eds., Basic Books, 2000). And is closely associated with Banfield's (1958) notion of amoral familism. See EDWARD BANFIELD, THE MORAL BASIS OF A BACKWARD SOCIETY (New York Free Press, 1958).

34 Mayer-Serra, *supra* note 6.

35 Fernando Escalante Gonzalbo, *México, fin de siglo*, *in* PENSAR EN MÉXICO (José Antonio Aguilar Rivera et al. eds., FCE, 2006).

36 THE QUALITY OF DEMOCRACY: THEORY AND APPLICATIONS 41 (Guillermo O'Donnell et al. eds., 2004).

> those of higher social standing […] Whereas the winners to such interactions see "justice" done, the losers experience the sting of *impunidad*.[37]

IV. Challenges and Conclusions

Most recommendations to address Mexico's rule of law problems center on strengthening the institutions of the criminal justice system, greater enforcement, and more oversight and accountability. Whereas a lengthy discussion on policy approaches is beyond the scope of this paper, the foregoing discussion crystallizes certain dimensions of the challenges and at least two priority approaches.

First, without addressing the critical issue of legitimacy, more enforcement tools, a stronger state, and more laws will be insufficient. If government and society are unable to control the police, then more police will not solve the problem; it will exacerbate it. Indeed, over the past decade, Mexican public security budgets increased 565 percent, the number of federal police climbed 51 percent (between 1999 and 2007), and the number of agents within the *Agencia Federal de Investigaciones* shot up almost 100 percent. The budget for the federal public security ministry doubled from 2000 to 2008 and the PGR budget increased 94 percent over a decade. And yet, despite the resources, the number of crimes rose by 8.6 percent between 2006 and 2007 and the number of reported kidnappings climbed 45 percent over the past 3 years (*Latin American Mexico & NAFTA Report*, September 2008 RM-08-09). More troubling, the deployment of military forces to contain drug trafficking have wrought an increase in human rights abuses. "Troops dispatched to try to wrest control of states where the drug trade has escalated are also accused of violations against the very civilians they are sent to protect" (*SourceMex* March 4, 2009). A recent report by the *Centro de Derechos Humanos Miguel Augustín Pro Juárez* highlights the rise in reported abuses since the start of the Calderón administration. The report also questions the immunity (*fuero*) enjoyed by the military and civilian control over the military forces.[38]

A similar dilemma relates to recommendations for more laws, greater judicial independence, and even more taxes. If the lack of compliance and enforcement of laws is the problem, then more law is often not a solution: it simply means more laws to ignore or abuse. In some areas, in fact, the problem may be too many laws or conflicting laws, which broadens the

---

[37] Chris Kyle & William Yaworsky, *Mexican Justice: Codified Law, Patronage and the Regulation of Social Affairs in Guerrero, Mexico*, 64 Journal of Social Affairs 67-90 (2008).

[38] Jorge Carrasco Araizaga, *El fuero militar, garante de impunidad*, Proceso, Mar. 8, 2009, at 12-17.

range of discretion.[39] Greater judicialization similarly does not necessarily mean greater respect for the rule of law,[40] particularly if the resulting judicial decisions are seen as partisan, of protecting the government or the ruling elite, or if they remain unenforceable. This point is even clearer when it comes to taxes: if tax evasion is pervasive, increasing taxes is hardly a solution. Even increasing the policing ability of the state to force taxes will not tackle the underlying problem of the lack of legitimacy. Forcing greater compliance while those in power are believed to be putting the extra revenue in their pockets will probably deepen the resentment and further weaken respect for the rule of law. Enhanced oversight without strengthening legitimacy and the voluntary foundations of compliance seem, in short, to have short-term effects at best. A study by O'Day and López on contraband trade in the north, for example, showed how a scandal focused attention on the problem and led to a crackdown that effectively paralyzed the industry. But this lasted for only for a short time: "Within no more than a month and a half, however, the public's attention began to focus on other things, and in short order, the fix [corrupt deal] was back in."[41]

Beyond the catch-22 dilemma of addressing enforcement and legitimacy, the above discussion also suggests certain strategies and approaches to deal with rule of law problem. First, owing to the hierarchy of legitimacy, establishing the rule of law vis-à-vis the state would seem to be more important, offering potential spillover effects on compliance to the rule of law within society. Of course, any concerted attack on state illegality (corruption, abuse of human rights, violation of institutional rules) must rise above the political fray and not be used or abused for political goals (or even be seen as such); otherwise, it too will be absorbed as simply "politics-as-usual."[42]

---

39 Valeria Merino Dirani, *Role of Civil Society in Promoting Transparency and Fighting Corruption in Ecuador*, 10 SOUTHWESTERN JOURNAL OF LAW AND TRADE IN THE AMERICAS 319-343 (2004).

40 Pilar Domingo, Rule of Law, *Citizenship and Access to Justice in México*, 15 (1) MEXICAN STUDIES 151-191 (1999); Pilar Domingo, *Judicial Independence: The Politics of the Supreme Court in México*, 32 JOURNAL OF LATIN AMERICAN STUDIES 705-753 (2000); Pilar Domingo *Judicialization of Politics or Politization of the Judiciary? Recent Trends in Latin America*, 11 (1) DEMOCRATIZATION 104-126 (2004); Lawrence Whitehead, *High Level Political Corruption in Latin America: A Transnational Phenomenon?*, *in* POLITICAL CORRUPTION: CONCEPTS AND CONTEXTS 801-818 (Heidenheimer & Johnston eds., 2002).

41 Patrick O'Day & Angelina López, *Organizing the Underground NAFTA*, 17 (3) JOURNAL OF CONTEMPORARY CRIMINAL JUSTICE 240 (2001).

42 This danger is illustrated in two critical areas: in the growing corruption within the military as its role in fighting drug trafficking has increased, and the concerns about the politicization of the ostensibly independent citizen counselors in IFE . See Patrick O'Day, *The Mexican Army as Cartel*, 17 JOURNAL OF CONTEMPORARY CRIMINAL JUSTICE 278-295 (2001); GUILLERMO ROSAS ET AL., ARE NON-PARTISAN TECHNOCRATS THE BEST PARTY WATCHDOGS MONEY CAN BUY? AN EXAMINATION OF MEXICO'S INSTITUTO FEDERAL ELECTORAL (American Political Science Association, 2005).

Second, given the anti-state/pro-society bias, strengthening the rule of law must rely on the institutionalized empowerment of citizens through various co-governance arrangements.[43] Citizens begin with a greater reservoir of legitimacy than do government officials, offering a small window of opportunity to strengthen oversight and accountability of rule of law institutions. Mexico's Federal Electoral Institute (IFE) provides an example whereby deeply engrained perceptions and attitudes regarding elections changed in a relatively short period of time, moving from the assumption of electoral fraud to a belief in free and fair elections. Again, the dangers, of course, are that such empowered citizens get pulled into partisan politics and in a sense lose their neutral, citizenship status, or, worse perhaps, become politically irrelevant. The main danger is that the political contaminates the social, rather than vice versa.

In the end, strengthening the rule of law is critical to the construction and consolidation of democracy in Mexico.[44] For many, of course, Mexico's weak rule of law stems from the nation's authoritarian past. González,[45] Philip and Zamora,[46] among others, cite overt rule breaking and the arbitrary application of law as a political strategy of the one-party regime. But if this authoritarian legacy were the true culprit, then democratization should improve the situation even if at a slow, glacial pace. And yet, the levels of state and societal illegality have arguably climbed since democratization as confidence in the law and institutions continue to deteriorate. During the key period of democratization, for instance, confidence in the government actually fell from 30 percent in 1998 and 36 percent in 2000 to 23 percent by 2003, while confidence in the police dipped consistently from 33 percent to 28 percent to 16 percent during those years.[47] Alberto Díaz-

---

[43] John Ackerman, *Co-Governance for Accountability*, 32 (3) WORLD DEVELOPMENT 447-463 (2004).

[44] Despite many differences, most discussions on the rule of law tend to agree on its centrality to democratic consolidation. According to Philippe C. Schmitter, *The Ambiguous Virtues of Accountability*, 15 (4) JOURNAL OF DEMOCRACY 52 (2004), democratic consolidation means "getting people to compete and cooperate according to rules and within institutions that citizens, representatives, and rulers alike find mutually acceptable." By contrast, non-consolidated democracy exists where the rules of the system are not the only rules that operate and where public opinion may not always uphold them (GEORGE PHILIP, DEMOCRACY IN LATIN AMERICA: SURVIVING CONFLICT AND CRISIS (2003)). On the challenges to the criminal justice system during democratization, see Susanne Karstedt & Gary LaFree, *Democracy, Crime and Justice*, 605 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES 6-23 (2006).

[45] Miguel González Compeán, *Justicia o legalidad: el discurso revolucionario y la descomposición de las reglas escritas*, *in* PENSAR EN MÉXICO 278-324 (José Antonio Aguilar Rivera et al. eds., FCE, 2006).

[46] Philip, *supra* note 44; STEPHEN ZAMORA ET AL., MEXICAN LAW (Oxford University Press, 2004).

[47] Demetrius Lee Walker & Richard W. Waterman, *Elections as Focusing Events; Explain-*

Cayeros and Beatriz Magaloni note that despite the institutional changes supporting accountability during these years, behavior has not been in the direction lawmakers intended. Rather than limiting discretion and the arbitrary use of power, the changes have seemingly enhanced both. So while authoritarianism may have created the unrule of law, democracy as practiced thus far has not only failed to reverse the course, but seems to have exacerbated it.[48] As Miguel Ángel Granados Chapa, the recipient of the government's Belisario Domínguez award, noted during his acceptance speech before the Senate:

> The power of money and the criminal power of arms increasingly undermine the rule of law and the capacity of the State [...] The real powers, which govern without having been elected, which seek and obtain profits from businesses that operate against the general interest, govern to a greater degree than the government; the struggle of some illegitimate powers against society, their success in efforts to dominate society, is favored by an economic situation, ever more adverse, that is less propitious than the prosperity and expansion of the human potential.

---

ing Attitudes toward the Police and the Government in Comparative Perspective, 42 LAW AND SOCIETY REVIEW (2) 337-366 (2008).

48 ALBERTO DÍAZ-CAYEROS & BEATRIZ MAGALONI, CONCLUSION: DEMOCRATIC ACCOUNTABILITY AND RULE OF LAW IN MEXICO (forthcoming).

Recibido el 26 de abril de 2010 y aceptado
para su publicación el 24 de junio de 2010.

Mexican Law Review
New Series
VOLUME III
Number 2

THE SOCIOLOGICAL CONCEPT OF JUDICIAL LEGITIMACY: NOTES OF LATIN AMERICAN CONSTITUTIONAL COURTS

Alba RUIBAL*

ABSTRACT. *This note presents a survey of the main issues discussed in the literature on judicial legitimacy from a sociological perspective. It focuses on the factors that may affect the legitimacy of judicial organs, and in particular that can influence diffuse support for courts. It offers a theoretical framework for the analysis of the legitimacy of constitutional courts in Latin America. Based on the theoretical and empirical findings in the literature, the note argues that in order to increase their legitimacy, constitutional courts in Latin America should give special attention to questions of transparency and accountability in their procedures and decision-making*.

KEY WORDS: *Sociological legitimacy, diffuse support, judicial accountability, Constitutional Courts, Latin America*.

RESUMEN: *Este trabajo presenta una revisión de los principales temas de discusión en los estudios socio-legales sobre legitimidad judicial. Se centra en los factores que pueden afectar la legitimidad de los órganos judiciales, y en particular en aquellos que pueden influir en el apoyo difuso a las cortes. El trabajo se orienta a ofrecer elementos teóricos para el análisis de la legitimidad de las cortes constitucionales en América Latina. Con base en los argumentos teóricos y hallazgos empíricos de la literatura, se argumenta que las cortes constitucionales en América Latina deben prestar especial atención a cuestiones relacionadas con la transparencia y la rendición de cuentas en sus propios procedimientos y procesos de toma de decisiones*.

PALABRAS CLAVE: *Legitimidad sociológica, apoyo difuso, rendición de cuentas judicial, cortes constitucionales, América Latina*.

* The author holds a Ph.D. in Political Science from FLACSO-México, a M.A. in Political Science from New York University and a Post-doctoral fellowship from the Institute for Legal Research at the National Autonomous University of Mexico. The author is grateful to Prof. Dr. André Alen, Evelyne Maes, Philippe Gerard and Willem Verrijdt, at Katholieke Universiteit Leuven, for their help and support.

TABLE OF CONTENTS

I. INTRODUCTION

Over the past two decades, Latin American countries have embarked on processes of judicial reform featuring empowerment and independence of constitutional review institutions as their main components.[1] In contrast to the generalized adoption of the Western European model of centralized judicial review by Eastern and Central European countries post-1989,[2] the landscape of constitutional adjudication in Latin America is much more complex and diverse.[3] However, beyond these differences, constitutional review organs in the region face similar challenges at this stage, in contexts

---

1 See in general Carlos Acuña, *La dinámica político-institucional de la reforma judicial en la Argentina*, Presented at the VII CLAD INTERNATIONAL CONGRESS ON STATE REFORM AND PUBLIC ADMINISTRATION, Lisbon (October 2002); Jodi Finkel *Judicial Reform as Insurance Policy: Mexico in the 1990s*, 47 (1) LATIN AMERICAN POLITICS AND SOCIETY 87-113 (2005); Héctor Fix-Fierro, *Judicial Reform in Mexico: What Next?*, *in* BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Erik Jensen & Thomas Heller eds., Stanford University Press, 2003); Beatriz Magaloni, *Authoritarianism, Democracy and the Supreme Court: Horizontal Exchange and the Rule of Law in Mexico*, *in* DEMOCRATIC ACCOUNTABILITY IN LATIN AMERICA, 266-305 (Scott Mainwaring & Christopher Welna eds., Oxford University Press, 2003); WILLIAM PRILLAMAN, THE JUDICIARY AND DEMOCRATIC DECAY IN LATIN AMERICA. DECLINING CONFIDENCE IN THE RULE OF LAW (Praeger, 2000); Julio Ríos-Figueroa, *Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994-2000*, 49 (1) LATIN AMERICAN POLITICS AND SOCIETY 31-57 (2007).

2 See Hernan Schwartz, *The New East European Constitutional Courts*, 13 MICH. J. INT'L L. 741-785 (1992).

3 The types of review powers and the organs that perform constitutional control vary from country to country and in some cases, recently created constitutional courts with concentrated review powers coexist with diffuse judicial review by other courts. As a result of historical development and of this recent wave of reforms, Latin America now presents a mixture of different judicial review systems, which draws both from the U.S. and the European models. See Patricio Navia & Julio Ríos-Figueroa, *The Constitutional Adjudication Mosaic of Latin America*, 38 COMPARATIVE POLITICAL STUDIES 189-217 (2005); Francisco Ramos Romeu, *The Establishment of Constitutional Courts: a Study of 128 Democratic Constitutions*, 2 (1) REVIEW OF LAW AND ECONOMICS 103-135 (2006).

marked by pervasive threats to their autonomy and effectiveness. In this sense, a common concern and one of the main challenges for constitutional review organs in Latin America today is how to consolidate their legitimacy and institutional authority in their respective political systems.[4]

This note is conceived as the first step of a project researching the means by which recently created or reformed courts in Latin America can establish themselves as legitimate and meaningful forces.[5] Given the wide range of studies on judicial legitimacy and the diverse concepts and dimensions of this term, the aim of this paper is to contribute to the understanding of the concept of legitimacy in socio-legal studies and offer a theoretical framework for the analysis of Latin American constitutional courts. The main focus is from a sociological perspective of judicial legitimacy and on the legitimacy of courts as institutions, as opposed to a jurisprudential analysis of court decisions. Special interest is placed on the factors that may affect the legitimacy of courts. This essay also intends to offer the theoretical grounds for implementing transparency and accountability mechanisms as effective ways to increase the legitimacy and institutional power of courts in Latin America.

The three sections discuss the concept of judicial legitimacy by analyzing the relevant literature in the field and highlighting the main problems and issues relevant to such an analysis of Latin American courts. Based on generalized propositions in the literature on judicial legitimacy, the central argument is that one of the principal ways for constitutional courts to build their institutional legitimacy is to implement mechanisms that could convey to the public a sense of procedural fairness in decision-making processes.

II. The Sociological Perspective on Judicial Legitimacy

In the field of legal studies, the problem of legitimacy is approached from different perspectives. Among them, one of the main discussions refers

---

[4] For a general statement on this, see Navia and Ríos-Figueroa, *supra* note 3. For one of the few extant empirical studies about how Latin American courts —the Mexican Supreme Court in this case— takes into consideration legitimacy issues, See Jeffrey Staton, *Constitutional Review and the Selective Promotion of Case Results*, 50 (1) AMERICAN JOURNAL OF POLITICAL SCIENCE 98-112 (January, 2006).

[5] In this sense, this paper assumes the findings of studies on new constitutional courts that observe that, after reform processes, courts themselves contribute to their own institutional empowerment. See mainly TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (Cambridge University Press, 2003) and Sabrina Pinnell, *Formation vs. Action: What Empowers Constitutional Courts?* Presented at the 65th MIDWEST POLITICAL SCIENCE ASSOCIATION ANNUAL CONFERENCE, Chicago (April, 2007).

to the sociological sources of the legitimacy and authority of the courts.[6] An exploration of the main arguments and findings in this field helps situate the problems related to the legitimacy of constitutional review organs in Latin America, and identify the factors that may affect the courts' ability to establish themselves as meaningful institutions. A sociological perspective generally analyzes the way in which courts gain legitimacy, as well as how they legitimate political decisions, and studies the inter-institutional relationships between courts and other significant actors. The sociological view of legitimacy has been contrasted with a legal perspective.[7] Whereas the sociological perspective implies an external and relational dimension, a legal perspective implies an internal or intra-institutional point of view based on the logical analysis and comparison between judicial behavior and the established rules and principles that govern it.[8] The sociological and legal perspectives are related since one of the main sources of the legitimacy of courts depends on perceptions of procedural legitimacy, that is, perceptions of principled and lawful decision-making.[9] However, judicial behavior

---

6 A different approach refers to a continuing debate in legal and political theory about the democratic legitimacy of judicial review, that is, the normative justification of the power of courts to assess decisions made by elected branches of government. See, for example, Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice"*, 35 CATHOLIC UNIVERSITY LAW REVIEW 1-32 (1985); JUAN F. GONZÁLEZ BERTOMEU, CÓMO APRENDÍ A ODIAR (Y A AMAR) LA DISCUSIÓN SOBRE CONTROL JUDICIAL (Forthcoming 2010). RONALD DWORKIN, FREEDOM'S LAW. THE MORAL REGARDING OF THE AMERICAN CONSTITUTION (Harvard University Press, 1996); Víctor Ferreres, *The Consequences of Centralizing Constitutional Review in a Special Court*. *Some Thoughts on Judicial Activism*, 82 TEX. L. REV. 1705-1736 (2004). This normative discussion is not the focus of this paper, which deals with the legitimacy of courts in terms of their institutional power. However, as has been noted, the increasing political role of courts in certain contexts may generate new questions about the democratic credentials of the judicial function, particularly in its co-government role, and as Loth points out, the empowerment of courts "raises new issues of legitimacy, such as 'who guards the guardians'." Marc Loth, *Courts in a Quest for Legitimacy: A Comparative Approach*, *in* THE LEGITIMACY OF HIGHEST COURT'S RULINGS: JUDICIAL DELIBERATIONS AND BEYOND (Nick Huls et al. eds., TMC Asser Press, 2009). Furthermore, another approach to judicial legitimacy can be identified in works by critical legal scholars who, as Yoo points out, argue that the legal system is indeterminate, unjust and, thus, illegitimate. John Yoo, *In Defense of the Court's Legitimacy*, 68 (3) THE UNIVERSITY OF CHICAGO LAW REVIEW 775-791 (2001). A strong critique to the latter perspective can be found Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283-337 (1989).

7 See Richard Fallon, *Legitimacy and the Constitution*, 118 (6) HARV. L. REV. 1787-1853 (2005); Craig McEwen & Richard Maiman, *In Search of Legitimacy: Toward an Empirical Analysis*, 8 (3) LAW AND POLICY 257-273 (July, 1986).

8 McEwen & Maiman, *supra* note 7.

9 Different authors have also studied it from a sociological perspective but with a moral view of legitimacy. See, for example, Fallon, *supra* note 7; Kress, *supra* note 6; Tom Tyler & Gregory Mitchel, *Legitimacy and the Empowerment of Discretionary Legal Authority: The*

based on abiding by established procedures and legal principles is not sufficient cause for legitimacy in the sociological sense. From a sociological perspective, the relationship between procedural fairness and the legitimacy of courts depends on the courts' ability to convey an image of fairness in the decision-making process and on the public's acknowledgment and preference for that kind of judicial behavior.

Studies about the sociological legitimacy of courts generally agree[10] on the crucial importance of legitimacy for judicial institutions, which in contrast to the political branches of government cannot rely on other sources of power,[11] and do not have popular elections that support their legitimacy.[12] In this regards, it has been argued that courts can only rely on voluntary acceptance[13] and that the institutional legitimacy of a governmental organ like a constitutional court "resides in public beliefs that it is a generally trustworthy decision maker whose rulings therefore deserve respect and obedience."[14] In general, authors coincide in that courts need a kind of support known as diffuse support, which goes beyond specific support to particular decisions.[15] This type of diffuse or institutional support has been equated with the institutional legitimacy of courts, and has also been referred to as a "reservoir of goodwill" on behalf of their constituencies.[16] The institutional legitimacy of courts has also been called "symbolic legitimacy,"[17] in con-

United States Supreme Court and Abortion Rights, 43 (4) DUKE L. J. 703-815 (1994). As Kress puts it, a moral view of legitimacy implies that "if a judicial decision is legitimate, it provides a prima facie moral obligation for citizens to obey the decision," Kress, *supra* note 6.

10 This widespread agreement is not shared by authors like Hyde, who, as seen below, has abandoned the use of the concept of legitimacy in legal theory (this does not imply, however, that Hyde argued against the need for courts to build and maintain their institutional power, which is the interest of the present paper). Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 2 WIS. L. REV. 379-426 (1983).

11 Alexander Hamilton's statement (*The Federalist* No. 78) that the judiciary "has no influence over either the sword or the purse" underlies all discussions about the institutional legitimacy of courts. Other authors have rephrased it saying that courts cannot "govern through rewards or coercion," Tyler & Mitchel, *supra* note 9, at 733, or that "the judiciary's power is distinguished from the use of force or finances, which are the tools of the political branches," Yoo, *supra* note 6, at 781.

12 Gregory Caldeira & James Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AMERICAN JOURNAL OF POLITICAL SCIENCE 635-664 (1992).

13 Tyler & Mitchel, *supra* note 9.

14 Fallon, *supra* note 7.

15 Walter Murphy and Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, LAW AND SOCIETY REVIEW, Vol. 2, 357-384 (1968).

16 James Gibson et al., *On the Legitimacy of National High Courts*, 92 AMERICAN POLITICAL SCIENCE REVIEW 343-58 (1998).

17 David Adamani, *Legitimacy, Realigning Elections, and the Supreme Court*, 3 WIS. L. REV. 790-846 (1973).

trast to "substantive legitimacy"[18] or "content legitimacy."[19] Under a sociological perspective, legitimacy is related to public perceptions of legal institutions. For this reason, it has been argued that authors working in the field of sociological legitimacy of courts assume that institutional legitimacy is closely linked to beliefs about institutions and their binding nature, and that, consequently, they use the term legitimacy in a Weberian sense.[20] Although a theoretical discussion about Weber's theory of legitimacy is not among the main interests of this paper, given the overwhelming presence of Weberian references in literature and the seemingly inescapable influence of this perspective,[21] a brief account of the discussion is presented.

Weber's theory is the main point of reference in studies on sociological legitimacy, and this theory has been widely discussed and criticized.[22] As Hyde explains, for Weber, legitimacy is "a belief that an order is obligatory or exemplary,"[23] and it is one of the motives for a type of behavior that can be distinguished from habit and self interest.[24] In the Weberian sense, legal legitimacy is the belief that government decisions should be complied with not because of self-interest or force of habit, but because they are lawful.[25]

---

18 Fallon, *supra* note 7.

19 Jeffery Mondak, *Policy Legitimacy and the Supreme Court: The Sources and Contexts of Legitimation*, 47 (3) POLITICAL RESEARCH QUARTERLY 675-692 (1994). Fallon explains that while institutional legitimacy is the characteristic of an institution, "substantive legitimacy is a property of judicial acts. It refers to the public's belief that a particular judicial decision is substantively correct" (Fallon, *supra* note 7).

20 Hyde, *supra* note 10.

21 Hyde argues that "most contemporary writers who use the word 'legitimacy' are at least playing on the Weberian sense, even where unwilling to commit themselves to it." Hyde, *supra* note 10, at 381.

22 "Max Weber's concept of legitimacy occupies a paradoxical position in modern political science. On the one hand, it has proved to be the dominant model for empirical investigations of legitimacy. On the other hand, it has met with almost universal criticism by those political philosophers who have evaluated it". Robert Graftein, *The Failure of Weber's Conception of Legitimacy: Its Causes and Implications*, 34 (2) THE JOURNAL OF POLITICS 456 (1981).

23 Hyde, *supra* note 10, at 382.

24 Weber argues that "custom, personal advantage, purely affectual or ideal motives of solidarity do not form a sufficiently reliable basis for a given domination. In addition there is normally a further element, the belief in *legitimacy*." MAX WEBER, ECONOMY AND SOCIETY. AN OUTLINE OF INTERPRETIVE SOCIOLOGY 213 (University of California Press, 1978).

25 *Id.* at 37. In fact, contrasting with the other two types of domination and associated legitimacy claims —traditional and charismatic— identified by Weber, legal domination is not legitimized by an external source. As Trubek explains, "when 'law' in a generic sense becomes rational law, it becomes its own legitimizing principle, and the basis of all legitimate domination. This is the nature of 'modern' law and, thus, the 'modern state'." David Trubek, *Max Weber on Law and the Rise of Capitalism*, 3 WISCONSIN LAW REVIEW 732 (1972).

According to Weber, in modern society "the most common form of legitimacy is the belief in legality, the compliance with enactments which are *formally* correct and which have been made in the accustomed manner."[26] This statement has originated some of the main criticism posed by legal scholars against Weber's notion of legitimacy.[27] In the first place, this idea implies identifying legitimacy through perceptions and acquiescence, and not through a normative evaluation of a regime.[28] Similarly, it has been argued that from this point of view, the law is the only legitimating principle in modern societies that entails abandoning normative concerns about the content of decisions.[29] Other criticism points to the weakness of the link between the formality of legal norms —in contrast with their content— and the individual's adherence to said norms by questioning the legitimating force of law.[30] In the end, it is argued that "Weber virtually identifies legitimacy with stable and effective political power, reducing it to a routine submission to authority."[31] This has led Hyde,[32] one of the main challengers to the Weberian concept of legal legitimacy, to argue that this idea should be replaced by "rational factors" as an explanation for compliance.[33]

However, beyond compelling criticism of this perspective, it is difficult to avoid some of the ideas included in Weber's concept of legitimacy. It is especially difficult to assert that legitimacy is grounded on something that transcends social perceptions, that legitimacy can be different from "perceived legitimacy" (to use Kress's terms).[34] On the other hand, it is not nec-

---

26 In this sense, Graftein explains that "Weber's analysis develops an idea associated with the positive theory of law: modern political systems do not rest on the moral unity of society or on unanimous agreement with the content of their decisions but, in part, on the simple fact that their decisions are made through legal procedure" (*supra* note 22, at 467).

27 Notably, Hyde, *supra* note 10, and Graftein, *supra* note 22.

28 Graftein explains that in Weber's theory "legitimacy no longer represents an evaluation of a regime; indeed, it no longer refers directly to the regime itself. Rather it is defined as the belief of citizens that the regime is, to speak in circles, legitimate." Graftein, *supra* note 22, at 456.

29 Hyde argues that "ideally, under this model the legitimating consequence of a legal norm depends not at all on the substantive content of the norm but entirely on the legal form." Hyde, *supra* note 10, at 403.

30 In Graftein terms, "Weber simply fails to establish an adequate motivational basis for submitting to varied decisions that are grounded by their mode of genesis rather than their content." Graftein, *supra* note 22, at 468.

31 Graftein, *supra* note 22, at 456.

32 Hyde, *supra* note 10.

33 In general, other authors do not recommend abandoning the Weberian perspective of the link between legitimacy and acquiescence, but is has been pointed out that the relation between institutional legitimacy and compliance is not clear and should be studied, as much as the link between coercion and compliance is studied. McEwen & Maiman, *supra* note 7.

34 Kress, *supra* note 6.

essary to adhere to the idea of legitimacy as a reason for compliance, to use the idea of legitimacy as institutional power and authorativeness and to analyze how the behavior of courts is related to their need to build and maintain their legitimacy.[35] Finally, as to allegedly conservative implications of the Weberian perspective, it can be argued that in order to achieve this type of legitimacy in contemporary democracies, it may be necessary to incorporate mechanisms and procedures that foster transparency, deliberation and the inclusion of citizens demands.[36] Thus, the search for institutional legitimacy may actually have positive implications for democratic practices. This is, in fact, one of the main normative arguments for the crucial importance of incorporating the idea of institutional legitimacy into the debate about the current situation and perspectives of constitutional courts in Latin America. This argument is further developed in the last section of this paper.

III. Legitimacy and Diffuse Support

The above theoretical discussion and, more generally, the sociological perspective on legitimacy concerns itself with the relationship between the courts and society in general, as well as with specific groups or relevant actors in the political system. In several empirical studies, this relationship has been studied particularly through the analysis of public opinion surveys, oriented at assessing the sources and implications of diffuse support to the courts. Diffuse support for courts has been equated to their institutional legitimacy, as opposed to specific support for particular decisions.[37] Empirical studies in this field have addressed different issues, such as the interaction and mutual effects of diffuse and specific support;[38] the relationship between knowledge of a court's functioning and decisions and diffuse support to the court as an institution;[39] the link between diffuse support and

---

35 Even Hyde admits that "regarding legitimation theory about the behavior of legal institutions, rather than as a theory about popular behavior, subtly improves the plausibility of the theory," because it does not require asserting a link between legitimacy and obedience. Hyde, *supra* note 10, at 417.

36 As Graftein argues, "most modern normative conceptions of legitimacy have a strong democratic component, which means that the actual beliefs and values of citizens must be taken into account." Graftein, *supra* note 22, at 457.

37 As Murphy and Tanenhaus point out, the distinction between diffuse support and specific support was first developed by David Easton at: DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE (John Wiley, 1965). Walter Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 NW. U. L. REV. 985-1023 (1990).

38 Caldeira & Gibson, *supra* note 12.

39 Murphy & Tanenhaus, *supra* note 37; Gibson et al., *supra* note 16.

broad political values and the role of opinion leaders;[40] the relationship between diffuse support and the level of compliance with court's decisions;[41] and how diffuse support to a court is related to its ability to legitimate public policy.[42]

The court's capacity to legitimate controversial policies, or the so-called "legitimacy conferring hypothesis," has been addressed by many works in the field of sociological legitimacy studies. This issue poses a very different concern from the problem of how courts build their own institutional legitimacy. As Adamani points out,[43] this idea, which has become a pervasive concept,[44] was put forward by the influential works of Bickel,[45] Black[46] and Dahl,[47] who argued that the U.S. Supreme Court[48] had the ability to legitimate policies because the people saw the court as acting lawfully as the guardian of the Constitution. This idea was later disputed, particularly for its lack of empirical bases.[49] More recently, different types of empirical studies have questioned or qualified this assertion. In fact, it can be argued that there are no bases in literature for conclusive assertions in this regards.

40 Caldeira & Gibson, *supra* note 12.

41 See James Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 (3) LAW AND SOCIETY REVIEW 346-396 (1989); James Gibson & Gregory Caldeira, *The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice*, 39 (2) AMERICAN JOURNAL OF POLITICAL SCIENCE 459-489 (May, 1995); McEwen & Maiman, *supra* note 7; Tom Tyler and Kenneth Rasinsky, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 (3) LAW AND SOCIETY REVIEW 621-630 (1991).

42 Adamani, *supra* note 17; Larry Baas & Dan Thomas, *The Supreme Court and Policy Legitimation: Experimental Tests*, 12 AMERICAN POLITICS QUARTERLY 335-353 (1984); Rosalee Clawson et al., *The Legitimacy-Conferring Authority of the U.S. Supreme Court. An Experimental Design*, 29 (6) AMERICAN POLITICS RESEARCH 566-591 (November, 2001); Charles Franklin & Liane Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 (3) THE AMERICAN POLITICAL SCIENCE REVIEW 751-771 (1989); Gibson, *supra* note 40; Hyde, *supra* note 10; Mondak, *supra* note 19; Walter Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 LAW AND SOCIETY REVIEW 357-384 (1968); Tyler and Mitchel, *supra* note 9.

43 Adamani, *supra* note 17.

44 According to Casey, this idea has even become a myth. Gregory Casey, *The Supreme Court and Myth: An Empirical Investigation*, 8 (3) LAW AND SOCIETY REVIEW 385-420 (1974).

45 ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Bobbs-Merrill, 1962).

46 CHARLES BLACK, THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (Macmillan, 1960).

47 Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 JOURNAL OF PUBLIC LAW 279-295 (1957).

48 In general, empirical studies on the legitimating capacity of courts have been carried out within the context of the United States.

49 Adamani, *supra* note 17.

On the one hand, experimental studies have argued that the Court does not apparently have the power to legitimate particular policies.[50] On the other hand, it has been noted that the institutional legitimacy of the U.S. Supreme Court may have contributed to the legitimization of unpopular decisions by other bodies of government under particular circumstances.[51] Finally, Mondak has developed what he calls "political capital hypothesis," which argues that a credible court can contribute to legitimize the policies it supports, but that, in turn, unpopular decisions may undermine the legitimacy of the issuing institution.[52] This argument refers to the mechanisms by which courts may gain and lose legitimacy, which are addressed below.

Concerning the relationship between public exposure of court procedures and diffuse support for courts, a controversial issue in literature focuses on whether the visibility and public awareness of courts' action fosters or hinders its legitimacy. This issue has important implications regarding the mechanisms by which courts —particularly new or recently reformed courts that need to build their institutional legitimacy— may implement to obtain recognition and acceptance. On the one hand, it has been argued that there is indeed low awareness among the general public about U.S. Supreme Court procedures and activities, whereas diffuse support for this court is high.[53] But on the other hand, studies from a different approach do not deny the latter argument, but assert that public exposure of court procedures —when it occurs—[54] generate support for courts as institutions. This effect takes place because exposing court activities implies exposing the legitimating symbols usually deployed by courts, particularly symbols related to impartiality and objectivity.[55] Particularly relevant for recently established or reformed courts is the finding that public satisfaction with courts evolves slowly through successive exposure of court activities and that, consequently, "young courts can only acquire legitimacy by making their decisions known to the mass public and waiting."[56] In general, these findings support the idea that courts should make their procedures public and establish the proper channels of communication with their public. For it would not only be good from a normative point of view as it would be

---

50 Baas & Thomas, *supra* note 42; Clawson *et al.*, *supra* note 42; Murphy & Tanenhaus, *supra* note 42.

51 Franklin & Kosaki, *supra* note 42; Gibson, *supra* note 41; Mondak, *supra* note 19; Tyler & Mitchel, *supra* note 9.

52 Jeffery Mondak, *Institutional Legitimacy, Political Legitimacy, and the Supreme Court*, 20 (4) AMERICAN POLITICS QUARTERLY 457-477 (October, 1992).

53 Murphy & Tanenhaus, *supra* note 37.

54 In this sense, Franklin and Kosaki, *supra* note 42, argue that it is possible to evaluate the impact of courts in public opinion only when public attention to court activity is high, as occurs with salient and controversial cases.

55 Gibson *et al.*, *supra* note 16; Tyler & Mitchel, *supra* note 9.

56 Gibson *et al.*, *supra* note 16, at 356.

valuable because this would foster the deliberative and democratic proceedings of courts, but it also may contribute to increasing the court's institutional power and legitimacy. The exposure of court mechanisms and decisions is related to the relationship between procedural fairness and legitimacy, which is discussed further in the last section of this paper.

IV. PROCEDURAL FAIRNESS AND LEGITIMACY

Concerns about sociological legitimacy are also related to a fundamental problem that, as realized by Shapiro,[57] is inherent to the nature of judicial institutions and to the basic social logic of courts: the constant tension created by the need of a court to build its legitimacy as a neutral third party to a dispute, while having to decide in favor of one of the other two parties, in the triadic structure that characterizes judicial conflict resolution. The problem of neutrality or impartiality is related to the sources or the basis of court's legitimacy. As mentioned above, one of the main arguments in this regard is that procedural fairness is the main factor of perceptions of judicial authority.[58] In fact, the assertion that perceptions of neutrality may enhance the legitimacy of courts is one of the few aspects in which there is agreement in the literature on sociological legitimacy.

The link between procedural fairness and legitimacy is particularly important for the analysis of the procedures and functioning of high courts in Latin America. As has been argued, after enacting institutional reforms intended to increase the formal powers and independence of courts, the institutions themselves may enhance their own legitimacy and institutional power through their procedures and activity. In this regard, the distinction Loth has made between input legitimacy and output legitimacy is relevant to further distinguishing the sources of legitimacy of the courts. According to this author, institutional factors, such as the selection of justices and judicial independence, are related to *input legitimacy*; whereas the performance of courts, the way they ground their decisions, their communication with the parties involved in a decision, among other factors, correspond to *output legitimacy*.[59] A similar distinction had been presented by Lasser,[60] who identifies institutional or argumentative means to generate legitimacy according

[57] MARTIN SHAPIRO, COURTS A COMPARATIVE AND POLITICAL ANALYSIS (The University of Chicago Press, 1981).

[58] Tyler and Mitchel, *supra* note 9.

[59] Loth introduces a third dimension: *functional legitimacy*, which Loth defines as "the actual role they [the courts] play in the legal order and in society at large." Loth, *supra* note 6, at 269.

[60] MITCHEL LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY (Oxford University Press, 2004).

to two models, corresponding respectively to the French and U.S. systems of judicial decision-making. Both analytical aspects of legitimacy are fundamental for the establishment of constitutional courts as meaningful and respected institutions. Loth argues that "enhancing legitimacy means working on imput and output factors,"[61] but he stresses that in contemporary systems, judicial legitimacy depends less on input aspects and more on features like "the quality of the proceedings, decisions, reasoning, communication, and the like."[62] Underlying these factors is the ideal of procedural fairness. It is not the aim of this paper to argue that these factors are more important than structural or input factors. However, in light of the arguments presented in recent literature on Latin American constitutional courts, it can be said that structural aspects related to the independence and formal powers of courts are already established and at work in the region. So, a logical step at this moment is to focus on output factors that could contribute to enhancing the legitimacy of courts. In fact, the ways in which courts develop and maintain their legitimacy depend on complex factors that cannot always be controlled by courts.[63] However, there are certain aspects that courts can indeed work on to enhance their institutional standing, and that according to the literature on judicial legitimacy are strongly related to procedural fairness. These aspects may not only contribute to empower constitutional courts, but are also valuable from the point of view of democratic ideals of publicity and accountability, but they are also preliminary conditions for promoting constitutional dialogue, which has been identified as one of the main functions of judicial review and constitutional courts.[64] Thus, the search for procedural fairness is a desirable end, as well as one of the few concrete, identifiable and agreed-upon ways to build institutional legitimacy for courts as opposed to other means by which courts can certainly build legitimacy, such as the substantive content of their decisions, which is too idiosyncratic and context dependent as to allow for more generalizable implications.

The concept of procedural fairness as a source of legitimacy is linked to the idea that what legitimates the judicial function is a perception of judicial institutions and decisions pertaining to rules and principles: the image that judges do not only make their decisions based on their political and personal preferences, and that judges can be impartial and neutral parties

---

61 Loth, *supra* note 6, at 287.

62 *Id.* at 272.

63 In this sense, Caldeira and Gibson state that diffuse support is related to "the actions of the Court itself and to external political conditions." Caldeira & Gibson, *supra* note 12, at 636.

64 Friedman argues that the main function of judicial review and of an institution like the U.S. Supreme Court is to act as a "catalyst for debate, fostering a national dialogue about constitutional meaning." Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 CINCINNATI LAW REVIEW 1296 (2004).

in a dispute. Following Fiss,[65] it can be argued that this image of impartiality can be built up by procedures that promote what he calls bounded objectivity or constrained judicial decision-making.[66] In this regards, it should be noted that this position does not imply asserting a strict separation between law and politics, which as Friedman[67] points out, is impossible to attain, or to deny the strategic component in judicial behavior, but to recognize that judicial decisions are subject to specific rules and that promoting certain types of judicial procedures may enhance the image of judicial impartiality and the legitimacy of courts, in addition to their normative desirability.

It has been generally argued that adhering to precedent, principled argumentation, deliberative practices, and transparency are fitting ways to attain an image of procedural fairness,[68] More specifically, Fiss argues that the main procedural rules that contribute to principled decision-making are judicial independence; non-discretionary jurisdiction; hearing all the parties involved; personal responsibility, as manifested for example in court opinions attributed to specific judges; justification of decisions in universal terms or neutral principles.[69]

Finally, the objection to the conservative implications of the Weberian view of legitimacy can be tempered by the potential democratizing effect of the search for institutional legitimacy by introducing mechanisms related to procedural fairness. If judicial bodies like constitutional courts need to open up their procedures and be more responsive to society to obtain legitimacy or diffuse support, they can become more democratic institutions. This is related to the courts' need to build up their institutional power without resorting to electoral, punitive or financial means to foster their legitimacy. As argued by Franklin and Kosaki, court responsiveness towards the public has both normative and pragmatic reasons: "courts *should* be responsive in a democratic society. The courts *must* be responsive because of their weakness as institutions."[70]

V. Conclusion

The concept of legitimacy is defined differently in legal and socio-legal literature, and continues to be a controversial concept. However, there is

---

[65] Owen Fiss, *Objectivity and Interpretation*, 34 STANFORD LAW REVIEW 739-763 (1981).

[66] According to Fiss, the two main "constraints in the interpretive process" are the "interpretive community," formed by the legal profession, and the existence of "procedural rules to discipline the interpreter." *Id.* at 754. These rules are mentioned below.

[67] Friedman, *supra* note 64.

[68] See Lasser, *supra* note 60; Tyler & Mitchel, *supra* note 9; Fiss, *supra* note 60.

[69] Fiss, *supra* note 65, at 754-755.

[70] Franklin & Kosaki, *supra* note 42, at 151.

agreement on the fact that it is important for courts to gain institutional standing and authority, understood as the institutional legitimacy of these bodies. Moreover, different approaches to judicial legitimacy argue, and offer grounds for arguing, that one of the main ways for courts to build up their own legitimacy is to convey an image of procedural fairness. Two inherent characteristics of judicial institutions, namely their weakness vis-à-vis the political branches and their normative place as neutral arbiters, implies the need courts have to take their public image into account and build their legitimacy through mechanisms that may create an image of impartiality and fairness in court procedures. This can be achieved, among other means, by court procedures that allow deliberation, transparency, principled decision-making and the participation of the interested parties involved. A next step in a research project on how bodies of constitutional review in Latin America have started to build up their legitimacy after judicial reform processes would be to analyze and compare the different transparency and accountability mechanisms implemented so far by the recently created or reformed courts in the region and the factors that have led to the adoption of these institutional provisions in each context.

Finally, an analysis of the theoretical literature on judicial legitimacy offers an explanation of the incentives and motivation that may lead members of constitutional courts in Latin America to encourage implementing normatively desirable procedures, like those regarding transparency and accountability. In fact, the literature suggests that enacting these mechanisms, which can be associated to more democratic practices, could ultimately be motivated by the self-interest of the members of the courts that need to gain public acceptance and recognition to build up their institutional authority and legitimacy.

Recibido el 6 de marzo de 2010 y aceptado
para su publicación el 31 de agosto de 2010.