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## An Evaluation of Process Rights Applying the U.N. Standard Minimum Rules for the Administration of Juvenile Justice and U.N. Convention on the Rights of the Child: A Study of Mexican Children

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### ABSTRACT:

The aim of this study was to analyze and compare process rights of minors applying the Beijing Rules and the U.N. Convention on the Rights of the Child and Juvenile Justice Law for minors in the (Mexico-U.S.) border state of Sonora. In order to determine what due process rights were enforced during juvenile process, a study was undertaken of the minors subject to process in January 2001. In this study, a checklist was used to determine variables regarding: the type and severity of the crime committed by the juvenile; the number and type of acts charged by the prosecuting attorney; the number of hours that the juvenile was kept under arrest before (s)he was transferred to the jurisdiction of the Council; the process in the Council; the actions of the defense attorney in the tutelary process; the existence of legal, psychological, social, and family foundations determining the initial and final resolutions; and the resolution issued by the Council. Results of this study show that under the State Juvenile Law, minors are not accorded basic procedural safeguards. Secondly, they are not afforded the care or treatment provided for by the *parens patriae* principle during the process, sentencing, or placement. Investigating, processing, and sentencing minors for offenses committed are all the responsibility of one organ, and any appeal must be filed to this same organ. Thus minors are denied the essential elements for a fair and just trial. In all the reviewed cases, a defense attorney was named in the initial transcripts, but signatures and promotions were nonexistent in most of the cases. This could mean that the right to counsel was formally satisfied but practically nonexistent. Upon initial contact with the prosecuting attorney, interviews were extracted from the minors without the presence of a parent or guardian. Minors are submitted to process for committing any antisocial behavior even when it is not punishable under the state or federal criminal code. In brief, these results show that despite the signed agreement with the United Nations, minors' rights in this Mexican state are not respected in accordance with the U. N. Convention on the Rights of the Child and the Beijing Rules.

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AN EVALUATION OF PROCESS RIGHTS APPLYING THE U.N. STANDARD MINIMUM RULES FOR THE ADMINISTRATION OF JUVENILE JUSTICE AND U.N. CONVENTION ON THE RIGHTS OF THE CHILD: A STUDY OF MEXICAN CHILDREN

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INTRODUCTION

The development of juvenile justice law in Mexico has consisted of removing juveniles from the reaches of criminal law and transferring juvenile transgressions of criminal law into a distinct jurisdiction. The aim of this reform was to create special tribunals and special laws for juveniles, maintaining them far from the criminal laws, process, and penalties applied to adults. Two objectives were considered: juveniles were to be separated from adults so as not to be negatively influenced, and juveniles were to be treated differently from adults. This “special treatment” was to be based on principles of education and protection.<sup>1</sup>

Juvenile tribunals in Mexico are an institution created according to the philosophy of *parens patriae*, in which the state will act as a parent in charge of protecting the child. Under this principle, taken from civil law, a court is to protect the child’s basic rights to property and liberty, as would a parent.<sup>2</sup> This principle was transferred to the area of criminal law, and as stated by the Supreme Court,<sup>3</sup> the

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<sup>1</sup> Robert C. Trojanowicz and Merry Morash. *Juvenile Delinquency: Concepts and Control* §3.6.1 4th ed., 1987.

<sup>2</sup> *Código Civil para el Estado de Sonora* (hereinafter *Civil Code for the State of Sonora*), Ley Número 32, B.O. July 8, 1949, Article 580.

<sup>3</sup> *Semanario Judicial de la Federación* (hereinafter S.J.F.). Primera Sala (First Chamber), Quinta Época. Parte L; p. 1352. *Nature of the Juveniles Courts*: Except for the projects of 1908 and 1920, relating to the founding of the Paternal Courts and the Court for the Protection of the Child, there is no other precedent to the Law of March 30, 1928. The main characteristic of the system established by this law is that it declares juveniles under 15 years old not criminally responsible of the offences they commit. It is the Tribunal for Juveniles, removed from the punitive system of the common courts that is in charge of hearing cases of contraventions to government regulations or criminal law by juveniles and to make all the personal determinations of the minor in order to propose educational corrective measures and change them when necessary. These resolutions do not have the form of sentences; they are merely preventive and educative measures and, in any case, conditional, according to the needs of the juvenile. The measures can consist of custody and educational reclusion of the minor and, in the case of observance of juveniles, special establishments in which juveniles can be better observed for a term of 15 days.

The police and judges do not have any authority over juveniles; their only authority lies in submitting them to the competent tribunal. Notwithstanding the age of juveniles, they are accorded all the guarantees compatible with their age. Thus they cannot be detained without a court order as mandated by Articles 16 and 19 of the Constitution. In our constitutional system, juveniles are subject to limitations to their constitutional due to their person; these limitations are the right to freedom, which is restricted by those who have custody over the juvenile and by the State in an auxiliary nature. These restrictions on freedom by parents or the State cannot be considered, due to their auxiliary nature, to be a denial of minimum constitutional rights. Detention by

function of the juvenile courts is to act as a *good parent*, thereby “substituting for the bad parents that were not able to control their own children.”<sup>4</sup>

Under current Mexican constitutional law, “In the United Mexican States every individual will enjoy the rights vested by this Constitution,”<sup>5</sup> thereby making any discrimination based on age unconstitutional. Further, it establishes in Article 133 that the Constitution, as well as the treaties approved by the Senate, will be supreme law.<sup>6</sup> Hierarchically, this makes any federal, state, or municipal legislation that is contrary to the Constitution or to an international treaty unconstitutional, and thus subject to injunction. The Beijing Rules, adopted by the United Nations in 1985, served as guidance to member states to protect juveniles’ due process and

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authorities cannot be considered a violation of minimum constitutional rights due to the auxiliary nature of the State in helping carry out these detentions. That is why an injunction (*amparo*) against these detentions is unfounded; Article 103 of the Constitution establishes that an injunction can only be considered against the acts of State. However, in these cases the State is only trying to carry out the objectives of a good parent, which in itself is not an act of State, strictly speaking, but acts toward protecting society. It is the State power, through the conduct of Juvenile Tribunals, that substitutes for those who exercise custody over minors in a non-coercive manner, when parents/tutors are lacking, cannot or will not exercise their custody for some reason, or cannot enforce their authority in a coercive manner, as can a State authority.

The non-coerciveness of the acts undertaken in the Juvenile Tribunals is the reason why a declaration of violation to constitutional rights against the determination emitted by the Juveniles Court cannot be accepted.

The lack of coerciveness of the acts of State are evident in the principles by which the Juveniles Tribunals were created, which prohibit that minors be criminally persecuted or processed. The objective of the Tribunal is not to apply the law but to carry out an educative or cultural mission when parents or tutors are lacking or for some reason are not able to carry out their duties appropriately.

Furthermore, the actions of the Juvenile Tribunals lack an authoritative nature; they are in fact carrying out a social mission. This is evident because offenders are not subject to imprisonment, and they are enrolled in an observation house. In an observation house, the process is conducted in a family environment that is considered adequate for successful scientific observation of the juvenile, which is necessary in the Tribunals’ determinations. The determinations undertaken by the Tribunal lack the characteristics of a sentence. If a juvenile were subject to a criminal process, usually exercised by the Supreme Power of the State with an authoritative nature, then a juvenile would be accorded all the constitutional guarantees and would thus be able to solicit an injunction (*amparo*). In order for an injunction to be ordered, there must exist evidence that the State lacks the necessary conditions to carry out the tutelary actions and that there is material as well as moral abandonment of the juveniles, hence the ineptness of those who exercise custody over the juveniles.

The analysis above does not differ from that contained in the decision emitted by the Supreme Court in 1931, which found that Articles 119 and 120 of the Criminal Code and the Criminal Process Code, which state that juveniles under 18 years of age cannot be criminally responsible for the offences they commit, and the measures necessary for their reform have a preventive and educative nature. Further, it states that juveniles will be institutionalized with an educational objective, for a period not less than that served by adults found guilty of the same crime. With this, punishments of any type are put aside and in their place there are corrective, medical, and educative measures, which cannot be considered in any way to be criminal sanctions. Accordingly, Articles 394 and 395 of the Criminal Process Code state that Juvenile Tribunals can only decree resolutions of a preventive and educative nature and that the Tribunal must decide whether to apply a tutelary measure and of what type. Article 404 of the Criminal Code sets out an exception to the articles above: juveniles under age 18 but over age 12 will be subject to criminal process and a diminished criminal sentence when the offence committed by the juveniles is found to be exceptionally serious by the Juvenile Tribunal. Notwithstanding this exception, the corrective system adopted by the State for juveniles cannot be considered different in any way given that this article is an exception to the general rule for treatment.

In conclusion, the institutionalization of a juvenile in an educative establishment, by order of the Juvenile Tribunal, cannot be considered a violation of Article 16 of the Constitution, due to the lack of incarcerative nature; the denial of parole cannot be considered a violation of section I of Article 20 of the Constitution in that the right to parole was created for those who are deprived of their liberty, according to a criminal process, and not for juveniles who are secluded in schools whose objective is not to punish but to apply social procedures for their improvement.

<sup>4</sup> Luis Rodríguez-Manzanera. *Criminalidad de Menores* [Criminality of Minors]. (1997), p. 367.

<sup>5</sup> *Diario Oficial*, February 5, 1917. *Political Constitution of the United Mexican States*. [hereinafter *Mexican Constitution*] Article 1.

<sup>6</sup> *Mexican Constitution*, supra note 5, Article 133.

to respect their needs in the development of a separate and specialized system of juvenile justice. The Beijing Rules were the first international legal instrument to comprehensively detail norms for the administration of juvenile justice. The Rules operate as guidance to establishing a justice system for juveniles in contact with the law. The first guidelines are the U.N. Guidelines for the Prevention of Juvenile Delinquency (the Ryad Guidelines), which set out the social policies necessary to prevent and protect juveniles from offending. The other guidelines are the United National Rules for the Protection of Juveniles Deprived of their Liberty (the JLD Rules), which work to safeguard a child's right to social reintegration after s/he has been in prison or institutionalized.

The Beijing Rules, as well as the Ryad Guidelines and the JLD Rules, are merely recommendatory and are nonbinding *per se*. However, a number of principles conveyed by the Beijing Rules were adopted by the Convention on the Rights of the Child,<sup>7</sup> a global treaty that is binding on all State Parties. Mexico ratified the U.N. Convention on the Rights of the Child in 1990, thus making this treaty part of the supreme law. However, despite the incorporation of the principles contained in the Convention on the Rights of the Child, the question remains whether juvenile justice legislation in Sonora is in compliance with the Beijing Rules and the U.N. Convention on the Rights of the Child. Article 18 of the Constitution is the foundation for juvenile justice, whereby the federal and state governments are required to create, regulate, and administrate a juvenile justice system within their respective systems.

Article 18 authorizes the government to intervene to provide parental guidance in cases of juvenile disruptive and/or criminal behavior.<sup>3</sup> When found guilty of committing antisocial behavior or criminal acts, juveniles are subject to treatment. This treatment could be medical, psychological, educational, or psychiatric, and include institutionalization.

Considering the described proceedings, the aim of this study was to analyze and compare process rights of minors applying the Beijing Rules, the U.N. Convention on the Rights of the Child, and the Juvenile Justice Law for Minors in the (Mexico-U.S.) border state of Sonora, comparing formal law to current practice.

## JUVENILE TRIBUNALS IN MEXICO

Mexico is a federal republic, and each state has its own laws and judicial institutions to treat juvenile offenses and criminal offenses.<sup>8</sup> There are 32 different

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<sup>7</sup> Convention on the Rights of the Child, ratified on August 10, 1990.

<sup>8</sup> *Diario Oficial*, February 5, 1917. *Political Constitution of the United Mexican States*. [hereinafter *Mexican Constitution*], Article 18(3). Arrest is permissible only for offenses punishable by imprisonment. The place of detention shall be completely separate from the place used for the serving of sentences. The federal and state governments shall organize the penal system within their respective jurisdictions on the basis of labor, training, and education as a means of social readjustment of the offender. Women shall serve their sentences in places separate from those intended for men for the same purpose. Governors of states, subject to the provisions of the respective local laws, may conclude agreements of a general nature with the federal government, under which offenders convicted of common offenses may serve their sentences in establishments maintained by the

legislations, one for each state and one for the area encompassing the Federal District (Mexico City).<sup>9</sup> The legal code is applied in each state within the federal court of equity, and it grants the local courts or councils jurisdiction to hear the case where the omission was committed.<sup>10</sup>

Before the introduction of juvenile courts in Mexico, juveniles were treated under the state criminal code, applying a treatment like that directed to persons with diminished capacity. A mitigating sentence was considered, applying one-third of the regular punishment.<sup>11</sup>

### Juvenile Courts in Sonora, Mexico

In Sonora State (in northwestern Mexico, bordering Arizona), there were no specialized courts for minors until 1984. Four articles of the 1949 criminal code regulated the treatment for juvenile offenders.<sup>12</sup> Those articles established that minors under 16 years of age were not responsible for their criminal acts, and those minors should receive reprimand and institutional treatment.<sup>13</sup> The State Criminal Process Code established the process for juvenile justice.<sup>14</sup> Under this code, the treatment could be delivered at school, in a foster home, in a government or civil organization, in a medical facility, or in a special-education institution.<sup>15</sup> A special tribunal for juveniles was created under the jurisdiction of the criminal courts.<sup>16</sup> This tribunal was in charge of investigating, judging, and sentencing.<sup>17</sup> The law left to the consideration of the courts the methods to be undertaken to investigate the charges. It left it to the court to determine whether the minor was “abandoned, corrupted, or in danger of becoming perverted.”<sup>18</sup> A Supervisory Council was in charge of overseeing the work of the tribunal and the condition under which juveniles were institutionalized; the Council could ask the court to modify sentences given to juveniles, as well as counsel and help juveniles who had been released. In sum, they were competent to intervene on behalf of juveniles, after sentencing, on the premise that they were there to protect the interest of the minor.<sup>19</sup>

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federal executive. The federal government and the state governments shall establish special institutions for the treatment of juvenile delinquents.

<sup>9</sup> Ana Josefina Alvarez, “México,” in *International Handbook on Juvenile Justice* (Ivonne Vinay, trans., Greenwood Press, 1996), p. 207.

<sup>10</sup> See note 9.

<sup>11</sup> Elena Azaola G. “Posibilidades y Límites de Dos Modelos de Justicia para Menores.” In *Cuadernos del Instituto de Investigaciones Jurídicas: Memorias del Coloquio Multidisciplinario sobre Menores, Diagnósticos y Propuestas* (Universidad Nacional Autónoma de México, 1996).

<sup>12</sup> *Código Penal del Estado de Sonora* (hereinafter *Criminal Code for the State of Sonora*), Boletín Oficial del Gobierno del Estado 10, sección II, August 3, 1949.6.

<sup>13</sup> Miguel Angel Cortés Ibarra, *Derecho Penal* (Criminal Law), 3d ed. (Cárdenas Editores, 1987), pp. 278 and 279.

<sup>14</sup> *Código de Procedimientos Penales* (hereinafter *Criminal Process Code for the State of Sonora*), published December 20, 1940.

<sup>15</sup> Beatriz Eugenia Montijo-Hijar, *Análisis del Menor* (Universidad de Sonora, 1982).

<sup>16</sup> *Criminal Process Code for the State of Sonora*, supra note 14, Article 451.

<sup>17</sup> *Criminal Process Code for the State of Sonora*, supra note 14, Articles 454-462.

<sup>18</sup> *Criminal Process Code for the State of Sonora*, supra note 14, Article 455.

<sup>19</sup> *Criminal Process Code for the State of Sonora*, supra note 14, Articles 452, 465, and 467.

In 1981 the State Criminal Code was amended to change the minimum age for juveniles to be considered not chargeable in the criminal process from 16 to 18 years of age.<sup>20</sup>

It was not until 1984 that the criminal code for the state of Sonora was amended to remove juveniles from the criminal process and a law was passed that created the Juvenile Tutelary Council (COTUME) and that regulates the juvenile justice system.<sup>21</sup> This Tutelary Council works as a tribunal and is administrative in nature.<sup>22</sup> The Council is composed of counselors instead of criminal judges.<sup>23</sup> The Council includes one president and three counselors, who must conduct plenary sessions in order to emit resolutions with the approval of the majority of the Council.<sup>24</sup> They meet once a week and resolve all accumulated cases of that week.

### ***Due Process Rights under the COTUME Law***

Beijing Rules and the U.N. Convention on the Rights of the Child state that the competent authority in charge of deciding the outcome of the process must conduct the process in accordance with the basic procedural safeguards in order to guarantee a fair trial.

Rule 7.1 of the Minimum Rules for the Administration of Juvenile Justice<sup>25</sup> and Article 40 of the U.N. Convention on the Rights of the Child indicate some essential elements for a fair and just trial. These elements are: the *presumption of innocence*, the *right to be notified of the charges*, the *right to remain silent*, the *right to counsel*, the *right to the presence of a parent or guardian*, the *right to confront and cross-examine witnesses*, and the *right to appeal to a higher authority* in all stages of the process.

In 1992<sup>26</sup> the COTUME law was modified, and articles were added to include the procedural safeguards established by Convention on the Rights of the Child and the Beijing Rules. One of the inclusions was Article 48 *bis* and an amendment to Article 55 of the COTUME law, which establish the procedural safeguards afforded in the Sonora juvenile justice process. According to these amendments, the following guarantees must be observed during the juvenile process before the COTUME:

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<sup>20</sup> Boletín Oficial del Estado, June 8, 1981, *Reformas al Código Penal para el Estado de Sonora* (hereinafter *Amendments to the Criminal Code for the State of Sonora*).

<sup>21</sup> *Ley que Crea el Consejo Tutelar para Menores de Estado de Sonora* (hereinafter *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*), Boletín Oficial del Gobierno del Estado, December 12, 1984. This law annuls Articles 113, 114, and 115 of the Criminal Code and Articles 451-471 of the Criminal Process Code.

<sup>22</sup> *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 18.

<sup>23</sup> *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 21.

<sup>24</sup> *Law that Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 35.

<sup>25</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice (hereinafter "*The Beijing Rules*"), G.A. res. 40/33, annex, 40 U.N. GAOR, Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985), Article 2.2(b).

<sup>26</sup> Boletín Oficial No. 52, sección 1 de 1992/12/28. Article 19 section I; 34, 44 paragraph II, 49 and 55 were reformed. And the following articles were added: 1bis, 48bis, 4 paragraph, 19 last paragraph, 28 section 10, 30 section VI, and 52 paragraphs II-V.

1. *The presumption of innocence (F. I.),*
2. *The right to notification of the parent or guardian of the charges (F. II),*
3. *The right to counsel (F. III),*
4. *The right to a state-appointed attorney when no other counsel has been designated (F. IV),*
5. *The right to be notified of the charges (F.V),*
6. *The right to present witnesses and other evidence (F. VI),*
7. *The right to confront and cross-examine witnesses (F. VII),*
8. *The right to have access to all of the information available from files and the investigation pertaining to the charges (F. VIII).*
9. *The right to appeal the Initial and Final Resolution before the Tutelary Council, which can be exercised by the juvenile's attorney or his representative (article 55),*
10. *The Tutelary Council can initiate any act, modify, suspend, or revoke any resolution or measure imposed at any moment, taking into account the results of the treatment (Article 55).*

Table 1 shows the correspondence between basic procedural rights, the Beijing Rules, the U.N. Convention on the Rights of the Child, and the Juvenile Justice Law in Sonora.

**Table 1**  
**Correspondence between basic procedural rights, the Beijing Rules, the U.N. Convention on the Rights of the Child and Juvenile Justice Law in Sonora**

Basic Procedural Rights	Beijing Rules	U.N. Convention on the Rights of the Child	Juvenile Justice Law in Sonora
<i>Presumption of Innocence</i>	7.1	<i>Article 40, section 2.b (i)</i>	<i>Article 48 bis. Section I</i>
<i>The Right to be Notified of the Charges</i>	7.1	<i>Article 40, section 2.b (ii)</i>	<i>Article 48 bis Section V</i>
<i>The Right to Remain Silent</i>	7.1	<i>Article 40, section 2.b (i)</i>	<i>Article 48 bis Section V</i>

**Table 1  
(Continue)**

Basic Procedural Rights	Beijing Rules	U.N. Convention on the Rights of the Child	Juvenile Justice Law in Sonora
<i>The Right to Counsel</i>	7.1	Article 40, section 2.b (iii)	Article 48 bis. Section III & IV
<i>The Right to the Presence of a Parent or Guardian</i>	7.1	Article 40, section 2.b (iii)	Article 48 bis. Section II & Article 55 & 39 Note: These establish that juveniles have the right to have parents or guardian notified of the charges and only mention their presence for the ruling of the final resolution.
<i>The Right to Confront and Cross-examine Witnesses</i>	7.1	Article 40, section 2.b (iv)	48 bis. Section VII
<i>The Right to Appeal to a Higher Authority</i>	7.1	Article 40, section 2.b (v)	Article 55 Note: There is a right of appeal, but it is only applicable to the initial and final resolution, and only before the same COTUME Council that issued the final Resolution, not to a separate and higher authority. However, there is a constitutional right of appeal to all Acts of State that infringe any of the basic guaranties protected by the Constitution, know as amparo.

**Definition of Delinquency under Sonora’s Juvenile Justice Law**

The Beijing Rules state that “an offence is any behavior (act or omission) that is punishable by law under the particular legal systems” and that these definitions are to be applied in a manner that is compatible with their respective legal systems.<sup>27</sup> The COTUME law extends to behavior not punishable by any law and encompasses it in the term *antisocial behavior*.<sup>28</sup>

**Antisocial Behavior**

Under Article 4 of the Juvenile Justice Law in Sonora, the State has the authority to correct any antisocial behavior committed by a minor. Antisocial behavior is

<sup>27</sup> See note 25.

<sup>28</sup> Law That Creates the Juvenile Tutelary Counsel for the State of Sonora, supra note 21, Article 5.



defined as: “the commission of infractions to criminal, police, or good government regulations, which includes conduct prohibited by the criminal code or any administrative law and any behavior that adversely affects the minor, his family, morality, or community welfare and safety.”<sup>29</sup> It also includes “reiterated manifestation of conduct,” or repeat offenders.<sup>30</sup>

## 1. Behavior Punishable by Law

“Antisocial behavior” as defined by the COTUME law distinguishes offenses punishable by law (administrative or criminal) from those that are not punishable by any law (except by the COTUME law). The application of the juvenile process to crimes punishable by law is an evident observance of the Beijing Rules. Of files reviewed, 84% of the juveniles were subject to process for offenses punishable by criminal law. Of these, 37% were processed for aggravated robbery, 11% for burglary, 7% for rape, 5% for drug trafficking, 4% for homicide, 4% for attempted robbery, 2% for serious injuries 2% for minor injuries, 3% for carrying weapons, and 1% for attempted homicide, attempted rape, child abuse, and prostitution and vagrancy.

## 2. Behavior Not Punishable by Law (Status Offenses)

In contrast, the insertion of behavior that adversely “affects the minor, his family, the morality, or community welfare and safety”<sup>31</sup> is a clear inclusion of *status offenses*.<sup>32</sup> The law does not define what actions affect the minor, his family, and the morality or community welfare.<sup>33</sup> Furthermore, the law does not establish how antisocial behavior is to be punished; it only states that the authorities have the power to “correct antisocial behavior committed by minors,”<sup>34</sup> in which case the “correction” can range from something as moderate as reintegration into the home to the harshest punishment—internship in the COTUME institution.<sup>35</sup>

This definition of delinquent behavior is a classic example of “status offense.”<sup>36</sup> The broadness of the term “antisocial behavior” encompasses any and all conduct from a minor; it does not define what acts are “antisocial” or what could be harmful to the minor, his family, and the community. Thus, under this vague definition, minors are discriminated against due to their age and can be subject to process for any conduct. This term does not preclude authorities from acting under any circumstance. This unlimited power accorded to juvenile justice authorities deprives minors of any legal defense, thereby literally sentencing juveniles to the juvenile process from the outset.

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<sup>29</sup> *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 5.

<sup>30</sup> *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 51.

<sup>31</sup> *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 51.

<sup>32</sup> Trojanowicz and Morash, supra note 1, p. 166.

<sup>33</sup> Alvarez, supra note 9, p. 208.

<sup>34</sup> *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 2.

<sup>35</sup> *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 72.

<sup>36</sup> Trojanowicz and Morash, supra note 1, p. 166.

Of the files reviewed, 16% of the juveniles were processed for offenses not punishable by law, such as vagrancy, antisocial behavior, and prostitution.<sup>37</sup>

i. Status Offenses and the Principle of Legality under Mexican Law

Status offenses are not compatible with the Mexican legal system. Article 14 of the Constitution<sup>38</sup> states that, for a punishment to be applied, there must be a crime committed: “No crime, no sentence without previously established laws.”<sup>39</sup> Given that status offenses are not punishable under criminal law, no sentence should be applied to the commission of these offenses. The COTUME law clearly goes beyond this definition in that it does not define what acts constitute antisocial behavior. The principle of legality limits the power vested in the authorities in order to curb the abuse of power. With the identification of “antisocial behavior” as a punishable offense, minors are processed for offenses that are not punishable if committed by an adult. It also enables juvenile authorities not only to hear and judge on behavior contrary to law but also to judge on unwritten, undetermined, and unknown standards to which minors are nevertheless subject.

ii. Federal Law for Juvenile Process and the Treatment of Status Offenses

While Sonora may be slow in amending its own Juvenile Justice Law, other states have conformed quickly. In 1991 the Federal District (Mexico City) published a new law and implemented a new policy on juvenile justice.<sup>40</sup> This new law was to provide delinquent minors real access to justice, taking into account their constitutional rights. This law eliminates the status offenses sanctioned in the prior law, which still appear in the Sonora law, and limits the power of the juvenile authorities to address behaviors penalized under criminal law.

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<sup>37</sup> In Mexico, prostitution is not considered a crime punishable by law. However, prostitutes have a duty to undergo periodic medical exams in order to practice the profession.

<sup>38</sup> *Mexican Constitution*, supra note 6, Article 14. No law shall be given retroactive effect to the detriment of any person whatsoever. No person shall be deprived of life, liberty, property, possessions, or rights without a trial by a duly created court in which the essential formalities of procedure are observed and in accordance with laws issued prior to the act. In criminal cases, no penalty shall be imposed by mere analogy or by a prior evidence. The penalty must be decreed in a law in every respect applicable to the crime in question. In civil suits, the final judgment shall be according to the letter or the juridical interpretation of the law; in the absence of the latter, it shall be based on the general principles of law. (Trans. <http://www.ilstu.edu/class/hist263/docs/1917const.html>).

<sup>39</sup> Alvarez, supra note 9, p. 208.

<sup>40</sup> Alvarez, supra note 9, p. 208.

## ***Process under Sonora's Juvenile Justice Law***

### *Competent Authority*

Within the mechanism of the COTUME process, the Council is the *competent authority* or maximum plenary organ in charge of administering justice to juvenile offenders. It handles cases of abused minors and sanctions those who in any way affect the health, security, or care of a minor.<sup>41</sup> The Council, as noted above, comprises a president and three tutelary counselors, as well as a documents officer.<sup>42</sup> The Council functions as a judicial body, and its attributions<sup>43</sup> include the powers to hear and decide cases presented by “instructing counselors”; to dictate any necessary temporary measures in the proceeding; to modify the legal conditions of the minors who are under rehabilitative treatment (only when merited by the conduct of the minor and requested by one of the counselors); to impose the sanctions recognized by the COTUME law; and to notify the agent of the Ministerial Police when there is a case of a crime against a minor or when parental custody must be revoked.<sup>44</sup> The Council must vote on the resolution submitted by the instructing counselor. The Council is also charged with hearing all appeals.

As for the responsibilities of the individual Council members, it is responsibility of the President to preside, direct and subject to vote all cases presented to COTUME. On receipt on a case involving a minor, one of the three tutelary counselors is attributed the position of instructing counselor. This counselor is in charge of conducting the investigation of the charges. The counselor must also submit before the Tutelary Council a recommendation for resolution of the case. Procedurally, the instructing counselor is in charge of investigating the facts of the case, resolving on detention pending the hearing before the Council, deciding whether to charge the minor and/or what to charge for, and submitting a proposal for treatment (sentencing or resolution) of the minor.<sup>45</sup>

### *Formal Process in the COTUME:*

Under the COTUME authority, a process can include up to five fundamental periods:

- *Initial Resolution:* This moment is similar to that of an arraignment hearing. During the phase for the initial resolution, a tutelary counselor/instructing counselor receives the minor and has to complete a resolution regarding his/her case within 72 hours.<sup>46</sup> In this initial resolution, the instructing

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<sup>41</sup> *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 19.

<sup>42</sup> *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 21. The president and counselors must be professionals who possess an interest in and understanding of the problems relating to minors.

<sup>43</sup> *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 29.

<sup>44</sup> *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 28.

<sup>45</sup> *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 30.

<sup>46</sup> This is when the time of minimum detainment by authorities begins for COTUME authorities, and it is not computed with any other time detained.

counselors should decide whether to divert or continue the process.<sup>47</sup> Cases that end with the initial resolution phase are usually those that involve status offenses or those where there has not been any relapse of deviant behavior.<sup>48</sup> If the instructing counselor decides to continue the process, s/he must determine whether to detain the minor pending a hearing before the Council. Minors could continue the process in family custody or under institutionalization.<sup>69</sup> If the instructing counselor decides to prosecute the juvenile, the instruction process is opened.<sup>49</sup>

- *Instruction Process*: The instruction process is divided into three consecutive moments. The objective of this phase is to integrate all evidence and formulate the allegations.<sup>49</sup>
  - i. Once the instruction is opened, the accused or his legal representative and the instructing counselor have 10 working days to offer evidence. During this time the instructing counselor should obtain clinical studies and all inquiries on social and family background, school career, and educational experience. Concurrently, the instructing counselor continues investigation into the facts surrounding the case. All documentary evidence must be submitted by this stage.<sup>50</sup>
  - ii. The parties have another 10 working days to interview witnesses or obtain any other physical evidence. The parties have the opportunity to formulate arguments orally.<sup>51</sup>
  - iii. Following this, the written arguments should be presented within 3 days. All of this information will be used by the instructing counselor to elaborate a final resolution proposal.<sup>52</sup>
  - iv.
- *Final Resolution Proposal*: The instructing counselor has 3 days to finish the final resolution proposal. This proposal is a summary of all evidence and clinical and social studies obtained, as well as suggestion of treatment.<sup>53</sup>
- *Final Resolution Hearing*: In the 3 days following the receipt of the final resolution proposal, the president of the Council (tribunal) should convene a hearing. In this hearing the instructing counselor presents and justifies the proposed resolution and receives the evidence (if something was missing).

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<sup>47</sup> Law That Creates the Juvenile Tutelary Counsel for the State of Sonora, supra note 21, Article 49.

<sup>48</sup> Law That Creates the Juvenile Tutelary Counsel for the State of Sonora, supra note 21, Article 51.

<sup>49</sup> Law That Creates the Juvenile Tutelary Counsel for the State of Sonora, supra note 21, Article 52.

<sup>50</sup> Law That Creates the Juvenile Tutelary Counsel for the State of Sonora, supra note 21, Article 52.

<sup>51</sup> See note 9.

<sup>52</sup> See note 9.

<sup>53</sup> Law That Creates the Juvenile Tutelary Counsel for the State of Sonora, supra note 21, Article 53.

Based on all these elements, the Tutelary Council takes the final resolution in a plenary session.<sup>54</sup>

If the offense has been established, the juvenile will be institutionalized. The treatment for the minor could be confinement, protection or guidance. The law establishes that only in severe cases should minors be institutionalized.<sup>55</sup>

Therefore, the overriding objective of the Council is rehabilitation.<sup>56</sup> Based on this goal, the disposition should fit the offender, not the offense. Psychologists and social workers should then determine the dangerousness of the juvenile offender.

- *Appeal*: The initial and final resolutions can be appealed before the same Tutelary Council. The appeal should be resolved within 3 days (initial resolution) or 5 days (final resolution), depending on the kind of resolution that was appealed.<sup>57</sup>

## ***Investigation and Prosecution***

### *Initial Contact*

*The Police and the Prosecutor's Office*: In most cases, minors first come in contact with authorities when they are apprehended in the commission of "antisocial behavior" as defined by the COTUME law. Usually they are detained by the Preventive Police, brought to the police station and turned over to the *Prosecutor's Office* for investigation. According to data published in 1993 from a diagnostic conducted by Mexico's National Human Rights Commission,<sup>58</sup> 39% of juveniles interviewed in treatment centers had been arrested by the Preventive Police, 42% by the Judicial Police, and 19% by others. Generally no order had been emitted by a Prosecutor's Office soliciting their arrest, and juveniles are not told their legal status or the reasons for being arrested, how long they will be arrested, or what will happen to them. <sup>59</sup>

Once a minor is in police custody, the COTUME law takes effect, stating that upon apprehension by any authority, minors must be relinquished to the proper juvenile authorities immediately, with an accompanying official letter stating the facts and/or acts for which the minor was detained.<sup>60</sup> Several legal issues arise on the arrest of a juvenile: a) whether the Prosecutor's Office, Preventive Police, or Judicial Police has authority to conduct an initial investigation; b) whether this investigation must be conducted according to the State Criminal Codes or the

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<sup>54</sup> *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 54.

<sup>55</sup> *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 79.

<sup>56</sup> *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 20.

<sup>57</sup> *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 55.

<sup>58</sup> Alvarez, supra note 9, p. 212 (CNDH, 1993: 10).

<sup>59</sup> Alvarez, supra note 9, p. 213.

<sup>60</sup> *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 46.

COTUME law; and c) whether the due process rights of the juvenile are protected under the Constitution and the COTUME law.

*Specialization within Police:* In accordance with section 12 of the Beijing Rules, police should be specially trained to deal with juveniles and/or the prevention of crimes by juveniles. In large cities, a special police unit should exist to deal with juveniles.<sup>61</sup> Article 40 of the U.N. Convention on the Rights of the Child states that “States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children.”<sup>7</sup> Juvenile justice is an extension of the administrative area of law, and as such, authorities working within it are not empowered to act on behalf of or like the police. Furthermore, special juvenile police or police specially trained for dealing with juveniles are not contemplated or regulated by either the criminal code or the criminal process code. Therefore, formally and practically speaking, there is no police specially trained to deal with juvenile crime, the rights of juveniles, or the proper handling of juvenile offenders.

*Discretionary Powers of the Police and the Prosecutor’s Office:* The Criminal Process Code in Sonora only describes the process of initial investigation applicable to the general population.<sup>62</sup> It does not expressly pertain to adults, nor does it indicate a special process for juveniles. The COTUME law proceeds once juveniles are turned over to the COTUME authorities.

As a result, in formal terms the police and the Ministerial Police lack discretionary power regarding actions pertaining to minors. Their only authority lies in the detention of minors. This silence in the COTUME law and in the Criminal Process Code leaves a gap in the juvenile justice process, where neither the COTUME law begins nor the Criminal Process Code should apply. This renders juveniles legally helpless, in a limbo between the powers of the Prosecuting Attorney’s Office and that of the COTUME authorities.

However, it is standard practice for the prosecuting attorney to conduct an initial investigation into facts of the case. The prosecuting attorney interviews the minor and witnesses, visits the scene of the crime, and conducts forensic and documentary analysis. At this point, the Prosecutor’s Office determines whether to release the minor or to remit him or her to COTUME authorities. During this time, minors are usually under “temporary arrest” in the same jail cells as, but separate from, adults. This practice is contrary to section 13.1 of the Beijing Rules, which states that “detention pending trial shall be used only as a measure of last resort

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<sup>61</sup> Commentary to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (hereinafter “*Commentary to the Beijing Rules*”), G.A. res. 40/33, annex, 40, U.N. GAOR (No. 53) at 207, U.N. Doc. A/40/53 (1985).

<sup>62</sup> *Criminal Process Code for the State of Sonora*, supra note 14: The state criminal process code states that the criminal process has four stages, the first of which is the initial investigation, under taken by the Ministerial Police (Article 1, Criminal Process Code for the State of Sonora). During the initial investigation it is the responsibility of the Ministerial Police to receive all reports, accusations, and complaints on activities that could be considered criminal (Article 2 of the Criminal Process Code for the State of Sonora). Second, the Ministerial Police has 72 hours to gather all evidence available to determine the crime committed and the probable responsibility of the accused, ultimately deciding whether to submit a formal indictment before the criminal courts (Article 19 of the Mexican Constitution).

and for the shortest possible period of time”<sup>63</sup> and “whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.”<sup>64</sup> This “temporary arrest” constitutes part of the pretrial detention to which a juvenile is subject. However, during this time, no due process rights are recognized, rendering juveniles helpless at this initial stage of the process.

#### *Detention Pending Transference to Custody*

*Diversion through the Prosecutor’s Office:* The determination that the prosecuting attorney makes regarding possible release from “temporary arrest” constitutes a provisional official decree, whereby juveniles who are not released will be subject to continued imprisonment and referral to the COTUME authorities. This results in the prosecuting attorney acting on behalf of COTUME authorities, without any discretionary or explicit power to do so.<sup>65</sup> This practice results in according initial control to the prosecuting attorney in the juvenile process of determining which juveniles come into contact with the juvenile authorities, without any formal discretionary power to “divert” juveniles.<sup>66</sup> The effect is that the Prosecutor’s Office illegally takes actions involving juveniles that will affect their legal status without recognizing their due process rights as established by the Beijing Rules, COTUME law, and the Constitution.

#### *Investigation of the Prosecutor’s Office*

*Relinquishing Juveniles to the COTUME Authorities:* Any authority, upon apprehension of a minor, must relinquish the minor to the proper juvenile authorities “immediately.” Usually this authority is the Prosecutor’s Office, because neither the Preventive Police nor the state police have the power to release; they are working under the orders of the Prosecutor’s Office. If the Preventive Police or state police detain a minor, the police must first remit the minor to the Prosecutor’s Office, which should immediately notify the COTUME authorities. The term “immediately” is not defined by the law. Nevertheless, COTUME states that on presentation to the COTUME, the instructing counselor has 72 hours to decide whether to release, divert, or subject the juvenile to process. The time that police or the Prosecutor’s Office detained the juvenile is not counted as part of this period.

According to the data obtained, juveniles apprehended by police were usually kept an average of 26 hours and sometimes up to 99 hours before they were turned over to the proper authorities (counselors in COTUME).

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<sup>63</sup> *The Beijing Rules*, supra note 25, section 13.1.

<sup>64</sup> *The Beijing Rules*, supra note 25, section 13.2.

<sup>65</sup> *The Beijing Rules*, supra note 25, sections 6 and 11.2.

<sup>66</sup> *The Beijing Rules* supra note 25, section 6.

*Detention Pending Hearing in the COTUME:* Once a juvenile is in the custody of the COTUME authorities, the instructing counselor must undertake an initial investigation to determine the age of the minor as well as the facts and circumstances under which the juvenile is accused.<sup>67</sup> The instructing counselor has 72 hours to determine whether to release unconditionally; remit to the custody of parents, tutors or someone who exercises authority over the juvenile; remain in custody of the COTUME for process; or mandate provisional institutionalization in the COTUME.<sup>68</sup>

*Detention Pending Trial:* As stated in the Beijing Rules, detention pending trial should only be used as a measure of last resort and for the shortest time possible. The other alternatives to detention pending trial are close supervision, intensive care, and placement with a family or in an educational setting or home. Again, the objective of this section is to shield juveniles from the negative influences of other detained juveniles. The time when they were in police custody is not computed into the 72-hour maximum confinement time specified for detention pending a decision.<sup>69</sup> Therefore, juveniles are usually detained for periods exceeding the 72 hours guaranteed by both the COTUME law and the Constitution,<sup>70</sup> thereby violating one of their basic rights.

*Diversion in the COTUME:* As defined by the Beijing Rules, diversion is the removal of a juvenile from juvenile justice proceedings and redirecting treatment through community service.<sup>71</sup> Diversion can also be considered a total removal from the process without referral to community service or any other type of treatment. The objective of diversion is to shelter juveniles from exposure to juvenile proceedings when it is appropriate to the juvenile and to the offense committed. Diversion should be able to be applied at any point, on apprehension by the police, during detention by the authorities, during the justice process, and so on.<sup>72</sup>

According to the data, of the juveniles under the COTUME process at the time of the research, police had detained 89%, and 86% of them were subject to an initial investigation by the Prosecutor's Office. Of the juveniles investigated by the Prosecutor's Office, 98% were relinquished to the COTUME authorities. Of those relinquished to the COTUME counselors, 99% were subject to process under the COTUME law.

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<sup>67</sup> *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 48.

<sup>68</sup> *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 49.

<sup>69</sup> *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 49.

<sup>70</sup> *Mexican Constitution*, supra note 38, Article 19. No detention shall exceed three days without a formal order of commitment, which shall state the offense with which the accused is charged; the substance thereof; the place, time and circumstances of its commission; and the facts brought to light in the preliminary examination. These facts must be sufficient to establish the *corpus delicti* and the probable guilt of the accused. All authorities who order a detention or consent thereto, as well as all agents, subordinates, wardens, or jailers who execute it, shall be liable for any breach of this provision. The trial shall take place only for the offense or offenses set forth in the formal order of commitment. Should it develop, during the course of the proceedings, that another offense, different from that charged, has been committed, a separate accusation must be brought. This, however, shall not prevent the joinder of both proceedings, if deemed advisable. Any ill-treatment during arrest or confinement; any molesting without legal justification; any exaction or contribution levied in prison are abuses which shall be punishable by law and repressed by the authorities.

<sup>71</sup> *Commentary to The Beijing Rules*, supra note 61.

<sup>72</sup> See note 9.



These data indicate that in the juvenile process in Sonora, the right of diversion for juveniles is not formally present until the initial formal proceeding before COTUME authorities.

## **DATA SOURCES**

We reviewed 142 files of institutionalized minors in the Tutelary Council of Hermosillo, Sonora (a midsize city in northwestern Mexico). The average age of the total sample of minors was 15 years, with a standard deviation of 1.52. Thirty-one percent of the sample were females, and 68% were males. 95% of the minors were single, 3% married, and 2% single but living with partners. Monthly family income for the sample was US\$247.25 (SD=\$391.37). Family income presented a negatively skewed distribution, which corresponds to the income distribution in this region (that is, most families fall into the lower-class and lower-middle-class categories). 3% had no education, 45% had completed elementary school, 42% had one or two years of junior high school, 4% had completed junior high, and 6% had one or two years of high school.

## **Instruments**

In this study, a checklist was elaborated to determine variables regarding: the type and severity of the crime committed by the juvenile; the number and type of acts instrumented by the prosecuting attorney; the number of hours that the juvenile was kept under arrest before s/he was transferred to the jurisdiction of the Council; the process in the Council; the actions of the defense attorney in the tutelary process; the existence of legal, psychological, social, and family foundations determining the initial and final resolutions; and the resolution issued by the Council.

## **Procedure**

The president of the Tutelary Council was contacted, and the objectives and goals of the study were explained. Afterward, permission was requested to access files of minors who had been submitted to process in January 2001. The president of the Council granted authorization on the condition that full confidentiality be maintained regarding all archival data. Students in their final year of law school were trained in juvenile court procedures and data collection. They reviewed the files and filled out a checklist for the data obtained.

## Data Analysis

Frequencies were calculated for the categorical variables, and means and standard deviations were computed for continuous variables. A Chi-square test measured the relationship or independence between categorical variables.

## DUE PROCESS RIGHTS

### The Presumption of Innocence

COTUME law establishes that juveniles have the right to the presumption of innocence until authorities prove their participation in the alleged acts. Presumption of innocence grants citizens general protection from being singled out by the authorities as criminals before their guilt has been established in a court of law. This precept is foreign to the Mexican criminal system. There is no inclusion of this presumption in any of the criminal codes or criminal procedural codes. Only the juvenile justice system states this presumption. Yet on initial contact with police and the prosecuting attorney, the juvenile is not treated accordingly, and the effects of the denial of this right are felt all the way through to the final resolution.

Upon the apprehension of a juvenile, the prosecuting attorney carries out an initial investigation into the causes of the apprehension and the “probable” participation of the minor in the “alleged” crime. The prosecuting attorney compiles initial evidence in order to determine the probable responsibility of the juvenile, which is officially recorded and sent to the COTUME authorities. In most cases, this constitutes the only evidence that the instructing counselors in the COTUME will use to process a juvenile. This evidence can include a statement and declaration of the prosecuting attorney, which could represent the only basis for the COTUME authorities’ decision. Therefore, it may be considered a breach of the presumption of innocence when the police and the public prosecution issue pronouncements *that may form a basis for drawing conclusions about the guilt of the accused person*.

Frequency analysis and Chi-square tests showed that when a prosecuting attorney interrogated a juvenile, the probability of institutionalization was increased. Of the cases reviewed, 60% of the minors who were institutionalized were accompanied by the pronouncements of the prosecuting attorney. Only one person who was interrogated by a prosecuting attorney was released in the final resolution.

### The Right to be Notified of the Charges

According to the COTUME law, “Within a lapse of 24 hours counting from the point when the juvenile was under custody of the Council, s/he must be notified in a clear manner, in the presence of his attorney, of the name of the person who is accusing the juvenile of the charges; the nature and the cause of the charges; and

his/her right to remain silent, having the opportunity during this notification to render an initial declaration.”<sup>73</sup> These guarantees provide added assurance that the juvenile’s rights are protected in order to provide juveniles the necessary information to prepare a proper defense.

According to the data, 88% of the juveniles were told the name of their accuser; 90% were told the nature of the charges. The Council fulfills this requirement by reading a manuscript that merely mentions that the minor was notified of the name of the accuser and the nature of the charges.<sup>74</sup> The instructing counselor reads this document to the minor in the initial declaration of the process, without explaining what the charges were and who was the accuser. The minor signs this document.

### **The Right to Remain Silent**

COTUME law establishes that minors have the right to remain silent. This basic right aims to avoid self-incrimination by a juvenile subject to process. However, the insertion of the opportunity for an initial declaration by the juvenile could be construed as contradictory to the right to remain silent. In practice, the initial declaration by the juvenile is foreseen as virtually an obligation. Of the cases reviewed, 76% were notified of their right to remain silent, and 88% rendered an initial declaration to the juvenile authorities. Throughout this stage, 17% had an attorney present. Seventy-seven % of minors who rendered an initial declaration were institutionalized. This may indicate that the initial declaration rendered by the minor will probably negatively affect the initial and final resolutions. Thus a minor who submits an initial declaration will most likely be institutionalized, rendering the “right to remain silent” void.

### **The Right to Counsel**

Article 48bis states in section III that a juvenile or his/her legal representatives have the right to designate, at their own expense, a licensed attorney at law of their preference, to legally assist the juvenile during process and the ruling of orientation measures, as well as institutional and noninstitutional protective measures. Furthermore, section IV establishes the right to free legal defense when the juvenile has not designated an attorney. In this case, an attorney from the State Office for the Protection of Minors and Families (SOPMF) is assigned to the case. It is the responsibility of the state-appointed attorney to legally assist the juvenile once he/she is in the custody of COTUME authorities and throughout the different stages in process, as well as during the ruling of orientation measures and institutional and noninstitutional protective measures. This right should

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<sup>73</sup> *Law That Creates the Juvenile Tutelary Counsel for the State of Sonora*, supra note 21, Article 48 bis.

<sup>74</sup> See appendix 1.

guarantee a lawyer within 72 hours. Self-representation in the juvenile process is not foreseen in the COTUME law.

According to the data obtained, in their first contact with the authorities, 43% of minors did not have an attorney present, and 37% of them were remitted to Tutelary Council (COTUME). A defense attorney was appointed within an average of 35 hours. 13% of the minors had a defense attorney in the initial resolution. 75% of those who had no attorney were institutionalized in the initial resolution, and 62% of the juveniles had an attorney present in the final resolution hearing. In the final resolution, only 3% of the juveniles subject to COTUME process were represented by a private attorney, 3% were represented by their mothers, and the remaining 94% were represented by an attorney from the SOPMF. A juvenile being represented by the SOPMF is more likely to receive a decree for institutionalization than to receive any other type of “treatment.” In 37% of cases the public defender was absent and no evidence was submitted, in 49% the public defender was present but did not offer any evidence, in 10% s/he was present and provided evidence. In 87% of the cases no other evidence was offered; the evidence presented by the prosecuting officer in the initial contact was the only existing evidence. Results of the analysis indicate that the presence of an attorney had no relationship to the tribunal decision in the final resolution; 47% of minors who had an attorney present were institutionalized.

### **The Right to the Presence of a Parent or Guardian**

The Beijing Rules state that a juvenile has the right to have a parent or guardian participate in the proceedings. They may also be required to attend the proceedings in the interest of the juvenile. However, this right can be denied if the competent authority determines that it is not in the best interest of the juvenile. The Commentaries to the Beijing Rules explain that the presence of parents or guardians should be viewed as “general and psychological and emotional assistance to the juvenile” which should be present throughout the process.

Because a juvenile has a right to conditional release and this release could be to his or her home, the presence and cooperation of parents or guardians may help the competent authority determine a disposition not to institutionalize. COTUME law establishes that juveniles have the right to have parents or guardians notified of their “situation” when their domicile is known. The only other mention of the presence of a parent or guardian is for notification of the final resolution.

The civil law principle of limited legal capacity of minors shapes the nature of the juvenile justice system in Mexico.<sup>75</sup> This principle states that minors, due to their age, do not have legal standing to exercise their legal rights. Their standing is considered limited because they can exercise this right through a legal

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<sup>75</sup> Rafael Rojina Villegas, *Compendio de Derecho Civil: Introducción Personas y Familia*, 31st ed. (Mexico: Porrúa, 2001), p. 164.

representative, which by law are parents or guardians.<sup>76</sup> This is echoed in criminal law where juveniles are considered nonchargeable due to their age.<sup>77</sup> It is assumed that juveniles are not capable of understanding criminal law, thus making them legally incapable of being responsible for the criminality of their actions. Therefore, a juvenile is subject not to criminal responsibility but to treatment when found responsible for committing an act of a criminal nature. Thus, under this principle, juveniles do not have competency to stand trial.<sup>78</sup> Their competence lies with those who have legal custody: parents or guardians.<sup>79</sup> It is the responsibility of these persons to care for, protect, educate, and be legitimate representatives of the minor. This right of representation extends to the right to represent a minor at trial. If a juvenile is incapable of standing trial, signing a legally binding contract or be criminally responsible for an act, he must be legally incapable of receiving notification of his rights in the juvenile justice process and to exercise these rights before the competent authority. Therefore, it is up to the parent or legal guardian to exercise these rights for the juvenile, and herein lies the importance of notifying parents or guardians when juveniles are detained by any authority or are subject to any type of process.

In the reviewed files, 60% of the parents did not receive notification of the charges of which their minors stood accused, and 90% of the files did not mention any reason why the parent or guardian was not notified. The right to notification of a parent or guardian does not exist on initial contact with police or the Prosecutor's Office. The COTUME law only requires notification if the address of a parent or guardian is known. It does not establish this notification as an obligation that COTUME authorities must fulfill in order to continue the process, thus leaving juveniles without legal representation from the outset. Here, it is the competent authority that is tacitly declaring parents incompetent to care for, guide, educate, and protect their children, without the right to a hearing.<sup>80</sup> It is the COTUME authorities that end up not only exercising these parental rights but also judging and sentencing the juveniles.

### **The Right to Confront and Cross-Examine Witnesses**

This right allows juveniles to defend themselves by confronting those who claim they have committed a crime. This is important because, as evidenced, cross-examining witnesses could help prove a juvenile's innocence. The COTUME law lists among the basic rights the right to cross-examine those who have declared against the juvenile. Because the process initiates with the investigation by the Prosecutor's Office (a phase not regulated by the COTUME law), juveniles are denied this right from the beginning. This fact ultimately negatively affects the minor during the formal process before the COTUME authorities, because the latter use the investigation conducted by the Prosecutor's Office to make the initial and final

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<sup>76</sup> *Civil Code for the State of Sonora*, supra note 2, Article 592.

<sup>77</sup> *Criminal Code for the State of Sonora*, supra note 12, Article 116.

<sup>78</sup> *Civil Code for the State of Sonora*, supra note 2, Article 591.

<sup>79</sup> *Civil Code for the State of Sonora*, supra note 2, Article 580.

<sup>80</sup> *Semanario Judicial de la Federación*, supra note 3.

determinations. During the process, only 6% of the cases had presented witnesses in defense of the minor for the initial and final resolution, and only 15% of them were cross-examined. That means that only one juvenile was cross-examined.

## The Right to Appeal to a Higher Authority

According to the Beijing Rules, the right to appeal is guaranteed when a case can be submitted to a separate and higher tribunal. There is a right of appeal, but it is applicable to the initial and final resolutions only before the same COTUME Council that issued the resolution, and not to a separate and higher authority. However, there is a constitutional right of appeal to all Acts of State that infringe any of the basic guarantees protected by the Constitution; this is known as *amparo*. According to the data, 21% of minors submitted appeals in the final resolution, and 17% of them proceeded, with the resolution being modified.

## CONCLUSIONS

Two of the fundamental principles stated in the Beijing Rules are to “further the well-being of the juvenile and his or her family”<sup>81</sup> and to “reduce the need for intervention under the law and deal effectively, fairly and humanely with the juvenile in conflict with the law.”<sup>82</sup>

The analysis of the COTUME law was two-pronged. On the one hand, we undertook a qualitative analysis of the sections of the COTUME law that were not in conformity with national or international legislation and that needed to be amended. This was the case for status offenses. On the other hand, we also reviewed parts of the COTUME law that had been amended to conform to international law to determine how black letter law pertaining to juvenile justice law was carried out in practice, whether these rights were being recognized and enforced in the manner intended by the Beijing Rules.

The first part of the analysis uncovered several sections of the juvenile justice process that needs to be annulled, amended, or included in local legislation. Status offenses need to be annulled because they are contrary to the Mexican Constitution and to federal juvenile justice law and the Beijing Rules. An inclusion in the current criminal code of a specialized police for detention of minors is necessary.

Relating to a juvenile’s initial contact with authorities, there are two options. One is to legislate to extend the authority of the prosecuting attorney concerning a juvenile during initial contact. The other is to limit and/or eliminate the powers that the criminal code and the COTUME law have vested in the prosecuting attorney, replacing them with a delegate of the COTUME in every police station and/or

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<sup>81</sup> *The Beijing Rules*, supra note 27, Part 1, section 1, Fundamental Principles.

<sup>82</sup> *Ibid.* 81.

Prosecutor's Office. This would protect minors on initial contact from authorities who are not specialized in juvenile attention.

The second part of the analysis was to determine how black letter law pertaining to juvenile justice law was carried out in practice. The procedural safeguards in the Beijing Rules are outlined in section 7. This section lists the following rights, which are included in the Mexican Constitution: the presumption of innocence,<sup>83</sup> the right to be notified of the charges,<sup>84</sup> the right to counsel,<sup>85</sup> the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses,<sup>86</sup> and the right to appeal to a higher authority.<sup>87</sup> These rights should be present at all stages of the proceeding, starting with arrest and detention by the police and the Ministerial Police and continuing until final sentencing. The basic procedural safeguards recommended by the Beijing Rules were included in the COTUME law. Nevertheless, the results of this study indicate that in fact the authorities do not respect these rights. Further, COTUME authorities are not fulfilling all the requisites stipulated by law for the submission of minors to the juvenile process, an outright violation of the COTUME law, the Constitution and the Beijing Rules.

The initial investigation conducted by the Prosecuting Attorney's Office is usually the only investigation carried out during the juvenile process, despite the fact that the COTUME authorities have the obligation to conduct a formal investigation into the facts surrounding the detention of a minor. This magnifies not only the importance of the actions taken by the prosecuting attorney but also the importance of the *de facto* discretionary powers vested in the police and Prosecutor's Office. Due to the gap in both the state juvenile and criminal law, the Prosecutor's Office does not accord juveniles the minimum due process rights.

Under the juvenile process in Sonora, the right of diversion as well as the application of any provisions for pretrial detention for juveniles are not formally present until the initial formal proceeding before the COTUME authorities. Due to the gap in both the state juvenile and criminal laws, none of the basic procedural

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<sup>83</sup> The presumption of innocence is not a basic procedural safeguard provided for in the Constitution. Quite the opposite, in fact. There is a presumption of guilt on the part of the investigating authorities.

<sup>84</sup> *Mexican Constitution*, supra note 5, Article 20. In every criminal trial, the accused shall enjoy the following guarantees:

III. He shall be publicly notified within forty-eight hours after being turned over to the judicial authorities of the name of his accuser and the nature of and cause for the accusation, so that he may be familiar with the offense with which he is charged, and reply thereto and make a preliminary statement.

<sup>85</sup> *Mexican Constitution*, supra note 5, Article 20. In every criminal trial the accused shall enjoy the following guarantees: IX. He shall be heard in his own defense, either personally or by counsel, or by both, as he may desire. Should he have no one to defend him, a list of official counsel shall be submitted to him, in order that he may choose one or more to act in his defense. If the accused does not wish to name any counsel for his defense, after being called upon to do so at the time of his preliminary examination, the court shall appoint his counsel for the defense. The accused may name his counsel immediately upon arrest, and shall be entitled to have him present at every stage of the trial; but he shall be obliged to make him appear as often as required by the court.

<sup>86</sup> *Mexican Constitution*, supra note 5, Article 20. In every criminal trial the accused shall enjoy the following guarantees: IV. He shall be confronted with the witnesses against him, who shall testify in his presence if they are to be found in the place where the trial is held, so that he may cross-examine them in his defense.

<sup>87</sup> The right to appeal is not one of the procedural safeguards provided by the sections of the Constitution that deal with basic rights. However, the right to appeal is guaranteed by Articles 103 and 104 of the Constitution. These articles define the process to defend basic rights which is the *amparo*.

safeguards is applied until minors are presented to the COTUME authorities. The majority of juveniles subject to investigation by the Prosecutor's Office were relinquished to COTUME authorities, and all were subject to process, which confirms the theory that on initial contact juveniles are not afforded due process rights.

The presumption of innocence is not endorsed in the criminal code, and juveniles' first contact is with the prosecuting attorney; this authority conducts the first investigation, which is sent to the COTUME. The Prosecuting Attorney's documentation contains statements and declarations that could lead the COTUME counselor to draw conclusions about the guilt of the accused juvenile even before initiating the process. This is contrary to the right of presumption of innocence.

Apparently the right to be notified of the charges and of the name of one's accuser is fulfilled. However, the analysis showed that counselors only read a previously prepared manuscript,<sup>88</sup> which states that a minor has been notified of these rights. However, the manuscript does not permit for the inclusion of this information and therefore does not provide the necessary elements for the defense of the minor.

The results confirm that the right to an attorney is merely a "formality" and is not a practice in the process, given that a defense attorney is absent at this stage of the proceedings. Relating to the right to counsel, we can infer that the state-appointed attorney usually does not present a defense or is absent throughout the process, despite the insertion of her/his name in the various stages and resolutions.

The right to remain silent is also specified in the COTUME law. Yet most minors subject to process rendered an initial declaration to the instructing counselor. As in the case of the right to be notified of the charges and one's accuser, for this right the counselor merely reads a document and asks for its verification.<sup>89</sup> As a consequence, most minors are institutionalized. It seems that the initial declaration is used as a tool for self-incrimination, contrary to the objectives of the Beijing Rules.

Even though the Beijing Rules establish that minors have the right to the presence of a parent or guardian, juveniles lack this right during proceedings. The COTUME Law only requires notification of parents or guardians if their address is known. Thus most parents were not notified of their minors' situation.

Because only one juvenile had the right to cross-examination, the existence of this right is considered null in practical terms.

The right to appeal to a higher authority in all stages of the proceedings is not provided for by the COTUME law. This law grants the right of appeal of the initial and the final resolutions. However, the authority in charge of hearing the appeal is the same authority that determined the first resolution; it is neither a distinct nor a

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<sup>88</sup> See note 60.

<sup>89</sup> See note 60.



higher authority. Further, common practice shows that it is not the Council as a group but the instructing counselor that makes the determinations during the process, and it is this same Counselor, and not the Council, who decides the appeal.

Section 13 of the Beijing Rules states that pretrial detention should be used only as a last resort, and no minors are to be held in a facility where they are vulnerable to the negative influences of adult detainees. According to the data, juveniles were usually held in the same facilities as adults on initial contact with the prosecuting attorney, and most were subject to pre-hearing detention before the COTUME. It is evident that juveniles are not protected at any point of the process from the negative influences or effects of detention. Quite the opposite; standard practice is for juveniles subject to process to bear the burden of knowing what a jail looks like, to be in contact with adult criminals, and to know the ins and outs of the COTUME.

In summary, the basic procedural rights included in international y domestic law are not fulfilled during the process. In spite of the law, in practice juveniles are not protected. This study documents the need for a modification of law and practice. Authorities participating in the juvenile justice process should be informed about the nature of minors' problems in order to ensure the impartial and effective administration of juvenile justice. It is difficult to eliminate accumulated practices, but government should initiate a national policy for researching planning, formulating, and evaluating a system for juvenile justice.