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The Absence of the Rule of Law in Mexico: Diagnosis and Implications for a Mexican Transition to Democracy

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“We don’t have conditions for security; we don’t have the rule of law that is required for Mexico to develop”¹

I. INTRODUCTION

In Mexico, perhaps more than in any Latin American country, the overwhelming dominance of the one-party state has emasculated and discredited the judicial branch of government. Seven decades of political manipulation and institutional neglect have created a notoriously corrupt and politicized Mexican judicial system. It is only recently that the Mexican Government (the Government), following the World Bank’s directives, began emphasizing the importance of the rule of law, linking it to security and economic development issues.² For example, upon taking

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1. President Ernesto Zedillo Ponce de León, Address at the 60th Mexican National Banking Convention, (Mar. 7, 1997).

2. Note a recent World Bank statement on the matter: “Economic reform requires a well-functioning judiciary which can interpret and apply the laws and regulations in a predictable and efficient manner. . . . In addition, the increase in economic integration between countries and regions demands a judiciary that meets international standards.” MARIA DAKOLIAS, *THE JUDICIAL SECTOR IN LATIN AMERICA AND THE CARIBBEAN: ELEMENTS OF REFORM 3* (World Bank Technical Paper No. 319, 1996). *See also*, *Inicitaiva Presidencial de Reformas al Poder Judicial y la Administración de Justicia Constitucional, Presidencia de la República, Palacio Nacional, Mexico, Dec. 5, 1994* [hereinafter *Iniciativa*], *cited in* Jorge A. Vargas, *The Rebirth of the Supreme Court of*

office in December 1994, one of President Zedillo's first official acts was to introduce a set of constitutional and legislative reforms aimed ostensibly at promoting the rule of law.³

Unfortunately, human rights initiatives were conspicuously absent from the Government's legislative agenda for judicial reform. Legislative proposals made over the past five years have shifted the focus of Mexican criminal law from protecting individual rights to instituting governmental controls. These reforms and initiatives played a major role toward institutionalization of the arbitrary and abusive practices of the police, public prosecutors and judiciary.⁴

The objective of this article is to examine the weaknesses of the rule of law in Mexico. Part II establishes the context for rising violence and human rights violations in Mexico by exploring how at the macro-level, public safety issues have been merged into national security issues, and how at the micro-level, individual rights have been abrogated in the judicial process.

Part III provides an overview of the judicial process in Mexico and discusses the *amparo* mechanism, the principal remedy available to defendants for violations of their individual rights. Part IV focuses on the judiciary itself, examining its role in the perpetuation of torture as an institutionalized practice among law enforcement in Mexico; and discusses why recent judicial reforms failed to establish authentic judicial independence. Part V discusses recent reforms in the criminal procedure codes as well in the Mexican Constitution (the Constitution). Specifically, the article considers pre-trial detention, the right to counsel, and the expansion of prosecutorial discretion. One point becomes clear after examining the reforms; expansion of the Public Prosecutor's

Mexico: An Appraisal of President Zedillo's Judicial Reform of 1995, 11 AM. U. J. INT'L L. & POL'Y 295, 296 (1996).

3. See "Decreto mediante el cual se declaran reformados los artículos 21, 55, 73, 76, 79, 89, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 110, 111, 116, 122 y 123 de la Constitución Política de los Estados Unidos Mexicanos," D.O., 31 de diciembre de 1994 (Mex.) (amending 27 articles of Mexico's Political Constitution, effective January 1, 1995).

4. In introducing the reforms of December of 1997, the Zedillo Administration stated that "after four years of applying the new constitutional text, an equilibrium between crime, prosecution and the right of subjects to freedom has not yet been reached." CENTRO DE DERECHOS HUMANOS "MIGUEL AGUSTÍN PRO JUÁREZ," LA NUEVA REFORMA PENAL: LEGALIZAR LA ARBITRARIEDAD 4 (1998) [hereinafter LEGALIZAR LA ARBITRARIEDAD].

role has had a detrimental effect on the goal of eliminating systemic human rights abuses.

II. POLITICAL CONTEXT FOR HUMAN RIGHTS VIOLATIONS IN MEXICO: THE STRUCTURAL NATURE OF VIOLENCE AND THE ROLE OF THE MILITARY IN HUMAN RIGHTS ABUSES

At the close of the Twentieth Century, Mexico finds itself undergoing tremendous political and social upheaval as the ruling Institutional Revolutionary Party's (*Partido Revolucionario Institucional* (PRI)) hold on power slowly deteriorates. While promising stories of electoral reform and electoral gains by opposition parties become common, drug-related violence, political assassinations, and the proliferation of rebel groups also dominate the headlines. In the wake of the decline of the "the perfect dictatorship" (a term coined by Mario Vargas Llosa), the resulting vacuum of power has left Mexico in a virtual state of crisis. The unraveling of the PRI signals some important opportunities for the emergence of a culture focused on human rights and the strengthening of civil society. Most significantly, the decline of the PRI creates the possibility of establishing an authentic multi-party democracy in Mexico. The July 1997 elections saw the election of the first plural congress in the nation's history. Opposition parties continue to gain control over state and local government, most notably the mayoralty of Mexico City.⁵

On the other hand, the "Mexican transition to democracy" runs the risk of creating a national security crisis. Government officials often refer to the impending public security crisis and the threat to national sovereignty.⁶ The rise in violence that Mexico experienced in recent years is used to justify reforms that restrict individual rights. Indeed, backed by the legal sanction of the Supreme Court, the Government's militarization of many previously civilian law enforcement activities has had a markedly deleterious effect not only on human rights, but on the rule of law itself.

5. Other political changes are notable as well. For example, for the first time in history, the PRI may use primary elections, rather than the *dedazo*, which is the hand-picked appointment of incumbents, to select its candidate for the presidential elections in 2000. See Sam Dillon, *Mexicans' Radical New Politics: Top Party May Adopt Primaries*, N.Y. TIMES, July 27, 1998, at A1.

6. See MASSIMO PAVAINI, CONTROL Y DOMINACIÓN 166-67 (1983).

A. *Rise in Violence and Nature and Sources of Violence*

In recent years Mexico has witnessed a dramatic rise in violent crime. This violence is perhaps most noticeable in Mexico City. Sam Dillon writes in *The New York Times*:

Although record-keeping is chaotic, and fear of the police keeps many victims from reporting crimes, government statistics for Mexico City show that reported murders rose by 50 percent from 1990 to 1995 and that robbery incidents have multiplied six-fold in 15 years. Experts estimate that kidnappings in Mexico, once rare, now number at least 1,500 a year.⁷

In the North, drugs, corruption, and violence are now endemic. In the South, paramilitary violence has become increasingly lethal.⁸

While some large capital owners benefited from the 1980's and 1990's deregulation of financial markets, liberalization of trade rules, and privatization of state-owned industries, the great majority of Mexicans suffered tremendous social dislocation. The subsequent poverty spawned much of the violence prevalent in Mexico today. The United Nations Development Programme (UNDP) notes that "the share of the population living in absolute poverty increased from 19% in 1984 to 24% in 1989."⁹ Between 1989 and 1992, in rural areas, where the majority of people live in absolute poverty, the number of absolute poor increased from 6.7 million to 8.8 million. The UNDP estimates that today "more than 30% of the rural population lives below the income poverty line."¹⁰ While there is little data on the period since the December 1994 peso collapse, the UNDP calculates that poverty levels have almost certainly worsened. The UNDP attributes the increased poverty, in part, to the fact that more than one million Mexicans lost their jobs in the aftermath of the crisis.¹¹

The Government's economic austerity measures have directly affected individual violence. Professor and criminologist, Rafael Ruiz Harrell, has tabulated annual figures for all reported crimes

7. See Sam Dillon, *Mexico Can't Fathom its Rising Crime*, N.Y. TIMES, June 28, 1998, at 4-1.

8. See RED DE DERECHOS HUMANOS TODOS LOS DERECHOS PARA TODOS, REPORT ON MASSACRE AT ACTEAL (1998).

9. UNITED NATIONS DEVELOPMENT PROGRAMME, 1997 HUMAN DEVELOPMENT REPORT 88 (1997).

10. *Id.*

11. *See id.*

since 1930; Harrell observes:

There's a clear association between economic crisis and crime. . . [B]eginning in 1983, the first year after an economic crisis sent wages into free-fall, crime rates took off, and they have yet to level out. In 1995, the year following the disastrous peso devaluation, reported crimes in Mexico surged 35 percent.¹²

In rural areas, the Government's political and economic policies have had an even more profound effect on violence and the underlying social fabric of communities. In the early 1990's, in preparation for the North American Free Trade Agreement (NAFTA) negotiations, the Government passed constitutional reforms that allowed for the privatization of land. Those reforms opened vast sectors of Mexican farmland up to agro-conglomerates, simultaneously leading to diminished access to credit, inputs, and markets for subsistence farmers.¹³ Since 1994, this rural impoverishment has coincided with, if not contributed to, growing support for rebel groups in a number of Southern states, especially the Zapatista Army for National Liberation (*Ejército Zapatista de Liberación Nacional*, Zapatistas or EZLN) in Chiapas. That support, in turn, has led to the orchestration of increasing paramilitary violence on the part of peasant followers of the PRI who vehemently oppose the Zapatista uprising.¹⁴

A 1997 report published by the non-governmental Fray Bartolomé de las Casas Human Rights Center (FBCHRC) in Chiapas describes the situation of military and paramilitary violence:

We are living in a context of low intensity warfare. . . . Within this context, a number of specific strategies are implemented by federal and state governments in order to demobilize, to "pacify" and contain the popular unrest created by disruptive economic and social policies . . . [including paramilitary violence].¹⁵

In 1997 alone, the FBCHRC reported on the following incidents: violent confrontations between peasants and members

12. Dillon, *supra* note 7, at 4-1.

13. See U.N. DEVELOPMENT PROGRAMME, *supra* note 9, at 88.

14. See generally CONPAZ, ET AL., MILITARIZACIÓN Y VIOLENCIA EN CHIAPAS (1996).

15. FRAY BARTOLOMÉ DE LAS CASAS HUMAN RIGHTS CENTER, WE WILL NOT FORGET 11-12 (1997).

of the paramilitary group "Peace and Justice" (*Paz y Justicia*) in the municipality of Sabanilla; ambush of human rights observers from a coalition of non-governmental organizations in the North of Chiapas; numerous violent confrontations between Government security forces and peasants; and, in the week before Christmas, the massacre of forty-five unarmed peasants by paramilitary groups in the municipality of Chenalhó.¹⁶ The paramilitary violence, linked to both state security police and the Armed Forces occurred with virtually absolute impunity, despite its role as the cause of a significant death toll and displacement of large populations from their communities.

The increased paramilitary violence and the dysfunctional criminal justice system are responsible for a significant portion of the rising violence and crime throughout the country. Ernesto López Portillo, co-author of a 1994 study of public security issues has argued:

In Mexico as elsewhere, crime is a career option that competes with others. . . . Many Mexicans are turning to crime because punishment is remote. The criminal justice system is chaotic; the country has had seven attorneys general in nine years, and turnover among lower officials is higher.¹⁷

In its 1998 Report on the Situation of Human Rights in Mexico (1998 Report), the Inter-American Commission on Human Rights (IACHR), noted that in 1995, of the 218,599 crimes reported to the Attorney General of the Federal District, only 5,479 alleged perpetrators were brought to court. This constitutes 2.5 per cent of the total number of crimes reported; "for every one thousand crimes, 25 were solved and 975 remained unsolved [and] the perpetrators remained unpunished."¹⁸ The IACHR made clear that the 1995 statistics were the norm during this decade and that in 1996 "the trend was the same as in previous years."¹⁹

In 1997 alone, almost one and a half million crimes were reported.²⁰ The Government itself observed that: "More than 150,000 arrest warrants were issued but only 85,000 were carried

16. See *id.* at 12.

17. Dillon, *supra* note 7, at 4-1.

18. Inter-Am. C.H.R. ch. 5, para. 360, *Report on the Situation of Human Rights in Mexico available at* <<http://www.oas.org/EN/PROG/ichr/countryrep/Mexico98en/Chapter-5.htm> at para. 360>.

19. *Id.*

20. See *id.* at para. 366.

out, which amount to only 6 percent of the total crimes reported. This means that many criminals are able to evade the law and to stay on the streets performing their deeds.”²¹ In its 1998 Report, the IACHR pointed to both the evident “lack of will on the part of the judicial authorities and their staff to apprehend those responsible for crimes” as well as the reluctance, corruption, or incapacity of the Public Prosecutor as an explanation for this situation.²² Other analysts noted that police agents are the principal organizers of crime and are often on the payroll of the drug cartels they are ostensibly combating.²³

While police involvement in criminal violence is high, police and security forces’ involvement in human rights abuses is so prevalent that it has become institutionalized. In a 1997 speech, President Zedillo conceded that the police are largely responsible for the public security crisis in Mexico:

It is profoundly indignating [sic] that judicial police agents, instead of preventing, investigating, fighting crime and protecting the population, are actually more cruel and dangerous criminals because of the impunity that follows their actions. In all honesty, ladies and gentlemen, we must admit that when it comes to public safety, the three Powers of the Union and the three levels of Government have failed the citizens of our country.²⁴

Restructuring the training and compensation systems for judicial police could go far toward remedying the problem.²⁵ In 1995, a federal judicial police agent earned N\$1,632.58 a month (approximately \$270); a unit chief, N\$1,818.85 (approximately \$300); a section chief, N\$1,948.18 (approximately \$325); and a head of group, N\$2,150.90 (approximately \$360).²⁶ The IACHR concluded that: “The lack of adequate physical resources and the

21. PRESIDENT ERNESTO ZEDILLO, AVANCES Y RETOS DE LA NACIÓN, [Advances and challenges of the Nation], PRESIDENT ERNESTO ZEDILLO’S MESSAGE AT THE PRESENTATION OF HIS IV GOVERNMENT REPORT TO THE NATION 7 (Sept. 1, 1998), reprinted in Inter-Am. C.H.R. ch. 5, para. 366, *supra* note 18.

22. *Id.* at para. 364.

23. “Lucio Mendoza, a former analyst at the national security agency who now runs a research organization, said that the authorities have not only lost control but that members of the police are now the main organizers of crime.” Dillon, *supra* note 7, at 4-1.

24. Inter-Am. C.H.R. ch. 5, para. 390, *supra* note 18.

25. *Id.* at para. 391.

26. In 1995, the exchange rate for the New Mexican Peso was approximately six New Mexican Pesos to one U.S. Dollar; see *id.*

low salaries result in glaring inefficiencies and create incentives for corruption to take place in the day-to-day tasks performed by the agents and to become the rule rather than the exception."²⁷

In its 1997 country report on Mexico, Amnesty International (Amnesty) expressed concern about the autonomy of police and security officers involved in torture:

Despite the prevalence of torture in Mexico and the hundreds of complaints filed by victims and their relatives before the Mexican authorities, to date Amnesty International is not aware of any government official who has been sentenced under the Federal Law to Prevent and Punish Torture.²⁸

Law enforcement agents accused of torture are occasionally indicted and sentenced under charges such as "abuse of authority" (*abuso de autoridad*). As the Amnesty report notes, these charges carry lesser penalties and allow for release on bail. For example, as the IACHR noted in a February 1998 report, Fernando Pavón Delgado was originally charged with abuse of authority in the torture of Manuel Manriquez Agustín and sentenced to two years in prison. On appeal, he was released on bail and the sentence was commuted to a fine. In total, Pavón Delgado spent nine months incarcerated for torturing a false confession out of a man who spent eight years in prison for a crime he did not commit, and who was released only because of pressure from the IACHR.

Often, the only punishment given federal police officers accused of human rights violations is that they are transferred to other jurisdictions. When agents are dismissed for human rights violations, they are frequently rehired by other police forces.²⁹ These transfer practices have been noted by both non-governmental and governmental human rights groups. Sam Dillon writes in the *The New York Times*:

In the mid-1980's, the Government promised to compile a single, computerized file of information on all Mexican police officers, thus helping the authorities to avoid hiring criminals. Three presidencies and nearly 15 years later, the list is still

27. *Id.* at para. 392.

28. AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL'S CONCERNS REGARDING TORTURE AND ILL-TREATMENT IN MEXICO 5, (April 30, 1997), AI Index No. AMR 41/17/97, available at <<http://www.amnesty.org/ailib/aipub/1997/AMR/24101797.htm>> [hereinafter AMNESTY INTERNATIONAL'S CONCERNS REGARDING TORTURE].

29. See AMNESTY'S CONCERNS REGARDING TORTURE, *supra* note 28, at 5.

incomplete.³⁰

In 1996, then chief of the Mexico City police General Enrique Salgado Cordero agreed to create such a data bank. The data bank would list the record of every police officer employed by the Federal District, with the purpose of dismissing and/or prosecuting persistent offenders. Amnesty reports that the head of the Mexico City Human Rights Commission “urged the creation of this data bank to stop ‘bad officers from entering other [police] corporations’ (*“evitar que los malos elementos puedan ingresar a otras corporaciones”*).³¹ Yet currently there are still no definitive plans to institute such a data bank.

Torture and police abuse are not the only rampant violations that occur in Mexico. During the Zedillo administration, there was also a marked increase in the number of “disappearances” in Mexico. Amnesty reports that, “In most cases, there is strong, or even incontrovertible, evidence of official participation in carrying out ‘disappearances,’ yet those responsible continue to benefit from impunity.”³² The majority of these disappearances occurred within the context of alleged counter-insurgency and anti-narcotics operations, most of which take place in rural areas.³³

Victims are often members of peasant organizations, indigenous people, students and teachers. Amnesty reports that in many of the cases, the victims disappeared “following their witnessed detention by members of the armed and police forces. However, their detention is then repeatedly denied by the security forces and the Mexican Government.”³⁴ Sometimes, after intense domestic and international publicity and pressure, victims reappeared after weeks or even months, manifesting signs that they suffered torture. In other cases, only the cadavers are found, often bearing evidence of extra-judicial execution. Amnesty notes, “Neither the victims nor their relatives appear to have any effective recourse before the law in Mexico for seeking redress for these gross human rights violations, particularly when the armed

30. Dillon, *supra* note 7, at 4-1.

31. AMNESTY INTERNATIONAL’S CONCERN’S REGARDING TORTURE, *supra* note 28, at 5.

32. AMNESTY INTERNATIONAL, MEXICO: DISAPPEARANCES A BLACK HOLE IN THE PROTECTION OF HUMAN RIGHTS 1 (May 7, 1998), IA Index No. AMR 41/05/98 [hereinafter DISAPPEARANCES].

33. *See id.*

34. *Id.*

forces are involved.”³⁵

In short, to understand the nature of the rising violence gripping Mexico, it is critical to look beyond the headlines. First, violent crime appears to be closely correlated with both the economic crisis of the past few years and the Government’s responses to that crisis. Second, police are responsible for a significant proportion of violent crime, and state-sponsored violence committed by security forces and paramilitary groups is rising as dramatically as individual crime in Mexico. Structural defects in the training and compensation of police agents, coupled with the Public Prosecutor’s office and the judiciary’s lack of will to counter this illegal activity, encourages corruption and abuse, and allows egregious human rights violations to continue unabated.

B. Militarization of Law Enforcement and Military Abuses

On the macro-level, one of the Government’s most notable responses to increasing violence is to involve the military in internal security matters that were previously had left to civilian law enforcement. The military is most visible in Chiapas where there are approximately 70,000 national troops. Its presence however, is increasingly felt in Oaxaca and Guerrero, where the Government believes suspected terrorist groups base their operations.³⁶ The Army also assumed an ever-larger role in Northern Mexico, where its alleged mission is to fight drug cultivation and trafficking. Under the guise of fighting terrorism and drugs, the military’s presence in law enforcement is “normalized” and spread to urban centers as well. For example,

35. *Id.* The Mexican Government often blames these human rights violations on the creation of the governmental National Commission on Human Rights (*Comisión Nacional de Derechos Humanos* (CNDH)). Such a commission, however, is no substitute for effective legal remedies and has proven inadequate due to structural constraints. The IACHR’s 1998 Report notes that:

[C]ompliance with a CDNH Recommendation does not necessarily mean that justice has been done for the victim or that the damage has been repaired. It must also be noted that the mandate of the CNDH and that of the state human rights commission does not allow for real autonomy; that they are not competent to analyze violations of rights of a political, labor or jurisdictional nature; and that its recommendations are not binding.

Inter-Am. C.H.R. ch. 5, para. 359, *supra* note 18.

36. See LA JORNADA, 17 de junio de 1998, cited in PHYSICIANS FOR HUMAN RIGHTS, HEALTH CARE HELD HOSTAGE: VIOLATIONS OF MEDICAL NEUTRALITY AND HUMAN RIGHTS IN CHIAPAS, MEXICO 2 (quoting Senator Patrick Leahy) (on file with author).

the police chiefs of many cities are now ex-military commanders, trained in and accustomed to military, rather than civilian law enforcement tactics.³⁷

The militarization of Mexico has had dire consequences for the rule of law. In a press release issued on July 24, 1996, the IACHR sounded its own alarm at the situation:

[B]ased on its experience, [the IACHR] wishes to draw attention to the consequences of the use of the Armed Forces in functions involving the security of citizens, since this could lead to serious violations of human rights because of the military nature and the training received by the Armed Forces.³⁸

The arbitrary detentions, disappearances, raids, and arrests the Army carried out from the beginning of the military presence in Chiapas, as well as in other states of the republic, such as Guerrero, Oaxaca, Puebla, and Veracruz, have resulted in a *de facto* suspension of individual rights. Such suspension of individual rights is simply not compatible with the rule of law.

The Armed Forces' actions are usurping civilian law enforcement functions. For instance, the IACHR noted in its 1998 report:

During the Commission's on-site visit to Mexico, it received a number of complaints that the Armed Forces were responsible for arbitrary detentions, the interrogation of alleged criminals and searches without court order. In this connection, it should be pointed out that article 21 of the Constitution provides that it is the exclusive responsibility of the Office of the Public Prosecutor and the Judicial Police to prosecute crimes.³⁹

Rather than making public security more professional by removing it from the purview of corrupt police agents, militarizing public security has resulted in Army officers' increasing involvement in human rights violations. In its 1997 Country Report on Mexico, Amnesty stated, "The growing militarizing of public security as well as the increase of anti-narcotics and counter insurgency operations carried out by the Army in Mexico, has seriously increased the number of reports of human rights

37. See, e.g., LAWYERS' COMMITTEE FOR HUMAN RIGHTS, THE TREATMENT OF FREEDOM OF ASSOCIATION IN THE U.S. DEPARTMENT OF STATE'S 1997 COUNTRY REPORT ON MEXICO (1998).

38. Inter-Am. C.H.R. ch. 5, para. 400, *supra* note 18.

39. *Id.* at para. 406.

violations by members of the Mexican Armed Forces.”⁴⁰

Little attention is focused on the process through which this sweeping militarizing has been legally sanctioned. The National Public Security System Law, enacted in 1995 (*Ley del Sistema de Seguridad Pública*), created the National Public Security Council (*Consejo Nacional de Seguridad Pública* (the Council)) to coordinate actions nation-wide against threats to security. The Council includes the Secretary of Government, Secretary of the Army, Secretary of the Navy, Attorney General, state governors, the Mexico City Mayor, and an Executive Secretary who is nominated by the Council's president and elected by the Council. The National Public Security System Law dramatically departed from the past by explicitly providing for the intervention of the Armed Forces in the fight against crime by converting *national* security into *public* security.⁴¹ For its part, the IACHR went to great lengths to reject this conflation of ordinary crime and threats to national sovereignty:

The [IACHR] has been informed that, under the pretext of the increase in crime in the country and society's demand for greater public security, the State has made a series of changes in the law permitting the Armed Forces to intervene in areas that are the responsibility of the civil authorities, such as public security and the prosecution of certain crimes. This permission, according to the same source, was granted because of a confusion between the concepts of public security and national security, when there is no doubt that the level of ordinary crime, however high this may be, does not constitute a military threat to the sovereignty of the State.⁴²

In fact, as the body charged with ultimate authority over police and military questions, the Council's composition guarantees that control over public security decisions lies with the Armed Forces.⁴³

On March 11, 1996, the Mexican Supreme Court (the Court)

40. See AMNESTY INTERNATIONAL'S CONCERN'S REGARDING TORTURE, *supra* note 28, at 5.

41. See *Continua el Motin en el Penal de Puebla*, LA JORNADA, 23 de octubre de 1995, at 10.

42. Mexican Commission for the Defense and Promotion of Human Rights in Mexico, *Report on the Human Rights Situation in Mexico* (July 1996) cited in Inter-Am. ch.5 at para. 404, *supra* note 18.

43. *Id.* at para. 405.

considered the constitutionality of the Army's participation in public security. Leonel Godoy and other members of the opposition Party of the Democratic Revolution (*Partido de la Revolución Democrática* (PRD)) presented petitions to the Court. In an unprecedented action, the Court ruled unanimously on the constitutional issue in six simultaneously issued opinions (*tesis*).⁴⁴ In those opinions, the Court conspicuously avoided consideration of the drafters' intent, holding that participation of the Secretaries of the Army and Navy in the National Council on Public Security did not violate Article 21 of the Constitution. The Court held that the Armed Forces could participate in civil actions to promote public security, provided that the participation meets the following conditions: (1) they are requested to do so by civilian authorities; (2) individual rights are not violated; and (3) such actions are carried out in strict accordance with the Constitution and the law.⁴⁵ In practice, the requirements for military involvement in internal public security are not monitored or enforced while the precedent allowing it is embraced.

From a jurisprudential perspective, the Court's action was astounding. The Court's holdings asserted that, "The Court, in its session of March 11 of this year, approves... the preceding statement and determines that the vote is fit to constitute jurisprudence[.]"⁴⁶ making painfully explicit that the unprecedented issuance of six simultaneous opinions was intended to constitute jurisprudence. Such jurisprudence would be binding on all lower courts and would definitively settle the constitutionality question because there could be no other opinion contradicting it. There is no other case in which the Court *en banc* delivered the five requisite opinions needed to constitute jurisprudence.⁴⁷

In Mexico the rule of law is further eroded by the impunity with which the military commits human rights abuses and the

44. See "Rangel, Leonel Godoy," 3 S.J.F. 350 (9a época 1996); "Rangel, Leonel Godoy," 3 S.J.F. 350 (9a época 1996); "Rangel, Leonel Godoy," 3 S.J.F. 434 (9a época 1996); "Rangel, Leonel Godoy," 3 S.J.F. 435 (9a época 1996); "Rangel, Leonel Godoy," 3 S.J.F. 436 (9a época 1996); "Rangel, Leonel Godoy," 3 S.J.F. 470 (9a época 1996); "Rangel, Leonel Godoy," 3 S.J.F. 471 (9a época 1996).

45. See "Rangel, Leonel Godoy," 3 S.J.F. 434, 435 (9a época 1996).

46. "Rangel, Leonel Godoy," 3 S.J.F. 350, 351 (9a época 1996).

47. For a discussion on how jurisprudence creates binding precedent, see *infra* Part III(B).

military's unwillingness to subject itself to the jurisdiction of civil courts. Despite the civilian authorities' constitutional power to assume jurisdiction over military personnel accused of common offenses, the construction of which offenses are common crimes is left to the discretion of military authorities. Moreover, as Amnesty notes, that military jurisdiction has "systematically blocked attempts by victims and their representatives to seek punishment for those responsible for human rights violations."⁴⁸

The Gallardo case, in which an officer accused the Mexican military of human rights abuses, illustrates the military's lack of legal accountability to civilian authorities, even in cases where international pressure is brought to bear. The IACHR, which heard evidence in the Gallardo case in 1996, issued its finding in 1997, calling for Gallardo's immediate release and for his indemnification for damages resulting from his imprisonment. The Government was unable or unwilling to confront the military regarding the allegations and, as a result, failed to comply with the findings of the IACHR.⁴⁹

Another case brought before the IACHR involved the execution of three men in Morelia, Chiapas in the wake of the EZLN uprising.⁵⁰ After all domestic remedies were exhausted, Mexican human rights groups, in conjunction with the Center for Justice and International Law presented the Morelia case to the IACHR on November 23, 1994.⁵¹ The petitioners accused the Army of violating fundamental civil liberties and depriving the victims of judicial guarantees and protection under, *inter alia*, Articles 1, 4, 8 and 25 of the American Convention on Human Rights (ACHR).⁵² Despite the Army's attempts to deny responsibility, the IACHR, after a lengthy investigation, found for the petitioners and recommended that the Government compensate the widows of the three victims and pursue criminal investigations against the suspected Army officers.⁵³ In March

48. AMNESTY INTERNATIONAL'S CONCERN'S REGARDING TORTURE, *supra* note 28, at 5.

49. See CENTRO DE DERECHOS HUMANOS "MIGUEL AGUSTÍN PRO JUÁREZ," SERVICIO DIARIO DE INFORMACIÓN SOBRE DERECHOS HUMANOS SOBRE MÉXICO (June 10, 1998) sec. V at 5-6.

50. See Case No. 11.411, Inter-Am C.H.R. 45, OEA/ser/L/V/II.96, doc. 95 rev. 7 (1996).

51. See *id.*

52. See *id.*

53. In 1996, Mexican Government officials informally spoke to the families of the

1998, after the Government continued to stall implementation of the recommendations, the IACHR announced that it was publishing its findings on the case to the General Assembly of the Organization of American States.

In sum, behind the alarming crime statistics in Mexico are deeply-rooted structural and institutional sources of violence. Mexico has become a nation where those charged with law enforcement are themselves perpetrators of criminal activity. The "Miguel Agustín Pro Juárez" Human Rights Center notes:

[A]lthough the Executive Branch alludes to diverse social causes for the phenomenon of crime, such as 'unemployment or under employment derived from the economic crisis period and austerity [measures], population growth, corruption among public security forces, impunity for criminals, its proposal attempts to reduce crime levels through only raising penalties and forgets the rest.'⁵⁴

The Government's own role in engendering human rights abuses is entirely disregarded. In particular, its conversion of public security into national security and concomitant militarizing of law enforcement only served to increase human rights abuses and further erode the rule of law. The IACHR, in its 1998 Report, urged the Government to revisit the Supreme Court decisions of March, 1996, and to reform the Law on the National System of Public Security "with a view to restricting the National Armed Forces to the role for which they were created, namely, the security and defense of the Federation against outside attack"⁵⁵ In particular, Article 27 of the ACHR, to which Mexico is a party, calls for such a restriction of the role of the Armed Forces.⁵⁶

men to discuss a solution to the dispute, but the families insisted on a full investigation and proper punishment of those responsible. The CNDH has been investigating the case from the beginning, but three years later has still not released a report and is reluctant to pressure the Mexican Army. See HUMAN RIGHTS WATCH/AMERICAS, *IMPLAUSIBLE DENIABILITY STATE RESPONSIBILITY FOR RURAL VIOLENCE IN MEXICO* (1997).

54. LEGALIZAR LA ARBITRARIEDAD, *supra* note 4, at 5.

55. Inter-Am. C.H.R. ch.5, at para. 421, *supra* note 18.

56. Case No. 11.411, Inter-Am. C.H.R. 45, OEA/ser/L./V./II.96, doc. 95 rev. 7, at para. 27(1996).

III. OVERVIEW OF THE JUDICIAL PROCESS AND THE AMPARO⁵⁷ MECHANISM

The right to a fair trial under Mexican law is protected through a series of "personal rights" enumerated in Articles 13, 14, 16, 17, 19 and 20 of the Constitution. This section provides an overview of the judicial process, notes where practice deviates from the provisions enshrined in the Constitution and discusses the role of the two types of *amparo* mechanisms, direct and indirect, used to safeguard individuals' rights within the judicial system. The Mexican civil code system differs from the common law system in the United States. Similarly, trial in Mexico differs from its common law equivalent. In Mexico the judicial process entails a series of fact-finding sessions and hearings over time, which are supplemented by documentary evidence. Judges play a more prominent role in the civil system, actively engaging in fact-finding and questioning witnesses rather than simply mediating the law. Moreover, in Mexico, as in most civil code systems judicial review is limited.

Indeed, the principal means of redressing violations of a defendant's constitutional rights in the judicial process is through the *amparo*, or protection suit, mechanism. As discussed below, the *amparo* greatly expands upon the United States' Writ of *habeas corpus* and allows defendants to appeal rulings regarding the admission of evidence, the validity of an arrest and other due process concerns.

A. Overview of the Judicial Process

A Mexican "trial" is really a judicial process with three distinct stages. In the first stage, the Public Prosecutor (*Ministerio Público*) conducts an extensive pre-trial preliminary investigation (*averiguación previa*).⁵⁸ The role of the Public Prosecutor is to determine whether, after interrogating the witnesses, the evidence is sufficient to warrant formal charges, gathering the other evidence, and questioning the suspect. Under Mexican law, the accused has the right to be represented by counsel during the

57. "*Amparo*" means protection, from the verb '*amparar*,' to protect or defend. THE UNIVERSITY OF CHICAGO SPANISH-ENGLISH DICTIONARY 55 (4th ed. 1987).

58. Obviously, this stage is obviated in cases where the suspect is arrested in the act of committing the crime.

preliminary investigation and the right to remain silent.⁵⁹ If the Public Prosecutor determines that the equivalent of reasonable cause exists, the Public Prosecutor sends the record assembled during the initial investigation to the criminal court.

A defendant's rights can be exercised *pro se* or through a lawyer. When a defendant cannot afford an attorney, one is appointed for him from a pool of public defenders (*defensores públicos*) who often lack independence and are severely overworked. Although the right to counsel theoretically attaches immediately in the pre-trial investigation phase, the early participation of public defenders does little to ameliorate abuse. Indigenous people fare even worse than other similarly impoverished defendants. Although the law calls for interpreters for non-Spanish speaking indigenous defendants, Amnesty reports that "these are rarely available and most indigenous people facing trial in Mexico continue to suffer the lack of this basic right."⁶⁰

After the accused submits a formal statement to the judge, (*declaración preparatoria*), the second phase, called "Instructions" (*Instrucciones*), begins. In this phase, the Public Prosecutor and the defense attorney conduct a series of discrete hearings before the judge and gather evidence from witnesses, including the accused. In addition to oral testimony, documentary evidence may be offered from private parties as well as public sources and records. Notarized documentary evidence need not be submitted to a separate evidentiary authentication process, as is the case in the United States. As in other civil code countries, a defendant in Mexico theoretically has an unlimited right to discovery of all the evidence assembled by the prosecution. This, however, is rarely observed in practice.

The Constitution also provides for the right of the accused to attend the hearings and challenge the evidence or testimony presented, but these rights are also seldom upheld in practice. Two 1998 cases involving indigenous persons who, accused of involvement in establishing autonomous Zapatista communities, were detained without bail in Tuxtla Gutiérrez, Chiapas, are illustrative. There, the presiding judge stated that "there was no

59. For a discussion on the practical reality of the abrogation of these rights, see *infra* Part V.B.

60. AMNESTY INTERNATIONAL'S CONCERNS REGARDING TORTURE, *supra* note 28, at 4.

reason for the accused to be present at the hearings” where the arresting police were going to testify.⁶¹ Routinely, transcripts of witness testimony are substituted for the defendant’s presence at the hearing, essentially nullifying the defendant’s right of cross-examination. The lack of cross examination arises as a result of the defendants’ difficulty obtaining transcripts for defendants; thus effective cross examination becomes difficult if not impossible.

Yet, international treaties to which Mexico is bound specify that the accused should always have the opportunity to cross-examine adverse witnesses and call their own witnesses according to the same terms as the prosecution. The International Covenant on Civil and Political Rights (ICCPR), states that, “everyone shall be entitled . . . [to] examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”⁶²

Also in this second stage of the Mexican trial, the judge actively questions both the witnesses and the defendant. The judge becomes an active arbiter between the prosecutor and defense counsel. In addition, the Public Prosecutor’s role is theoretically less partisan than in the common law adversarial system.⁶³ The Government bears the burden of proof and the Public Prosecutor must consider all exculpatory evidence in both the preliminary investigation and during the trial.

In the third and final stage of the Mexican trial, often called “Conclusions” (*conclusiones*), the judge reaches conclusions based on written recommendations from the defense attorney and Public Prosecutor and formulates a sentence. Article 20 of the Mexican Constitution states that the criminal trial process, from arrest to ultimate disposition of the case, should last no more than four months if the charge carries a penalty of less than two years of imprisonment, and no more than twelve months if the penalty exceeds two years (except where defense counsel seeks more time

61. Statements made by presiding judge, at hearings on October 9, 1998 Juez Tercero de lo Penal, Tuxtla Gutiérrez, Chiapas. Author, Pilar Noriega, was present during these statements and, as defense counsel, insisted on the defendants’ presence (transcripts on file with author).

62. *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 3d Comm., 21st Sess., Supp. No. 16., at art. 14(3)(e), U.N. Doc. A/6316 (1967).

63. See MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 95 (1994).

to prepare the case). In practice, however, few judicial processes are completed within this timeframe. Records from Mexico's National Human Rights Commission indicate that "the average time taken for an accused person to be sentenced in a court of first instance is one year and 10 months."⁶⁴ Delays are principally due to backlogs and the difficulty in scheduling police agent and government forensic expert appearances at trial.

In sum, the three-stage Mexican trial process parallels that of the trial process in the United States. Mexico maintains a dual state and federal court system where the court of last resort is the federal Supreme Court. In addition, Mexican federal courts have jurisdiction over disputes concerning official acts that allegedly violate individual rights (*amparo* cases), acts by the federal government that infringe upon states' rights, acts that infringe on the jurisdiction of the Federal District (Mexico City), and acts by state governments or the Federal District that infringe upon the jurisdiction of the federal government.⁶⁵ Lower criminal court decisions can be appealed to intermediate appellate courts and, in certain instances, to the Supreme Court. Lower state court decisions can be appealed to the highest state court and, in certain instances, to the Supreme Court. Although these parallels to the United States trial process exist, there is an additional process distinct to Mexico. In Mexico, claims based on abuses of constitutional rights almost always turn on a second kind of appeal available exclusively at the federal level, the "*amparo*" mechanism.

B. The *Amparo* Mechanism

The *amparo*, or "protection suit," originated in 19th Century Mexico, but is now used by many Latin American countries. In Mexico today, the *juicio de amparo* provides a cause of action where in a plaintiff can challenge the constitutionality of actions by a government authority or provisions of a given law.⁶⁶ *Amparo* combines elements of the Anglo-American writs of *habeus corpus*, *mandamus*, error and injunction.⁶⁷ *Amparos* may be exercised by

64. Inter-Am. C.H.R. ch.5 at para. 397, *supra* note 18.

65. CONST. art. 103 (Mex.).

66. In other countries, the *amparo* is limited to a habeus corpus function. See HECTOR FIX-ZAMUDIO, LA PROTECCIÓN JURÍDICA Y PROCESAL DE LOS DERECHOS HUMANOS ANTE LAS JURISDICCIONES NACIONALES 121-36 (1982).

67. RICHARD D. BAKER, JUDICIAL REVIEW IN MEXICO: A STUDY OF THE

individuals who previously suffered harm as well as by those in fear of imminent harm by governmental officials resulting from violations of the personal rights set out in the first 29 articles of the Constitution, the equivalent of the U.S. Bill of Rights.⁶⁸ The *Amparo* can also be invoked in Constitutional disputes over federal and state jurisdiction.⁶⁹

In Mexico, the *amparo* is used as a broad procedural device that permits individuals to protect their constitutional and human rights not only in criminal cases, but also in civil, administrative or labor disputes, and at both the state and federal level.⁷⁰ In practice, the *amparo* is often the last resort for safeguarding a criminal defendants' rights. This practice, however, is troubling since it results from other theoretically available safeguards—such as the ordinary appeals process—not being respected. Thus, the recent reforms in the Law of *Amparo*, which limit defendants' recourse, require examination.

Some jurists and commentators delineate five functions of the *amparo* mechanism but, in practice, it is best to distinguish between two types of *amparos*: direct and indirect.⁷¹ The direct *amparo* is used within the judicial process itself against final judgments by courts of law and administrative or labor tribunals. In criminal trials, the *amparo* proceeding is a type of special appeal made directly to the federal Collegial Circuit Courts (*Tribunales de Colegiado*).⁷² When granted, the direct *amparo* modifies or revokes the sentence issued by the trial judge.

The indirect *amparo* protects against official actions that

AMPARO SUIT at xiii (1971).

68. In practice, *amparos* are generally sought for violations of Articles 14 or 16 of the Constitution. Inter-Am. C.H.R. ch. 1b at para. 93, *supra* note 18.

69. Ignacio Burgoa Orihuela, a Mexican constitutional scholar, has called the *amparo* a constitutional oversight mechanism. See IGNACIO BURGOA ORIHUELA, EL JUICIO DE AMPARO (1986) in Inter-Am. C.H.R. ch.5 at para. 404, *supra* note 18.

70. See generally HÉCTOR FIX-ZAMUDIO, JUSTICIA CONSTITUCIONAL, OMBUDSMAN Y DERECHOS HUMANOS (1993); HÉCTOR FIX-ZAMUDIO, ESTUDIOS SOBRE EL DERECHO DE AMPARO (1993).

71. See FIX-ZAMUDIO, *supra* note 66, at 121–136. Fix-Zamudio enumerates the personal liberty *amparo*; the *cassation amparo*, the *amparo* against laws, the administrative *amparo*, and the agrarian *amparo*. See also BAKER, *supra* note 67, at 175–6 (discussing the *amparo*).

72. In criminal cases, the *amparo* can substitute for an appeal, whereas in civil, administrative, commercial cases, all appeals must be exhausted before an *amparo* is filed. See Michael Taylor, *Why No Rule of Law in Mexico? Explaining the Weakness of Mexico's Judicial Branch*, 27 N.M. L. REV. 141, 151–52 (1997).

violate constitutional guarantees outside of the judicial process. For example, as expulsion of foreigners increased in the southern state of Chiapas in 1998, a number of foreign nationals invoked *amparos* against the future threat of detention and expulsion from the country.⁷³ Indirect *amparos* may also be used to challenge the application of unconstitutional laws. "The individual challenges a law, not to have it struck from the books, but rather to gain a personal exception from it for particular reasons to be presented."⁷⁴ If the plaintiff wins, he receives a personal exemption from the application of the law, but the law itself remains in force. Finally, the indirect *amparo* can also be utilized in cases where third parties allege violation of their rights during a judicial process.

In contrast to direct *amparos*, indirect *amparos* are heard by the Federal District Courts (*Tribunales de Distrito*).⁷⁵ The *amparo* proceeding is brought directly before the Supreme Court when the dispute involves a constitutional controversy between the federal government and municipalities, the Federal District, or the states, in the event of a dispute between any two of the three branches of government within a state or at the federal level. The *amparo* is also used in the case of "actions of unconstitutionality" (*acciones de inconstitucionalidad*).⁷⁶

One U.S. critic of the *amparo* mechanism, Michael Taylor, argues that "the segregation of all constitutional issues into *amparo* suits lowers the 'constitutional consciousness' of a significant portion of the judiciary. Taylor further asserts, "The majority of magistrates and judges are never given the opportunity to develop a facility for defending, defining, and interpreting constitutional principles."⁷⁷ That is, if a Mexican criminal defendant chooses to make a constitutional claim about an illegal detention or search and seizure, he must file a separate *amparo* suit, which is not considered a part of the original case, in the form of a suppression hearing. In the United States, all of this would normally be heard as one case. Taylor suggests that the vast majority of magistrates and judges never hear or rule upon constitutional issues because constitutional arguments must be

73. See generally LAWYERS' COMMITTEE FOR HUMAN RIGHTS, *supra* note 29.

74. Taylor, *supra* note 72, at 152.

75. Note the discussion in Taylor ignores this fact; *see id.*

76. For a discussion on the "actions of unconstitutionality" *see infra* Part IV.C.

77. Taylor, *supra* note 72, at 154.

heard in special federal courts, and that this is detrimental to the defendants. Practitioners in Mexico, however, feel strongly that given the degree of corruption and ineffective due process in state courts, the defense of individuals' rights would suffer greatly if state trial court judges (*jueces comunes*), who are renowned for their corruption and ineptitude, determined *amparo* proceedings.⁷⁸

Such a separation of constitutional issues from ordinary trial proceedings exists in other civil law jurisdictions as well. For example, in Germany, when a defendant raises a constitutional objection to a statute involved in any civil, criminal, or administrative case, the case will be referred to a special Constitutional Court. The court will decide on specific constitutional issues and remand the case so that the original proceeding can resume.⁷⁹

Taylor next argues that in accordance with the "Otero formulation" of the *amparo* in Mexico, *amparo* rulings have no binding precedential value on future cases. An *amparo* issued in a case of a police coerced confession may have no precedential effect on a case where another defendant's confession was extracted under precisely the same circumstances. Similarly, a finding that a law is unconstitutional benefits solely the individual plaintiff.⁸⁰ Taylor further claims that this "system allows an unconstitutional law to be validly applied to all other citizens . . . [and] only those citizens attuned to the minutiae of the legal system and who have the economic resources to hire a lawyer will be exempted."⁸¹

Although Taylor is correct in pointing out that in other civil law countries, similarly situated plaintiffs can jointly bring suit using some form of *amparo* mechanism, it is misleading to overemphasize the lack of *stare decisis* in Mexico with respect to *amparos*.⁸² As the IACHR notes:

[T]he effects of the so-called "Otero formula" pertaining to the relative nature of the *amparo* sentences are attenuated by the power given to the criteria of the Supreme Court and the

78. In some ways, Mexican attorneys' feelings in this regard mirror the justifications for the use of federal civil rights statutes in the United States. See Taylor, *supra* note 72, at 164-65.

79. See GLENDON, *supra* note 63, at 59.

80. See *id.*

81. *Id.*

82. See *id.*

Appellate Courts . . . under which such criteria become jurisprudence of an obligatory nature for the rest of the courts of Mexico. This means that if in a concrete case the Supreme Court were to determine that a legal norm is unconstitutional, those affected by that decision may invoke in their favor the criterion set forth by that Court in the respective *amparo* decision⁸³

In Mexico, according to the Constitution, the Supreme Court and Collegial Circuit Courts are authorized to give rulings of "jurisprudence," which are binding precedents. The resolutions of the Supreme Court and the Collegial Circuit Courts constitute jurisprudence when the decisions are sustained in five opinions and not overruled.⁸⁴ According to the Law of *Amparo*, a Supreme Court decision is binding on all courts in the country. The difference between the jurisprudence of the Supreme Court and that of its panels is that *Supreme Court jurisprudence is binding on the panels, but the panels jurisprudence is not binding on the Court en banc*. The jurisprudence of the Collegial Circuit Courts is binding on all courts except the Supreme Court.

Thus, the problem with the *amparo* mechanism lies not so much in the legal device itself but in the fact that the federal judges who preside over *amparo* proceedings replicate the same corruption and lack of respect for human rights that infects the rest of the judicial system. The overwhelming majority of *amparo* suits are thrown out of the federal courts. Taylor reports: "The *Centro de Investigación para el Desarrollo* (Center of Investigation for Development (CIDAC)) reports that while 11% of plaintiffs were successful in their *amparo* suit in 1992, and 12% were unsuccessful, a full 77% of all *amparo* suits filed resulted in a denial of proceedings. Improper procedure is the most common reason given by the Supreme Court for a denial."⁸⁵ Judges and Public Prosecutors argue that defense attorneys abuse the *amparo* procedure to obtain reduced sentences for their clients. Indeed, sentence reduction is one of the purposes of the mechanism. However, attorneys would not need to resort to *amparos* so

83. Inter-Am. C.H.R. ch. 1b, para. 100, *supra* note 18.

84. *See id.* The opinions of the Mexican Supreme Court must be approved by eight of the eleven justices while, in order to constitute jurisprudence, the opinions of the Collegial Circuit Courts must be unanimous. ENGLISH TRANSLATION OF AMPARO LAW 41 (Vera Murray-Campbell trans., 1969) (discussing art. 192).

85. *Id.*

frequently if trial and appellate judges ensured defendants their due process rights, including rights of appeals in the first instance.

In theory, the Mexican judicial process provides the defendant with virtually all of the same protections that a defendant would receive in the United States. In practice, however, the government routinely deprives the accused of even the most basic rights of due process, such as non-incrimination and cross-examination. Under these circumstances, the *amparo* mechanism increasingly becomes the only recourse against rampant abuses by the Government. While potentially an effective mechanism for the protection of individuals' rights within the judicial process, the *amparo* proves susceptible to the same problems of judicial apathy and corruption plaguing the rest of the judicial structure.

IV. THE JUDICIARY AND RECENT JUDICIAL REFORMS

In Mexico, the judiciary has historically been in the shadow of the executive. It is also deeply involved in the abuse of human rights. In particular, torture has become an institutionalized method of extracting confessions from suspects. This is largely due to the acceptance of forced confessions. Moreover, while attention focuses on the inept and corrupt police, the role of judges in the perpetuation of torture has remained relatively unexamined. In this section, this article first examines how part of the gap between law and practice is attributable to the structural inadequacies of the judicial branch, which is hampered by corruption and cronyism in the ruling PRI. Specifically, this article considers the role of judges in the institutionalization of torture. Finally, this article describes the Zedillo Administration's judicial reforms and discusses the cosmetic nature of the reforms, as they ignore both human rights concerns and fundamental challenges to creating an independent judiciary in Mexico.

A. Overview of the Judiciary

In its report on the World Bank sponsored reform of the Venezuelan judiciary, *Halfway to Reform: The World Bank and the Venezuelan Justice System*, the Lawyers Committee for Human Rights (the Lawyers Committee) notes:

Almost all Latin American constitutions have established republican states based on the historical tripartite division of power among the executive, legislature, and judiciary.

Historically, however, the three branches have never been coequal (and were never intended to be). The Latin American executive has extensive formal power, deriving from the presidential rule roles of chief executive, commander-in-chief and head of state.⁸⁶

In the case of Mexico, the judiciary's subservience to the executive branch is exacerbated by the one-party state. The ruling PRI has historically used the judiciary to house party loyalists who have not received, or are waiting for more plum political appointments.⁸⁷ Just as the PRI-dominated legislature traditionally rubber-stamped legislation proposed by the President, the judiciary lacks anything more than the most nominal independence.

As the state began to pursue the neo-liberal economic policies of the 1980's and 1990's, it began to privatize assets. The state and the ruling PRI lost some of the social control and conflict resolution techniques that they relied upon in the past. As electoral reforms began taking effect, and opposition parties gained important positions during the last ten years, co-optation and social marginalization became somewhat more limited as means of securing voter and party loyalty. In its briefing paper, *The Judicial Sector in Latin America and the Caribbean: Elements of Reform*, the World Bank notes this general trend in Latin America:

As the Latin American and Caribbean Region continues the process of economic development, greater importance is being given to judicial reform. A well-functioning judiciary is important for economic development. The purpose of any judiciary of any society is to order social relationships and resolve conflicts among those societal actors.⁸⁸

Therefore, it was predictable that in Mexico, where the Salinas and Zedillo administrations have vigorously pursued models of economic development sponsored by the World Bank

86. THE LAWYERS COMMITTEE FOR HUMAN RIGHTS & THE VENEZUELAN PROGRAM FOR HUMAN RIGHTS EDUCATION AND ACTION, *HALFWAY TO REFORM: THE WORLD BANK AND THE VENEZUELAN JUSTICE SYSTEM* 17 (1996) [hereinafter *HALFWAY TO REFORM*].

87. For example, an article recently described the Mexican Supreme Court as "a holding pen for presidential cronies." Sam Dillon, *Crime is Unleashed, But the D.A. Is Undaunted*, N.Y. TIMES, Aug. 6, 1998, at A4.

88. DAKOLIAS, *supra* note 2, at xi.

and United States, that the courts would to assume a greater role in resolving disputes between individuals and conflicts between individuals and the state.

The Lawyers Committee argues that foreign investors, in particular, are concerned that “fundamental civil and political rights, the right to be free from arbitrary arrest and imprisonment, the right to fair pretrial and trial procedures, the right to be free of any unconstitutional actions taken by the government, cannot be vindicated by a deeply politicized and corrupt judiciary.”⁸⁹ As part of its economic development programs, the World Bank stressed the need for raising public confidence in the deeply discredited judiciaries of Latin America.⁹⁰ Yet, the Mexican judiciary is saddled with the legacy of decades of politicization and neglect, which are not so easily undone. In a 1995 interview, Juventino Castro, former Legal Coordinator of the federal Attorney General’s Office and current President of the First Panel of the Supreme Court, argued that the principal problem with the judiciary in Mexico is a lack of public confidence. Castro stated that the Executive and Legislative Branches treat the judiciary paternalistically, directing its actions, regulating it, and deciding its structure.⁹¹ In *Human Rights and Judicial Power in Mexico*, the Minnesota Advocates for Human Rights argues that the judiciary’s lack of independence manifests itself in both objective, e.g. political appointments and subjective, e.g. patterns of serving the Government’s interests.⁹²

In *Transition to Democracy in Latin America: The Role of Judiciary*, Owen Fiss distinguishes among the three different types of judicial independence that incorporate both the objective and subjective elements discussed by Minnesota Advocates for Human Rights. The three elements are: (1) party detachment or

89. *Id.*

90. For example, “in Argentina only 13 percent of the public have confidence in the administration of justice. In Brazil, 74 percent of the public view the administration of justice as fair or poor. The worst case perhaps exists in Peru, where 92 percent of the population lack confidence in the judges.” DAKOLIAS, *supra* note 2, at 4 (footnotes and citations omitted).

91. See David Aponte & Jesús Aranda, *Tratan como Menor de edad al Poder Judicial*, LA JORNADA, 2 de junio de 1995, available at, <http://serpiente.dsgca.unam.mx/jordana/1995/jun95/950602/ministro.html> (interview with Juventino Castro).

92. See MINNESOTA ADVOCATES FOR HUMAN RIGHTS MEXICO PROJECT, *DERECHOS HUMANOS Y PODER JUDICIAL EN MÉXICO* (1995).

independence from the interests of political parties; (2) individual autonomy or independence from the bureaucratic judicial structure and other judges; and (3) political insularity or independence from other governmental institutions."⁹³ In Mexico, none of these elements exist as the symbiotic PRI and Government overwhelmed any autonomy that judges might hope to exercise. Politicized court appointments and the exertion of political influence over cases, coupled with egregious corruption among judges who have gone out of their way to serve the state's interests, have entirely undermined the prestige and respectability of the judiciary as an institution.

A successful judicial career in Mexico often covers a series of progressively higher court appointments which have traditionally been made on the basis party loyalty and patronage, rather than merit. Even with its rather narrow view of judicial reform, the World Bank decried this kind of subjection of judicial appointments to political interests:

Judicial appointments that are based on standards to ensure political loyalty only perpetuate the dependence of the judiciary. It is essential, therefore, that only those individuals truly qualified be considered for judicial positions. . . . In addition to the judicial appointment system, the judicial term also plays an important role in ensuring the independence of the judiciary. Judicial terms should be set to allow for as much independence as possible.⁹⁴

In Mexico, circuit and district court judges serve six-year terms. These terms coincide with the duration of the Presidential term. At the end of six years, they are renewed in their posts or promoted to higher office. Theoretically, every six years, these

93. Owen Fiss, *The Right Degree of Independence*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF JUDICIARY* 55-56 (1993). Theodore Becker has defined independence as follows:

(a) [T]he degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values and conceptions of the judicial role (in their interpretation of the law), (b) in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and (c) particularly when a decision adverse to the belief or desires of those with political or judicial power may bring some retribution on the judges personally or on the power of the court.

DAKOLIAS, *supra* note 2, at 7 n.29 (citation omitted).

94. In 1993, about 50 percent of the superior court judges in Peru were provisional judges without tenure, and were therefore unwilling to take action that might risk their jobs. DAKOLIAS, *supra* note 2, at 11-13.

judges may be removed from office only under enumerated circumstances and in accordance with the procedures established by law.⁹⁵

However, judges are often removed or forced out to make way for other political appointments when the administration changes. The IACHR confirms this view in its 1998 report:

Numerous complaints about corruption, lack of independence and impartiality have made the judicial branch in Mexico one of the organs that enjoys the least public prestige. This mistrust is most pronounced with respect to the judicial branch at the state level, because of the influence which some individuals or groups exercise over the bodies responsible for the appointment of judges.⁹⁶

State judges shall hold office for the term established pursuant to the state constitutions. State judges are often chosen by panels and may be re-appointed at the end of their terms. In theory, they can only be removed from office only in accordance with statutory provisions governing the accountability of state employees.⁹⁷

In Mexico, only the justices of the Supreme Court cannot be removed from office. The IACHR notes the impact of this situation on what, in Fiss' terminology, would be a prerequisite for "political insularity," which is a necessity for achieving true judicial independence:

The fact that circuit magistrates and district judges are subject to transfer until appointed to a new position undermines the principle of genuine unremovability, which is an essential requirement for an independent judicial branch. Moreover, the fact that lower court judges are not unremovable at all, together with the absence of anything that could be called a genuine legal career, gives cause for real concern.⁹⁸

In its 1998 Report, the IACHR went on to point out that the Supreme Court lacks independence: the "[Mexican] system for the political appointment of judges of the Supreme Court of Mexico is the control which one political party has had for more than 60 years over both the executive and the legislative

95. CONST. art. 97. (Mex.).

96. Inter-Am. C.H.R. ch. 5 para. 394, *supra* note 18.

97. CONST. art. 116 § III (Mex.).

98. Inter-Am. C.H.R. ch. 5, para. 395, *supra* note 18.

branches.”⁹⁹

In addition to the structural aspects of judicial independence, such as judicial appointments, terms and removal, the World Bank has emphasized that the concept also contains organizational and administrative elements:

[W]hich must be considered during reform... in order to change the public's perception of corrupt behavior in the judiciary... The administrative aspects of independence include court and case administration. Court administration involves the administrative functions of the courts, including administrative offices, personnel, budget, information systems, statistics, planning and court facilities.¹⁰⁰

These administrative aspects are in serious need of reform in Mexico. The Byzantine bureaucracy of the Mexican court system not only creates long delays, but also creates opportunities for corruption in order to “speed up” a person’s trial. Court fees are often very high, especially when bribes for having processing done in a timely manner are included, making it difficult or impossible for poor defendants to acquire their case file of the charges filed against them. In truly Kafkaesque form, the defendant may be unaware of the full nature of the charges pending against him or the source of the accusation by the state.¹⁰¹

B. The Role of the Judiciary in the Perpetuation of Torture

The most extreme manifestation of political corruption is the judiciary’s role in the perpetuation of torture as a method of extracting confessions and solving cases. Although many

99. *Id.* at ch.1, para. 41.

100. DAKOLIAS, *supra* note 2, at xii–xiii.

101. The IACHR Report states:

Mr. Jorge Luis Rodríguez Losa, President of the High Court of Justice of the State of Yucatán, in October 1992, acknowledged the existence of corruption in the jurisdictional organ of the state and added that a case may be dragged out for 7 or 8 years. In November 1992, Mr. Evaristo Morales Huerta, President of the National Federation of Colleges of Lawyers, noted the need to restore the prestige of the Supreme Court of Justice and drew attention to the fact that its decisions are more political than legal, since members were appointed from the political arena, a trend which must be stopped. This position is consistent with the complaint lodged by members of the High Court of Justice of the Federal District, who also claimed that innocent persons were sentenced to avoid the suspicion of corruption.

Criminal Proceedings Review No. 854, March 1993 cited in Inter-Am. C.H.R. ch. 5, para. 395, n.7, *supra* note 18.

commentators attribute the prevalence of torture in Mexico to police agents,¹⁰² the judiciary has been just as guilty of such offenses. It is, after all, judges who determine whether there are indications of torture and the validity of evidence obtained illegally. It is judges who provide the necessary oversight so that the defendant receives an appropriate defense and has every opportunity to present exculpatory evidence. In short, it is judges who ought to be, but in practice are not, the gatekeepers of the defendant's most fundamental rights.

A panoply of international instruments speak to the inadmissibility of statements gathered under torture. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT), obligates Mexico, as a signatory nation, to "ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."¹⁰³ The ICCPR, to which Mexico is also a party, prohibits torture, and cruel or inhuman treatment.¹⁰⁴ The Constitution also prohibits the use of torture, and all states, except Puebla and Hidalgo, have laws on their books forbidding torture.¹⁰⁵

In 1993, an amendment to Article 20 of the Constitution was passed prohibiting the use of opinions given to police by detainees as evidence in criminal trials. Pursuant to that reform, opinions can only be used as evidence when made to Public Prosecutors or in front of a judge.¹⁰⁶ Two years earlier, Congress passed the Federal Law to Prevent and Punish Torture (*Ley para Prevenir y Sancionar la Tortura*), which prohibits and penalizes use of torture and states that, "no confession or information obtained through

102. See, e.g., *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur*, U.N. Commission on Human Rights, 53d Sess., Agenda Item 8(a), U.N. Doc. E/CN.4/1997/7 (1997) [hereinafter 1997 *Human Rights, Report of the Special Rapporteur*].

103. *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR 3d Comm., 49th Sess., Supp. No. 44, at 197, U.N. Doc. A/39/51 (1984).

104. See CONST. art. 20 (II) (Mex.); G.A. Res. 2200, *supra* note 62, at art. 2.

105. See AMNESTY INTERNATIONAL'S CONCERNS REGARDING TORTURE, *supra* note 28.

106. See CONST. art. 20 (II) (Mex.).

torture can be used as evidence.”¹⁰⁷ It further mandates that the detainee’s lawyer or a person of confidence has to be present during any period an official opinion of confession is given.

Despite Mexico’s constitutional provisions, this legislation, and its obligations under international law, torture continues to be practiced systematically and with impunity. Indeed, a 1997 report by the Human Rights NGO Network, “All Rights for Everyone” (*Red de Organismos Civiles de los Derechos Humanos “Todos los Derechos para Todos”*), stated that levels of torture in the country were at their highest levels in decades.¹⁰⁸ Nigel Rodley, the U.N. Special Rapporteur on torture, also concluded from his 1997 visit that the use of torture in Mexico appears to be endemic.¹⁰⁹ Torture increased 600% in Mexico between 1996 and 1997.¹¹⁰ This is an alarming finding, especially given the prevalence of torture already recorded in the country.¹¹¹

Article 11 of the Federal Law to Prevent and Punish Torture obligates all public servants who are aware of a case of torture to report it immediately. However, this is not practiced by Public Prosecutors, judges, or public defenders. Not only is this law not followed, but judges consistently rule that a certification of lesions on the detainee is not sufficient evidence that the lesions were caused by the officer.¹¹² Despite the existence of the Federal Law to Prevent and Punish Torture, as well as amendments to the Constitution that explicitly prohibit torture and the use of opinions exacted with the use of torture, judges continue to consider that the first statement or “confession” was made without coaching and therefore ought not to be retracted.¹¹³

In Mexico, the confession has historically been treated by judges as one of the most valuable types of evidence. Judicial opinions are rife with statements regarding a defendant’s declarations about torture and mistreatment at the hands of the

107. LEY PARA PREVENIR Y SANCIONAR LA TORTURA, art. 8 (1991) (Mex.).

108. See RED DE DERECHOS HUMANOS TODOS LOS DERECHOS PARA TODOS, LA CNDH: IMPUNIDAD Y TORTURA 3 (1998).

109. See generally 1997 Human Rights, *Report of the Special Rapporteur, supra* note 102, at 25.

110. See CENTRO DE DERECHOS HUMANOS “MIGUEL AGUSTÍN PRO JUÁREZ,” SERVICIO DIARIO DE INFORMACIÓN SOBRE DERECHOS HUMANOS EN MÉXICO § IV (June 17, 1998).

111. See *id.*

112. LEY PARA REVENIR Y SANCIONAR LA TORTURA, art. 11 (1991) (Mex.).

113. CONST. art. 20 (Mex.).

police. If these statements are contrary to a declaration by the arresting judicial agents, or are contrary to a report finding no injury opinions issued by the medical examiners from the Public Prosecutor's office, the suspect's statements are given no legal value. Due to precedent, many judges are suspicious of confessions that are retracted only after the defendant has received protective instructions from defense counsel. Notwithstanding significant evidence indicating that involuntary confessions are unreliable, judges in Mexico to view confessions to have the most probative value.¹¹⁴

Due process not only necessitates that defendants' statements are made voluntarily, to ensure reliability, but it also acts as a check on the judiciary in other areas. For example, it is well established in the United States that the exclusionary rule deters police misconduct.¹¹⁵ Further, more recent opinions by the U.S. Supreme Court articulate an inherent value in avoiding judicial sanction of unconstitutional practices.¹¹⁶ In *Mapp v. Ohio*, the Court stressed the importance of judicial integrity for the sake of maintaining public confidence in the judiciary as an institution.¹¹⁷

The integrity of the judiciary in Mexico, however, has historically been of little weight in the official discourse surrounding forced confessions in Mexico. To this day, judges in Mexico go out of their way to dismiss the statements of the accused by forcing him or her to bear the burden of proof as to the lack of veracity of the police. A typical court record reads as follows:

One must point out that there does not exist the evidence on records of a sufficiently strong motive that the Judicial [Police]

114. See generally 22 S.J.F. "Martinez, Sebastian Garrido," 36 (6a época). "*Para que la retractación de la confesión anterior del inculpado tenga eficacia legal, precisa estar fundada en datos y pruebas aptas y bastantes para justificarlo jurídicamente.*" *Id.* See Documents Related to the Request for the Extradition of Mr. Geovanni Gomez Esprin [Criminal Case No. 93/1985], Presented by the Government of Mexico to the Government of the United States of America, (Procuraduría de la República, Resolution dated Aug 4, 1986) [hereinafter Gomez Esprin Case].

115. As early as the 1940's, the U.S. Supreme Court made clear that the exclusionary rule for confessions was similar to the exclusionary rule under the Fourth Amendment and was meant to deter abuse on the part of investigating police agents. See, e.g. *Ashcraft v. Tennessee*, 322 U.S. 143, 143 (1944); *Haley v. Ohio*, 322 U.S. 596, 596 (1948).

116. In *Elkins v. United States*, the Supreme Court admonished judges who assisted "in the willful disobedience of a Constitution that they are sworn to uphold." *Elkins v. United States*, 364 U.S. 206, 223 (1960).

117. See *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

Agents, of their own will, pointed out the accused as the perpetrators of the crime. . . . [Therefore] given the theory of the procedural proximity of the evidence, the initial declarations of the accused receive priority since the corresponding legal value had been given to them because they were issued with proximity to the facts, which does not apply to his retraction.¹¹⁸

Thus, even if the defendant consistently claims his confession was extracted under torture, he bears the burden of proof as to the motive on the part of the police for detaining him and forcing a confession.¹¹⁹ Such a policy directly conflicts with the internationally recognized human right to be presumed innocent.¹²⁰ In Mexico, where there is a widespread practice of arbitrary arrests based on subsequently fabricated charges, the use of forced confessions is especially troubling.¹²¹

It is this judicial policy of placing greater weight on the first statements given by detainees rather than on later statements that is the most fundamental obstacle to the eradication of torture in Mexico; as Amnesty's 1997 report states:

[Amnesty International] believes that the practice of torture in Mexico is not only caused by corruption and lack of resources in the initial stages of criminal investigations, but by a judicial system which gives confessions, regardless of the circumstances in which they are obtained, full weight as evidence. According to Mexican law, when the defendant does not support with other evidence his or her claims that the initial statement was obtained under duress, this claim, by itself, is not sufficient to invalidate his confession.¹²²

Many non-governmental organizations acknowledge that such

118. Gomez Esprin Case, *supra* note 114, at Annex I.

119. 472 S.J.F. App. 818 (1917-1988) (Mex) ("*Cuando el confesante aporta ninguna prueba para justificar su aserto de que fue objeto de violencia por parte de alguno de los organos del estado, su declaración es insuficiente para hacer perder a su confesión inicial el requisito de espontaneidad necesaria a su validez legal.*") In the United States, of course, the voluntariness of a confession must be demonstrated by a preponderance of the evidence.

120. See *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR 3d Sess., at art. 11 U.N. Doc. A/810 (1948); G.A. Res. 2200, *supra* note 62, at art. 11 (1).

121. See HUMAN RIGHTS WATCH, *SYSTEMATIC INJUSTICE: TORTURE, "DISAPPEARANCES," AND EXTRAJUDICIAL EXECUTION IN MEXICO 39-42* (1999) [hereinafter *SYSTEMATIC INJUSTICE*].

122. AMNESTY INTERNATIONAL'S CONCERNS REGARDING TORTURE, *supra* note 28, at 4.

confessions are extracted using illegal methods such as torture during the initial investigation period.

In short, the Mexican judiciary has abdicated its responsibility as the arbiter of justice. This abdication has exacerbated the structural defects in the Mexican criminal justice system. Without judicial sanctions on torture, the police, who by and large are untrained, have no incentive to cease use of illegal methods of information gathering. Furthermore, such sanctions are needed to pressure Public Prosecutors who oversee the police forces in order to forgo this economical method of resolving cases.

C. *Evaluating Recent Judicial Reforms*

Although President Zedillo's promised reform of the judiciary upon taking office in 1994, the efforts made have been principally administrative, superficial, and have failed to make the judiciary more effective and independent. In its 1998 Report, the IACHR concluded that:

[N]otwithstanding the progress achieved, the executive branch retains its excessive legal and extralegal powers over the judicial branch. As long as this situation lasts, it will be impossible for Mexico to have fully independent and impartial courts, despite the existence of a constitutional system based on a balance of powers and despite the international treaties signed by Mexico which expressly provide for an independent judiciary.¹²³

There is no hard evidence of Government commitment to a system of genuine checks and balances. The reform efforts of the Zedillo Administration fail to address crucial structural impediments to judicial independence.¹²⁴

One belated attempt at reform was a change in the selection process of federal judges and secretaries. Previously, political patronage served as the primary means of competitive examination.¹²⁵ Although welcome, the lack of information available to the public about the new selection process makes it impossible to determine how this new process actually works.

Other attempts at reform were primarily administrative and

123. Inter-Am. C.H.R. ch. 1, para. 56, *supra* note 18.

124. For a general discussion on the World Bank programs' limitations in this regard, see *HALFWAY TO REFORM*, *supra* note 86, at 6.

125. See *FEDERAL JUDICIAL ORGANIZATION ACT*, art. 112 (1995) (Mex.); see also Inter-Am. C.H.R. ch. 1, at para. 44, *supra* note 18.

organizational in nature. To date, although well received, the attempts at reform have done little to reduce the bureaucracy and delay experienced by defendants at the trial level. For example, one reform created a Federal Judiciary Council (*Consejo Federal de la Judicatura*) to oversee the federal courts and their administration, shifting this duty away from the Supreme Court (except for the Supreme Court, which still administers itself).¹²⁶ The principal reason for the creation of the this Council was to follow World Bank recommendations and other models of judicial reform in Latin America, which appear to relieve the backlog of cases in other countries.¹²⁷ The reasoning behind this reform suggests that the integrity of the judiciary is questionable. "The law shall lay the foundations for the training and refresher training of public officials, which shall be governed by the principles of excellence, objectivity, impartiality, professionalism, and independence."¹²⁸ The Council shall appoint circuit and district court judges according to a set of objective criteria.¹²⁹ Yet, there is insufficient public information regarding these criteria, and it is still too early to evaluate how these appointments will be affected in practice.

Another reform stipulates a reduction in the number of Supreme Court ministers, or justices, from 21 to 11, and a reduction in the number of specialized panels (*salas*) for administrative hearings from four to two.¹³⁰ This touted solution, however, does not actually resolve the problem for the partisan

126. The amendment to Article 100 of the Mexican Constitution states: "The administration, oversight, and discipline of the judicial branch of the Federation, with the exception of the Supreme Court of Justice, shall be the responsibility of the Federal Council of the Judicature, as provided by law and in accordance with the provisions of this Constitution." CONST. art 100 (amended 1995) (Mex.).

127. "Judicial independence requires a transparent and merit-based appointment system. Such a system could involve a judicial council which participates in the process." DAKOLIAS, *supra* note 2, at xii.

128. Inter-Am. C.H.R. ch. 5, para. 398, *supra* note 18.

129. Paragraph 2 of Article 100 provides:

The Council shall comprise seven members, one of whom shall be the President of the Supreme Court of Justice, who shall also preside over the Council; one judge from the collegiate circuit courts; one judge from the single judge circuit courts, and one district judge, who shall be elected by ballot; and two members appointed by the Senate and one by the President of the Republic. The latter three members of the Council shall be individuals who have distinguished themselves through their ability, honesty and integrity in the field of the law.

CONST., art. 100 (amended 1995). *See also* arts. 95(b), 97.

130. *Id.* art. 94.

nature of the Supreme Court. This becomes clear upon a close inspection of the reforms. This reform required two-thirds approval by the Senate, as opposed to a simple majority to confirm the appointment of a Supreme Court justice. Nonetheless, the reform allows the President to appoint a justice to an open seat if his candidates are rejected by the Senate on two successive occasions. Therefore, in practice, this reform made little progress toward an objective, non-partisan appointment procedure. The IACHR 1998 report states that "the system under which the President nominates candidates for confirmation by the Senate does not appear to be conducive to the proper functioning of an open, competitive system with due checks and balances on the selection process."¹³¹

Another reform changed the life term of a Supreme Court justice to one non-renewable term of fifteen years. The Administration's claims of de-politicization were further undercut when President Zedillo began the reform process by firing all of the current justices on the Supreme Court in order to select his own candidates.¹³² Through this reform, the Court became more susceptible, rather than less susceptible to political influence.

In theory, many reforms authorize the Supreme Court to strike down laws as unconstitutional (*acciones de inconstitucionalidad*) if eight justices concur. Such reform purports to go beyond the *amparo*, which allows individuals exemptions from unconstitutional laws. However, such judicial review cannot occur unless one-third of Congress, one-third of a state congress, or the Attorney General requests review by the Supreme Court and a petition is filed within thirty days of the passage of that law. These strict requirements upon *acciones de inconstitucionalidad* virtually eliminate the possibility of using this theoretically important new procedure.¹³³

A thirty-day period is rarely long enough to become aware of and formulate a constitutional challenge to a law. Further, the constitutionality of a law should not depend on the time elapsed

131. See Inter-Am. C.H.R. ch. 1, para. 41, *supra* note 18.

132. "Decreto mediante el cual se declaran reformados los artículos 21, 55, 73, 76, 79, 89, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 110, 11, 116, 122 y 123 de la Constitución Política de los Estados Unidos Mexicanos," D.O., 31 de diciembre de 1994 (Mex.) (providing for the current justices to "conclude their functions at the entry into force" of said decree, i.e., January 1, 1995).

133. CONST. art. 105 (Mex.).

since enactment. Moreover, while the Attorney General who is in the employ of the Executive is almost certain not to raise a constitutional challenge and the one-third of a legislative body required to do so is also unlikely. "With the current political realities of Mexican politics, the restriction on who may initiate a challenge and the thirty-day time limit virtually guarantees that [this] procedure will only be used in a political struggle between government branches [and] is not likely to be used . . . to elicit a carefully reasoned decision about the constitutionality of a controversial statute."¹³⁴ The progress which this constitutional reform potentially represents could be consolidated by the introduction of a system that permits true popular action. That is, a system under which any citizen would be entitled to recourse to the competent bodies for review of laws which they claim violate their human rights and under which such laws were thereby subject to general repeal or nullification.¹³⁵ Finally, the requirement that eight justices concur with respect to a law's unconstitutionality is a "high requirement by universal standards of comparative law."¹³⁶

In addition to the general ineffectiveness of the reforms discussed above, attempts to police the judiciary have been improperly targeted at personal corruption rather than at structural abuses in the process where they should be focused. The U.S. State Department reports that between 1995 and 1997:

[S]even judges have been investigated for the alleged protection they granted to criminals, including drug traffickers. Some of these judges are accused of having abused the *amparo* . . . to benefit the accused criminals. Other judges face investigations for the lenient sentences they handed down in specific cases of serious crimes.¹³⁷

134. Taylor, *supra* note 72, at 163; cf. Vargas, *supra* note 2, at 312.

135. Inter-Am. C.H.R. ch. 1b, para. 108, *supra* note 18.

136. In countries of the western hemisphere, as in European countries, in order to declare a law unconstitutional, the majority of the members of the Supreme Court or the supervisory institution under the constitution is required. See generally ALLAN BREWER CARÍAS, JUDICIAL REVIEW IN COMPARATIVE LAW (1985). In its comments on this report, the Mexican Government argued that the provision requiring a special majority of eight magistrates to declare a law unconstitutional "gives Mexicans the security that the decision made is absolutely irrefutable, and there is no possibility of deceit. In this regard, Mexico is in the vanguard." Inter-Am. C.H.R. ch. 1b, para. 108, *supra* note 18.

137. U.S. DEPARTMENT OF STATE, REPORT ON HUMAN RIGHTS PRACTICES IN MEXICO FOR 1997 §1(e) (Jan. 30, 1998).

To uphold the law and protect individuals' rights, these enforcement measures seem off the mark, and at best inadequate. Investigations should focus on abuse of individuals' rights, such as failure to report evidence of torture under the Federal Law to Prevent and Punish Torture; but, instead, improperly focuses purely on leniency on crime.¹³⁸ For its part, the State Department completely ignores the fact that the Public Prosecutor's Office often uses the investigations of judges in a politicized manner to punish judges that act independently or issue *amparos* against the wishes of the prosecution. The Mexican Government needs to commit to the structural reforms necessary to reduce human rights violations and hold judges accountable for their role in the infringement of civil liberties.

In sum, the judiciary in Mexico has become all too politicized by and subservient to the executive branch due to its structural weakness. The judiciary structure is rife with cronyism and corruption, and judges play a central role in the institutionalization of torture as a means of extracting confessions by admitting tainted evidence into trial proceedings. Recent judicial reforms by the Zedillo Administration generally fail to provide the judiciary with true independence. To achieve successful reform, party detachment, individual autonomy, and political insularity must be implemented. This requires a broad program of reform including making the judiciary accountable for the human rights abuses. Without such reform, the credibility and stature of the judiciary will continue to erode. The Zedillo Administration has made largely administrative changes and disciplined judges not for complicity in human rights abuse but for leniency in sentencing.¹³⁹

V. EVALUATING RECENT CRIMINAL PROCEDURE REFORMS FROM A HUMAN RIGHTS PERSPECTIVE

While critics focus on the application of the laws, a series of recent constitutional and legislative reforms that whittle away defendants' legal rights shows there is a problem with the laws themselves.¹⁴⁰ Rather than increasing the efficiency and integrity

138. See HUMAN RIGHTS WATCH, SYSTEMATIC INJUSTICE, *supra* note 121, at 50.

139. For a general discussion on Latin American judiciaries, see HALFWAY TO REFORM, *supra* note 86, at 6.

140. Note that previous 1990 legal reforms were aimed at strengthening human rights guarantees, and that more recent measures reflect a dangerous change of course.

of the judicial system, the Government undertook a series of legal reforms to endow its notoriously corrupt law enforcement agents and prosecutors with far greater discretion and power, especially during pre-trial detention and for the purpose of indictment standards. In addition, these reforms have restricted defendants' remedies against the ineffectiveness of counsel. Such criminal procedure changes threaten the legalization of arbitrary and illicit actions by public officials in the police forces and Public Prosecutor's office. Clearly, the laws should not be changed to conform to the reprehensible conduct of public officials.¹⁴¹

A. Pre-Trial Detention

A defendant's right not to be arbitrarily detained has recently been eroded by powers given to the police and the Public Prosecutor's office. The 1994 reforms expanded the authority of the Public Prosecutor to issue "summons" or "detention orders," which are only nominally distinct from arrest warrants and which prevent the defendant from immediately challenging the detention before a court. Moreover, the 1998 reforms expanded the concept of *in flagrante delicto* to allow the police almost unlimited discretion in detaining persons without having to seek warrants from a judicial authority. Both police and prosecutors discretion to hold suspected criminals without prompt judicial review should be restricted. In addition, Mexico's laws should be brought into compliance with international human rights standards.

Since torture is often committed during the initial investigation phase, it is easy to see how reforms that were implemented during the Salinas Administration and the beginning of the Zedillo Administration, which extended the detention period permitted before bringing a detainee before a judge, have actually facilitated torture in practice.¹⁴² These changes are contrary to the spirit of international law, which requires that, "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power."¹⁴³

Before the reforms of January 1994, the only public authority,

141. See HUMAN RIGHTS WATCH, SYSTEMATIC INJUSTICE, *supra* note 121, at 46-47; see also LEGALIZAR LA ARBITRARIEDAD, *supra* note 4, at 9.

142. CONST. art. 16 (Mex.).

143. G.A. Res. 2200, *supra* note 62, at art. 9(3).

according to Article 16 of the Constitution, which could order the arrest or detention of a person was a judge. With the reforms, the Public Prosecutor can issue "summons" or "detention warrants," which ostensibly are not the equivalent of arrest warrants. Yet the distinction remains theoretical. In accordance with the reforms to Article 16, a detention can be ordered by a non-judicial authority under the following circumstances: "in urgent cases dealing with felonies . . . and having established a risk of flight of the accused, if and only if the [Public Prosecutor] cannot appear before a judge because of time, place or circumstantial restraints."¹⁴⁴ In other words, the Constitution now allows wide latitude for the Public Prosecutor to issue detention warrants as he wishes. It is enough that the Public Prosecutor be dealing with a felony, that there be a risk of flight, and that there be "time, place or circumstantial constraints."

The requirement of obtaining a warrant from an impartial judicial authority is important because it provides for an *ex ante* record of the facts upon which the equivalent of probable cause can be based. When police can act without warrants, or when warrants are issued by prosecutors without the benefit of *ex ante* judicial review, this determination must rely on the officer's testimony, which leaves room for such a determination to be based on few and more circumstantial facts.

In the past, Public Prosecutors frequently issued orders for detention, but they were unconstitutional practices that could be remedied through an *amparo* suit. Before these reforms, Article 16 was very clear in establishing that "only in cases of emergency where there is *no judicial authority available*" could the Public Prosecutor order the detention of a defendant.¹⁴⁵ The Public Prosecutor bore the burden of demonstrating that no judicial authority was objectively available. Otherwise such detention was illegal and the defendant could be freed pursuant to an *amparo* proceeding. Thus the effect, if not the explicit aim, of this Constitutional reform was to legitimize the practice of Public Prosecutors issuing the equivalent of arrest warrants. According to Mexican jurist, Ignacio Burgoa, this power "opens the door to unlimited actions by administrative authorities . . . to limit personal

144. CONST. art. 16 (Mex.).

145. See CONST. art. (amended 1992) (Mex.).

liberties.”¹⁴⁶

Moreover, in the face of this newly-legitimized omnipotence of the Public Prosecutor’s office, the detainee has no judicial recourse because the Law of *Amparo* was also amended in 1994. Previously, in cases where there was no judicial order of detention, notification of this breach on the part of the authorities responsible compelled such authorities either to free the detainee or to charge him within 24 hours, regardless of which authority had detained the individual. This is the classic case for the use of habeus corpus. The ICCPR states clearly that, “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”¹⁴⁷

Subsequent to the amendments of January 10, 1994, an individual detained without a judicially issued warrant by an authority other than the Public Prosecutor (*i.e.*, any police force) was required to be brought before the Public Prosecutor “without delay”. This would allow the Prosecutor to determine whether the defendant was to be freed or charged within 48 hours. That is to say, regardless of how many days the detainee is held by the police, the individual can be, and generally is, detained for another forty-eight hours by the Public Prosecutor before being either freed or charged.¹⁴⁸ Moreover, Article 19 of the Constitution provides that detention by a judicial authority may not exceed seventy-two hours without a formal indictment being issued. Such detention must be preceded by showing that sufficient evidence exists about the act allegedly committed to permit it to be characterized as a crime and the evidence points toward the accused as the perpetrator.¹⁴⁹ Thus, in total, a suspect may be held first by the police for an undefined period, and then for another 120 hours before the equivalent of probable cause is determined.¹⁵⁰

A 1998 reform of Article 193 of the Federal Code of Criminal Procedure enlarged the concept of *in flagrante delicto* in order to allow the detention of perpetrators of felonies within 48 hours

146. HUMAN RIGHTS WATCH, SYSTEMATIC INJUSTICE, *supra* note 121, at 49.

147. G.A. Res. 2200, *supra* note 62, at art. 9(4).

148. In cases involving organized crime, this period extends to 96 hours.

149. See CONST. art. 19 (Mex.).

150. See Inter-Am. C.H.R. ch. 5, para. 356, *supra* note 18.

after commission of a crime. Under this reform, detention is allowed not only when a suspect is caught in the act, or is caught in "hot pursuit," fleeing the crime scene, but also in the following circumstances: when the suspect is identified by the victim, a witness, or a co-conspirator; or if the object, instrument, or product of the crime is found in the suspect's possession; or when there are fundamental indications of the suspect's participation in the crime.¹⁵¹ In these cases, the Public Prosecutor is empowered to issue detention warrants for the accused. This proposal is contrary to any common-sense notion of *in flagrante* or even quasi-*in flagrante* detention. Essentially, the proposal permits the Public Prosecutor's office to detain a suspect within the 48-hour period following the crime, and then investigate the circumstances surrounding the crime while the suspect is in custody.

Under the 1998 reform, simply indicating a person's guilt for committing a certain crime would be enough to open an initial investigation and permit arrest of that person within 48 hours. Arbitrary detentions would, in effect, be legalized. The mere fact of having a stolen object in one's possession within 48 hours of a crime, for example, could allow for allegations that that person came into possession of the object while committing a crime and, therefore, that person could be held under the notion of *in flagrante delicto*. The protections of Articles 14, 16 and 20 of the Constitution refer to personal liberty, conditions for detention and due process before an impartial tribunal, these would be rendered nugatory.¹⁵²

There were, of course, alternatives to this proposed expansion of the notion of *in flagrante delicto*. If, upon discovering that a suspect was in possession of an object, instrument, or product of a crime, the Public Prosecutor could immediately apply for an arrest warrant, and the judge could issue an arrest warrant within a matter of hours. This alternative would not have violated any constitutional norms and would increase the efficiency of the system.¹⁵³ In contrast, the 1998 reform presumes the inefficiency of the police and Public Prosecutors to compensate for their standard of conduct, and would lower the legal threshold for

151. Note that this reform is only applicable to felonies; see C.F.P.P., art. 193(III) (1998); see also LEGALIZAR LA ARBITRARIEDAD, *supra* note 4, at 9.

152. See *id.* at 7.

153. See *id.* at 8.

detention.

B. *The Right to Counsel*

Both non-governmental and intergovernmental organizations repeatedly assert that the lack of access to effective representation in Mexico is a significant factor that perpetuates human rights abuses. During the preliminary investigation phase, suspects are perhaps most in need of legal assistance. In theory, lawyers' participation at this stage not only facilitates preparation of the defense to be presented at trial, but also reduces the incidence of torture, forced confessions, and other police abuses.¹⁵⁴ The report by U.N. Special Rapporteur on torture, P. Kooijmans, for the period of 47 sessions of the Human Rights Commission in January 1991, noted that, particularly in Mexico, was facilitated by the absence of a defense attorney during the first hours or sometimes days of detention and the importance placed on obtaining confessions as evidence.¹⁵⁵

The presence of counsel at the preliminary hearing or investigation phase assures due process to the accused in a variety of ways. Theoretically, through defense counsel's cross-examination of the state's witnesses, the judge may conclude that the state lacks the equivalent of probable cause. Additionally, a defense lawyer can use the preliminary hearing to examine the state's case against his client and make preparations for the instruction phase of the judicial process. In Mexico, a competent defense counsel can be influential at the preliminary hearing in arguing not only for bail, but also for a physical or psychiatric examination that can provide strong evidence of torture or police

154. See generally LAWYERS COMMITTEE FOR HUMAN RIGHTS, OPENING TO REFORM? AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW 38 (1996).

155. See Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur, U.N. Commission on Human Rights, 47th Sess., Agenda Item 10(a), U.N. Doc. E/CN.4/1991/17 (1991) [hereinafter 1991 Human Rights, Report of the Special Rapporteur]. In contrast, the Sixth Amendment of the U.S. Constitution requires the right to counsel be available at all "critical stages" in the criminal prosecution, i.e., at any stage where substantial rights of the accused could be damaged "by counsel's absence." *Mempa v. Rhay*, 389 U.S. 128, 132 (1967). The U.S. Supreme Court, for example, held that any identification procedures, such as police or prosecutor attempts to elicit inculpatory statements from the accused, first appearances, in arraignment or preliminary hearing, where determinations made there can later be used against the defendant, and sentencing, may constitute such "critical stages." *Id.*

abuse.

In 1991, partly in response to the Special Rapporteur's report and other critiques, the Government passed the Federal Law to Prevent and Punish Torture. The Government also introduced significant changes to the federal and Federal District Codes of criminal procedure. Specifically, Articles 128 and 269 of the Federal and Federal District codes for criminal procedures, respectively, state that when the accused makes a statement, he should be notified of his right to not make a statement.¹⁵⁶ These changes in the Federal and Federal District Codes were intended to deny the validity of a statement made without the presence of a public defender or a "person of the defendant's confidence" (usually a family member).

Superficially, these reforms appear to represent a substantial improvement in defendants' rights. Practice shows, however, that the reforms may actually have been a step backwards in combating torture. Perhaps the most serious flaw in both Section II of Article 20 of the Constitution and in the Federal and Federal District Penal Codes is the presumption of the validity of *any* statement given in the presence of a public defender.

In reality, most detainees are not allowed to speak to *anyone*, much less a lawyer. If the detainee is able to locate a family member to act as a "person of confidence," the detainee is not given more time to find a lawyer. Often the "person of confidence" is a stranger to the defendant, someone who happens to be down the hall from the Public Prosecutor's office. Even more frequently, the person of confidence exists only on paper: a name written into the proceedings when the public defender was not actually present during the sessions or during their entirety.¹⁵⁷

Amnesty notes in its 1997 Country Report on Mexico that, "Lawyers working for the State are inadequately prepared, badly paid, with few resources assigned to them, and severely overworked [and] [a] lack of independence from the courts seriously undermines their impartiality."¹⁵⁸ Even more discouraging is that when the public defender *is* physically present, he rarely distinguishes himself from any other prosecutor, even

156. See C.F.P.P. F. arts. 128; 269 (amended 1991).

157. For a discussion of egregious abuses in the appointment of persons of confidence, see HUMAN RIGHTS WATCH, SYSTEMATIC INJUSTICE, *supra* note 121, at 35-36.

158. AMNESTY INTERNATIONAL'S CONCERNS REGARDING TORTURE, *supra* note 28, at 5.

joining in the questioning of the accused. A typical example occurred in a case that came before the Second District Judge in Criminal Matters, in Toluca, State of Mexico.¹⁵⁹ In a March 3, 1997 hearing before the judge, Perla Gabriela Villegas, the ostensible "public defender," who was supposedly representing the defendants, admitted that during the initial investigation phase of the case, she had, in fact, been doing her obligatory social service for the Office of the Public Prosecutor, by "helping the Prosecutor in any need."¹⁶⁰ The address and other information that Villegas provided for the original record were false.¹⁶¹ In practice then, the right to not make a statement or to have an efficient and adequate defense is not guaranteed. Reforms in the criminal procedure codes only create the appearance of such a right.

In practice, public defenders are often so incompetent, overworked, and thoroughly corrupt that even the poorest of citizens will opt for a private lawyer. These private lawyers, sometimes referred to as *coyotes*, however, are often equally corrupt, charging their clients exorbitant sums for bribes or for services they did not perform. For instance, the private lawyer will boast to the client that he obtained subpoenas for witnesses and require the client to pay a large fee. The subpoenas, however, mean little and cost nothing. Or the lawyer, like the pettifogging Huld in Kafka's novel, will exact money from the client in order to have lunch with the judge in the case, telling the client that the lunch is essential for a favorable disposition. When these private lawyers are present during the defendant's initial declaration (*declaración preparatoria*), they are no more likely than public defenders to counsel the detainee to remain silent or to refrain from answering the questions of the Public Prosecutor.

A study carried out by the Assembly of Representatives of the Federal District (*Asamblea de Representantes del Distrito Federal*) and the Human Rights Commission for the Federal District (*Comision de Derechos Humanos del Distrito Federal* (CDHDF)) analyzed how the problems in obtaining effective representation have hampered attempts to eliminate human rights violations. The report produced from the study proposed the

159. See Statements made at hearing on March 3, 1997 (Hearing No. 82/96) (transcripts on file with author).

160. *Id.*

161. See *id.* These facts were only brought to light because Pilar Noriega assumed the defense of the accused.

creation of a decentralized organization to oversee training and monitoring of the city's lawyers.¹⁶² Thus far, no such organization has been created.

Under international law—both that based on treaties and that based on the practice of nations—the right to counsel implies the effective assistance of counsel. In the United States, for example, the U.S. Supreme Court has long held that the purpose of the right to counsel, “assur[ing] fairness in the adversary process,” requires the defendant to have counsel that acts as his zealous advocate and subjects the State's case to the “crucible of meaningful adversary testing.”¹⁶³

In Mexico, the perversion of the right to counsel is particularly serious because ineffectiveness of counsel is not considered a government violation of the rights of the accused and therefore, does not give rise to an *amparo* proceeding (*juicio de garantías*).¹⁶⁴ This result flows from the fact that the Law of *Amparo*, often the only practical mechanism of enforcing the defendant's ability to redress his rights, has not been reformed in accordance with the changes in the codes of criminal procedure. The result is absurd. Article 159 of the Law of *Amparo* indicates that in civil, administrative, and labor cases that are appealed, it is a violation of the procedural guarantees for a party to be falsely or inadequately represented and this gives rise to a cause of action for *amparo*.¹⁶⁵ Astoundingly, however, the analogous clause does not exist for criminal trials despite the fact that Article 14 of the Constitution provides for due process of law.

Article 14 refers to the “necessary formalities of the proceeding,” but commentators have generally concluded that

162. See AMNESTY INTERNATIONAL'S CONCERNS REGARDING TORTURE, *supra* note 28, at 5.

163. *Cronic v. United States*, 466 U.S. 648, 656 (1984). The U.S. Supreme Court articulated a two-pronged test to determining whether a defendant's representation had been constitutionally ineffective; to satisfy this test, the defendant must show: (1) incompetence on the part of counsel that (2) results in prejudice to his defense. The finding of such ineffectiveness would be made on appeal. See *Strickland v. Washington*, 466 U.S. 668, 670 (1984).

164. “Suarez, Jose Medina,” 12 S.J.F. 81 (6a época). “*La inactividad del defensor durante el proceso no es acto atribuible a las autoridades que pueda repararse en el juicio de garantías.*” *Id.*

165. ENGLISH TRANSLATION OF AMPARO LAW, *supra* note 84, at 33–33A (discussing art. 159, which provides that, in civil, administrative or labor suits, procedural rules and the interests of the plaintiff shall be considered to be violated when the plaintiff has received a false or inadequate representation).

these only include the right to raise points in the defense, and the right to be heard (*garantía de audiencia*).¹⁶⁶ Yet, a declaration by the accused that the public defender failed to provide adequate representation is deemed irrelevant in applying for an *amparo*. According to the Supreme Court, it is not within the judiciary's power to analyze the form or terms of a defense, but only to see that every defendant gets a "proper," i.e., paper, defense in accordance with the Constitution.¹⁶⁷

In short, reforms ostensibly mandating the presence of defense attorneys during the initial stages of investigation, when torture most frequently occurs, have accomplished little except they ensure the automatic validity of the defendant's statements. Such is the result even if defense counsel was present in name only, with the defendant having been deprived of the benefit of his constitutional protections. Moreover, the failure to amend the *amparo* law to provide for redress in the event of ineffectiveness of counsel increasingly leaves defendants with no recourse against such abuses in the process.

C. Prosecutorial Powers

The lack of redress for ineffective counsel must exist in the context of recent reforms that decreased the independence of the Public Prosecutor's Office and systematically granted more powers to that office relative to the judiciary and defense counsel. In its 1998 Report, the IACHR highlighted:

[T]he series of reforms in which the Office of the Public Prosecutor appears to have been granted a range of powers that exceed the functions of an investigative organ and in which that representative of society plays the role of official, party and judge, thereby weakening the defense and subjecting the court to the rhythm and requirements of the prosecutorial side.¹⁶⁸

166. See CONST. art. 14 (Mex.) (commentary by Rodolfo Cartas Sosa, Patricia Cano Vargas and Jose Antonio Bunt Castro).

167. See 58 S.J.F. 21 (7a época 1969).

La afirmación del acusado en el sentido de que el defensor de oficio no actuó correctamente, procurando la absolución de su defensa, es intrascendente para fundamentar sentencia de amparo, toda vez que no es facultad jurisdiccional el analizar la forma y términos de la defensa, sino solamente vigilar el que todo inculpado tenga una defensa de conformidad con nuestra Ley Suprema.

Id.

168. Inter-Am. C.H.R. ch. 5, para. 383, *supra* note 18.

Through the reforms enacted under the Zedillo Administration, the presumption of innocence has been steadily eroded, while the standard of proof for indictment in criminal cases has increasingly become indistinguishable in practice from the standard used for conviction. Ultimately, recent reforms have converted the Public Prosecutor into a *de facto* instructional judge.

Under Mexican law, the Public Prosecutor's Office is supposed to play a more neutral role in the investigation and prosecution of crimes than in common law systems. In practice, however, the reverse is true. Article 21 of the Constitution indicates that the prosecution of crimes is the sole responsibility of the Public Prosecutor and the Judicial Police, who are under the authority and immediate command of the former.¹⁶⁹ With respect to federal jurisdiction, Article 102 of the Constitution specifies that the federal Public Prosecutor merely has the power to prosecute federal crimes and, to this end, to obtain arrest warrants against the accused and to search for and present evidence to determine responsible parties for given crimes.¹⁷⁰

The need for independence from the political influence of the Executive Branch, and impartiality in the Public Prosecutor's Office has been repeatedly stressed both Mexican and international commentators. In its 1998 Report, the IACHR noted that:

As far back as in the Second Latin American Colloquium and First Mexican Congress on Procedural Law, which were held in Mexico City in February 1960, a proposition was adopted by acclamation to the effect that: "The Office of the Public Prosecutor must be an organ independent of the executive branch and must have the attributes of irremovability and other constitutional guarantees afforded to members of the judicial branch." Héctor Fix-Zamudio himself has described this independence of the Office of the Public Prosecutor as being "indispensable".¹⁷¹

Yet, recent legal reforms in Mexico have greatly decreased the independence and autonomy of the Public Prosecutor.

On April 30, 1994, then President Salinas created the so called Office for the Coordination of Public Security in the Nation, which

169. See CONST. art. 21 (Mex.).

170. See *id.* at art. 102.

171. Inter-Am. C.H.R. ch. 5, para. 373, *supra* note 18.

included the Federal Attorney General's Office (*i.e.*, the Federal Public Prosecutor) as a department within the Office of the President of the Republic.¹⁷² A General Law establishing the basis for coordination of the public security system was later passed under President Zedillo in 1995.¹⁷³ Mexican jurist Ignacio Burgoa Orihuela argues that the placement of the Public Prosecutor's Office within the Office for the Coordination of National Public Security has meant that "in practice it has become an office under the public administration, contrary to the provisions of the Mexican Constitution itself."¹⁷⁴

As the Public Prosecutor's Office, at least at the federal level, becomes more politicized, the procedural reforms passed under the Zedillo Administration go far toward enlarging the purview of the Public Prosecutor's office into what has traditionally been the judiciary's role. The most significant of the 1994 reforms to the Federal and Federal District Codes of Criminal Procedure conferred on the Public Prosecutor all of the judicial faculties necessary to order and carry out all acts leading to the proof of the elements of the crime (*comprobación de elementos de tipo penal*), and the demonstration of probable guilt of the accused. Additionally, the Prosecutor was assigned the responsibility of guaranteeing the protection of individual rights (*bien jurídico protegido*).¹⁷⁵ Thus, the Public Prosecutor must not only collect evidence of the crime, but also must determine the extent of involvement of the defendant, and the wanton or intentional nature of the alleged act or omission. It is also the Public Prosecutor's responsibility to verify the circumstances of time and place, as well as the subjective elements and "other circumstances that the law provides for."¹⁷⁶

In other words, both the validity of the evidence and the weight it is accorded are now largely determined in the initial investigation phase by the Public Prosecutor's Office rather than during the Instructions Phase of the trial process, where the defendant would have the opportunity to present his defense before a judge. Under international human rights law, judgments of criminal culpability are made after a public hearing before an

172. *See id.* at para. 374.

173. *See id.* at para. 375.

174. *Id.* at para. 379.

175. *See* C.F.P.P. art. 168; C.P.P.D.F. art. 122 (amended 1994).

176. C.P.P.D.F. art. 122 (amended 1994).

independent and impartial court. For example, the ICCPR states: "In the determination of any criminal charge against him . . . everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law."¹⁷⁷ Through these reforms, which virtually move determinations of guilt or innocence into the purview of the Public Prosecutor, Mexican criminal procedure law is backsliding dangerously in terms of compliance with international standards of due process.

The 1999 reform of Article 16 would further empower the government by only requiring the Public Prosecutor to demonstrate the "probable existence of the objective elements of the crime" and the "probable responsibility of the accused." This lower standard would subject defendants to even greater vagaries by the Public Prosecutor and effectively leave them with no remedy. On the effects of this change, one group of human rights experts commented:

[I]t would be wrong to believe that the way to resolve the very serious and intolerable problem of public insecurity . . . is precisely to create a new cause of public insecurity, which is what would result from reducing through these reforms constitutional guarantees that protect citizens in general from authorities.¹⁷⁸

The "Miguel Agustín Pro Juárez" Human Rights Center articulated its concern with respect to this lending more power to the Public Prosecutor:

The generalized and evident corruption in the [Public Prosecutor's Office] has given rise to the lack of credibility in its function, due to the terrible facility with which charges are prefabricated and initial investigations are manipulated in order to have absolute control over the proceeding.¹⁷⁹

The concomitant effect of giving greater discretion and power to the Public Prosecutor is increased ambiguity in judicial practice. In practice, judges and magistrates would be able to rely on this lower "probable" standard in indictments and even in the

177. G.A. Res. 2200, *supra* note 62, at art. 14(1).

178. HUMAN RIGHTS WATCH, SYSTEMATIC INJUSTICE, *supra* note 121, at 51 (comments by the Citizens' Legislative Proposal Workshop) (footnote and citation omitted).

179. See LEGALIZAR LA ARBITRARIEDAD, *supra* note 4, at 2.

conclusions phase of trials.¹⁸⁰

A 1993 reform of Article 19 required that, for an indictment (*auto de formal prisión*), all of the elements of the crime, as well as the probable culpability of the accused, must be clearly demonstrated. A March 1999 reform requires only “objective” elements to be plainly demonstrated (*cuero del delito*), while subjective elements, such as intent, need only be demonstrated to become probable. This would inject tremendous uncertainty and confusion into trial practice because “objective” elements are not defined, nor even mentioned, in the Federal Code of Criminal Procedure.¹⁸¹ It also leans toward contradiction of one of the most basic tenets of internationally recognized due process: the right of the defendant to be presumed innocent until proven guilty.¹⁸²

Again, recent reforms go even further than previous reforms. According to the 1997 amendments to Article 286 of the Code of Criminal Procedure for the Federal District and Article 145 of the Federal Code of Criminal Procedure, the initial proceedings allow the public prosecutors and judicial police to act as fact-finder, judge and jury. They may do this so long as, “they abide by the rules of the [respective] Code.” As a result, the right not to incriminate oneself or not to confess cannot be respected in practice because the detainee is essentially judged before he can stand before the court. Coupled with the recent March 1999 constitutional reforms, these provisions leave the principle of presumed innocence badly eviscerated.

In short, the rule of law requires a true division of power and a system of checks and balances among the branches of government. This can only occur with the presence of an effective and independent judiciary. In the constitutional debates of 1917, it was clear the role of the Public Prosecutor’s office was to carry out the prosecution and preliminary investigation of crimes. Today, the Public Prosecutor usurps many judicial responsibilities, including ordering pre-trial detention and weighing evidence in the process of determining levels of culpability. All this added responsibility while the judiciary remains hamstrung and ineffective. The IACHR noted in its 1998 report that “coercive

180. See *id.*

181. See C.F.F.P. art. 168

182. See *Universal Declaration of Human Rights*, G.A. Res. 217A (III), *supra* note 120, at art. 11; G.A. Res. 2200, *supra* note 62, art. 14 (2).

power over persons for purposes of instituting legal proceedings which, as provided for in Article 20 of the Constitution, resides only with the judicial authority from which the Office of the Public Prosecutor is separated by the constitutional principle of the separation of powers.”¹⁸³ Yet, the 1994 and 1998 reforms, coupled with the most recent 1999 reforms, dramatically curtail the right of due process; the right to be heard by a judge in a competent, independent, and impartial court; the right to be presumed innocent with full equality before the law; and the right to pursue legal remedies.¹⁸⁴ All of the reforms discussed above represent a step backwards for Mexico in terms of bringing its criminal procedure laws and practice into compliance with international human rights standards.

Moreover, as the “Miguel Agustín Pro Juárez” Human Rights Center notes, the continuous undertaking of constitutional reforms itself is troubling from the perspective of the rule of law:

These frequent reforms of constitutional norms lead us to note that the reform initiatives proposed by the Executive have never been subject to an effective debate that would permit an in-depth analysis, but rather have until now been approved almost automatically. . . . The casual manner in which constitutional norms have been reformed paces in grave doubt juridical stability, which should be a fundamental characteristic of the rule of law and of a democracy.¹⁸⁵

Unfortunately, the tradition of the executive rewriting rights in the name of political expedience is a fundamental threat to the rule of law.

VI. CONCLUSIONS

Despite significant advances toward political pluralism, Mexico cannot hope to be a true democracy without entrenching the rule of law. Richard Goldstone, former Chief Prosecutor for the Ad Hoc International Tribunals for the Former Yugoslavia and Rwanda and Justice of the Constitutional Court of South Africa, stated in an address at Stanford Law School in 1997:

There is no element of a democratic and open society more essential to its well-being than the rule of law. This, more than

183. Inter-Am. C.H.R. ch. 5, para. 385, *supra* note 18.

184. See *LEGLIZAR LA ARBITRARIEDAD*, *supra* note 4, at 4.

185. *Id.* at 1.

all else is the dividing line between freedom and despotism which has taken some of its most sophisticated forms of repressive cruelty in this century. The administration and application of the rule of law by principled, independent adjudicators and officers of the court . . . are inextricably bound up with the idea itself.¹⁸⁶

At this pivotal moment in its history, Mexico risks sliding ineluctably into full-fledged despotism if serious reforms in the administration of justice are not undertaken. Democratization must be accompanied by implementation of the rule of law at the micro and macro levels. Yet, as political, economic and social tensions grow, the Government has responded with authoritarian reforms derived from its narrow focus on public security and a stable environment for narrowly construed economic investment and development. This results in the Government investing far more in instruments of social control and security, and less in social services that might alleviate the underlying causes of much of the violence.¹⁸⁷

Within the criminal justice system itself, it is clear that despite the fact that the Constitution was a model for rights accorded to criminal defendants, the administration of justice falls far short of the ideal enshrined in Mexico's Magna Carta. Franz Kafka's famous novel, *The Trial*, might just as well describe the real story of many criminal defendants in Mexico, who have found themselves entangled in a surreal nightmare not of their making and beyond their control. Charges are concocted by corrupt police with virtually no training or investigative techniques. The accused is often unaware and uninformed of the state of the proceedings, and rarely receives adequate legal representation. At the same time, judges, who feed on patronage, willfully ignore evidence of official abuses.

The Zedillo Administration's response to the ineffective and politicized judiciary did not seriously reform that institution. Instead, the Administration instituted a series of largely cosmetic and organizational reforms, which have failed to establish the prerequisites for an impartial judiciary, which include, detachment

186. Richard Goldstone, *Assessing the Work of the United Nations War Crime Tribunals*, 33 STAN J. INT'L L. 1 (1997).

187. See MANUEL MORENO, *La Seguridad Nacional desde la Perspectiva de la Constitución*, in CUADERNOS DE INVESTIGACIÓN (1987).

from the dominant PRI, individual autonomy and political insularity. Moreover, other legal reforms further weakened and undermined the rule of law and the principle of separation of powers by allowing the Public Prosecutor to usurp many of the judiciary's functions.

On the eve of this historic presidential election in the year 2000, the Government must reverse the abrogation of individual rights caused by recent reforms to the Constitution and Codes of Criminal Procedure. It also must provide for remedies for violations of rights under the Law of *Amparo*. Where Mexican law departs from the country's obligations under the ICCPR, the American Convention, the CAT and other international treaties, it should be brought into compliance. Finally, on a macro-level, the Government must evince a firm determination to return security to civilian authorities accountable to the public and to ensure accountability of those authorities. Police officers, prosecutors and judges cannot be above the law. They must be prosecuted and punished for abuses, or complicity in abuses. Lists of police officers involved in abuses should be fastidiously kept to prevent future employment in other states or agencies. Above all, the Government must possess the political will to establish a truly independent judiciary and a credible system for the administration of justice.