



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

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

Mexican President Felipe Calderón,
Oct. 25, 2008¹

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.*

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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 policíacos, 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.*

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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. HENDRIX⁴

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 University¹⁶

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 reach²⁹ 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 Times³²

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 Tribble 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.gabinecece.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 present⁴⁷ 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 case-loads 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/ENGA.MR410022007?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-crackdown-drug-gangs.html>.

¹⁰³ *Mexican City World’s Murder Capital*, PressTV.com (2009), <http://www.presstv.ir/detail.aspx?id=104593§ionid=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).