

THE IMPLEMENTING LAW OF MEXICO'S NATIONAL PROSECUTOR'S OFFICE

Progress and Pending Issues

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REPORT

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In 2014, Mexico's Constitution was reformed to create an autonomous National Prosecutor's Office (*Fiscalía General de la República*), separate from the Executive Branch. The reforms called for the new office to replace the Attorney General's Office (*Procuraduría General de la República*, PGR), an institution marred by a lack of independence and minimal results.

On January 18, 2019, in an accelerated process without civil society participation or a true assessment of the candidates, the Mexican Senate selected the acting head of the PGR, Alejandro Gertz Manero, to be the first national prosecutor, a post he will occupy for the next nine years.

Below, we present an analysis of progress made in developing the structure of this new institution as well as the issues that remain pending for this new stage.

INTRODUCTION

On December 14, 2018, the “implementing law” (Ley Orgánica) of Mexico’s new National Prosecutor’s Office was officially published.¹ This law is important because it sets the foundation for ensuring that the first national prosecutor, as well as the special prosecutors for investigating human rights violations, electoral crimes, corruption cases, and other crimes, are politically independent from the president and his close circle and have the background and capacity necessary to properly investigate these cases. The law also establishes the institutional framework and tools with which the National Prosecutor’s Office will operate.

The draft of the law, which was presented in Mexico’s Congress by MORENA (the political party of the new President, Andrés Manuel López Obrador), is the result of working groups held between the new government and civil society representatives. While some of the organizations’ proposals were not taken into account, the final version of the law represents an important step forward in terms of developing the autonomy of the new institution, which is critical in the fight against impunity in Mexico, and for civil society participation in this process. However, the law itself is insufficient. It is paramount that National Prosecutor Gertz demonstrates the will to properly implement the law and to ensure the National Prosecutor’s Office’s effectiveness, as well as its openness to citizens and victims.

Citizens’ demand for an independent, autonomous National Prosecutor’s Office, capable of confronting the fact that more than 93 percent of crimes in Mexico are not reported or investigated,² stood at the center of the presidential debate last year and forced candidates to take a stance on the issue. However, unlike other candidates, President López Obrador stayed silent about having a National Prosecutor’s Office separate from the Executive Branch.³ In fact, just before the election, he publicly stated that he already had a list of possible candidates in mind for the position of first national prosecutor, all of whom were close to his political party.⁴

In January, the Senate sent López Obrador a list of 10 candidates, from which he chose three finalists to send back to the Senate. Two of the three he chose for the Senate’s final selection were individuals he proposed during the campaign period. The third individual was Alejandro Gertz Manero, who López Obrador named to head the PGR until the selection process for first national prosecutor was finished.

Given this context, we provide below a general overview of the main opportunities and progress made with the implementing law for the National Prosecutor’s Office, as well as the concerns and challenges that persist.

PROGRESS

THE CITIZENS' COUNCIL OF THE NATIONAL PROSECUTOR'S OFFICE

The implementing law introduces an important avenue for citizen participation in the implementation and operation of the new prosecutor's office: the Citizens' Council. The Citizens' Council is a permanent and specialized body of the National Prosecutor's Office, charged with providing important support and advice. It is composed of five citizens with distinguished

backgrounds in criminal justice and human rights who are named by the Senate through a public, transparent selection process based on the qualifications of the candidates. Members of the Citizens' Council hold their position for a single, five-year term, and are replaced in a staggered manner.

This citizen-led body can issue opinions and recommendations about the structure and function of the National Prosecutor's Office and its various

departments, such as its internal regulations, budget, and professional career service plans. Additionally, one of its most important responsibilities is to oversee the implementation of the institution's Criminal Prosecution Plan (discussed below) and to periodically monitor progress made.

While the Council's opinions and recommendations are not binding, the national prosecutor and the various bodies that make up the National Prosecutor's Office are required to respond to them, and must indicate their reasoning behind accepting or rejecting them. Because its recommendations are public, the Citizens' Council is a powerful accountability mechanism for the new institution.

However, one of the Council's biggest weaknesses is that the national prosecutor has the power to remove its members when he or she determines that their recommendations "interfere with substantive aspects of the prosecutor's responsibilities" or when they "disclose confidential information".

Given the vagueness of these circumstances, it is important that the reasons for removing a Council member be developed in a more specific manner in order to prevent them from being used to manipulate or control the Citizens' Council, which is precisely meant to act as one of the main counterweights to the National Prosecutor's Office.

The implementing law (as outlined in its 10th transitory article) states that the members of the Citizens' Council must be named within 30 business days after the national prosecutor is appointed. Since Gertz was appointed on January 18, this creates a deadline of March 1, 2019.

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NEW SPECIAL PROSECUTOR'S OFFICES: HUMAN RIGHTS AND INTERNAL AFFAIRS

The constitutional reforms that created the National Prosecutor's Office only called for two special prosecutor's offices, one for corruption cases and one for electoral crimes. The new implementing law calls for the creation of two additional offices for human rights and internal affairs. According to the law, the national prosecutor will select the heads of these offices based on candidates' background and qualifications, and whether they meet the requirements set forth in the implementing law. The Senate can object to the national prosecutor's appointments if they do not meet the established requirements.

Additionally, the national prosecutor can create new special prosecutor's offices to meet institutional needs, taking into consideration the opinion of the Citizens' Council. National Prosecutor Gertz has announced his intention to create a Special Prosecutor's Office for the Ayotzinapa Case to continue with the investigation into the forced disappearance of the 43 students from Ayotzinapa, Guerrero,⁵ but this measure would have to adapt to the National Prosecutor's Office's new structure and procedures.

According to the law, each special prosecutor's office will have technical autonomy, meaning they will have the power to formulate strategies and conduct investigations with independence, including from the national prosecutor. There are two points worth highlighting related to this: 1) special prosecutor's offices can coordinate directly with prosecutor's offices in other countries, and 2) their management reports must be incorporated into the annual report the national prosecutor presents to Congress.

The Special Prosecutor's Office for Human Rights will be in charge of conducting criminal investigations into human rights violations (cases where the life, integrity, or personal liberty of the victim has been affected). It will also be charged with investigating cases in other special circumstances, such as when there is reason to question the impartiality of an investigation carried out by a state prosecutor's office.

The Special Prosecutor's Office for Internal Affairs will investigate crimes committed by personnel within the National Prosecutor's Office while carrying out their duties, and will establish guidelines for overseeing, investigating, and monitoring their actions. The creation of this office represents an important step toward combating corruption within the criminal justice system. For example, the office will be in charge of investigating the irregularities and possible criminal acts committed by PGR officials during their investigation into the Ayotzinapa case.⁶

THE CRIMINAL PROSECUTION PLAN, A CRITICAL ELEMENT FOR ENSURING ACCOUNTABILITY WITHIN THE NATIONAL PROSECUTOR'S OFFICE

The Criminal Prosecution Plan is the National Prosecutor's Office's main accountability mechanism. This public document should establish the new institution's investigative priorities, its short, medium, and long-term goals, as well as the responsibilities of prosecutors and other personnel.

The national prosecutor should develop the plan at the beginning of his term, based on previous analyses of

criminal activity, citizens' perceptions of violence, the situation of victims, and other objective information that facilitates the development of an adequate criminal prosecution strategy. The law establishes that the development of the Criminal Prosecution Plan should include civil society participation. Given the seriousness of the situation in Mexico, the plan should prioritize the investigation of human rights violations and corruption cases.

The plan should be presented to the Citizens' Council for consultation, and later to the Senate for approval. From then on, the national prosecutor must report to the Senate on the progress made in implementing the plan and, when applicable, explain any modifications that are necessary.

This instrument for planning and control will allow citizens to monitor and evaluate the National Prosecutor's Office's progress in investigating and prosecuting crimes. It will also include relevant information that will facilitate the development of strategies that are more suitable to the reality of the country. However, for citizen participation to be effective in this process, the National Prosecutor's Office needs to guarantee that its institutional information is always public and transparent.

CONCERNS

The new implementation law reinforces the national prosecutor's power over the entire institution.

For example, the law gives the national prosecutor the power to appoint and remove the special prosecutors as well as "any other prosecutors or personnel within the National Prosecutor's Office that he or she considers appropriate". It also allows the national prosecutor to assert power over any case that falls under federal jurisdiction so that he or she can personally investigate them. The head of the National Prosecutor's Office also controls the institution's information management, and has the power to promote and sign agreements with international bodies in order to develop joint actions or strengthen the institution.

The concentration of power within the national prosecutor is not concerning in and of itself. To a certain extent, it is necessary in order to maintain the consistency and coherence of criminal prosecution efforts. However, what is concerning is that this concentration of power is paired with two other elements: 1) the shortcomings and lack of transparency of the process for appointing the national prosecutor, and most importantly, 2) the fact that the president of the country has the power to remove the national prosecutor.

Mexico's Constitution states that the president is the only public official that can remove the national prosecutor. Neither the Senate nor the National

Prosecutor's Office's Citizens' Council can initiate a motion for removal, even when evidence suggests the national prosecutor has committed a grave offense. This gives rise to the serious risk that the national prosecutor will be unable to exercise his or her responsibilities independently or that due to the interests of the political party in power, a prosecutor is "protected" by the president. Additionally, the president's involvement in the process of appointing the national prosecutor raises the concern that he or she will name someone from their close circle, as happened in the process of appointing the first national prosecutor.

The power of the president to participate in the appointment and removal of the national prosecutor must be reevaluated in order to truly guarantee the autonomy of the National Prosecutor's Office from the Executive Branch. Having a national prosecutor whose stay in the position depends on the president, and giving that person the majority of power within the National Prosecutor's Office, is a combination that severely threatens the independence of investigations as well as the fight against impunity in the country.

In Mexico, law enforcement institutions have historically garnered suspicion given their ineffectiveness at investigating crimes involving the ruling political class.⁷ Therefore, in order to restore citizen confidence in the impartiality of criminal prosecution, there must be a clear separation between the head of the National Prosecutor's Office and the president's inner circle.

SHORTCOMINGS IN THE SELECTION PROCESS OF THE NATIONAL PROSECUTOR: AN IMPORTANT CONTINUED CONCERN

The process of selecting the national prosecutor is outlined in Article 102 of Mexico's Constitution. Since 2016, citizens' collectives like #FiscalíaQueSirva,⁸ the business sector,⁹ and other civil society actors¹⁰ have been calling for Article 102 to be reformed.

These groups raised several concerns about the Constitution's regulations because: 1) the nomination process does not fulfill the obligation to hold a public hearing, 2) it does not require that the chosen candidate has the appropriate background and qualifications, 3) it does not include procedures for ensuring that the process is transparent, public, or based on merit, or for guaranteeing citizen participation, and 4) it gives the Executive Branch an excessive amount of influence over the process.

Given these shortcomings, the implementing law contains a number of articles that seek to improve the selection process as much as possible. Article 15 of the law states that the appointment must meet certain standards that guarantee that the process is transparent, public, based on merit, non-discriminatory, and involves citizen participation. These standards are binding, as they are derived from international human rights instruments that the Mexican government has signed.

The law also adds details for what should be understood as a "good reputation" standard (this is the only substantial requirement included in Mexico's Constitution to be a candidate for the national prosecutor). While the law addresses aspects such as the quality of relevant experience, honorability, and commitment to human rights and democratic values, it does not touch on a key aspect necessary for guaranteeing that the national prosecutor is capable of combating systemic corruption and impunity: requiring that candidates do not have political ties or relationships that could compromise their ability to carry out their job with independence.

In order to restore citizen confidence in the impartiality of criminal prosecution, it is paramount that there be a clear separation between the head of the National Prosecutor's Office and the president's inner circle.

OPPORTUNITIES

COOPERATION WITH INTERNATIONAL BODIES

The implementing law contains various articles that open avenues for international cooperation and that subject the criminal prosecution process to international law.

For one, it specifies that prosecutors are responsible for complying with international human rights standards (Article 9.XV). The law grants the national prosecutor the power to coordinate, promote, and conclude agreements with international entities in order to strengthen the National Prosecutor's Office's functions (Article 19, sections XV, XVI, XVII).

The national prosecutor cannot establish an international treaty, convention, declaration, or agreement related to its own institutional functions (such as an agreement to create an international mechanism similar to the International Commission against Impunity in Guatemala, or the Mission to Support the Fight against Corruption and Impunity in Honduras). However, he or she can decide to promote such a mechanism.

Similarly, the special prosecutors, in using their technical autonomy, can participate in international coordination strategies with prosecutors in other countries, without the need for authorization from the national prosecutor or any other department of the National Prosecutor's Office (Article 26.VIII). This can serve as an important tool that provides great potential for strengthening investigations into transnational organized crime.

A YEAR LATER: POSSIBLE ADJUSTMENTS TO THE CONSTITUTION AND THE LEGAL FRAMEWORK OF THE NATIONAL PROSECUTOR'S OFFICE

A transitory provision included in the implementing law establishes that one year after the national prosecutor is appointed, the National Prosecutor's Office must hold a public hearing to review its constitutional and legal framework. The purpose of this activity is to identify, discuss, and propose reforms necessary for ensuring the institution's optimal functioning.

The results of this consultation will be public and will be presented to Mexico's Congress so that it can analyze and propose the reforms that are necessary. This can serve as an important opportunity to address pending reforms related to the national prosecutor's appointment and removal processes, as well as reforms related to the autonomy and efficiency of criminal prosecution.

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WHAT'S NEXT: THE TRANSITION

The transition away from the old institution, which was troubled, inefficient, and lacked independence, towards a modern, autonomous National Prosecutor's Office will not happen overnight. Truly transforming law enforcement in Mexico not only requires adapting the way the National Prosecutor's Office operates (such as the 2008 criminal justice reforms that transitioned Mexico toward an adversarial system with oral trials),¹¹ but also transforming the institution's legal culture.

The implementation law gives the new national prosecutor a year to define a transition strategy and to present a Strategic Transition Plan, which should include an assessment of the institution's financial, human, and material needs, pending cases, and a process for collaboration and intelligence, among other issues.

Additionally, the implementing law calls on Mexico's lower house of Congress to guarantee that Mexico's 2019 budget provides the National Prosecutor's Office with the funds necessary to implement its strategic transition plan.¹² However, the López Obrador government's budget adjustments cut funds to the National Prosecutor's Office by 5 percent compared to the PGR's 2018 budget.

In this context, it is clear that the national prosecutor faces many challenges this year. While Prosecutor Gertz has already named special prosecutors for investigating corruption cases and electoral crimes (individuals López Obrador suggested for these positions at the beginning of his campaign),¹³ he has yet to name the special prosecutors for internal affairs and human rights. This presents a second opportunity for Gertz to demonstrate his independence from the Executive. Whoever is chosen to lead these important offices will serve as a key testament to the national prosecutor's commitment to these issues.

2019 will be a year of transition, setting the foundation for the work of the National Prosecutor's Office for years to come. With a new national prosecutor heading the institution, the international community will observe with hopes that his actions will reflect the new office's autonomy and will respond to citizens' and victims' long overdue demands for justice.

ENDNOTES

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DPLF is a regional organization comprised of professionals with a variety of nationalities, that promotes the Rule of Law in Latin America through the use of analysis and recommendations, cooperation with private and public organizations and institutions, exchanges of experiences, and advocacy efforts.

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WOLA is a leading research and advocacy organization advancing human rights in the Americas. We envision a future where public policies protect human rights and recognize human dignity, and where justice overcomes violence.

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Alejandro Gertz Manero swears in as the National Prosecutor's Office's first national prosecutor on January 18, 2019. Source: Senate of Mexico

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