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POLITICAL CHANGE AND ABATEMENT OF WHITE COLLAR CRIME IN MEXICO

PROF. ALEJANDRO POSADAS *

The prospects for the abatement of white-collar crime are currently very good because of the political and historical change Mexico is experiencing. Mexico is going through a democratic transition that is helping its efforts in this area. For the first time Mexico has a president from the PAN party.¹ There is an emphasis on prosecuting white-collar crimes and substantial public pressure to institute change. The challenge is to institutionalize the change within government and society. Institutionalizing these policies takes time and patience, and requires structural changes. This paper will review the current change occurring in Mexico and illustrate the need for the creation of an independent anti-corruption agency.

One of the most important developments involves the *ministerio público*, or the federal prosecutor. The powers of the *ministerio público* are very important. Article 2 of the Organic Law of the Attorney General's office establishes that the mandate of the *ministerio público* is supervising and securing the observance of the constitutional legal order, trying to seek prompt, expeditious and due justice, and overseeing within the limits of his or her powers that human rights are respected.²

There are important initiatives being made to effectuate this mandate. Unfortunately, the majority of Mexican citizens would not associate this mandate with the *ministerio público*. This institution is undergoing an intense crisis of its own, and in order for these policy enforcement efforts to become part of a new culture of due process and legal order in Mexico, this challenge must be dealt with.

Many citizens and lawyers are concerned because the *ministerio público* requires that a private person provide them with evidence before they will begin to prosecute a case. However, this occurs mainly because those prosecutors that do require evidence from private persons are not doing their job. This happens not only with fraud in a private scenario, but also in most cases where there is not a high political will interested in the resolution of that case. The *ministerio público* has ample powers not to press charges, and although empirical evidence does exist, most lawyers would say that in many cases the office does not press charges. It simply does not investigate. It does not act.

Mexico also has to contend with overcoming the intense negative attitude and opinion towards the legal culture. There are many American movies that show

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1. Partido de Acción Nacional (National Action Party). The party that formerly had control over the presidency was the Partido Revolucionario Independiente or PRI (Independent Revolutionary Party).

2. Organic Law of the Attorney General for the Republic (*Ley Organica de la Procuraduria General de Justicia de la Republica*) Diario Oficial de la Federacion, Capitulo 1, December 27, 2002. Available through <http://www.cddhcu.gob.mx/leyinfo/txt/232.txt> last visited March 21, 2003.

positive role models for lawyers. However, there are no such Mexican movies. People who have a career in the United States Department of Justice regularly participate in conferences, but seldom do career *ministerio público* officials participate in conferences or talk about their experiences. This is not to imply that participation does not exist or that there are not very good prosecutors in Mexico. However, practicing and litigating criminal law are not valued within society. There is not a positive public opinion about the *ministerio público* or the work it does. Given the situation that the country is going through and the great window of opportunity opened by the democratic change, a change in the public attitude and opinion toward lawyers should evolve for the better.

To accomplish this change of public opinion there must be increased incentives to practice criminal law and to pursue a legal education. In many areas such as money laundering and fraud enforcement efforts, Mexico faces tremendous pressure from the United States to move and prosecute for those offenses. However, Mexico itself does not understand where its priorities lie because there has never been any serious study devoted to this issue. In general, Mexican society regards crimes like security issues and corruption as being more important than drug trafficking. This does not mean that the possible connection between them does not exist. This illustrates the need for a review of Mexico's resources and how best to put them into play. For example, in the *casas de cambio* (currency exchange business) context, the Mexican laws are closing business opportunities in Mexico, but not facilitating other alternatives. It is easier for a Mexican to open an account in the U.S. than for that same person to open an account in Mexico. In part, it is much more difficult in Mexico because many of its citizens do not have sufficient resources or education.

Another challenge is reigning in over-regulation and overreaction. For example, in Banrural³ alone, one of the Mexican state-owned banks, there are 600 agents of the Secretaría de la Controlaría de México (the Office of the Controller General of Mexico). There are now empirical studies prepared by the Mexican Chapter of Transparency International showing the negative effects of the growth of the controller agency in the last six to eight years.⁴ In many cases government officials were prosecuted for technical violations under the law for making decisions that probably did not constitute illicit or corrupt behavior. Much of this work was done by the auditors of the controller agency because of the need for some positive statistics showing that the fight against corruption was being won. The more cases they initiated, the more favorable they appeared from the Mexican government's perspective. It did not matter how these cases ended.

Finally, there is a need for an independent anticorruption agency for two separate reasons. First, although the work being done now is good, it will never be enough in the eyes of public opinion. Second, independent agencies have had great success amidst our democratic change. Now that corruption is a priority in the agenda, it must be legitimized through the creation of an institution that would not shift with political change.

3. Banco Nacional de Crédito Rural, S.N.C., at <<http://www.banrural.gob.mx/>> last visited 2/7/03.

4. Mexican Chapter of International Transparency, Encuesta Nacional de Corrupción y Buen Gobierno, <http://www.transparenciamexicana.org.mx/transparencia.html> last visited March 21, 2003.

The challenges faced by Mexico are still enormous, and there is no way to foresee what will happen in the future. For example, the new law on administrative violations for public officials is strict and in some ways overreaching.⁵ This law could be used in negative ways in different political scenarios.

In conclusion, the prospects for the abatement of white-collar crime in Mexico are very good, but it is also the right time to push further to make the appropriate institutional changes that are needed to assure that these important policies will remain and will build the culture of due process and legality that is needed in Mexico.

SUMMARY GUIDE TO SOME STATUTORY SOURCES OF WHITE COLLAR CRIME IN MEXICO

Introduction

This document highlights some of the relevant Mexican provisions in connection with white collar crime. In doing so, it acknowledges the difficulties of defining and classifying white collar crime. If this task is still subject to debate in the country where the concept was coined, a more difficult challenge can be expected in Mexico where the Spanish term "*delitos de cuello blanco*" has been infrequently invoked in the public discourse and used almost exclusively by specialized criminal scholars and legal practitioners. However, the current government has spelled out that the fight against *delitos de cuello blanco* constitutes one of the five pillars of its national public security program. In a speech delivered last April (2002) during the ceremony establishing a Citizen's Watch Group for the Federal General Attorney Office, President Fox reaffirmed its government's commitment to combat white collar crime as a priority.

Constitutional Foundations

The criminal legal system in general is subject to Constitutional protections, principles and limitations. Salient among these are the legality and due process protections of Article 14 and 16 of the Mexican Constitution. Article 14 establishes that:

...
No person shall be deprived of life, liberty, property, possessions, or rights without a trial before a previously established court in which the essential formalities of procedure are observed in accordance with laws in effect prior to the act.

In criminal cases no penalty shall be imposed by mere analogy on convincing rationale but rather must be based on a law which is in precisely applicable to the crime in question.

And Article 16 establishes that:

5. Federal Law on the Administrative Responsibilities of Public Officials (*Ley Federal de Responsabilidades Administrativas de los Servidores Publicos*) Diario Oficial de la Federacion, Capitulo II, March 13, 2002. Available through <http://www.cddhcu.gob.mx/leyinfo/txt/232.txt> last visited March 21, 2003.

No one shall be disturbed in his person, family, domicile, documents or possessions except by virtue of a written order by the competent authority stating the legal grounds and justification for the action taken.

No order of arrest or detention shall be issued against any person other than by the competent judicial authority, unless such arrest or detention is preceded by a charge, accusation, or complaint concerning a specific act punishable at least by imprisonment and there is evidence of proof of a criminal act and the suspect's probable responsibility.

The same article 16, and articles 17 to 23 contain other protections and rights directly applicable to criminal matters. Among them, the right not to be detained by investigators, prosecutors or any other non-judicial authority more than 48 hours without being released or being turned to a judge; the right of access to the courts and tribunals to seek justice; the rights of the accused in a criminal trial to be released on bond if applicable, not to be forced to declare, to be informed of the charges laid against him and of the name of his accuser, to cross-examine its accusers before a judge, to hear and respond to the evidence brought against him, to have a speedy trial, etc.

Pursuant to the *nulla crimen, sine lege* principle established in Constitutional Article 14 (reproduced above) and as applied in our civil law system, crimes in Mexico must be previously and precisely defined by legislation. White collar crimes are thus found in federal and state statutes. I only include in this document crimes of federal jurisdiction.

Public Corruption

The Mexican legislator has been prolific criminalizing a large variety of types of public corrupt conduct. The *Código Penal Federal* (Federal Criminal Code) dedicates a number of Articles under its *Título Décimo* [Section Tenth] to crimes committed by government officials. These provisions apply to any person employed in any capacity (including an agent) by the federal government, by any of its entities, including state enterprises, by the government of the Federal District, by the Federal Congress, by the Supreme Court or any federal court. Article 212 establishes also the applicability of the provisions of Section Ten to State Governors, State Legislature Representatives and State Judges for the commission of the crimes of federal jurisdiction established in that section. The same penalties apply to non-government officials who collaborate in the commission of the crimes. Among the crimes established in Section Tenth of the Federal Criminal Code that can be considered as white collar crimes are the following:

- § *Abuso de autoridad*: the abuse of official position in its modality of obtaining from someone else funds, moneys or something of value, which was not originally entrusted to that official and making a wrong use of it (Article 215 VIII).
- § *Uso indebido de atribuciones y facultades*: the misuse of powers or position to unduly grant, *inter alia*, permits, licenses, authorizations, concessions or government contracts with an economic value, tax reductions or unduly authorize the contracting of public works or other government contracts of economic value (Article 217).

- § *Concusión*: the abuse of official position to collect from citizens fees, duties, taxes or other moneys not owed or in excess of what is due (Article 218).
- § *Ejercicio abusivo de funciones*: the use of official position to unduly, directly or indirectly, enter into or grant contracts, permits, licenses or conclude any other legal agreement that results in an economic benefit to the government official, his spouse, children, relatives or any person with whom the official has personal or business relation (Article 220).
- § *Cohecho y cohecho a servidores públicos extranjeros*: the payment or solicitation of bribes to and by government officials and the bribing of foreign government officials (Articles 222 and 222 bis).
- § *Peculado*: the misuse of government funds or property for private or other purposes, including their use to politically promote the offender's own image, or that of somebody else, or to attack the reputation of others (Article 223).
- § *Enriquecimiento ilícito*: illicit enrichment, namely, the unjustifiable and unexplainable enrichment of a public official during the tenure of his position (Article 224).

Obstruction of justice

Protections against the due administration of justice are found in Section Eleventh under the heading *Delitos cometidos contra la administración de justicia*. Article 225 establishes a long and to some extent disorganized catalogue of acts considered to be crimes against the administration of justice. These crimes are offenses committed by government officials and in particular, by judges or officers involved in the judicial system. The conducts punished go from maliciously or negligently delaying or obstructing the administration of justice and forcing an accused person, by subjecting her to seclusion, torture or intimidation, to make a statement, to a judge advising a party litigating before her, or a prosecutor initiating a legal proceeding against a government official enjoying prosecutorial immunity. Article 215 can also be used to prosecute a judge or adjudicator that refuses without cause to resolve a case before him within the maximum time periods established by law. The criminalization of acts by private citizens that could fit also the category of acts against the administration of justice are found spread out in other articles and statutes. For example, Article 180 of the Federal Criminal Code establishes as a crime punishable with up to two years in prison acts to resist authority or its agents in the fulfillment of legitimate duties. This would apply also to judicial proceedings.

Fraud

Article 386 of the Federal Criminal Code defines fraud as illicitly obtaining something or an economic benefit through deceit or by taking advantage of someone's error. A fraud for less than the equivalent to 500 minimum wages is prosecutable subject to the victim submitting a written complaint. If the person accused makes due reparation the judge may acquit if none of the accusers opposes the motion (Article 399 bis of the Federal Criminal Code).

Tax Crimes

Mexico has a sophisticated and complex set of tax legislation. The main statute is the *Código Fiscal Federal* (Federal Fiscal Code). The Fiscal Code establishes a number of tax related administrative offenses and crimes. The principal authority

charged with administering the Code is the *Secretaría de Hacienda* (Finance Secretariat). However, only the *Ministerio Público*, which works under the General Attorney's Office, can bring criminal charges before a judge in Mexico. However, in order for the *Ministerio Público* to prosecute someone for a tax crime under the Fiscal Code, the Finance Secretariat must generally file a complaint and in certain cases declare that the Federal Treasury has suffered or could suffer harm. The Fiscal Code punishes with up to six years imprisonment the covering up of a tax crime (Article 96).

Contraband and tax fraud are criminal conduct regulated in Articles 102-110 of the Federal Fiscal Code. Article 111 of the Fiscal Code criminalizes the establishment of off-book accounts and in general the use of two or more accounting systems with different contents, as well as the partial or total concealment, alteration or destruction of accounting systems, records, or relevant documents. Other practices listed in Article 83, such as inadequately identifying transactions, recording non-existent expenditures, entering liabilities with incorrect identification of their object, and using false documents constitute administrative law offences under the Fiscal Code subject only to non-criminal fines.

Securities Crimes and Crimes against Financial Institutions

Securities crimes and crimes against financial institutions are spread out in different statutory provisions. For example, the Federal Criminal Code criminalizes the illicit tampering of financial institutions' computing systems and the damage and modification of their information. Other prohibited conduct in connection with financial institutions is found in the *Ley de Instituciones de Crédito*; the *Ley Federal de Instituciones de Fianzas*; the *Ley General de Organizaciones y Actividades Auxiliares de Crédito*; and the *Ley General de Instituciones y Sociedades Mutualistas de Seguros*. Articles 52, 52bis-52bis of the *Ley del Mercado de Valores* [Securities Exchange Act] establishes securities crimes, including, *inter alia*, recording of false or misleading information or omitting recording relevant information; revealing confidential information; unduly taking advantage of insiders' information, and; fabricating and distributing false or misleading information in connection with securities transactions.

Regulatory Crimes: environmental crimes

In 1996, the Federal Criminal Code was amended to introduce a new section (Título Vigésimo Quinto) under the heading *Delitos Contra el Ambiente y la Gestión Ambiental* [Crimes Against the Environment and Environmental Policy]. Articles 414 to 423 regulate environmental crimes, including the illicit handling of hazardous substances; polluting air, land and water harming the environment; acts threatening or affecting biodiversity and the ecology; illicit use of genetically modified products, and; the unlawful handling of hazardous or radioactive products. The prosecutor does not need a complaint to investigate and prosecute environmental crimes. This section also established the ability of the judge to impose compensation and sanctions to mitigate the environmental harm.

Money Laundering

Article 400 bis of the Federal Criminal Code establishes the crime of *operaciones con recursos de procedencia ilícita* or money laundering. This crime was introduced in Mexican legislation in 1996. The Code imposes penalties of 5 to 15 years in prison and economic fines up to the equivalent of 5,000 days of minimum wage to whoever launders money knowing it is the result or proceeds of a crime. The scope is broad as the offense is predicated on the commission of any crime whether it is committed inside or outside Mexico. The same punishment is applicable to employees of financial institutions who aid or help others commit this crime. If the offender is a government official in charge of preventing or combating crime the prison sentence can be increase by one half. In order for the prosecutor to exercise the criminal action, it is necessary that the *Secretaría de Hacienda* (Finance Secretariat) submit a complaint in cases where the money laundering activities use the Mexican financial system. Both the Secretariat of Finance and the Attorney General Office are charged with investigating money laundering. This is done through specialized units in each institution.

