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REPORT



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MEXICO'S RULE OF LAW EFFORTS: 11 YEARS AFTER CRIMINAL JUSTICE REFORMS

Challenges and Opportunities for the López Obrador Administration

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INTRODUCTION

In recent months, a number of high-profile acts of violence in Mexico have garnered national and international media attention and highlighted the extensive security challenges facing the Mexican government¹. Growing violence, coupled with widespread impunity, has underscored the urgent need to strengthen Mexico's criminal justice system. Since the start of the year, an average of 95 people a day have been killed in Mexico—yet only 5 percent of homicide cases ever end in a conviction.²

More than eleven years and two presidential terms have passed since Mexico approved sweeping constitutional reforms mandating the nationwide adoption of an **adversarial criminal justice system**, a tool meant to strengthen Mexico's capacity to counter violence and impunity.³ A shift away from the country's previous inquisitorial system—in which court procedures were largely oriented around written documents presented to a judge—the new system is based on oral trials in public courtrooms.

The transition to oral trials has aimed to address the inefficiency, opacity, and lack of due process guarantees that characterized the old system. First, trials now take place with judges, prosecutors, and defendants all in one room, which has helped to reduce excessive judicial and prosecutorial discretion. Moreover, the reforms required that courtrooms be equipped with audio and visual recording equipment, making trials more transparent. The reforms were also designed to move cases through the system more quickly and to safeguard the human rights of detainees.

When Mexico's Congress passed the 2008 reforms, it established an eight-year timeframe to complete this comprehensive overhaul. However, more than three years after the June 2016 deadline, the transition is far from complete. Justice institutions remain backlogged and many personnel continue to lack the necessary training and specialization to carry out their functions effectively. Additionally, torture and other human rights violations remain prevalent in criminal proceedings. Finally, the federal Congress as well as several state congresses have proposed, and in some cases approved, constitutional and legal reforms that are in their very essence incompatible with the new system.⁴

In this report, the Washington Office on Latin America (WOLA) examines Mexico's progress in implementing the adversarial system, as well as the degree to which this transition has helped make Mexico's justice institutions more transparent, efficient, fair, and rights-respecting. In addition, we take stock of the Mexican government's approach to criminal justice reforms during the first year of President Andrés Manuel López Obrador's presidency.

This includes an analysis of the troubling implications of recently approved reforms that are contrary to due process guarantees, as well as other pending proposals that are reminiscent of the old inquisitorial system and its shortcomings. The report also includes an examination of U.S. support for Mexico's rule of law efforts over the past decade.

EFFICIENCY UNDER THE ADVERSARIAL SYSTEM

Under the old, written system, trials were painfully lengthy and cumbersome. Prosecutors presented the majority of their arguments and evidence in the form of enormous stacks of paperwork that judges had to sort through to learn the details of a case. In this regard, the transition to the adversarial system has cut down trial times substantially.

The reforms also aimed to reduce stress on Mexico's overburdened justice institutions by giving judges and prosecutor's offices more room to negotiate plea bargains and other alternative dispute resolutions for certain low-level crimes. In theory, this means most non-violent crimes don't have to be tried in court.

However, it's clear that justice officials have struggled to make full use of this opportunity. Mexican think-tank México Evalúa's most recent report on the implementation of the adversarial system found that while the use of alternative dispute resolution varies widely across states, on average, Mexican prosecutor's offices processed only 6.1 percent of cases under the alternative justice system in 2018. Similarly, judges referred only 4.2 percent of cases they received in 2018 to alternative resolution, based on their analysis of the case and in agreement with the parties involved.⁵

While not the only factor, the failure to make use of the alternative dispute resolutions has contributed to major backlogs in the justice system: in 2018, 44.6 percent of cases opened by prosecutor's offices ended up backlogged, as did 42.3 percent of the cases being processed in the courts.⁶

Another difficulty is that Mexico's justice sector remains understaffed relative to the needs of the population. There are less than three prosecutor's offices and about 0.9 judges for every 100,000 people. This falls far short of Latin America's regional average of 10 judges for every 100,000.⁷ This shortage of justice authorities has made reporting crimes a cumbersome process, as victims must often travel long distances and sit through extensive wait times to file a report.

Given this environment, victims have little faith in justice institutions to properly tend to their complaints. According to Mexico's most recent national victimization survey, nearly a third of Mexicans were victims of some crime in 2018, yet almost 90 percent of victims opted not to file a crime report. When asked what influenced their decision, 32 percent of victims responded that they considered it "a waste of time," 17 percent said they "lacked trust in authorities," and 9 percent cited "long and difficult procedures." These dynamics have changed very little since Mexico's National Statistics Institute (*Instituto Nacional de Estadística y Geografía, INEGI*) began conducting the victimization survey in 2012.⁸

BOX 1: AUTONOMY OF PUBLIC PROSECUTOR'S OFFICES

While political influence over criminal investigations—particularly investigations into corruption and grave human rights violations—frequently stymies the ability of Mexican prosecutors to honestly and credibly carry out their work, the 2008 reforms lacked sufficient measures aimed at tackling this issue. Consequently, Mexican civil society organizations and victims' groups supported additional reforms to guarantee the autonomy of prosecutor's offices.

In 2014, as part of a broader package of political and electoral reforms, Mexico's Congress enacted a constitutional reform to replace the country's Attorney General's Office (*Procuraduría General de la República*, PGR) with an autonomous National Prosecutor's Office (*Fiscalía General de la República*, FGR), separate from the executive branch.⁹ While it took years to establish the legal framework for the creation of this new body and to name the first national prosecutor, the new institution officially began its work in December 2018.¹⁰

In addition to the National Prosecutor's Office, almost all of Mexico's 32 states have completed their own transitions to an autonomous prosecutor's office, with a few exceptions: Tamaulipas and Mexico City are still in the process of transitioning, while Baja California, Baja California Sur, Hidalgo, and Tlaxcala have yet to initiate such a process.¹¹

However, some of these transitions were in name alone, and did not actually involve any substantive reforms. The states of Chihuahua, Durango, and Campeche, for example, have yet to pass a single reform designed to guarantee the technical, financial, or managerial autonomy of their state prosecutor's office, meaning any sensitive investigations carried out by these state prosecutors remain vulnerable to political meddling. The state prosecutor's office in Yucatan also continues to lack financial autonomy.¹²

While efforts to transition to an independent prosecutor's office in Mexico City has seen delays, the capital has employed an innovative approach. Here, the focus is not only on establishing a fully independent and autonomous prosecutor's office, but also on reorienting its structure and investigative priorities to bring them more in line with the adversarial system. As mandated by a transitory article in Mexico City's constitution, a commission of seven civil society experts is responsible for coming up with the proposal for how Mexico City can accomplish these goals. Over the past year, the group has formulated a detailed proposal that includes a thorough assessment of the prosecutor's office's unique structural and investigative inefficiencies, with additional insights gained from interviewing victims of crimes and human rights violations.¹³

TRAINING AND SPECIALIZATION

The adversarial system has involved major shifts in the roles of justice and law enforcement personnel. However, more than a decade after the justice reforms were passed, many officials have not received adequate training on their new functions.

For instance, under the old system, most police in Mexico were ostensibly dedicated to crime prevention functions such as conducting street patrols. The 2008 reforms expanded police powers so that officers would also act as first responders, secure crime scenes, and collect and preserve evidence. Nevertheless, a report by Mexican think-tank *Causa en Común* found that by 2017, nearly two-thirds of police had yet to even receive their “first responder kit”—the materials needed to conduct these tasks at crime scenes.¹⁴

In 2018, the Executive Secretariat of the National Public Security System (*Secretariado Ejecutivo del Sistema Nacional de Seguridad Pública*, SESNSP) announced that it would implement annual, 30-hour training workshops for police forces on how to carry out their new functions under the adversarial system. The Ministry established that all police forces would

have undergone these workshops by 2019.¹⁵ However, as of June 2019, the SESNSP reported that only 42.7 percent of Mexico’s police forces had taken at least one of the required trainings.¹⁶

Moreover, a single 30-hour course is arguably insufficient to ensure police are well prepared to carry out critical and sensitive functions at crime scenes. There remains a strong need for an evaluation system, so as to better detect and correct any shortcomings by police officers carrying out investigative tasks.

Most prosecutor’s offices also continue to lack specialized personnel capable of closely analyzing the details of criminal cases. The country’s forensics capacity is particularly wanting. According to government responses to freedom-of-information requests acquired by NGO México Evalúa, only 22 of Mexico’s 32 state prosecutor’s offices report having forensics units. Of those, only 21 have areas specialized in ballistics, genetics, chemistry, or forensic medicine, 18 have psychology or psychiatry units, 10 have fingerprinting specialists, and eight have areas specialized in spoken portrait.¹⁷

BOX 2: THE ROLE OF THE NEW NATIONAL GUARD IN CRIMINAL INVESTIGATIONS

During his successful campaign for president, Andrés Manuel López Obrador called for strengthening and professionalizing Mexico's police and putting an end to the country's militarized public security strategy. However, rather than focus on police reform, the López Obrador administration created a new military-led force to assume federal policing functions: the National Guard. The new National Guard is made up of Military Police (drawn from the Army and Navy), additional members of the Armed Forces, Federal Police agents, and new recruits. While the constitutional reforms creating the National Guard established that it would be a civilian force under civilian direction, its first chief, Luis Rodríguez Bucio, is a recently retired Army general, and the majority of the new force's equipment, training, and leadership comes from the Mexican military.¹⁸

In addition to serious concerns about what the new National Guard will mean for public security and human rights, its creation also presents troubling implications for criminal investigations.¹⁹ Guard members have been granted all the faculties of traditional police forces, such as detaining suspects and working with public prosecutor's offices to investigate crimes. In addition to federal crimes, the National Guard has the power to investigate common crimes such as homicide and robbery if they have signed an agreement with state or local authorities.²⁰

The National Guard's expanded investigative powers are highly concerning given the number of cases in which soldiers and Federal Police agents have been implicated in obstructing justice in criminal investigations.²¹ Mexico's National Human Rights Commission (*Comisión Nacional de los Derechos Humanos*, CNDH) has documented numerous cases in which soldiers participating in criminal investigations either gave false testimony or altered the crime scene, including by planting weapons and drugs or by moving the victims' corpses.²² The CNDH has also documented similar actions involving the Federal Police. For example, in May 2015, an armed conflict between Federal Police agents and civilians in Tanhuato, Michoacan resulted in the killing of 43 individuals (42 civilians and one Federal Police agent) and the arbitrary detention of several others. After analyzing the case, the CNDH found that Federal Police agents had tortured two of the detainees and altered the crime scene, including by planting weapons on 16 of the victims.²³

In August 2019, Mexico's Security and Citizen Protection Secretary, Alfonso Durazo, proposed further modifying the country's constitution in order to grant the National Guard and other police forces the autonomy to carry out criminal investigations independently from public prosecutor's offices, regardless of whether a criminal complaint has been presented. If the proposal were to move forward, National Guard members would only be required to report crimes to the public prosecutor's office once they have finished their investigation. After that, prosecutors could then decide whether or not to press charges against the indicated suspects.²⁴

Such a reform would be highly concerning, as it would further weaken oversight and control over National Guard members carrying out sensitive investigative actions, especially in cases where Guard members themselves may have been involved in the crime. It would also directly contradict the 2008 criminal justice reforms, which specifically stipulate that all actions related to the investigation of crimes must be conducted in direct coordination with public prosecutor's offices.

RESPECT FOR HUMAN RIGHTS AND DUE PROCESS

TORTURE AND OTHER COERCIVE TACTICS

The implementation of safeguards against torture and other coercive tactics in criminal justice proceedings is meant to be a hallmark of the new adversarial system. However, physical and psychological coercion remain prevalent throughout arrest and detention processes.

According to Mexico's most recent national survey of detainees (from 2016), 75.6 percent of detainees interviewed for the survey reported being subjected to some type of psychological violence at the time of their arrest, while 49.4 percent reported suffering such abuses while they were at the public prosecutor's office. The most common forms of psychological abuse detainees reported include being held incommunicado, threatened with false charges, undressed, tied up, blindfolded, pressured to incriminate someone, subjected to asphyxiation, and threats against their family.²⁵ Similarly, 63.8 percent of individuals reported being subjected to some type of physical abuse at the time of their arrest, while 39.4 percent reported physical harm later in their detention. The most common forms of physical aggression reported include being kicked or punched, hit with objects, injuries as a result of being crushed, and electric shocks.²⁶

Mexico's General Law on Torture, passed in 2017, helped strengthen the country's legal framework to combat the use of torture. But the law suffers from incomplete implementation and widespread noncompliance. One problem is that only the federal government and 15 out of 32 states have complied with the law's requirement mandating the creation of special prosecutor's offices for handling torture cases. Additionally, the Mexican government has yet to implement a national registry of torture cases as mandated by the law.²⁷

In May 2019, nearly two years after the passage of the General Law on Torture, the UN Committee against Torture recognized a "very high frequency" of torture committed by security forces and investigative

officials, particularly during the first hours and days after arrest. The Committee expressed particular concern over the lack of access to basic procedural safeguards (such as lawyers) following detention, and the continued use of statements obtained through torture in criminal trials. According to the Committee, the lack of adequate investigation into torture complaints raises serious doubts about the impartiality of those responsible for carrying out such investigations.²⁸ Indeed, the federal government has secured only 15 convictions for torture since 2006.²⁹

SHORTAGE OF PUBLIC DEFENDERS

A severe lack of human and financial resources within public defenders' offices also raise serious due process concerns. On average, every public defender in the country represented 219 defendants in 2018. In some states, this ratio was much higher: in Nuevo Leon, for example, the average caseload of public defenders in 2018 was 1,496 cases. Additionally, it's clear that strengthening public defenders' offices has not been a priority for the federal government. In 2018, these agencies received less than 2 percent of a pool of funds allocated to public defenders' offices, federal courts, the Federal Police, the National Prosecutor's Office, and the Executive Commission for Attention to Victims.³⁰

PRE-TRIAL DETENTION

Under the adversarial system, individuals accused of a crime are not to be imprisoned while their cases are being tried, unless it is determined, with reasonable evidence, that detention is necessary to guarantee that the accused appears in trial, to ensure the suspect does not obstruct the investigation, or to protect any victims or witnesses. Nonetheless, nearly a third of individuals currently detained in Mexico's prisons have not yet been sentenced for a crime.³¹

Since the 2008 reforms, a network of agencies called the State Units for the Supervision of Precautionary Measures (*Unidades Estatales de Supervisión a Medidas*

Cautelares y Suspensión Condicional del Proceso, UMECAS) have been set up to carry out case-by-case evaluations of whether preventive prison could be replaced with other precautionary measures (such as assigning a parole officer, installing an electronic locator bracelet, or seizing the individual's assets). However, the U.S. Agency for International Development (USAID) supported a nationwide assessment of the Precautionary Measure Units in 2018, finding that they had only been fully implemented in a little more than half the states, and that not a single one of them was functioning at optimal capacity.³²

Additionally, in a blow to efforts to reduce the use of pre-trial detention, a federal constitutional reform expanded the number of crimes eligible for automatic pre-trial detention (*prisión preventiva oficiosa*) in April 2019.³³ Following the passage of the reform, the Mexico Office of the UN High Commission for Human Rights, judicial experts, and human rights organizations expressed concerns that this would weaken due process guarantees, put more innocent people behind bars, and have a disproportionate impact on individuals who are unable to afford a personal lawyer.³⁴ In August, Secretary Alfonso Durazo proposed expanding the list of eligible crimes even further.³⁵

ADDITIONAL REFORMS, AND POSSIBLE COUNTER-REFORMS, ON THE HORIZON

In addition to expanding the number of crimes eligible for automatic pre-trial detention and granting the National Guard the power to carry out criminal investigations independently from prosecutor's offices, federal and state congresses have proposed other laws and reforms, or enacted changes, in recent years that are incompatible with the adversarial system.³⁶

On October 21, representatives from Mexico's three branches of government—including National Prosecutor Alejandro Gertz, Senator Ricardo Monreal (who leads the president's political party, MORENA),

Arturo Zaldívar, the chief justice of Mexico's Supreme Court, and Julio Scherer, López Obrador's legal advisor—announced a series of working groups to develop integral reforms to Mexico's judicial branch.³⁷

While the details are not yet clear, these reforms could represent the most significant judicial reforms in Mexico in recent years.³⁸ Civil society organizations have denounced the opacity in which the government has carried out these discussions. It is critical that all authorities involved ensure civil society participation in these discussions, as the law requires.³⁹

BOX 3: U.S. SUPPORT FOR MEXICO'S RULE OF LAW EFFORTS

U.S. support has been key to Mexico's transition to an adversarial criminal justice system. Since 2008, the U.S. Congress has appropriated USD\$3 billion in security assistance to Mexico through a multi-year aid package known as the Merida Initiative. Over USD\$400 million of Merida Initiative funds have gone toward supporting Mexico's transition to the adversarial justice system.⁴⁰ Part of this assistance administered by USAID and the U.S. State Department's Bureau of International Narcotics and Law Enforcement Affairs (INL) has been used to equip more than 120 courtrooms in 21 states with audio and video recording technology to record the new oral trials. U.S. agencies have also used these funds to train over 230,000 preventive police and 30,000 ministerial police on how to conduct their work under the adversarial system.⁴¹

The Department of Justice's Office of Overseas Prosecutorial Development Assistance and Training (OPDAT) has also trained justice sector personnel on the adversarial system and has collaborated with the Mexican government in drafting several pieces of legislation to facilitate its transition to the adversarial system. This includes the country's National Criminal Procedure Code (passed in 2014), the 2012 Witness Protection Law, and the 2014 Law on Alternative Justice. OPDAT also provides technical assistance to Mexican legal and law enforcement officials.⁴²

USAID's rule of law projects in Mexico have supported state attorneys general offices and courts in developing analytical capacity, improving victims' access to justice, and building public support for the criminal justice system. USAID has reported several key achievements in its Mexico rule of law work, including a 59 percent increase in the use of alternative dispute resolution in target states. USAID projects also aim to increase citizen literacy on the criminal justice system: the agency supported the creation of a digital platform called "Justice for You" dedicated to providing information on the legal system.⁴³

In May 2019, President López Obrador announced that his administration was looking to rethink the Mérida Initiative and all future cooperation with the United States.⁴⁴ While this leaves the future of U.S. assistance for justice sector reforms unclear, it may provide a good opportunity for both countries to reevaluate where assistance could be most useful, and to determine appropriate indicators for success. Any re-evaluation of assistance should aim to ensure that USAID and the Department of Justice are coordinating their efforts and measuring the impact of U.S.-supported training, including through indicators capable of demonstrating whether training has increased the effectiveness of justice sector officials and their capacity to apply the skills required under the new system. Going forward, U.S. assistance could be particularly helpful in supporting Mexico's transition to the autonomous National Prosecutor's Office.

CONCLUSIONS AND RECOMMENDATIONS

Entrenched old practices and continued shortcomings in investigative and technical capacity continue to cripple Mexico's efforts to combat violence and corruption and hold government officials accountable for human rights violations. More than 11 years since Mexico passed the 2008 justice reforms, impunity remains the norm.

However, as President López Obrador's administration nears the end of its first year in office, it has a critical opportunity to provide the criminal justice system with the resources it needs to step up to the challenge. Apart from supporting the 2008 reforms, the administration should provide political and financial support to other efforts to strengthen criminal justice institutions. This includes the new, autonomous National Prosecutor's Office as well as the National Anti-Corruption System. This also includes the two landmark laws Mexico passed in 2017 to address widespread torture and disappearances.

COORDINATION AND OVERSIGHT

An efficient criminal justice system requires strong coordination between justice agencies as well as effective oversight and evaluation. Such oversight should include ongoing budget analyses to determine how much technical and financial support each institution needs to properly carry out its mandate.

In May 2019, the federal government created a body called the Support Unit for the Justice System (*Unidad de Apoyo al Sistema de Justicia*) within the Ministry of the Interior. This body is charged with establishing points of contact between justice institutions and designing standardized technical criteria under which agencies should operate. However, the Support Unit is not responsible for conducting impact evaluations or assessments of how to rectify shortcomings within justice institutions. That responsibility falls on the Executive Secretariat of the National Public Security System (SESNSP). Due to this fragmentation in responsibilities, both institutions must work to complement each other by establishing strong coordination mechanisms.

FUNDING

The federal government must provide robust funding to support the implementation of the 2008 justice sector reforms. This should include substantial funds for the Support Unit and the SESNSP. Funds should also prioritize training police on investigative tasks, increasing staffing levels within public defenders' offices, and strengthening forensic capacity. Federal funding for state justice reforms should be flexible, in order to give state governments a certain amount of autonomy to determine their own priorities based on their unique needs.

INVESTIGATIVE PRIORITIES

By January 18, 2020, National Prosecutor Alejandro Gertz is required to present a Criminal Prosecution Plan. This document must lay out the new National Prosecutor's Office's investigative priorities as well as its short, medium, and long-term goals. It must also detail the specific responsibilities of prosecutors, police, and other personnel within the new institution. The Criminal Prosecution Plan will serve as an important mechanism to measure the efficiency and impact of the National Prosecutor's Office. By law, Gertz must allow victims and civil society organizations to participate in the development of this plan. Civil society organizations that form part of the #FiscalíaQueSirva citizens' collective have already presented a document outlining the main points they believe the plan should include.⁴⁵

REJECT HARMFUL REFORMS

The Mexican government must refrain from passing reforms that are incompatible with the adversarial criminal justice system. The content and scope of the proposed judicial reforms recently announced by the three branches of government (discussed above) will be strong indicators of whether Mexico is taking steps to effectively tackle the crisis of impunity or if the hard-fought gains of the 2008 reforms are at risk of being lost.

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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 in the Americas protect human rights, recognize human dignity, and where justice overcomes violence.

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