

NOTES ON CRIMINAL PROCESS AND CONSTITUTIONAL REFORM IN MEXICO TODAY*

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ABSTRACT. *The constitutional reform on criminal justice and public security enacted on June 18, 2008 represents the most significant change to the Mexican criminal justice system in over 100 years. By laying the groundwork to replace the current “mixed” procedural code with a more adversarial model, the reform completely alters not only the institutional framework of the Mexican criminal justice system but also its modus operandi. A reform of this magnitude can only be explained by the enormous difficulties currently faced by Mexico’s justice system. In order to better understand the nature of this reform, we shall first consider the problems it intends to address. After defining these in detail, we shall explore how these legislative changes may eventually affect the normal criminal process.*

KEY WORDS: *Constitutional reform, criminal justice, public security, Mexico, accusatory model.*

RESUMEN. *La reforma a la Constitución Política de los Estados Unidos Mexicanos en materia de seguridad pública y justicia penal, publicada el 18 de junio de 2008, representa el cambio más importante en el último siglo para el sistema de justicia penal en México. Establece las bases para sustituir el actual modelo procesal “mixto” por un sistema penal acusatorio, lo que conlleva modificar no sólo el entramado legal sino su modus operandi. Una reforma judicial de esta magnitud sólo puede ser entendida al observar los problemas que el sistema de justicia penal actualmente afronta. En consecuencia, con el fin de lograr un mejor entendimiento de este proceso, en este trabajo se realiza un breve recuento de los problemas que se pretende afrontar, para posteriormente comentar el proceso legislativo de la reforma constitucional.*

PALABRAS CLAVE: *Reforma constitucional, sistema de justicia penal, México, proceso penal acusatorio, reforma judicial.*

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This note begins with an overview of the key elements of the criminal process in Mexico today and the most important challenges faced in this process. It then explores the political context and background for the approval of the constitutional reform and concludes with an overview of the content of the reform itself.

I. PRE-TRIAL INVESTIGATION

The initial stage of an ordinary Mexican criminal proceeding is called the pre-trial investigation (“*averiguación previa*”), where several problems often arise. For clarity, we shall divide this discussion on the basis of where exactly these problems take place.

1. *Problems from the Perspective of the Victim or Injured Party*

A. *Limited Participation in the Pre-trial Investigation*

In Mexican criminal courts, the victim or injured party normally faces various uncertainties. Despite legislative efforts to strengthen victim’s legal status, his situation remains precarious. Nevertheless, agents of the Public Prosecutor (“*Ministerio Público*”) encourage victims to actively collaborate in the process. They require the issuance of sworn affidavits and their help to identify witnesses, that later on becomes evidence and a critical part of the investigative file. However, the victim is relegated to a marginal role once this first phase ends, as every decision regarding the use of evidence then reverts to the public prosecutor. Although in practice the victim bears much of the weight of the criminal process, the public prosecutor alone is responsible for evaluating the evidence and deciding whether or not to proceed—in essence, monopolizing the decision to file criminal charges.

These issues must be re-analyzed in light of recent legislative and judicial reforms that now permit victims to challenge public prosecutors who choose not to file criminal charges. Without any doubt, these changes shall help reduce the lack of transparency that characterizes Mexico’s public prosecutors. Nonetheless, it must be acknowledged that this new framework shall not resolve all the problems it intends to address.

B. *Issues of Restitution Damages*

Cases involving restitution damages not only directly affect the victim but also reveal critical institutional deficiencies. In general, the pre-trial investigation and criminal procedures fail to address this important situation. Although victims’ rights during criminal proceedings are at best tenuous, he/she must assume the burden of proof and take aggressive action to present any claim for damages.

For instance, goods confiscated in connection to the alleged crime often remain in precarious storage conditions for long periods of time and are subject to constant deterioration. This not only generates significant losses for victims, but also results in high storage costs for the authorities.

2. Institutional Problems during the Pre-trial Investigation Stage

A. Ineffective Criminal Investigation

One of the most serious problems facing the Mexican criminal justice system is the ineffectiveness of the main actors during pre-trial investigations. Generally speaking, agents of the Public Prosecutor and the police at their command are often less than competent. For example, empirical studies have shown that the more time has passed after a crime occurs, the less likely the offender will be apprehended. An incontrovertible piece of evidence appeared in a study called "Crime, Poverty and Institutional Performance,"¹ showing that only a small percentage of prisoners are arrested more than 24 hours after a crime occurs. Based on responses to this survey, 48% of accused parties were arrested within sixty-four minutes immediately following the crime; and 22% were arrested within the next 24 hours. In sum, this finding reveals the limited effectiveness of investigations carried out by Mexican police and public prosecutors; if criminals are not caught *in flagrante delicto* or apprehended within hours after the crime, the probability of their apprehension drops precipitously. This phenomenon has resulted in both a significant rise in impunity and distrust in law enforcement institutions by the general public. In fact, most Mexicans refuse to even report crimes to which they are victims since they regard the procedures as time-consuming, onerous, and most significantly, a waste of time.

Another notable issue related to Mexican authorities' maladroit investigative work concerns human rights violations against both defendants and victims. Not infrequently, inadequate training and lack of resources lead authorities to choose interrogation techniques that violate citizens' constitutionally guaranteed rights.

Among causes often mentioned to explain these deficiencies are: the excessive workload of both public prosecutors and police; lack of adequate equipment and training; corruption; lack of incentives to perform proper investigations; and the limited use of expert services. In practice, limited training and incentives for public officials in charge of the justice system seem to be the most serious problems faced by these institutions.

Other problems include lack of training (both police and public prosecutors); ineffectiveness or inexistence of controls to help monitor and evaluate investigations; and a lack of transparency during the entire process. All these factors are combined to reinforce corruption and promote irregular practices within these entities. This situation is especially egregious in areas where high police corruption has been reported.

¹ MARCELO BERGMAN ET AL., DELINCUENCIA, MARGINALIDAD Y DESEMPEÑO INSTITUCIONAL. RESULTADOS DE LA ENCUESTA A POBLACIÓN EN RECLUSIÓN EN TRES ENTIDADES DE LA REPÚBLICA MEXICANA: DISTRITO FEDERAL, MORELOS Y ESTADO DE MÉXICO (CIDE, 2003).

To be fair, it should be pointed out that police officials and prosecutor's agents have serious difficulties in coordinating their work. This institutional flaw limits the effectiveness of criminal investigations and often leads to an inefficient use of resources.

B. Problems with Expert Services and Underused Facilities

Several serious issues hinder the current situation for expert services. First, specialized services generally play a limited role in the pre-trial investigation. They are rarely employed, with the exception of public prosecutors looking to support allegations regarding the defendant's guilt. In fact, both defendants and victims have difficulty obtaining access to expert findings, and they do not often understand the methodologies used. At the same time, multiple irregularities have occurred as a result of the close connection between expert services contractors and the Public Prosecutors. Individuals contracted directly by the Public Prosecutor perform most expert findings, which has resulted in serious questions concerning the partiality of experts.

C. Lack of Incentives to Perform Proper Investigations

Article 287 of the Federal Code of Criminal Procedures and article 59 of the Code of Criminal Procedures for Mexico City stipulate that the Public Prosecutor cannot take an accused party into custody based solely on a confession. More importantly, article 249 of the second code aforementioned, stipulates that a confession is not valid if circumstantial evidence exists that makes the allegations seem improbable.

As we will address in detail below, while the defendants are at the prosecutor's office, the police who conduct the interrogation often coerce them into confessions or force them into providing information about the alleged crime. In other cases, police interrogations resort to physical violence and other aggressive measures. This practice has conveniently enabled law enforcement personnel to "prove" many defendants' guilt. Based only on the need for a confession, the police skirt the need for serious investigative work, facilitate the prosecutor's job and allow the judge to deliver a guilty verdict.

Additional data has shown that documentary evidence and expert findings are rarely presented to judges. One investigation done about Mexico City criminal courts² found that the evidence most frequently used in criminal proceedings are testimony provided by the complainant or victim; followed by testimony of the defendants, police, and witnesses. This was confirmed by a

² LUIS PÁSARA, *CÓMO SENTENCIAN LOS JUECES DEL DISTRITO FEDERAL EN MATERIA PENAL* (UNAM, 2006), available at <http://www.bibliojuridica.org/libros/libro.htm?l=1951>.

later quantitative study carried out by the Superior Court of Mexico City and the National Center for State Courts, which concluded that documentary evidence and expert findings are rarely used either by the Public Prosecutor or the defense.³

The above seems to confirm that: (a) most evidence used to support pre-trial investigations in Mexico are rudimentary; and (b) the effectiveness of investigative work performed by the Mexican authorities is limited at best.

Perhaps the main reason why confessions and witness testimony are the most common forms of evidence in Mexican criminal proceedings is because defendants have difficulty raising objections, as information provided directly to authorities other than the judge are difficult to refute. To make matters even worse, appellate courts and tribunals for writs of protection (“*amparos*”) regularly use illicitly obtained confessions as a legal basis to dismiss judgment. In sum, Mexican law clearly tends to favor the complainant’s position.

In a widely disseminated study on individual rights guarantees in Mexico, the United Nations has said that Mexican investigators prefer torture simply because public prosecutors and police officers are unfamiliar with alternative techniques.⁴ In our view, torture is often employed for several reasons. First, police officers, public prosecutors and judges suffer from severe work overload and use torture to help move cases along more quickly. Second, the legal basis validating the accused party’s first testimonial evidence (see section above), provides a strong incentive to continue this practice. Third, when a defendant accuses the authorities of torture, he must bear the burden of proof.

3. *Problems from the Accused Party’s Perspective*

A. *Validity of the Accused Party’s Testimony before the Public Prosecutor*

As mentioned above, judges tend to assign greater weight to testimony given to the public prosecutor despite objections raised by the defendant. This situation generates significant procedural imbalances. First, the situation in which statements are issued in criminal proceedings is generally highly adverse for the defendant. Accused parties often have no contact with a defense counsel and/or submit to pressures and other types of abuse by security forces that coerce them into testifying in support of the prosecutor’s allegations.

To understand this situation in greater depth, we shall first analyze the criteria used to evaluate defendants’ and witnesses’ testimonial evidence de-

³ Seminar Superior Court of Mexico City, Distrito Federal and National Center for State Courts (TSJDF-NCSC) (Sept., 2002).

⁴ See also the chapter about Mexico in HUMAN RIGHT WATCH, REPORT 2009, COUNTRY SUMMARY: MEXICO (Jan. 2010), available at http://www.hrw.org/sites/default/files/related_material/mexico_0.pdf.

spite their later retraction. These criteria deeply affect how criminal proceedings take place, and their application subverts the reasoning used to evaluate evidence; undermines procedural rules; and obstructs the legal principle of immediacy.

The legal theory used to validate the “principle of immediacy”, which gives priority to the initial testimony given to prosecutors, is based on the idea that the first testimony provided by defendants or witnesses is “closer” (or more “immediate”) to the disputed facts.⁵ Another argument given is that the first testimony is inherently more spontaneous, since the witness has not yet received instructions nor been able to deeply reflect on ways to avoid responsibility or otherwise seek advantage.⁶

From a legal perspective, however, the criteria used to evaluate the “principle of immediacy” are not always obligatory. Criteria exist under Mexican law that allow exceptions to this rule. Unfortunately, these exceptions refer to situations in which the “immediacy” would have benefited the defendant. In fact, we discover that the “principle of immediacy” is only deemed valid when the accused party’s first testimony is self-incriminating. In other words, if the defendant first pleaded not guilty but later gives testimony that can be used against him, the first statements are no longer valid to support his innocence. This same exception applies to witness testimony.⁷

As mentioned above, these criteria have had a negative impact on criminal proceedings. Pursuant to this legal theory, for example, a defendant’s con-

⁵ PRUEBA TESTIMONIAL. PRINCIPIOS QUE RIGEN LA INMEDIATEZ PROCESAL PARA SU VALORACIÓN, Tribunales Colegiados de Circuito [T.C.C], *Semanario Judicial de la Federación y su Gaceta*, Novena Época, T. XX, octubre de 2004, tesis I.6o.P.J/6, p. 2251, Registro No. 180282 (Mex.), available at <http://www2.scjn.gob.mx/ius2006/UnaTesislnkTmp.asp?nIus=180282> (last visited June 16, 2011).

⁶ INMEDIATEZ PROCESAL EN MATERIA PENAL. ES VÁLIDO QUE LA AUTORIDAD JUDICIAL OTORQUE VALOR PROBATORIO A LAS PRIMERAS DECLARACIONES DE LOS TESTIGOS REALIZADAS AÑOS DESPUÉS DE COMETIDO EL HECHO IMPUTADO AL INDICIADO, SIEMPRE QUE LA RETRACTACIÓN DE DICHAS TESTIMONIALES NO SE CORROBORE CON ALGÚN MEDIO PROBATORIO Y AQUÉLLAS SE ENCUENTREN CONFIRMADAS CON OTRAS PRUEBAS, Tribunales Colegiados de Circuito [T.C.C], *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo XXVI, Octubre de 2007, tesis VI.2o.P.92 P, página 3199, Registro No. 171155 (Mex.), available at <http://www2.scjn.gob.mx/ius2006/UnaTesislnkTmp.asp?nIus=171155> (last visited June 16, 2011).

⁷ See the following: RETRACTACIÓN, INMEDIATEZ, Tribunales Colegiados de Circuito [T.C.C.], *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo IV, Agosto de 1996, tesis VI.2o.J/61P, página 576, Registro No. 201879 (Mex.), available at <http://www2.scjn.gob.mx/ius2006/UnaTesislnkTmp.asp?nIus=201879>; DECLARACIONES DEL REO. INMEDIATEZ PROCESAL, Tribunales Colegiados de Circuito [T.C.C], *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo IV, Julio de 1996, tesis IX.1o.6 P, página 385, Registro No. 201879 (Mex.), available at <http://www2.scjn.gob.mx/ius2006/UnaTesislnkTmp.asp?nIus=201879>; INMEDIATEZ. PRINCIPIO DE, QUÉ DEBE ENTENDERSE POR, Tribunales Colegiados de Circuito [T.C.C], *Semanario Judicial de la Federación y su Gaceta*, Octava Época, tomo 86, Febrero de 1995, tesis VII.P.J/48, página 43, Registro No. 209212 (Mex.), available at <http://www2.scjn.gob.mx/ius2006/UnaTesislnkTmp.asp?nIus=209212> (last visited June 16, 2011).

fession would normally suffice to prove charges against him, regardless of the non-existence of further evidence. Since there is no incentive to obtain additional evidence, investigators are more likely to use coercion to obtain a confession.

It should also be pointed out that the criterion used to evaluate the defendant's testimony during criminal proceedings goes directly against the principle of the "free assessment of evidence" ("*libre valoración*") ostensibly used by Mexican judges. In this sense, the "principle of immediacy" becomes an obstacle to the independence of courts and judges, and causes needless delays in the application of already obsolete evidentiary procedures ("*sistemas de prueba legal o tasada*").

As a consequence, the judicial criteria applied to the "principle of immediacy" in Mexican criminal proceedings, actually hinder authentic immediacy. For instance, if the application of immediacy requires that the judge personally evaluates all evidence, nothing goes against this more than the requirement that the judge grant full evidentiary value to the defendant's testimony when the judge was not "immediately" present. These criteria are clearly an obstacle to a real adversarial system.

B. *Ambiguity of the Concepts of "Flagrancy" and "Urgency"*

Flagrancy normally takes place when the perpetrator of the alleged crime is caught *in flagrante delicto*.⁸ In the Mexican legal framework, flagrancy is tied to the protection of fundamental rights. In fact, the fourth paragraph of article 16 of the Constitution stipulates that all detentions must comply with the criteria described in the preceding paragraphs, namely: a judicial order; an accusation or complaint; behavior of an illicit nature; and probable guilt. From a protective point of view—which seeks to establish minimal conditions for any type of detention—the principle of flagrancy (based on a necessary response to unlawful behavior) permits the immediate detention of an alleged criminal.

The development of this legal concept has nonetheless deeply altered the meaning of how flagrancy is applied, broadening its scope to the point of debilitating the protection of fundamental rights. Article 193 of the Federal Code of Criminal Procedures—pursuant to reforms implemented on February 8, 1999—sets forth three types of flagrancy: The first section refers to conventional flagrancy (*in flagrante delicto*) which, as has been noted, occurs when the accused party is physically caught in the act of a crime. The second section refers to when the accused is caught *right after* committing the alleged criminal act.

⁸ Álvaro Búnster, *concepto de Flagrancia*, in NUEVO DICCIONARIO JURÍDICO MEXICANO 1710 (IIJ-UNAM-Porrúa, 2000).

The third section describes three additional “sub-types” of flagrancy: first, when the victim, a third-party witness or somebody involved in the crime identifies the defendant as the guilty party; second, when the accused party is caught *in flagrante delicto* with the object, instrument or product of the crime; and finally, when fingerprints or other circumstantial evidence leads to a reasonable presumption of the accused party’s guilt.

For these conditions to apply, the third section of article 193 stipulates the conditions necessary in case of serious crimes; namely, that no more than forty-eight hours pass after the alleged crime; that the pre-trial investigation is already in process; and that no interruption occurs in the criminal proceedings.

The importance of the forty-eight hour period (or longer) pursuant to that set forth in many state codes cannot be over emphasized. In fact, these provisions seem to further restrict fundamental constitutional rights.⁹

C. Limited Participation of the Defense

During the pre-trial investigation, the position of the accused party in respect to that of the public prosecutor is tenuous at best. This situation adversely affects the options available to the defense. In the public prosecutors offices, it is not uncommon to see defendants and defense counsel inactive during the entire prosecution phase. There are several explanations for this phenomenon, all related to the attitude displayed by agents of the public prosecutor, who tend to discourage procedural motions raised by the defense; limit communication between the defense counsel and the accused; and hinder the defense’s ability to present additional evidence.

During the pre-trial investigation, contact between defendants and their counsel is sporadic and communication is severely limited. Moreover, agents of the public prosecutor usually wait until the end of interrogations before they allow the defendant to testify, at which point the forty-eight hour period stipulated in article 16 of the Constitution is nearly over. This causes several problems for the defense. First, the likelihood that the defendant takes action is significantly reduced, given that this is normally when he/she first hears the charges against him and he/she is first allowed to have contact with his attorney. Second, the defense’s arguments are excluded from the line of inquiries developed during the earlier phase of the investigation. By the time the accused is allowed to testify, the file is nearly ready for submission. This limits the defense’s ability to effectively prepare arguments to counter the charges against him and hinders his ability to present evidence. This situation becomes even more complex if state procedural codes are taken into

⁹ With regard to this and various other issues mentioned herein, see HUMAN RIGHTS CENTER: MIGUEL AGUSTÍN PRO JUÁREZ & LAWYERS COMMITTEE FOR HUMAN RIGHTS, LEGAL INJUSTICE (Human Rights Center: Miguel Agustín Pro Juárez A. C., 2001).

account. For example, article 53, section VI, third paragraph of the Code of Criminal Procedures of the State of Coahuila establishes that “the public prosecutor shall not be obligated to notify (the defense) of the admissibility of evidence. In addition, criminal charges may be filed without the need to consider evidence submitted by the defendant or their counsel, the judge having sole authority to decide the admissibility of the same.” In addition, article 128, paragraph E of the Federal Code of Criminal Procedures stipulates that “witnesses shall be received as well as other evidence [...] provided their admission does not obstruct the investigation [...]”. In practice, this translates into significant limitations for the defense if the authorities fail (for whatever reason) to properly exercise their discretionary powers.

D. “Any Trusted Person” as Defense Counsel

Prior to its reform, article 20, paragraph A, section IX of the Political Constitution of the United Mexican States stipulated that accused parties had the right to a proper defense by (a) acting on their own behalf; (b) hiring an attorney; or (c) utilizing any trusted person throughout the entire duration of the proceedings. Consequently, provisions exist in diverse codes that establish the accused right to be heard on his own behalf or vis-à-vis any trusted person or both, pursuant to his election. In case the trusted person or persons designated by the defendant are not lawyers, he also has the right to appoint an attorney-at-law. In case this right is not exercised, a public defendant with a license to practice law is usually appointed.

Despite these so-called protections, public defendants’ jobs are severely limited and their independence compromised. This reality tends to complicate matters for the defendant. First, the public prosecutor’s agents have difficulty finding adequate public defenders to guarantee accused parties an adequate defense during the pre-trial investigation. As a result, they seek lawyers or “any trusted person” among those available at the public prosecutor’s office or the surrounding geographical area. In general, the talents and abilities of these public defenders have been limited. In this respect, the Supreme Court of Justice has ruled that the Constitution does not require that individuals who assume the role of defense counsel have a law degree¹⁰ or even, law expertise.¹¹

¹⁰ DEFENSORES DE OFICIO EN MATERIA PENAL. EL ARTÍCULO 20, FRACCIÓN IX, DE LA CONSTITUCIÓN FEDERAL NO EXIGE QUE TENGAN TÍTULO PROFESIONAL, Pleno de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta*, tomo XI, Abril de 2000, tesis P.LI/2000, página 70 (Mex.), available at <http://www2.scjn.gob.mx/ius2006/UnaTesislnkTmp.asp?nIus=191975&cPalPrm=LI/2000,&cFrPrm=> (last visited June 28, 2011).

¹¹ DECLARACIÓN ANTE EL MINISTERIO PÚBLICO DE LA FEDERACIÓN. NO CONSTITUYE REQUISITO LEGAL QUE LA PERSONA QUE ASISTA A LOS INculpADOS EN SU DESAHOGO SEA UN LICENCIADO EN

In addition, the public defenders' lack of independence and, in general, their shortcomings have significantly impacted the relation between defense counsel and public prosecutors. Often, the defense counsel becomes in effect subordinate to the public prosecutor, with severely limited abilities to operate effectively. In other cases, the public prosecutors appoint "any trusted person" to assist the accused party in the proceedings but, in reality, this individual never even meets the defendant. On a visit to Mexico, the Inter-American Human Rights Commission stated that many "trusted persons" pursuant to that set forth in the Constitution are in fact appointed by the public prosecutor; or a public defender is appointed but never appears at the proceedings, showing up only to sign documents as a formality.¹² In addition to the above situation, a recent empirical investigation has shown that 54% of defense counsels at pre-trial investigations were "trusted persons"; 27% were public defenders; and only 17.8% were private attorneys.¹³

E. Inadequate and Impartial Registry of Detained Parties

Procedural laws contain several provisions that establish the authority's obligation to immediately record all detentions. Article 134 of the Code of Criminal Procedures of Mexico City, Distrito Federal and article 197 of the Federal Code of Criminal Procedures, respectively, stipulate that those who make an arrest pursuant to a court order ("*orden judicial*") must inform the judge of the date, time, and place in which the detention was executed. Similarly, article 269 of the first Code and article 129 of the second Code stipulate that when a defendant has been detained or voluntarily surrenders to the public prosecutor, the latter must verify the time, place, and date of the arrest and whenever appropriate, the name and function of the individual who gave and executed the order.

Despite the above, however, many cases exist in which the authorities fail to comply with that stipulated under law. In other words, the information that must be registered regarding detentions is either incomplete or improperly recorded. To make matters worse, irregularities that arise during the detention are usually never recorded.

In practice, registered information about the time and circumstances of detentions are often falsified. This encourages physical, psychological, and

DERECHO. Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta*, tomo XVII, Junio de 2003, tesis P.LI/2000, página 51, Registro No. 17610 (Mex.), available at <http://www2.scjn.gob.mx/ius2006/UnaEj.asp?nEjecutoria=17610&Tpo=2> (last visited June 28, 2011).

¹² Comisión Interamericana de Derechos Humanos, *Informe sobre la situación de derechos humanos en México, 1998*, § 321 (Sept. 24, 1998), available at <http://www.cidh.org/countryrep/mexico98sp/capitulo-4.htm> (last visited June 28, 2011).

¹³ See MARCELO BERGMAN ET AL., *supra* note 1.

other types of abuse of defendants. In accordance with recent studies, police and soldiers frequently apprehend individuals and detain them for hours or days without filing a report.¹⁴ Several cases presented before the Mexican Commission for the Defense and Promotion of Human Rights demonstrate that defendants are often kept for hours without the ability to communicate; and that during these periods, they are sometimes tortured and forced to sign confessions.¹⁵ Other sources indicate that many detentions are arbitrarily performed at both federal and state levels.¹⁶

In May 2002, the National Human Rights Commission issued a report¹⁷ that denounced the impunity of cases involving torture, illegal detentions, disappearances and extrajudicial executions. In addition, it said that torture, arbitrary detention and mistreatment continue to be “habitual practices” utilized by the Mexican Army and police departments on federal, state and municipal levels. The last report that covers the period between January 1st and December 31, 2010 indicates that illegal detention is the most frequent complaint filed before the commission, with 346 cases reported.¹⁸

II. INTERMEDIARY STAGE / “INDICTMENT”

In the Mexican criminal justice system, once the public prosecutor makes a formal accusation before a judge, a 72 hour period begins —which can be duplicated at the accused party’s request. At the end of this period, a judge decides if sufficient evidence exists to continue the process. This is called the pre-evidentiary phase (*pre-instrucción*) and is similar to the intermediary stage in other legal systems.¹⁹

¹⁴ Recent empirical studies in show that 33% individuals are detained at least three hours (in some cases for days) before the police file a report. ELENA AZAOLA & MARCELO BERGMAN, *DELINCUENCIA, MARGINALIDAD Y DESEMPEÑO INSTITUCIONAL. RESULTADOS DE LA TERCERA ENCUESTA A POBLACIÓN EN RECLUSIÓN EN EL DISTRITO FEDERAL Y EN EL ESTADO DE MÉXICO* 36 (CIDE, 2009), available at <http://es.scribd.com/doc/28582675/Delincuencia-marginalidad-y-desempeno-institucional>.

¹⁵ University of Minnesota, Human Rights Library, *Abstract, Alejandro Ortiz v. Mexico*, available at <http://www1.umn.edu/humanrts/cases/S101-05.html> (last visited June 28 2011).

¹⁶ See Víctor Ballinas, *La PGR y el Ejército encabezan lista de detenciones arbitrarias*, LA JORNADA, Nov. 5, 2002, available at <http://www.jornada.unam.mx/2002/11/05/010n2pol.php?origen=politica.html>. See also Víctor Ballinas, *El plan cero tolerancia aumentaría detenciones ilegales, advierte ONU*, LA JORNADA, Nov. 9, 2002, available at <http://www.jornada.unam.mx/2002/11/09/035n1soc.php?origen=soc-jus.html>.

¹⁷ Also see Informe Especial de la Comisión Nacional de los Derechos Humanos sobre los Casos de Homicidios y Desapariciones de Mujeres en el Municipio de Juárez, Chihuahua, 2003, sección VI.E, available at <http://www.cndh.org.mx/lacndh/informes/espec/juarez2003/index.htm>.

¹⁸ CNDH, *INFORME DE ACTIVIDADES 2010*, at 391, <http://www.cndh.org.mx/lacndh/informes/anales/2010activo.pdf>.

¹⁹ JULIO CÉSAR HERNÁNDEZ PLIEGO, *PROCESO PENAL MEXICANO* 408 (Porrúa, 2002).

During this stage, we shall focus on one overarching problem that reveals not only how courts function in practice but how accused parties must defend themselves: the limited constitutionally-dictated period for the issuance of a formal indictment.

Once the public prosecutor places the defendant at the judge's disposition, the court has a period of seventy-two hours to resolve the defendant's legal situation. This period, at the defendant's request, may be doubled to allow more time to gather evidence. Judges normally have 72 hours to resolve the legal predicament of criminal defendants placed before them and, in extraordinary cases, 144 hours.

There are three types of constitutionally-mandated deadlines. First, the court order to dismiss charges (*auto de libertad*) issued when the judge believes that the public prosecutor's allegations fail to support the filing of criminal charges. Second, the order for trial (*auto de sujeción a proceso*), a recognition that elements exist to continue the process to determine whether the defendant is guilty, but without preventive imprisonment. Finally, a formal indictment is issued in which the judge finds the necessary elements to proceed with criminal charges and, in addition, orders the accused party to serve in preventive prison. In the latter two cases, judges are obligated to issue rulings that meet the requirements set forth in article 161 of the Federal Code of Criminal Procedures: (a) pre-trial testimony of the accused party; (b) proof of the "body of a crime" sanctioned by imprisonment; (c) probable guilt; and (d) no verifiable circumstantial evidence that may relieve the accused party of guilt or abrogate the criminal charge.

The above criteria require that the judge realize a series of important steps during a seventy-two hour period or, as the case may be, one hundred forty-four hours, a time period clearly inadequate to avoid the risk of error. We must keep in mind that during this period, the judge must settle the matter, monitor the detention and take the pre-trial statement. In addition, judges are responsible for many cases, all involving voluminous details and urgency. For this reason, pressure exists not only as a result of time deadlines but also significant workloads.

In practice, the time periods stipulated in article 19 of the Constitution are inadequate to properly evaluate each case. These periods are also insufficient to satisfy the requisites in a diligent and timely manner. As a result, the risk of improperly assessing evidence is extremely high.

One reason for allowing extensions to one hundred forty-four hours is to provide the defendant more time to prepare a proper defense. Even with this extension, however, the time is inadequate; in most cases, it is simply not possible. In fact, it isn't usually until the start of the pre-trial statement within the first forty-eight hours of the constitutionally-mandated term that the defendant is permitted to have any contact with his defense counsel and first learns the details of the pre-trial investigation. In other words, until that time the accused is unaware of the formal charges and evidence to be used against him.

As a result, judges tend to formally indict an extremely high percentage of individuals taken into custody. Given the time constraints, judges often end up lowering the standards required to properly evaluate criminal indictments.

It is often pointed out that the formal indictment does not represent final judgment but rather the beginning of a multiple-staged legal process; in practice, however, studies show that this ruling is mostly influenced by the constitutionally-mandated deadline (“*auto de término constitucional*”).²⁰ In criminal proceedings carried out in Mexico City, not only are templates used to facilitate detention orders and formal indictments, but also their content.

III. COURT INVESTIGATION

Once the judge issues a formal indictment or an order for trial (“*sujeción a proceso*”), the third phase of the criminal investigation begins. At this stage, the following problems frequently appear:

1. *Problems from the Point of View of the Victim or Injured Party*

As described in the section about the pre-trial investigation, the victim’s precarious procedural situation hinders his full participation in the proceedings. This is a major problem, not only because the victim’s full participation in the investigation is indispensable to clarify the charges brought against the defendant but also because it hinders the victim’s own ability to protect his interests, such as the restitution of damages. As a result, the victim is often unable to defend his basic rights.

2. *Institutional Problems*

A. *Judges’ Failure to Attend Hearings*

Non-compliance with procedural immediacy is another major problem in Mexico’s criminal justice system. Judges often fail to attend important proceedings and limit their participation to “delicate matters or complicated cases”. For instance, one of the most important procedural steps, the pre-trial statement —critical to the fate of the accused party— is rarely if ever heard by the judge. In spite of a total lack of immediacy, the judge never directly

²⁰ HUGO ALEJANDRO CONCHA & JOSÉ ANTONIO CABALLERO, DIAGNÓSTICO SOBRE LA ADMINISTRACIÓN DE JUSTICIA EN LAS ENTIDADES FEDERATIVAS. UN ESTUDIO INSTITUCIONAL SOBRE LA JUSTICIA LOCAL EN MÉXICO 204 (National Center for State Courts-Instituto de Investigaciones Jurídicas, 2001), available at <http://www.bibliojuridica.org/libros/1/47/6.pdf>.

hears the defendant's version of the facts or considers irregularities that may have occurred during the pre-trial investigation.

Despite the judges' obligation to diligently follow the proceedings and be present at hearings, this rarely occurs in practice. Evidence of this emerged from a survey carried out in 2002,²¹ where one of the questions—whether the judge was present at the pre-trial statement—was answered affirmatively by merely 30% of those interviewed. Even more significantly, 90% of respondents reported that the defendant never had an opportunity to speak with the judge. In this sense, it appears judges have delegated many of their procedural duties to court clerks. Which leads to the response to another question asked in the same survey: “Who do you think controls the hearings?” 51% of respondents said the court clerk, whereas only 8.5% mentioned the judge.²²

Some commentators believe that as a result of the judges' loss of control, it is likely that procedural rules and guidelines are often inadequately followed. This may not only cause deficiencies in procedural protection (“*tutela de garantías*”) but also—not infrequently—erroneous judgments. It is said that judges who fail to attend hearings run a higher risk of misinterpreting evidence.²³ It isn't unreasonable to assume that judges who are absent at key points in the proceedings may not only create a distance between themselves and defendants, but also between themselves and the process.

Nevertheless, it would be unfair to comment on this lack of immediacy without also mentioning the conditions under which judges and their clerks work. An accurate assessment of this situation leads us to believe that the workload assumed by Mexican judicial institutions is often excessive. As a result, judges have no choice but to conduct several hearings simultaneously. Nevertheless, the emphasis placed on recording every act in writing produces an important body of documentary work that contains every detail of the hearings in a way that allows judges to access relevant information at any time.

B. *Limited Transparency of the Hearings and, in General, Criminal Proceedings*

The limited transparency in the Mexican criminal justice system is closely tied to the way in which proceedings take place. First, courtroom conditions tend to be far from adequate; the physical space utilized for hearings, for example, is usually limited. The opportunity for defendants to establish adequate contact with their defense counsel is practically non-existent. In addition, the emphasis placed on recording every detail in writing often prevents proper observation of what actually happens at the hearings. It wouldn't be

²¹ See MARCELO BERGMAN ET AL., *supra* note 1, at 52.

²² *Id.* at 52-53.

²³ Centro de Derechos Humanos “Miguel Agustín Pro Juárez” & Lawyers Committee for Human Rights, *Injusticia legalizada* 66 (Centro de Derechos Humanos “Miguel Agustín Pro Juárez” A. C., 2001).

far from the truth to say that hearings actually revolve around typewriters and computers used to capture what happens.

Even though important privacy-related issues exist for the parties involved, we believe that transparency in and of itself helps to reduce irregularities throughout the entire course of criminal proceedings.

C. *Judges' Limited Independence*

Judicial independence is an indispensable element to assure that judges are able to impartially exercise their duties and protect defendants' rights. Since the mid-1990s, Mexican states have been implementing judicial reforms designed, among other things, to strengthen judicial independence. The results have been uneven, as different geographic regions grant different degrees of independence to their judges.²⁴

One issue that generates significant conflict in matters related to judicial independence involves judges' assessment of evidence presented by the public prosecutor. This situation has given rise to tension between judicial authorities and public servants, since the former must authorize or disapprove allegations made by the latter. In this sense, judges are not infrequently viewed as "caving in" to the public prosecutor, who may threaten them with legal action with respect to their rulings. To make matters even worse, elected officials occasionally realize media witch-hunts that put into question judges' integrity.

As judicial independence becomes more precarious, the capacity of the parties involved in the proceedings to properly defend their rights become more limited. In large measure, this phenomenon is reflected in the attitudes of judges who tend to unconditionally favour the complainants or simply invert the principle of the presumption of innocence, as shall be analyzed in the next section.

3. *The Defendant's Perspective*

A. *Writ of Protection ("Amparo") Inadmissible for Fait Accompli ("Actos Consumados")*

Writs of protection ("*amparos*"), understood as means to protect defendants against abuse by the authorities in criminal proceedings, are designed to safeguard the individual rights of all citizens. This may take the form of a demand requiring the authorities to respect accused's rights; or a request for a remedy to address victims' rights violation.

As a way to avoid abuses in criminal proceedings, however, writs of protection are limited. For instance, some provisions restrict the chance to request a

²⁴ See CONCHA & CABALLERO, *supra* note 20.

writ of protection when the case has already proceeded to the following stage. As a result, an accused party found guilty in a court of first jurisdiction who alleges coercion by the authorities often loses access to *any* type of protection, as the violation of his individual rights is deemed irreparable.²⁵

Pursuant to criteria used by the Federal Judicial Branch, when guarantees stipulated in article 16 of the Political Constitution of the United Mexican States are violated, grounds for their admissibility based on a change of legal status only apply in cases where there is no judgment in a court of first jurisdiction.²⁶

B. *The Lack of Extraordinary Remedies to Address Basic Rights Violations*

Another way to confront violations of basic rights in the criminal process is the recognition of innocence (“*reconocimiento de inocencia*”). Due to their peculiar nature and history, however, Mexican judicial institutions have been generally unable to resolve due process violations. In effect, the “recognition of innocence” is an extraordinary remedy that permits an accused party to present circumstantial evidence to show that the judgment was made in error. In accordance with Mexican judicial theory, however, this remedy is of an “extraordinary and exceptional nature that recognizes the principle of judicial security based on the fact that final judgment seeks to correct genuine injustices committed by courts in cases where defendants have been condemned and can subsequently show, without any doubt, that they are innocent.”²⁷

In sum, the objective of the “recognition of innocence” does not permit the reparation of fundamental rights violated during the criminal process. The defendants seeking the “recognition of innocence” insist that the Supreme Court of Justice of the Nation or a state Superior Court of Justice review the final judgment, re-evaluate the evidence, examine alleged procedural violations and, when appropriate, modify the verdict. This approach, however, has resulted in many groundless “recognition of innocence” cases.

²⁵ Cf. Miguel Ángel López Aguilar, *Análisis del artículo 59, fracción XV, párrafo segundo del proyecto de Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos*, 16 TEPANTLATO 10 (2010), available at http://www.tepantlato.com.mx/tepantlato/revistas_pdf/16.pdf (last visited Oct. 15, 2010).

²⁶ Article 73, section X, of the Law of Amparo states that violations to the rights of defendants contained in articles 19 and 20 of the Constitution are deemed irreparable once the sentence of first instance has been pronounced. ORDEN DE APREHENSIÓN. INTERPRETACIÓN DE LA FRACCIÓN X DEL ARTÍCULO 73 DE LA LEY DE AMPARO, VIGENTE A PARTIR DEL NUEVE DE FEBRERO DE 1999, Novena Época, Tribunales Colegiados de Circuito [T.C.C.], Semanario Judicial de la Federación y su Gaceta, tomo XIV, Octubre de 2001, tesis VIII.1o. J/17, página 970 (Mex.).

²⁷ Novena Época, Tribunales Colegiados de Circuito [T.C.C.], Semanario Judicial de la Federación y su Gaceta, tomo V, Febrero de 1997, tesis I. 1º. P.22P, página 785 (Mex.).

In fact, only one real and well-grounded case involving “recognition of innocence” ever succeeded in Mexico: in 1990, Alberto Saba Musalli.²⁸

4. *Presumption of Innocence in Mexican Criminal Proceedings*

Finally, we dedicate a section to explore the defendant’s right to the “presumption of innocence”. In practice, we discover that problems encountered in the exercise of this right clearly show that due process, in general, is often absent in Mexican criminal justice. The lack of this basic right is especially worrisome as—in my opinion—it adversely affects the entire criminal justice system.

If one carefully considers the aforementioned problems, it becomes clear that the Mexican criminal process severely restricts defendants’ rights to the presumption of innocence. There is in practice no presumption of innocence during the first phases of the process, which is to say during the pre-trial investigation and pre-evidentiary stages, as a result of the procedural imbalance between the public prosecutor and defendant. Among factors that explain this absence is that the presumption has not always been part of the Mexican legal tradition; that until the reform of June 2008, the Mexican Constitution never explicitly mentioned it. Even more importantly, Mexican jurisprudence never developed a similar criterion to the concept of “beyond a reasonable doubt” in the common law tradition. In this sense, we observe that personal injunction proceedings (“*medidas cautelares personales*”) such as pre-trial detention (“*arraigo domiciliario*”) and preventive imprisonment (“*prisión preventiva*”), are so widely accepted in Mexican criminal law that the authorities rarely consider the defendant’s specific circumstances. In other words, the general rule is that the defendant—regardless of the offense—remains in prison during the entire legal process. Another example in which the presumption of innocence is hardly recognized is during the judgment phase (“*fase del juicio*”). In practice, little or no attention is given to the fact that sufficient proof of having committed a crime must first exist in order to supersede the presumption of innocence.

In general, the application of preventive imprisonment in Mexico is one of the main violations to the fundamental right to the presumption of innocence. The Inter-American Commission of Human Rights (IACHR) has established that preventive imprisonment, as a general rule in criminal proceedings is contrary to the standards of the American Convention, since it violates both the right to individual liberty and the presumption of innocence.

The text of article 18—still applicable, as the reform established a period of eight years before it goes into effect—establishes the use of preventive

²⁸ Reconocimiento de inocencia 8/89, Ministro ponente: Luis Fernández Doblado. Secretaría: Lic. Edith Ramírez de Vidal, Suprema Corte de Justicia de la Nación [S.C.J.N.], Mayo de 2007 (Mex.).

imprisonment in cases involving corporal punishment, which is especially permissive within the context of comparative constitutional law. For the IA-CHR, preventive imprisonment should only be used in special cases where individual circumstances require its application, or when a threat exists against society and/or public order.²⁹ The objectives set forth in the Mexican doctrine³⁰ are the streamlining of criminal proceedings, the improvement of detention center conditions and periodic monitoring of detentions. For these reasons, the relation between the presumption of innocence and preventive imprisonment continues to be subject to widespread debate.

Given the imbalance that exists in the first stages of Mexican criminal proceedings, the right to the presumption of innocence has been inverted in such a way that starting from the pre-investigation stage, the defendant bears the burden of disproving all evidence presented against him. For this reason, the public prosecutor is rarely required to prove the defendant's guilt. Thus, the problem begins in the pre-trial investigation. During the constitutionally mandated phase, the judges review the foundation of the pre-trial investigation and, on this basis, issue a formal indictment or an order for trial. However, in reality judges find it easier to rubberstamp the allegations contained in the pre-trial investigation rather than go against the public prosecutor.

IV. BACKGROUND OF THE LEGISLATIVE REFORM

We can say that an indirect precedent for the constitutional reform enacted on June 18, 2008, was the constitutional reform bill called the structural reform of the Mexican criminal justice system presented in 2004 by President Vicente Fox. This bill consisted not only of an important series of constitutional reforms³¹ but also significant legislative changes.³² For various reasons, it

²⁹ Informe N 2/97 de la CIDH sobre Argentina (Report No. 2/97 of the Inter-American Commission of Human Rights on Argentina). In its Report, the IACHR also pointed out that preventive detention of a person for a prolonged period can only be justified on legitimate grounds. However, the Commission expressed the conviction that in all cases the universal principles of presumption of innocence and respect for individual freedom must be taken into account. The justifications mentioned by the IACHR in its report are the following: the presumption that the defendant has committed a crime; the danger of flight, the risk of new crimes, the need to investigate and to prevent collusion, the risk of pressures on witnesses, and the conservation of public order.

³⁰ See Julio César Hernández Pliego, *Presunción de inocencia y prisión preventiva*, 1 ITER CRIMINIS 127 (2001); SERGIO GARCÍA RAMÍREZ, *MANUAL DE PRISIONES* (Porrúa, 3rd ed., 1994).

³¹ The proposal included reforms to articles 16, 17, 18, 19, 20, 21, 22, 29, 73, 76, 78, 82, 89, 93, 95, 102, 105, 107, 110, 111, 116, 119 and 122 of the Political Constitution of the United Mexican States.

³² The bill proposed a new Federal Code of Criminal Procedure, as well as new texts for various laws: the Federal Law for the Implementation of Criminal Penalties, the General Law of Criminal Justice for Adolescents, the Law of the National Attorney's General Office, the

never received sufficient support in Congress. Its main effect was therefore to initiate a debate about the effectiveness of the Mexican justice system.

Immediately following this bill, several Mexican entities implemented criminal justice reforms at a state level. In the summer of 2004, the border state of Nuevo Leon was the first entity to implement a partial reform by introducing oral testimony at the intermediate or pre-investigative stage of proceedings, applicable for a series of minor crimes in accordance with that set forth in state legislation. In 2004, the State of Mexico also performed a similar reform by introducing oral testimony applicable to crimes involving negligence (*delitos imprudenciales*), starting from the preliminary investigation stage.

It was in the states of Oaxaca and Chihuahua, however, where new codes of criminal procedure were first drafted and modifications done to the structure and organization of judicial institutions, especially in local judicial entities. On January 1, 2007 in Chihuahua City and September 9, 2007 in the Istmo de Tehuantepec region in Oaxaca, new criminal adversarial procedures were first introduced. These new models notably influenced the drafting of the new constitutional text.

In the June 18, 2008 reform, the legislative process started with the introduction, between September 2006 and October 2007, of 10 constitutional reform bills and one bill to reform the Organic Law of the Federal Judiciary Branch;³³ most of the proposals were sent to Mexico's Chamber of Deputies. At first, only the Constitutional Points Committee was intended to issue an assessment (*dictamen*), but in December 2006 the procedure was modified so that the assessment would be issued jointly with the Justice Committee.

Among the bills under consideration, the one presented on December 19, 2006, by representatives César Camacho, Felipe Borrego Estrada, Raymundo Cárdenas Hernández, and Faustino Javier Estrada González of the parliamentary groups of the *Partido Revolucionario Institucional* (PRI), *Partido Acción Nacional* (PAN), *Partido de la Revolución Democrática* (PRD), and the *Partido Verde Ecologista de México* (PVEM) stand out.

Organic Law of the Federal Police, and the Public Security Law, Regulations of Paragraphs 7 and 8 of Article 21 of the Political Constitution of the United Mexican States. Similarly, proposals were introduced to reform the Federal Law Against Organized Crime, the Organic Law of Federal Public Administration, the Organic Law of the Federal Judiciary Branch, the Federal Law of Public Defenders, the Regulations of Article 5 of the Constitution in relation to the exercise of Professions in Mexico City, Distrito Federal, the Federal Criminal Code, the Regulations for the Law of Writs of Protection of Articles 103 and 107 of the Political Constitution of the United Mexican States, and the Regulations of Sections I and II of Article 105 of the Political Constitution of the United Mexican States.

³³ See Decreto por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, Cámara de Diputados (Jun. 18, 2008), available at http://www.diputados.gob.mx/LeyesBiblio/proceso/lx/089_DOF_18jun08.zip (for the texts of the initiatives and rulings) (last visited Oct. 10, 2010).

Two other bills presented on March 7, 2007, by the representative César Camacho Quiroz of the PRI parliamentary group are also notable, since they both assume the position of the “Red para los Juicios Orales”, a civil society network promoting criminal justice reform. By means of these proposals, we encounter the origin of the texts that helped advance the adversarial system as it then operated in several States of the Federation.

On March 9, 2007, President Calderon introduced two bills³⁴ to the Senate in matters related to security and criminal justice, with the intention of fighting impunity, strengthening citizen security and providing additional powers to the Federal Police and Public Prosecutor in the national fight against organized crime.

Other proposals were introduced on April 2007, by the parliamentary groups of the PRD, *Partido del Trabajo* (PT) and *Partido de la Convergencia* (*Convergencia*), complemented by five additional bills presented on October 4, 2007, by the PRD which in essence defines the opposition’s stand.

All these bills were based on the idea that the Mexican criminal justice system was no longer effective and, for this reason, required urgent reform; and coincided with the need to recover citizens’ trust in the legal institutions responsible for maintaining and imparting justice. As a result, the debates both in committee hearings and plenary sessions, centered on identifying options available for restructuring the criminal system and, above all, redefining the scope of powers granted to the police and public prosecutor.

Most discussions regarding the reform’s content were held in the committees established in both the Chamber of Deputies and the Senate. The assessment that won the most agreement between the political parties was presented on December 12, 2007, in the Chamber of Deputies. On that date, the majority of deputies rejected the PRD’s request to re-initiate the debate and voted to approve the measure.

Once approved, a draft was sent to the Senate where it was discussed on December 13, 2007. At this time, the majority of senators decided to modify two important aspects of the text: first, the elimination of direct access by the public prosecutor to “tax, financial, trust, stock, electoral, and other information that is considered private or confidential by law, when related to the criminal investigation;”³⁵ and second, the modification of terms that permit-

³⁴ See Decreto por el que se reforman diversos artículos de la Constitución Política de los Estados Unidos Mexicanos, Gaceta Parlamentaria, Senado de la República, 13 de Marzo de 2007 (Mex.), available at <http://www.senado.gob.mx/index.php?ver=sp&mn=2&sm=2&id=2486&lg=60>; Proyecto de Decreto que reforma el artículo primero de la Ley Orgánica de la Procuraduría General de la República, initiative, Senado de la República, 13 de marzo de 2007 (Mex.), available at <http://www.senado.gob.mx/index.php?ver=sp&mn=2&sm=2&id=2492&lg=60> (last visited June 16, 2010).

³⁵ This authorization was included in the tenth paragraph of article 16 of the Mexican Constitution. This can be seen in the minutes received any House of Deputies on February 1, 2008, page 3.

ted police to break into private homes without a court order in cases “when information or knowledge exists of an actual or imminent threat to the life or physical integrity of others.”³⁶

Upon completing this change in accordance with procedures established for the reform of the Political Constitution of the United Mexican States, the modified draft bill was returned to the Chamber of Deputies. Given that on December 13th was the last annual session of Congress, the reform bill was not discussed again until February 26, 2008; at this session, the deputies decided to eliminate the paragraph granting authorization to the police to enter private homes without a court order.

Once this draft was approved, it was sent back to the Senate where it was discussed and approved on March 6, 2008. Upon approval, the modified drafts were sent to the legislatures of each of the 32 states in the Mexican Republic so they could debate the measure and, as the case may be, grant approval. On May 28, 2008, after officially announcing that the draft had been approved by 19 state legislatures, the Permanent Commission of the National Congress formally authorized the constitutional reform. The Executive Branch published this reform on June 18, 2008.

V. CONTENT OF THE REFORM

For readers unfamiliar with the content of the constitutional reform decree published on June 18, 2008, it will probably be simpler to describe its scope and content by using three separate parts of the reform as points of reference. Although these sections are related among and between themselves, they each have a distinct objective:

The first part of the reform is intended to strengthen two aspects of the institutions that comprise the criminal justice system: the creation of a public security system and the modification of principles upon which the prison system is based.

With respect to public security, changes were made to articles 21 and 73, section XXIII, and article 115 of the Constitution in order to implement new regulations that establish a basis for coordinating elements of the National Public Security System. These changes represented a clear attempt to coordinate the Public Prosecutor and federal, state, and municipal police forces; as well as to integrate public security on a national level. In sum, this reform seeks to update the system created in 1995 that, despite significant financial investment, failed to generate the results expected in matters related to Public Security.

In the definition of the section of the reform related to the National Public Security System, conditions prevailing at police departments on a local, state,

³⁶ *Id.*, at 4.

and federal level were evaluated. The constitutional reform process openly recognized significant regional differences with respect to waste, corruption and, in some cases (as has been recognized), the infiltration of drug traffickers in state institutions. While certain states and municipalities were found to have well-trained and effective police departments, others were less favorably positioned. Despite undeniable progress, the federal police institutions have not yet been able to consolidate their work.

The reform thus established the need to pass a public security law which clearly facilitates the coordination of the National Public Security System based on the regulation of several elements: first, the selection, acceptance, training, commitment, evaluation, recognition and certification of the members of public security institutions; and second, the establishment of a uniform and nation-wide law enforcement career. In addition, specific regulation will eventually be implemented to certify police officers and public prosecutors, requiring not only their registration in a national system to avoid the admission of felons or members of organized crime, but also a way to guarantee that police personnel acquire the knowledge and abilities necessary to perform their duties within a framework based on respect for human rights. This law officially went into effect on January 2, 2009.³⁷

In this part of the reform, it may be pointed out that article 18 of the Constitution, which establishes the basis of the Mexican penitentiary system, was also modified. These changes were mainly related to terminology and focused on operations. On the one hand, the health of imprisoned individuals was included as a basic human right; on the other, the words “corporal punishment” (“*pena corporal*”) were replaced with the term “imprisonment” (“*pena privativa de la libertad*”). As a result of its degrading meaning, the word “prisoner” or “convict” (“*reo*”) was also replaced with the term “defendant” (“*sentenciado*”). Similarly, the term “social rehabilitation” (“*readaptación social*”) was deemed inappropriate to describe defendants who already finished their sentences and returned to society. For this reason, the term was changed to “social reintegration” (“*reinserción social*”).

The new wording of article 18 establishes a prison system organized around the principles of work, training, education and health as means to help defendants socially reintegrate to society and avoid relapse into crime.

Second, the reform contains a series of modifications that grant increased powers to the public prosecutor and police in order to combat organized crime. In this part of the reform, we shall first point out the constitutional regulation of the “restriction order” or “pre-charge detention” (“*arraigo*”).

This legal concept permits the deprivation of an individual’s personal freedom by means of a judicial order for a determined period of time —up to

³⁷ Ley General del Sistema Nacional de Seguridad Pública (L.G.S.N.S.P.), *as amended*, Diario Oficial de la Federación [D.O.], 2 de enero de 2009 (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/LGSNSP.pdf> (last visited Jun. 17, 2011).

80 days— by means of a request made by the public prosecutor during the preliminary phase of the criminal investigation, before formal charges are filed before a judge, in order to prevent the accused party from leaving the jurisdiction, hiding from the authorities or influencing other individuals involved in the investigation.

The *arraigo*, one of the most controversial legal procedures under Mexican law since it involves depriving defendants of liberty without a hearing, was first introduced in the legal system via procedural codes and applies in cases involving serious felonies and organized crime. In addition, a new definition of organized crime was inserted into the text of the Constitution based mostly on elements of the existing legal framework.

Within this section of the reform, we encounter the legal precedent already accepted by federal courts that in cases involving certain crimes (such as kidnapping), family members of the victim can record conversations with the alleged criminals and later use these tapes as evidence in criminal procedures as an exception to the general rule of the inviolability of private communication. Under certain circumstances, this evidence shall henceforth be admissible at hearings.

In matters related to the prison system, the reform establishes the existence of high security centers built for members of organized crime and other prisoners requiring special security. A proposal was also presented to restrict the communication of these prisoners with third parties —except with defense counsel— and impose special security measures.

Similarly, the possibility of preventive prison was established in cases involving allegations of organized crime. The judge shall make rulings involving preventive prison.

In addition, a suspension of the terms of the statute of limitations was established for criminal acts and processes related to organized crime. In order to prevent individuals arrested for their participation in organized crime from escaping justice, the statute of limitations may be suspended once a relation to organized crime has been established.

In these cases, the constitutional reform carves out an exception to the principle of immediacy when it is no longer possible to replicate the evidence at trial because a witness died as a result of an act attributable to the defendant; or because a real risk exists for witnesses or victims willing to testify.

With respect to the accused person's right to know the reason for his detention at the time of his arrest or at his initial appearance before the public prosecutor, an exception was also made in cases involving organized crime. Under the reform, authorization may be given to maintain the name of the accusing party in secret.

This part of the reform is especially important because it introduces the procedure of asset forfeiture ("*extinción de dominio*"). With this legal concept, the State seeks to benefit from goods seized based on information that confirms their use as instruments, objects or products of activities related to organized

crime, drug trade, kidnapping, car theft or human smuggling; or when they are intended to hide or mix merchandise acquired as a result of said offences.

Enacted to find effective tools to help dismember criminal organizations, limit their pernicious effects, prevent their reproduction and expedite the forfeiture of assets, these reforms are considered necessary to help creating effective criminal procedures and an independent judiciary.

In relation to the fight against criminal organizations, section XXI of article 73 of the Constitution was modified so that Mexico's Congress may now solely and exclusively legislate in matters related to organized crime, which means that only the Federation shall be considered competent to judge crimes of this nature.

It should be pointed out that the section of this reform related to national public security, the prison system and the new rules to help combat organized crime already entered into effect the day after their publication on June 19, 2008.

Finally, the third part may be categorized as the new adversarial model pursuant to that set forth in article 16, second and thirteenth paragraphs; article 17, third, fourth and sixth paragraphs; articles 19, 20 and 21, seventh paragraph.

This third part is intended to establish a criminal system that guarantees due process and the presumption of innocence; assures the civil rights of victims and defendants; and generally protects all citizens from abuse by the authorities. With this purpose, an adversarial criminal system was established governed by the principles of public access, confrontation and cross-examination, concentration, continuity and immediacy, all intended to assure procedural balance between the defendants, prosecution and crime victims.

To achieve this, profound changes were made to the judicial structure in order to create the figure of preliminary proceedings judges ("*juez de control*") who shall be responsible for overseeing issues involving the constitutional guarantees of both the defendant and victim. In this way, practices based on written procedures were abandoned so that this judge may quickly resolve requests by the authorities for injunction proceedings and investigative work while, at the same time, respecting the parties' constitutional rights.

Defendants' rights shall now be regulated with greater clarity, including the explicit introduction of the right to the presumption of innocence. The use of preventive imprisonment shall now be restricted unless the public prosecutor clearly demonstrates that other injunction proceedings would be insufficient to protect the victim or community and/or avoid interference with the investigation. Similarly, crime victims' rights shall be strengthened. In this part of the reform we also find changes in the evidentiary parameters used by public prosecutors to make accusations.

This new system shall go into effect eight years after the day following publication of the Decree, meaning that it shall not become effective until June 18, 2016.

In this part of the reform, the greatest challenge shall in fact be its implementation; although it should also be mentioned that as of October 2010, six states of the Federation have already implemented or initiated the implementation of this reform: Chihuahua (starting on January 1, 2007); Oaxaca (September 9, 2007); Morelos (October 30, 2008); Zacatecas (January 5, 2009); the State of Mexico (October 1, 2009); Durango (December 14, 2009); and Baja California (August 3, 2010).³⁸

³⁸ Consejo de Coordinación para la Implementación del Sistema de Justicia Penal, *Reporte: Reforma legal en los estados*, available at <http://www.setec.gob.mx/reformac2.htm> (last visited Oct. 10, 2010) (report on the implementation process may be accessed on the site of the Technical Ministry of the Coordination Council for the Implementation of the Criminal Justice System).