

# Detention Without Charge

The Use of *Arraigo* for Criminal Investigations in Mexico



## SPECIAL REPORT

By Janice Deaton and Octavio Rodríguez Ferreira



**Justice in Mexico**

*Department of Political Science & International Relations*

University of San Diego

January 2015

## About Justice in Mexico:

Started in 2001, Justice in Mexico ([www.justiceinmexico.org](http://www.justiceinmexico.org)) is a program dedicated to promoting analysis, informed public discourse, and policy decisions; and government, academic, and civic cooperation to improve public security, rule of law, and human rights in Mexico. Justice in Mexico advances its mission through cutting-edge, policy-focused research; public education and outreach; and direct engagement with policy makers, experts, and stakeholders. The program is presently based at the Department of Political Science and International Relations at the University of San Diego (USD), and involves university faculty, students, and volunteers from the United States and Mexico. From 2005 to 2013, the project was based at USD's Trans-Border Institute at the Joan B. Kroc School of Peace Studies, and from 2001 to 2005 it was based at the Center for U.S.-Mexican Studies at the University of California-San Diego.

## About the Report:

This is one of a series of special reports that have been published on a semi-annual basis by Justice in Mexico since 2010, each of which examines issues related to crime and violence, judicial sector reform, and human rights in Mexico. This special report provides a detailed assessment of the use of *arraigo* as a prosecutorial mechanism in Mexico, as national and international organizations have increasingly questioned the practice. Evidence collected for this report suggests that detention without charge is a poor substitute for due process protections that help to ensure the integrity and legitimacy of police and prosecutorial investigations. This report was authored by Janice Deaton and Octavio Rodríguez Ferreira. The report was formally released on January 12, 2015 and was made possible by the generous support of the John D. and Catherine T. MacArthur Foundation. This report does not represent the views or opinions of the University of San Diego or the sponsoring and supporting organizations.

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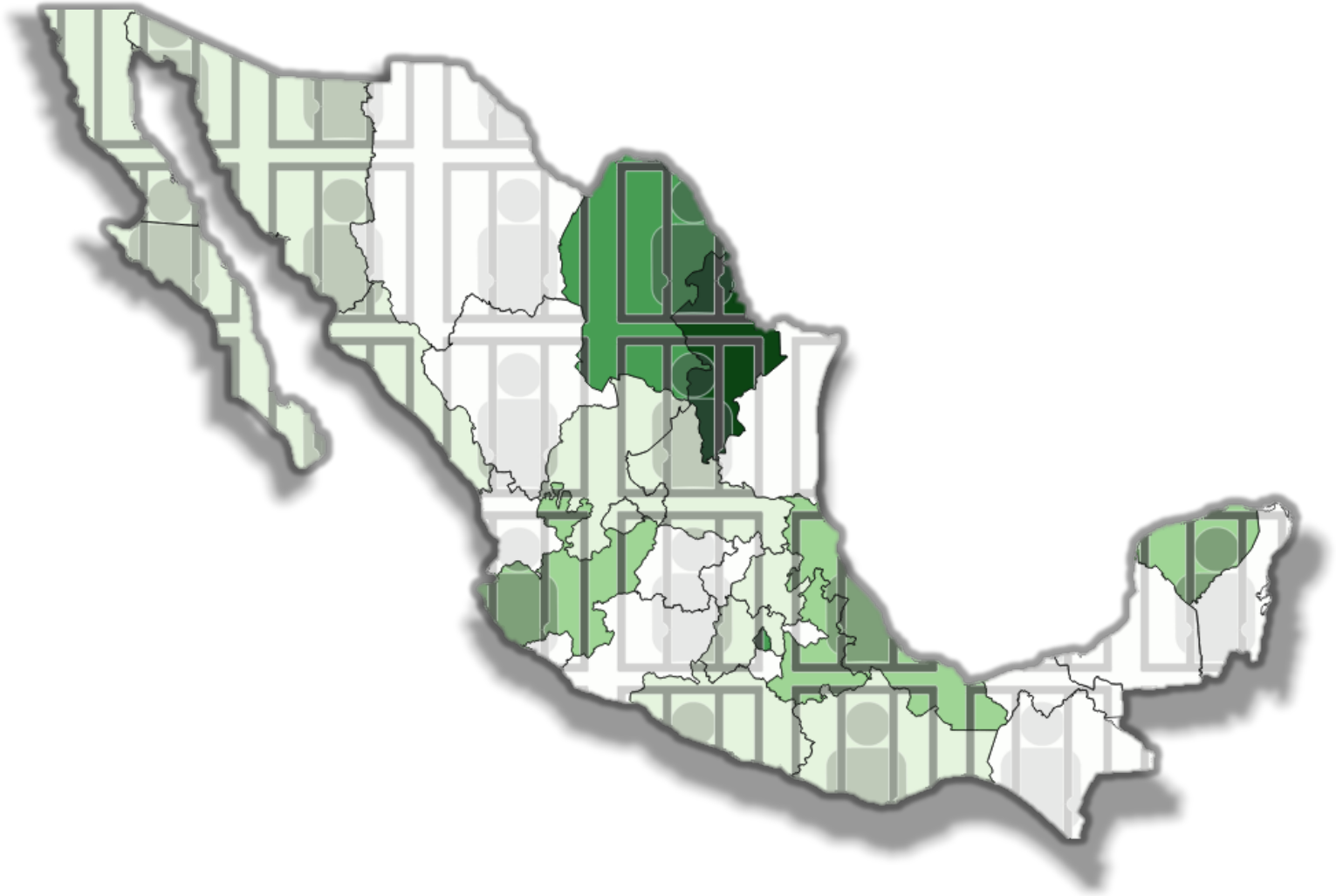
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## LIST OF ACRONYMS

ACHR	American Convention on Human Rights
AI	Amnesty International
CAT	U.N.'s Committee Against Torture
CCPR	United Nations Committee on Civil and Political Rights
CFPP	Código Federal de Procedimientos Penales (Federal Code of Criminal Procedures)
CNPP	Código Nacional de Procedimientos Penales (National Code of Criminal Procedures)
CNDH	Comisión Nacional de los Derechos Humanos (National Human Rights Commission)
CPEUM	Constitución Política de los Estados Unidos Mexicanos (Mexican Constitution)
CMDPDH	Comisión Mexicana de Defensa y Promoción de los Derechos Humanos (Mexican Commission for Defense and Promotion of Human Rights). Mexican NGO.
CJF	Consejo de la Judicatura Federal (Federal Judiciary Council)
DEA	Drug Enforcement Agency (U.S.)
DF	Distrito Federal (Federal District). Mexico City.
DOF	Diario Oficial de la Federación (Official Journal of the Federation).
Edomex	Estado de México (State of Mexico). One of 32 Mexican States.
FBI	Federal Bureau of Investigation (U.S.)
HRW	Human Rights Watch.
HR Committee	United Nations' Human Rights Committee
IFAI	Instituto Federal de Acceso a la Información (Federal Institute for Access to Information). Mexican Transparency Agency.
ITAM	Instituto Tecnológico Autónomo de México (Autonomous Technological Institute of Mexico). A Mexican University.
IACHR	Interamerican Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
JUCOPO	Junta de Coordinación Política (Senate's Political Coordination Board)
NSJP	Nuevo Sistema de Justicia Penal (New Criminal Justice System).
OHCHR	Office of the United Nations High Commissioner for Human Rights
PAN	Partido Acción Nacional (National Action Party), a Mexican political party
PGR	Procuraduría General de la República (Attorney General's Office)
PRD	Partido de la Revolución Democrática (Democratic Revolution Party), a Mexican political party
PRI	Partido Revolucionario Institucional (Institutional Revolutionary Party), a Mexican political party
SCJN	Suprema Corte de Justicia Nacional (National Supreme Court of Justice), Mexico's Supreme Court.
SEDENA	Secretaría de la Defensa Nacional (Mexican Secretary of Defense, Army and Air Force)
SEGOB	Secretaría de Gobernación (Mexican Interior Ministry)
SEMAR	Secretaría de Marina (Mexican Secretary of the Navy)
SPT	Subcommittee on Prevention of Torture
SSP	Secretaría de Seguridad Pública (Public Security Ministry)
UN	United Nations
UNHRC	United Nations Human Rights Council

## EXECUTIVE SUMMARY

- *Arraigo* is a form of preventive detention that allows for imprisonment without formal charges for up to 80 days. This investigative tool is presently authorized under Article 16 of the Mexican Constitution as amended in the 2008 reforms that underpin Mexico's ongoing transition to adversarial criminal justice.
- Under Mexican federal law, a person detained under *arraigo* may be held without formal criminal charges for up to 40 days with a judge's approval, or up to 80 days with further judicial review, provided the detainee is suspected of involvement in organized crime.
- *Arraigo* was initially introduced to the Mexican legal system on December 15, 1983, through reforms of the Federal Code of Criminal Procedure. Some states adopted the mechanism into their own legal codes shortly thereafter.
- In 2006, concerns about due process violations related to detention under *arraigo* led the Mexican Supreme Court of Justice to declare that such provision under the Code of Criminal Proceedings from the State of Chihuahua was unconstitutional because *arraigo* was in breach of the fundamental rights of personal freedom, and freedom of transit.
- *Arraigo* mechanism was restored to use on June 18, 2008, upon publication of constitutional amendments and legislative changes to overhaul the Mexican judiciary and create Mexico's so-called New Criminal Justice System. Because the reforms incorporated *arraigo* into the Constitution, the mechanism could no longer be challenged on grounds of constitutionality.
- Preventive and administrative detentions refer to detention without charge, and are contrary to basic human rights law and specific international conventions, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights.
- 3,166 *arraigos* were requested by prosecutors from December 2006 through December 2012, of which 2,939 were granted by judicial authority; thus, only 277 requests were denied. Overall, from 2007 to 2012 the percentage of *arraigos* denied by the judicial authority was just 7%, which indicates that once the prosecutor submitted its request to the judicial authority, 13 out of 14 suspects were detained under *arraigo*. Of those 13, at least seven were held for more than the initially granted 40-day period. Statements from Mexican authorities suggest that only 3.2% of all *arraigos* from 2011 to 2012 led to a conviction, meaning that the margin of error could be more than 95%.
- Because of the arbitrary nature of detention and prevalence of torture and other human rights violations under *arraigo*, it has received criticism and grabbed the international

attention of numerous human rights organizations and bodies, from the United Nations to Amnesty International, and domestically from Mexico's National Human Rights Commission to the Mexican Commission of the Defense and Promotion for Human Rights, among many others.

- Reports by the United Nations and other national and international organizations have found patterns of violations under *arraigo*, including denial of counsel, torture, and being held incommunicado.
- The length and reasonableness of detention, access to counsel, judicial access, torture, and/or right to *habeas corpus* are all issues raised by human rights advocates and international organizations about the practice of *arraigo*.
- Mexico is not the only country that applies a regime of preventive detention. Other countries, especially under the flag of "preventing terrorism," have developed their own forms of detention with certain similarities, but evident differences from *arraigo*. Examples are the United Kingdom, Ireland, and Israel, among others.
- The Mexican Supreme Court (Suprema Corte de Justicia de la Nación, SCJN) in 2013 recognized that human rights included in international treaties have a constitutional status and that judges should always seek the most favorable right for the person. However, the ruling also recognized that in certain cases, the restrictions to human rights imposed by the Constitution should prevail. Without explicitly mentioning *arraigo*, the SCJN ruling therefore permits its continued use.
- In 2014 the Supreme Court ruled that states could no longer legislate on *arraigo* and that state authorities would no longer be permitted to use the practice in cases of organized crime, which therefore falls under federal jurisdiction, once again granting the federation with the possibility of the use of *arraigo*.
- The authors recommend that the use of *arraigo* be eliminated and prohibited by the constitution, or at a minimum that major modifications be made to provide some measure of protection of the fundamental rights of individuals detained without charge.



# Detention Without Charge

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### 1. INTRODUCTION

In March 2014, the Mexican government responded formally to the recommendations that the United Nations Human Rights Council (UNHRC) issued Mexico during its 53<sup>rd</sup> meeting in October 2013, as a result of its Universal Periodic Review. Out of the 176 recommendations to improve human rights in the country, the Mexican government accepted 166, and rejected the rest.

Among those ten recommendations that Mexico refused to abide was the UNHRC's call to abolish the practice of *arraigo*. *Arraigo* is a practice in Mexican law enforcement by which, under federal law, a person may be detained without formal criminal charges for up to 40 days with a judge's approval, or up to 80 days with further judicial review, provided the detainee is suspected of involvement in organized crime.

The use of *arraigo* has been a central part of the war against organized crime in Mexico over the last several years, but has received surprisingly little public attention or analysis. It suddenly became a usual tactic by the Mexican government in its efforts to counter organized crime groups, despite the denunciation from human rights organizations and activists who argue that *arraigo* violates human rights.

Time and again, Mexico has elected to maintain its practice despite an early declaration of unconstitutionality by the Supreme Court (Suprema Corte de Justicia de la Nación, SCJN) and several recommendations from the U.N. Human Rights Council (UNHRC), the U.N. Committee Against Torture (CAT), and other national and international organizations to abolish such a tool.

This special report provides a detailed assessment of the use of *arraigo* as a prosecutorial mechanism in Mexico, as the new government of President Enrique Peña Nieto, the SCJN, and international human rights organizations have increasingly questioned the practice. Evidence collected for this report suggests that detention without charge is a poor substitute for due process protections that help to ensure the integrity and legitimacy of police and prosecutorial investigations.

## 2. THE EVOLUTION OF THE *ARRAIGO* MECHANISM

*Arraigo* is a form of preventive detention that allows for imprisonment without formal charges for up to 80 days. This investigative tool is presently authorized under Article 16 of the Mexican Constitution (Constitución Política de los Estados Unidos Mexicanos, CPEUM), as amended in the 2008 reforms that underpin Mexico's ongoing transition to adversarial criminal justice. *Arraigo* was initially introduced to the Mexican legal system on December 15, 1983, through the introduction of Article 133 *bis*<sup>1</sup> to and the reform of Article 205 of the Federal Code of Criminal Procedure (Código Federal de Procedimientos Penales, CFPP), as shown in Tables 1 and 2 (CFPP (Ref.), 1983). The initial provisions for *arraigo* at the federal level allowed the detention of a suspect for up to 30 days during a preliminary investigation conducted by a public prosecutor (*ministerio público*) acting under judicial supervision. Some states adopted the mechanism into their own legal codes shortly thereafter.

Table 1: Article 133 *bis* as introduced to the CFPP on December 27, 1983

Article 133 <i>bis</i>	
Cuando con motivo de una averiguación previa el Ministerio Público estime necesario el arraigo del indiciado, tomando en cuenta las características del hecho imputado y las circunstancias personales de aquel, recurrirá al órgano jurisdiccional, fundando y motivando su petición para que éste, oyendo al indiciado, resuelva el arraigo con vigilancia de la autoridad, que ejercerán el Ministerio Público y sus auxiliares. El arraigo se prolongará por el tiempo estrictamente indispensable para la debida integración de la averiguación de que se trate, no pudiendo exceder de 30 días, prorrogables por igual término a petición del Ministerio Público. El juez resolverá, escuchando al Ministerio Público y al arraigado, sobre la subsistencia o el levantamiento del arraigo.	When deemed necessary, the <i>arraigo</i> of the accused during a preliminary investigation, the public prosecutor, taking into account the characteristics of the alleged offense and the individual circumstances of such, and founding and substantiating its reasons for it, will request the judiciary, which having previously heard the suspect, will resolve the <i>arraigo</i> with authority oversight, carried out by the public prosecutor and its assistants. The <i>arraigo</i> will continue until strictly necessary for the proper integration of the investigation, not exceeding a period of 30 days, renewable for the same time at the request of prosecutors. The judge shall determine the continuation or termination of the <i>arraigo</i> previously heard by the public prosecutor and the <i>arraigado</i> .
Source: CFPP (Ref.), 1983.	

<sup>1</sup> It is common in Mexican legislation to add Latin numerical suffixes to the articles when it is necessary to add new articles to avoid changing the existing ascending order within a specific law. Thus the use of Latin suffixes such as *Bis*, which means Two, *Ter*, which means Three, *Quater*, which means Four, and so on.

Table 2: Article 205 the CFPP as reformed on December 27, 1983

Article 205	
Cuando por la naturaleza del delito o de la pena aplicable el imputado no deba ser internado en prisión preventiva y existan elementos para suponer que podrá sustraerse a la acción de la justicia, el Ministerio Público podrá solicitar al juez, fundada y motivadamente, o este disponer de oficio, con audiencia del imputado, el arraigo de éste con las características y por el tiempo que el juzgador señale, sin que en ningún caso pueda exceder del máximo señalado en el artículo 133-bis o bien tratándose de la averiguación previa o bien en el proceso por el término constitucional en que deba resolverse.	When due to the nature of the offense or the relative penalty, the accused should not be held in preventive detention and there are grounds for assuming that the accused may evade from justice, the public prosecutor, founding and substantiating its request, may request the judge, or the judge itself grant it ex officio, by prior hearing the accused, an <i>arraigo</i> for the time and with the characteristics the judge decide, not exceeding the maximum specified in Article 133-bis, or in the course of the investigation or the process by constitutional term to be resolved.
Source: CFPP (Ref.), 1983.	

The original legislative initiative to introduce *arraigo* noted the frustration caused when persons responsible for criminal wrongdoing could easily elude authorities, and the lack of alternatives to address the problem of organized crime both effectively and legally (Initiative, 1983). Prior to the introduction of *arraigo*, in accordance with the CPEUM, no person could be detained unless a judicial authority issued an arrest order or the suspect was caught “red handed” (*in flagrante delicto*). Powerful organized crime figures were often adept at evading formal investigations and arrests through legal maneuvering or outright bribery. The *arraigo* mechanism was therefore initially introduced to give prosecutors the tools and time needed to gather evidence in sensitive cases.

The initial proposal for *arraigo* maintained that the public prosecutor did not have independent authority to detain someone who is under a preliminary investigation without formal charges. Therefore, the use of *arraigo* would require the prosecutor to request consent from a judicial authority in order to be able to detain someone during the preliminary investigation, yet prior to criminal indictment. This detention would presumably occur without undermining the “freedom of movement” and other rights protected by the CPEUM and international treaties, and without prolonging detention more than necessary to gather the evidence needed to successfully build a case for prosecution (Initiative, 1983).

The wording of *arraigo* in the Mexican legislation remained unchanged for more than 15 years until 1999, when Article 133 *bis* was modified from its original in order to specify that individuals detained under *arraigo* should remain in “house arrest” or should not be allowed to leave a certain area, as noted in Table 3.

Table 3: Article 103 *bis* of the CFPP as reformed on February 8, 1999

Article 133 <i>bis</i>	
La autoridad judicial podrá, a petición del Ministerio Público, decretar el arraigo domiciliario o imponer la prohibición de abandonar una demarcación geográfica sin su autorización, a la persona en contra de quien se prepare el ejercicio de la acción penal, siempre y cuando exista el riesgo fundado de que se sustraiga a la acción de la justicia (Fragmento).	The judicial authority may, at the request of the public prosecutor, grant a domiciliary <i>arraigo</i> or forbid a person against who [the MPI] is preparing criminal charges to leave a certain location without [the prosecutor's] authorization, as long as there is a founded risk that the person detained would evade justice (Fragment).
Source: CFPP (Ref.), 1999.	

Even under house arrest, an *arraigo* detainee's access to the outside world – including their ability to communicate with co-conspirators – could be severely curtailed if not completely eliminated, thereby preventing criminal interference as the prosecution develops its case. Information collected while a suspect is held under *arraigo* can be used to build a case for eventually filing charges, though that information would not be admissible in court as evidence.<sup>2</sup> For some advocates of *arraigo*, having such a prosecutorial mechanism therefore provides an essential guarantee against interference from suspects who are detained, while also allowing judicial review of evidence brought forth during the formal investigation and trial.

However, from the point of view of suspects, defense attorneys, and human rights advocates, the use of *arraigo* severely violates the most basic principles of due process, including the rights of *habeas corpus* and access to an adequate legal defense.

In February 2006, concerns about due process violations related to detention under *arraigo* eventually led the Mexican Supreme Court of Justice to declare its use unconstitutional (Tesis: P. XXII/2006; Tesis: P. XXIII/2006, 2006).<sup>3</sup> The SCJN held two theses<sup>4</sup> declaring that the Article 122 *bis* of the Code of Criminal Proceedings from Chihuahua – that introduced *arraigo* in that state – was unconstitutional because *arraigo* was in breach of the fundamental rights (*garantías*) of personal freedom (*libertad personal*) (Tesis: P. XXII/2006, 2006) and freedom of transit (*libertad de tránsito*) (Tesis: P. XXIII/2006, 2006) as shown in Tables 4 and 5.

<sup>2</sup> In 2014, a resolution of the Supreme Court became the first official invalidation of evidence obtained under *arraigo*. The resolution of March 6, 2014, established that "...the judge in a criminal case is constrained to [...] determine what evidence should be excluded from any analysis, for being immediately and directly related with the *arraigo*, which are those that could not be obtained unless the person was deprived of his personal liberty by this measure" (Amparo en Revisión, 2014).

<sup>3</sup> The decision of the SCJN came after a motion of unconstitutionality by the Legislature of Chihuahua against article 122 *bis* of the Code of Criminal Proceedings from that state that introduced *arraigo* at the state level (Tesis: P. XXIII/2006, Tesis: P. XXIII/2006, 2006). At that time, there were 130 detainees being held under *arraigo*, largely for drug trafficking and kidnapping (Avilés, 2006).

<sup>4</sup> In Mexican law, a single decision by the Supreme Court or a Federal Tribunal does not become jurisprudence *per se*, but it originates an isolated thesis (*tesis aislada*) that serves as a legal criteria. Jurisprudence comes in the form of a jurisprudential thesis (*tesis jurisprudencial*) that is formulated by five isolated thesis decided in the same sense or by a decision of the SCJN when there are two contradicting thesis by different tribunals or different chambers of the Supreme Court.

Table 4: Thesis P. XXII/2006 of February 2006 of the Supreme Court

Tesis: P. XXII/2006	
Arraigo penal. El artículo 122 bis del Código de Procedimientos Penales del Estado de Chihuahua que lo establece, viola la garantía de libertad personal que consagran los artículos 16, 18, 19, 20 y 21 de la Constitución Federal.	Penal <i>Arraigo</i> . Article 122 <i>bis</i> of the Code of Criminal Proceedings of the State of Chihuahua that sets it forth [ <i>arraigo</i> ], violates the right of personal freedom consecrated by articles 16, 18, 19, 20 and 21 of the Federal Constitution.
Source: Tesis: P. XXII/2006, 2006.	

The reasoning behind this last thesis was that the CPEUM allows exceptional limits to personal freedom under certain conditions, such as:

- a) in case of *flagrante delicto*, allowing anyone to arrest the wrongdoer and turn he or she immediately over to the closest authority;
- b) in urgent circumstances by the public prosecutor without judicial authorization when it is a serious crime, when there is a founded risk that the suspect may escape justice, and when it was not possible to request a judicial order;
- c) by arrest warrant issued by judicial authority;
- d) by virtue of a warrant of prison dictated by the trial judge; and
- e) for penalties for violations of governmental and police orders.

In all cases the Constitution establishes specific and brief deadlines so the suspects can appear before court to face their accusations according to due process. Thus, Article 122 *bis* of the Code of Criminal Proceedings of the State of Chihuahua, in establishing *arraigo*, despite aimed to ease the investigation and to avoid a possible escape by the suspect, violates the guarantee of personal freedom because it does not present sufficient proof of possible responsibility. It therefore deprives an individual from their liberty without justification from a judicial order where the accusation is made clear along with the opportunity for the accused to challenge the evidence presented (Tesis: P. XXII/2006, 2006).

Table 5: Thesis P. XXII/2006 of February 2006 of the Supreme Court

Tesis: P. XXIII/2006	
Arraigo penal. El artículo 122 bis del Código de Procedimientos Penales del Estado de Chihuahua que lo establece, viola la garantía de tránsito consagrada en el artículo 11 de la Constitución Política de los Estados Unidos Mexicanos.	Penal <i>Arraigo</i> . Article 122 <i>bis</i> of the Code of Criminal Proceedings of the State of Chihuahua that sets it forth [ <i>arraigo</i> ], violates the right of freedom of transit consecrated by article 11 of the CPEUM.
Source: Tesis: P. XXIII/2006, 2006).	

According to the SCJN in this thesis, freedom of transit results in the right of every individual to enter or leave the country, to travel within its territory, and to change residence without any permit or authorization. In penal or criminal *arraigo* – as opposed to civil *arraigo* – the suspect is forbidden from leaving a building and held under the custody and supervision of

the investigating authority, which violates the freedom of transit of a person who is otherwise presumed innocent (Tesis: P. XXIII/2006, 2006).<sup>5</sup>

Despite the landmark decision of the Supreme Court in 2006, the *arraigo* mechanism was restored to use on June 18, 2008, upon publication in the Official Journal of the Federation (Diario Oficial de la Federación, DOF) as part of the package of constitutional amendments and legislative changes to overhaul the Mexican judiciary and create Mexico's so-called New Criminal Justice System (Nuevo Sistema de Justicia Penal, NSJP). The NSJP consists of new procedures and legal capacities for judges, prosecutors, defense attorneys, and police, and is intended to increase the overall transparency, efficiency, and fairness of Mexico's criminal justice system. Specifically, the reform consisted of amendments to Articles 16 to 22, 73, 115, and 123 of Mexico's Constitution, and contained provisions regarding criminal justice and public security (Rodríguez Ferreira, 2013a).

The 2008 judicial reform brought about many progressive changes aimed at creating a more transparent, independent judiciary, and stronger civil rights for both defendants and victims. The hope is that these changes will result in a more efficient criminal justice system.<sup>6</sup> The most relevant changes in the CPEUM (Art. 20) in terms of due process are:

- a. Right of the accused to be informed of the charges against him or her and of his or her constitutional rights at the time of detention;
- b. Presumption of innocence;
- c. Burden of proof on the prosecution;
- d. Right of the accused to remain silent and to be informed of that right at the time of his or her arrest;
- e. Prohibition of torture, intimidation, and incommunicado detention;
- f. Inadmissibility of confession obtained without the presence of defense counsel;
- g. Inadmissibility of evidence obtained by the violation of fundamental rights; and
- h. Right to a professional licensed public defender if the accused cannot afford an attorney (Art. 17).<sup>7</sup>

In addition to such changes, the Constitution includes several new law enforcement tools, such as judicial authority for electronic eavesdropping or wiretaps (Art. 16), forfeiture of property and illegal proceeds obtained in the course of criminal conduct (Art. 22); and creation of law enforcement databases (Art. 21). Such measures constituted a so-called "special regime for organized crime," and also included measures of special confinement and prison conditions, defined process rules, asset disposition by the authority, and certain

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<sup>5</sup> In cases of civil liability, limitations or restrictions on freedom of movement—civil *arraigo*—consist only in the prohibition to leave the country or city of residence, unless a representative is named and guarantees the amount demanded (Tesis: P. XXIII/2006, 2006).

<sup>6</sup> In many respects the Mexican Constitution is more progressive than the U.S. Constitution, at least on paper. For example, not only does it provide for many civil rights, it requires that persons *be advised* of these rights. (Edmonds-Poli & Shirk, 2012, p. 318). Additionally, confessions are inadmissible at trial unless they were provided by the defendant in the presence of his attorney (CNPP, 2014).

<sup>7</sup> Most of the latter provisions already existed in the Mexican Constitution. The reform, however, intended to make them operational, as many of them were not always enforced.



exceptions to the due process rights granted by the same reform. There is also a provision for stricter custodial housing for those convicted of organized crime (Art. 18); an exception to the right to confront witnesses in a public trial if it is determined the evidence cannot be reproduced at trial or there is a risk to witnesses (Art. 20); and the preventive detention or *arraigo* (Art.16) as shown in Table 6.

Table 6: Article 16 of the CPEUM as reformed on June 18, 2008

Article 16	
La autoridad judicial, a petición del Ministerio Público y tratándose de delitos de delincuencia organizada, podrá decretar el arraigo de una persona, con las modalidades de lugar y tiempo que la ley señale, sin que pueda exceder de cuarenta días, siempre que sea necesario para el éxito de la investigación, la protección de personas o bienes jurídicos, o cuando exista riesgo fundado de que el inculcado se sustraiga a la acción de la justicia. Este plazo podrá prorrogarse, siempre y cuando el Ministerio Público acredite que subsisten las causas que le dieron origen. En todo caso, la duración total del arraigo no podrá exceder los ochenta días.	At the request of the public prosecutor regarding organized crime, the judicial authority may order the <i>arraigo</i> of a person, setting the place and time established by law, not to exceed forty days, so long as it is necessary for the success of the investigation, the protection of persons or legal rights, or when there exists a founded risk that the accused will evade justice. This period may be extended, if and when the public prosecutor shows that the reasons that gave rise to the <i>arraigo</i> persist. In any case, the total duration of the <i>arraigo</i> may not exceed 80 days.
Source: DOF, 2008.	

In addition to *arraigo*, Article 16 of the Constitution provides for various other means of legal detention, as previously mentioned. Accordingly, a suspect can be:

- Detained in the commission of a crime (*in flagrante*);
- Arrested by judicial petition of the attorney general;
- Arrested through an order of the attorney general in urgent cases where the special judge is not available; or
- Arrested through the judicial order of apprehension.

*Arraigo* adds a fifth method of detention in addition to these other precautionary measures (*medidas cautelares*) provided for in the Mexican Constitution (Amparo 1622/2007-II-A, 2007). In order for a judge to grant an order of *arraigo* under the special regime created in 2008, there are typically three criteria that must be met (Amparo 2500/2009-II, 2009):

- It must be at the request of the federal or state prosecutor;
- There must be an existing preliminary investigation into organized crime; and
- The *arraigo* must be necessary for the success of the investigation, or there must be a founded risk of threats to the preservation of evidence or witnesses, or a risk that the accused will evade justice if not detained.

During the 40-day detention period, the state or federal Attorney General's Office investigates allegations of criminal conduct, while the accused theoretically has the right to participate in this portion of the process to show guilt or innocence (Amparo 1000/2009-4, 2009). This is referred to in the Constitution as "incorporation in the preliminary

investigation.” Nevertheless, evidence has suggested that the main way the accused participates in any *arraigo* investigation is through confessing.<sup>8</sup>

The language in Article 16 of the CPEUM directs the judicial authority to detain a person according to “the modalities of place and time described by law.” The criterion set forth in the Constitution is practically the same of Article 133 *bis* complemented by Article 133 *ter* of the CFPP (2009) as shown in Table 7 and 8.

Table 7: Article 133 *bis* of the CFPP as reformed on January 27, 2009

Article 133 <i>bis</i> (fragment)	
La autoridad judicial podrá, a petición del Ministerio Público, decretar el arraigo domiciliario del indiciado tratándose de delitos graves, siempre que sea necesario para el éxito de la investigación, la protección de personas o bienes jurídicos o cuando exista riesgo fundado de que el inculpado se sustraiga a la acción de la justicia. Corresponderá al Ministerio Público y a sus auxiliares vigilar que el mandato de la autoridad judicial sea debidamente cumplido. El arraigo domiciliario se prolongará por el tiempo estrictamente indispensable, no debiendo exceder de cuarenta días.	The judicial authority may, at the request of the public prosecutor, grant a domiciliary <i>arraigo</i> of the accused in cases of serious crimes, insofar as is necessary for the success of the investigation, for the protection of persons or assets, or when there is a founded risk that the person detained would evade justice. The public prosecutor and its collaborators will oversee the strict compliance of the judicial mandate. The domiciliary <i>arraigo</i> will last for the time necessary not exceeding 40 days.
Source: CFPP (Ref.), 2009.	

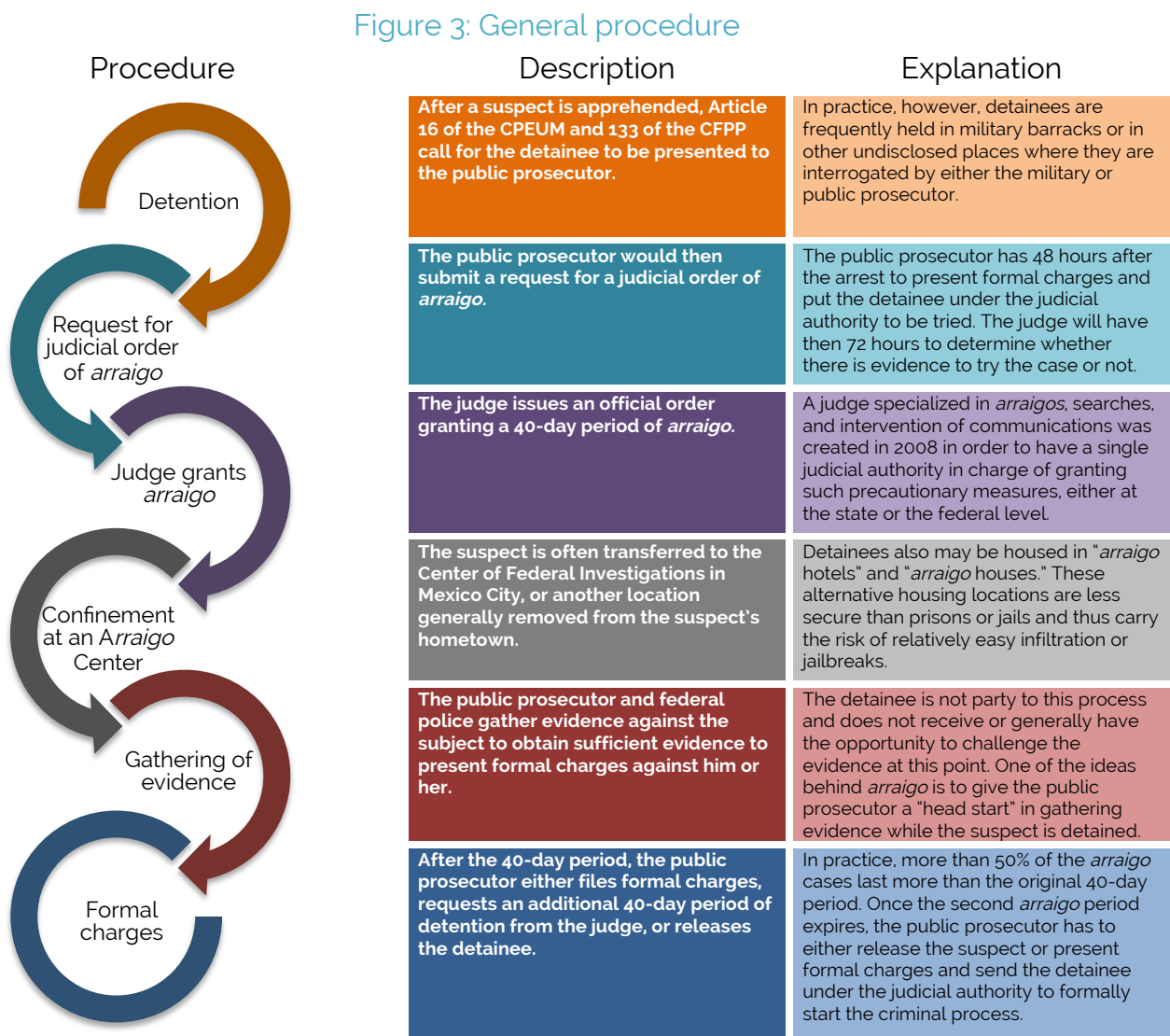
Table 8: Article 133 *ter* of the CFPP as reformed on January 27, 2009

Article 133 <i>ter</i> (fragment)	
La autoridad judicial podrá, a petición del Ministerio Público, imponer las medidas cautelares a la persona en contra de quien se prepare el ejercicio de la acción penal, siempre y cuando estas medidas sean necesarias para evitar que el sujeto se sustraiga a la acción de la justicia; la destrucción, alteración u ocultamiento de pruebas, la intimidación, amenaza o influencia a los testigos del hecho a fin de asegurar el éxito de la investigación o para protección de personas o bienes jurídicos. Corresponderá al Ministerio Público y a sus auxiliares vigilar que el mandato de la autoridad judicial sea debidamente cumplido.	The judicial authority may, at the request of the public prosecutor, impose preventive measures on the person against whom a criminal action is being brought, insofar as these measures are necessary to avoid flight from judicial action; the destruction, alteration or hiding of evidence; intimidation, threat or improper influence of witnesses to the crime, with the ends of assuring a successful investigation or for the protection of persons or judicial resources. The public prosecutor and its collaborators will oversee the strict compliance of the judicial mandate.
Source: CFPP (Ref.), 2009.	

<sup>8</sup> As stated by the Mexican Commission for Defense and Promotion of Human Rights (Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, CMDPDH), “[i]n the end, this means that the investigation is not carried out to detain a person, but instead the person is arbitrarily detained to be investigated and in most cases to get a confession, contrary to the basic principles of justice under a democratic regime.” (CMDPDH, 2012)



These various procedural steps set forth by the Mexican legislation regarding *arraigo* are summarized in Figure 1.



Sources: SPT (2009); Amparo 1000/2009-4 (2009); Navarro Peraza (2010); Ortiz de León (2010).

Because the 2008 reforms incorporated *arraigo* into the Constitution, the mechanism could no longer be challenged on grounds of constitutionality. Yet while this may have settled the domestic constitutional challenges, it did not resolve troubling questions surrounding *arraigo*’s violation of fundamental due process rights and led to an ongoing legal debate that has enraged among jurists, authorities, and human rights advocates. We explore these issues below.

### 3. THE LEGAL DEBATE OVER ARRAIGO

*Arraigo* underscores the contradictions of the judicial reform process in Mexico and exemplifies the tensions between fundamental freedoms and national security, between Mexican and international law, and between Mexican Constitutional principles and the implementation of those principles. *Arraigo* can be used as a prism to explore the relationship between these three areas and to examine how such tensions can be reconciled. In light of the challenges of implementing judicial reform at the same time that Mexico must deal with increasing violence related to organized crime, the ability of Mexico's judiciary to conduct meaningful judicial review to bring *arraigo* into compliance with international human rights law is a serious challenge.

Former President Felipe Calderón (2006-2012) was a major champion for the re-introduction of *arraigo*. In presenting his view of the proposed 2008 judicial reforms, Calderón acknowledged that *arraigo* infringes upon fundamental freedoms, and argued that for this precise reason it was essential to raise its legal standing to the constitutional level in order to overcome the objections raised by the SCJN in its prior ruling (PRD, 2011, p. 7). Calderón believed that the measure of *arraigo* was necessary, in the following words:

"It is clear that the measure [of *arraigo*] is necessary, and, given its character of restricting fundamental rights, it must be incorporated at the constitutional level. The Supreme Court, in its decision [...], conveyed that a measure that restricts the personal liberty must be included in the constitution's text; therefore, in order to implement an important step in preventive measures, adding the second paragraph to Article 16 will make it constitutional."

At the time of the initial debates, other advocates promoted the resurrection of *arraigo* as part of this package of reforms, arguing that it was an essential legal instrument to fight organized crime. For example, advocates in the legislature felt *arraigo* was a vital and useful investigative tool, and urged its continued use (Avilés, 2006).<sup>9</sup> While debating the possibility of new reforms to the Mexican criminal justice system, the Commission on Judicial Reform stated the importance of *arraigo*:

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<sup>9</sup> This point was urged by a legislative group from the Party of the Democratic Revolution (Partido de la Revolución Democrática, PRD) in the Commission on Constitutional and Justice Issues, (*Comisiones Unidas de Puntos Constitucionales y de Justicia con Proyecto de Decreto*). Deputies Javier González Garza, Andrés Lozano Lozano, Claudia Lilia Cruz Santiago, Armando Barreiro Pérez, Francisco Sánchez Ramos, Victorio Montalvo Rojas, Francisco Javier Santos Arreola, and Miguel Ángel Arellano Pulido declared, "...deputies [...] argue that one of the most serious problems in Mexico is physical and legal insecurity, the former due to daily high levels of violence that affect all social sectors, [and] the latter [because of] the absence of a legal framework to help combat the high levels of impunity. Due to this problem [...] the response has not been very efficient: increases [in] penalties and prison overcrowding, rather than developing a strategy for crime prevention, and transforming police forces into solidly trained, professional, honest, efficient, and reliable institutions" (translated from original, Cámara de Diputados, 2007).

The measure is especially useful when applied to subjects who live clandestinely or do not reside in the area of investigation, but especially when they belong to complex criminal structures that can easily circumvent the restrictions of movement; or when there exists a reasonable doubt that, if left free, they would obstruct the investigation; and against whom [authorities] cannot obtain an arrest order due to the complexity of the investigation or the necessity of having to wait for evidence through international cooperation (Cámara de Diputados, 2007).

On the other hand, critics sharply criticized the logic by which arraigo was re-introduced and noted that it contradicted the virtues of the new criminal justice system introduced in 2008 (Rodríguez Ferreira, 2013b, p. 10). For example, Autonomous Technological Institute of Mexico's (Instituto Tecnológico Autónomo de México, ITAM) law professor Miguel Sarre<sup>10</sup> objected to Calderón's interpretation of the Supreme Court's opinion, arguing that he turned the opinion on its head:

In no way has the Supreme Court said that measures that restrict personal liberty "*must* be included in the text of the Constitution." What the court has said is that these types of measures, like *arraigo*, are contrary to the letter of the Constitution. The Supreme Court has not suggested including these provisions in the Constitution in order to give them validity, as [...] the initiative seems to suggest, which detracts from and distorts in the crudest way the opinion of the highest court (Sarre, 2010a).

In particular, opponents like Sarre criticized the inclusion of *arraigo* as part of a reform package intended to increase due process protections in Mexico. That is, while the 2008 reforms enshrined one set of rights in the Constitution, another parallel set of law enforcement tools simultaneously undermined these rights in the case of organized crime suspects under the same Constitution. As Sarre (2010b) commented, "it seems as though one part of the Constitution was written by [human rights champion Luigi] Ferrajoli and the other was written by the commander of the federal police."

Others raised concerns about the possible use of *arraigo* as a political tool. Specifically, although its members largely supported the reforms to create the NSJP, the PRD, Mexico's major leftist party and the strongest opponent to Calderón's policies, argued for strict limitations on its use. While acknowledging the national urgency in the prosecution of organized crime and the extraordinary measures needed to combat organized crime, the PRD emphasized that *arraigo*'s use should be bounded by strict criteria.<sup>11</sup> Recognizing past political abuses in Mexico, the PRD specifically indicated that under no circumstances should

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<sup>10</sup> Miguel Sarre is a member of the United Nations Subcommittee on Torture and law professor at the Autonomous Technological Institute of México (*Instituto Tecnológico Autónomo de México* ITAM). Professor Sarre also belongs to several committees and civil society organizations that closely monitor the implementation of the judicial reform.

<sup>11</sup> PRD changed its position in this regard. In August 2010, then PRD Coordinator and President of the Senate Carlos Navarrete Ruiz criticized President Calderón for the use of *arraigo*, considering it was a "mistake" to use it (Michel & Ramos, 2010).

*arraigo* be used to detain people for political purposes or to silence political opposition (Cámara de Diputados, 2007; 2008).<sup>12</sup>

Once restored by the 2008 reforms, the SCJN had to address again the legality of the use of *arraigo* – though this time indirectly – by re-opening the debate on the hierarchy of international law of human rights vis-à-vis the CPEUM on August 26, 2013. The debate came after a reform published on June 10, 2011, that amended Article 1 of the Constitution by adding the phrase “human rights” to its title for the first time, and that set forth the provision that human rights had to be interpreted according to the Constitution and international treaties. The SCJN discussed a draft for resolution that was presented by Justice Arturo Zaldívar, which argued that human rights included in international treaties have a constitutional status and that judges should always seek the most favorable interpretation for the person. This is known as the *pro-homine* principle (Justice in Mexico, 2013b). Nevertheless, the text of the amended Article 1 did not establish which legal *corpus* (i.e. national constitution or international treaties) should supersede when there is conflict between the two regarding an issue of human rights; thus the lack of clarity generated contradicting rulings by federal courts, leading the SCJN to resolve the issue (Justice in Mexico, 2013b).

The SCJN ultimately made a decision on September 3, 2013 with ten of the 11 justices voting in favor of recognizing that human rights included in international treaties have a constitutional status and that judges should always seek the most favorable right for the person.<sup>13</sup> However, the ruling also recognized that in certain cases, the restrictions to human rights imposed by the Constitution should prevail.<sup>14</sup> Without explicitly mentioning *arraigo*, *arraigo* remains lawful under Mexican law as one of such restrictions not affected by the SCJN ruling (Contradicción de Tesis 293/2011, 2013).

Such decision of the SCJN led to the formulation of the thesis explained in Table 9 (Tesis 20/2014, 2014):

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<sup>12</sup> Indeed, the PRD’s fears may have been validated in May 2009 when federal troops invoked *arraigo* to detain nearly 30 public officials one month before mid-term elections – ten of whom were mayors, and nine of those whom belonged to opposition parties. They were alleged to have cooperated with the drug cartel La Familia Michoacana, though all were eventually released for lack of evidence. The motivation behind the arrests have been questioned and, in fact, the incident reached the Inter-American Commission on Human Rights (IACHR) during a hearing held on March 28, 2011 (IACHR, 2011) where the issue of *arraigo* was being debated. Concerns regarding political abuse of *arraigo* have also been voiced elsewhere, such as by the Fray Bartolomé Center for Human Rights in Chiapas, which claims that the practice of *arraigo* was being abused in the Mexican state of Chiapas where there has been a political conflict ranging from vociferous political opposition to actual violence since the North American Free Trade Agreement (NAFTA) was signed in 1994 (Frayba, 2008).

<sup>13</sup> Moreover, on June 10, 2011, a reform was approved to amend Article 1 of the Constitution in which the word “human rights” appeared for the first time in place of the traditional “individual guarantees.”

<sup>14</sup> With a majority of six votes in favor, the SCJN ruled that the jurisprudence of the Inter-American Court of Human Rights (IACHR) is binding for Mexican judges even if the court did or does not expressly mandate or name Mexico in its ruling.

Table 9: Tesis 20/2014 by the Supreme Court of April 2014.

Tesis 20/2014	
Derechos humanos contenidos en la constitución y en los tratados internacionales. Constituyen el parámetro de control de regularidad constitucional, pero cuando en la constitución haya una restricción expresa al ejercicio de aquéllos, se debe estar a lo que establece el texto constitucional.	Human rights contained in the Constitution and international treaties. They constitute the control parameter of constitutional regularity, but when the Constitution contains and precise restriction on the exercise of those, what the constitutional text established should be observed.
Source: Tesis P./J. 20/2014 (10a.), 2014.	

Justice José Ramón Cossío Díaz, who had repeatedly expressed that the Constitution cannot be considered above human rights treaties, was the only one who voted against the ruling. Justice Cossío argued that allowing restrictions to human rights to prevail was a “regression” from previous decisions by the SCJN, since a principle such as *pro-homine* has been recognized on the one side, and limited on the other (Justice in Mexico, 2013b). For Cossío, the problem with the ruling was it did not set forth a general rule to follow when there is a conflict between a treaty and the Constitution – as could be the case for *arraigo* –, and thus it leaves the judges to decide the matter on a case-by-case basis. Moreover, he explained that whenever this conflict presents itself, the judge will have to interpret and decide accordingly, thus altering the original purpose of the discussions to create a general rule on the hierarchy of international law of human rights vis-à-vis the Constitution (Contradicción de Tesis 293/2011, 2013).

The issue of *arraigo* became the center of a renewed debate in 2014 when the SCJN ruled that states could no longer legislate on *arraigo* and that state authorities would no longer be permitted to use the practice (Justice in Mexico, 2014). In an 8 to 2 vote, the Court ruled that the 2008 judicial reform that incorporates *arraigo* into the Constitution allows for it only to be used in cases of organized crime, which therefore falls under federal jurisdiction. The decision came after the National Commission on Human Rights (Comisión Nacional de Derechos Humanos, CNDH) submitted a claim arguing its unconstitutionality in response to a criminal legislation reform in Aguascalientes that allowed state prosecutors to use *arraigo* in cases of serious crimes (Acción de Inconstitucionalidad 29/2012, 2014). This case led the court to establish the general thesis shown in Table 10.

Table 10: Tesis 31/2014 of the SCJN as published in May 2014.

Tesis: 31/2014	
Arraigo en materia penal. A partir de la reforma a la Constitución Política de los Estados Unidos Mexicanos, publicada en el Diario Oficial de la Federación el 18 de junio de 2008, las legislaturas locales carecen de competencia para legislar sobre aquella figura, al ser facultad exclusiva del Congreso de la Unión.	Penal <i>arraigo</i> . Starting with the reform of the CPEUM published in the Official Journal of the Federation on June 18, 2008, state legislatures lack competence to legislate regarding such figure [ <i>arraigo</i> ], being this an exclusive competence of the Congress of the Union [Federal Congress].
Sources: Tesis P./J. 31/2014 (10a.), 2014.	



#### 4. BY THE NUMBERS: THE USE OF *ARRAIGO* IN PRACTICE

The language in the Constitution limits the use of *arraigo* to when it is “necessary” for the success of an investigation or when there is a risk of flight. Still, the courts have been willing to allow *arraigo* even when there is sufficient proof to bring formal charges and to initiate criminal proceedings (Amparo 1000/2009-4, 2009). This pervasive allowance for the use of *arraigo*, coupled with the government’s favorable disposition toward using it as a weapon against organized crime, resulted in a significant increase in its use since its restoration in 2008.

That said, statistics on *arraigo* are scarce and oftentimes hard to compile from both the government and media outlets. Despite several attempts by the authors to get these data from the government through freedom of information requests, governmental agencies have consistently only provided partial information or have denied the requested information. Before 2013 there was no official source of information on *arraigo* and the data compiled from different sources was inconsistent. By the end of 2013, the Federal Institute for Access to Information (Instituto Federal de Acceso a la Información, IFAI) released to the press data that the federal Attorney General (Procuraduría General de la República, PGR) made public in compliance with a resolution from the former. The data, whether broken down by state, year and crime, or by individuals liberated, processed, prosecuted and/or convicted, was nevertheless only provided to the claimant, and only partial information was made public through media outlets.

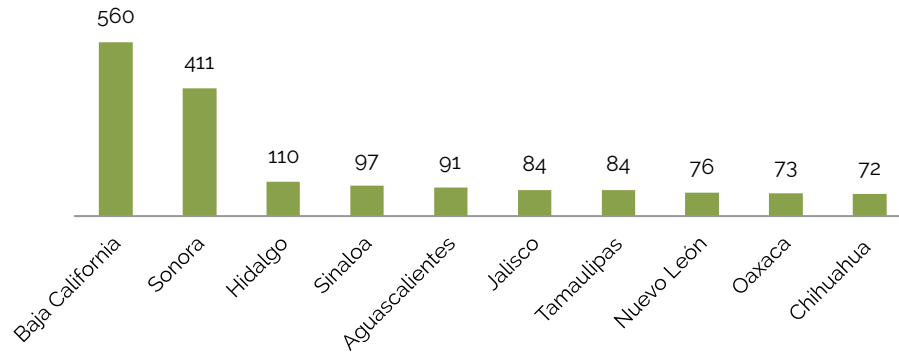
According to these data, during Calderón’s presidency and the first four months under President Peña Nieto (2012-2018), 7,984 people were detained under *arraigo* for different crimes, such as organized crime, kidnapping, operations with illegal proceeds, crimes against public health, violations to gun laws, human trafficking, possession of stolen vehicle, and robbery. Of those individuals held in *arraigo*, only 464 were released due to lack of evidence (Redacción Proceso, 2013).<sup>15</sup>

According to the information provided by the PGR and released by IFAI, Baja California was the state with most cases of *arraigo* during that period (560), followed by Sonora (411), and Hidalgo (110). The use of the measure in Baja California and Sonora seems completely disproportionate with the rest of the states, which have a more even distribution (See Figure 1).

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<sup>15</sup> IFAI released the information to the press, however such press release is not publicly available. All information presented in this report was taken from Proceso (Redacción Proceso, 2013). Many other news outlets published similar articles using the exact same figures of Proceso, thus the use of Proceso as the main source. Other media outlets referencing such data include Grupo Fórmula (2013), Organización Editorial Mexicana (Chávez Ogazón, 2014), La Jornada (Redacción La Jornada, 2013), and Terra (Rodríguez D. , 2013) among others.

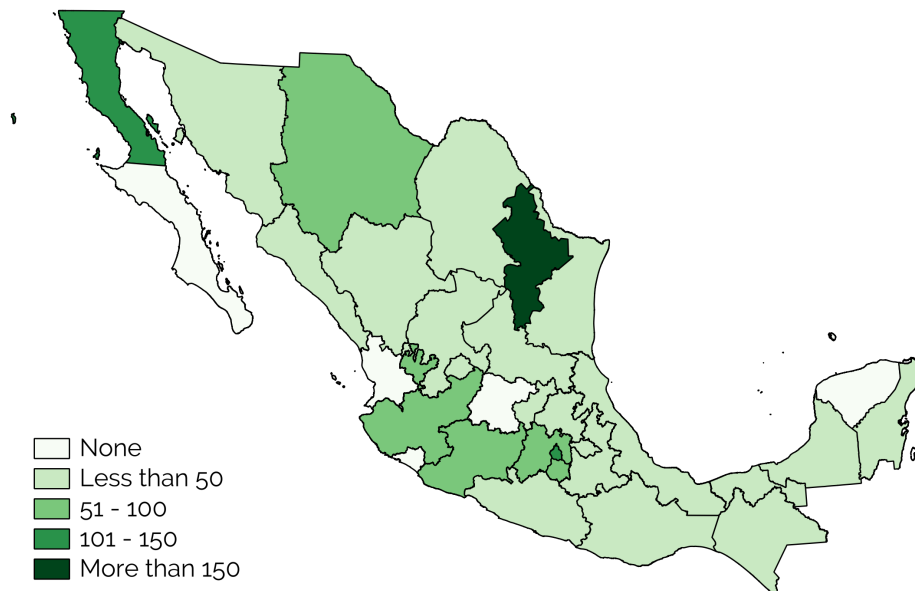
Figure 1: Top ten states with highest number of *arraigos* issued (December 2006 - April 2013)



Source: Redacción Proceso (2013).

The information disclosed by IFAI did not include information of the rest of the states. Nevertheless, the CMDPDH—a Mexican nongovernmental organization—put together a publication (Cantú Martínez, Gutiérrez Contreras, & Telepovska, 2012) in which, based on its monitoring of the news, they present statistics about the use of *arraigo* at the federal and state levels in Mexico's 32 different entities. This data helps to complete the gap in official information and allows us to at least get a sense of the geography of the use of *arraigo* in Mexico (See Figure 2).

Figure 2: Map of Federal Cases of *arraigo* by State (Jan. 2010 – Jul. 2012)



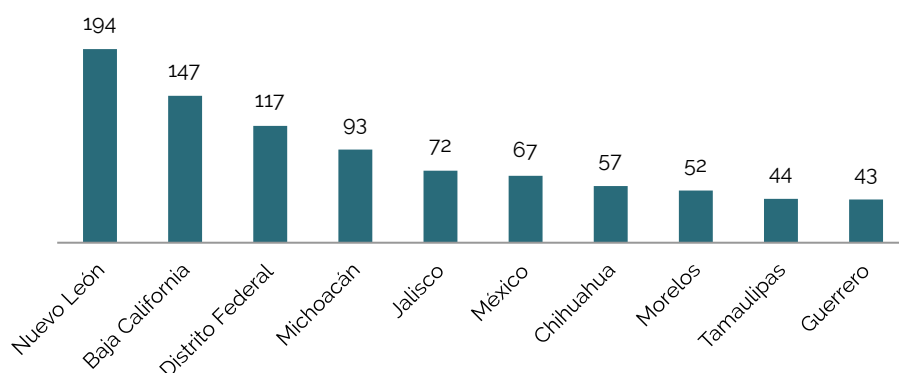
Map: Octavio Rodríguez Ferreira.

Source: Cantú Martínez, Gutiérrez Contreras, & Telepovska (2012).

Contrary to PGR data, CMDPDH's numbers suggest a more pervasive use of *arraigo* in the state of Nuevo León than in Baja California. Nevertheless, official data points to Baja California as the state with more *arraigos*, while Nuevo León is ranked eighth. Moreover, CMDPDH indicates a high intensity in the use of such measure in the Federal District (Distrito Federal, DF), while in the statistics PGR provided it is not even included in the top ten. The same happens with other states such as Michoacán, the State of Mexico (Estado de

México, Edomex), and Morelos. On the contrary, while the PGR indicates that Sonora is the second state with the most *arraigos*, CMDPDH lists it fourteenth. The differences, however, can be attributed to the a wider timeframe of PGR statistics; moreover, the data compiled by CMDPDH comes from media reporting, which can also suggest more news coverage of these issues from one state to another. According to CMDPDH, the ten states where the use of *arraigo* was more frequent are: (See Figure 3)

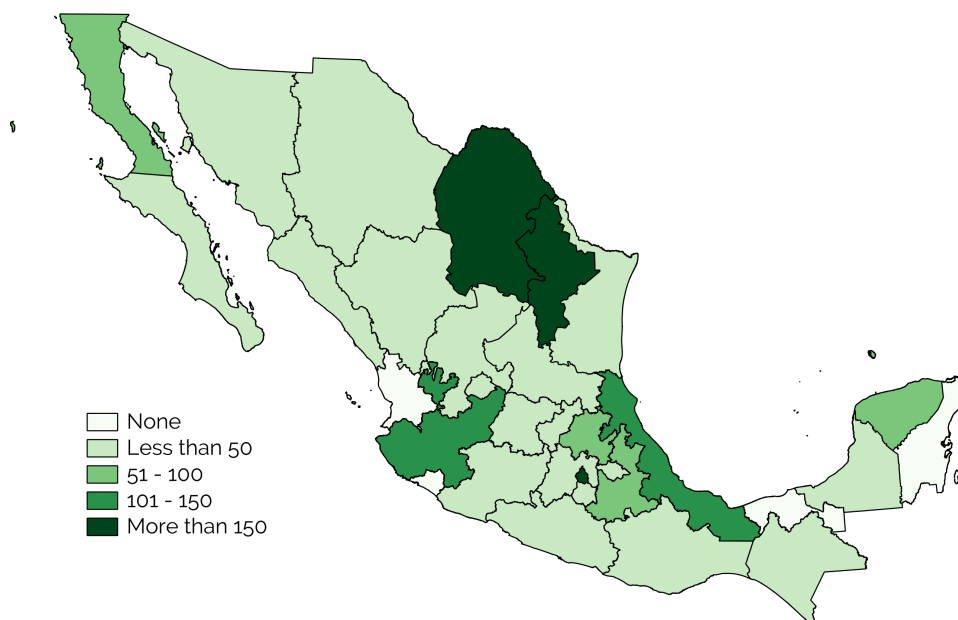
Figure 3: Use of *arraigo* at the Federal level per state (Jan. 2010 – Jul. 2012)



Source: Cantú Martínez, Gutiérrez Contreras, & Telepovska (2012).

As for the use of *arraigo* at the local level, there is not much information available. The CMDPDH data is the best reference available to see how state level authorities have used such measures in their jurisdictions. Nuevo León, Coahuila, and the Federal District were reported to be the states where the use of state level *arraigo* was the most frequent (See Figure 4).

Figure 4: Map of use of *arraigo* at the State level per state (Jan. 2010 – Jul. 2012)



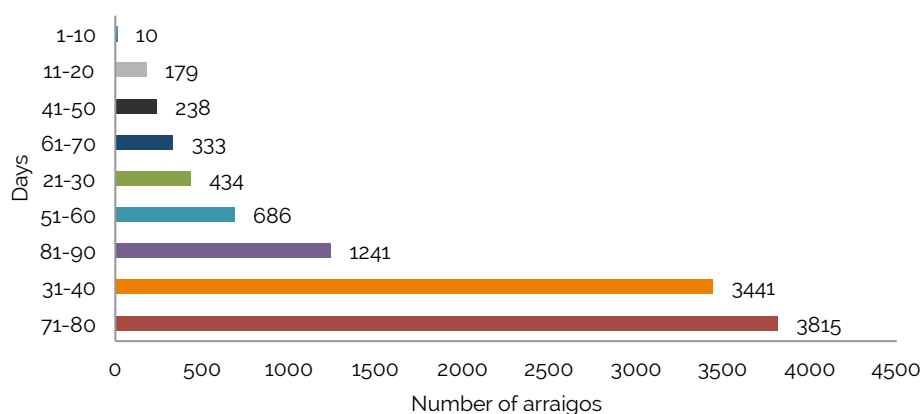
Map: Octavio Rodríguez Ferreira.

Source: Cantú Martínez, Gutiérrez Contreras, & Telepovska (2012).



In response to a freedom of information request submitted by the authors of this report in mid-2013, the PGR reported that a total of 10,377 people were detained under *arraigo* from 2006 to 2012. The list the PGR provided also included the length of time people were detained during 2006 to 2012 (PGR, 2013). The number of persons detained under *arraigo* from 2006 to 2012 for a period of one to 90 days is as follows: (See Figure 5)

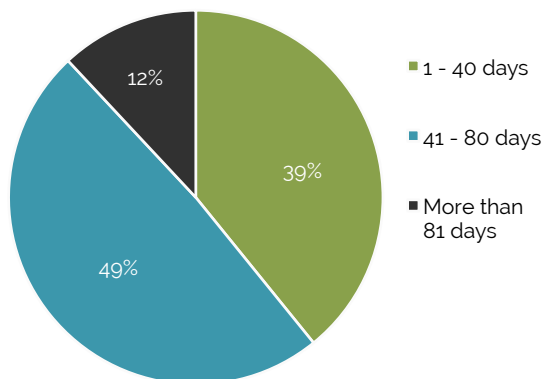
Figure 5: Breakdown of people held in *arraigo* per period of time (2006 - 2012)



Source: PGR (2013).

In other words, of all those detained under *arraigo* from 2006 to 2012, 39% were released within the first 40-day period, and 49% within the second 40-day period that the public prosecutor could request to the judge in order to gather more evidence. Finally, it is not clear why there were people detained more than the 80-day threshold set forth by Mexican Law, assuming that the data does not count the two-to-four-day period of preliminary detention granted by the CPEUM to the MP, which is independent of the *arraigo*. According to the data provided, 12% of the detainees, or *arraigados*, were detained more than 80 and up to 90 days (See Figure 6).

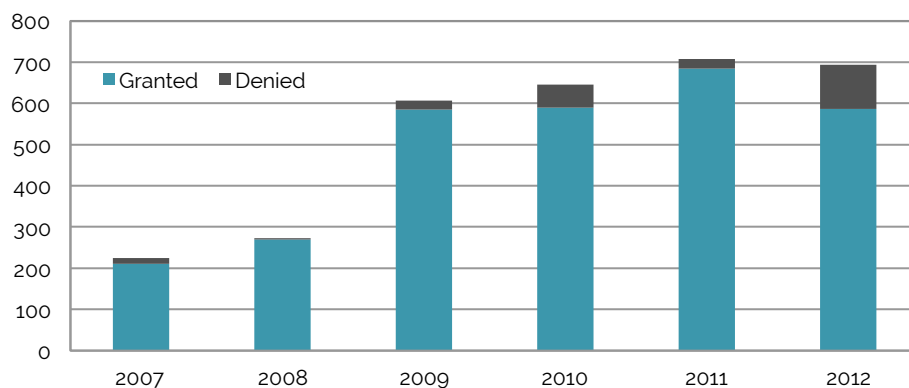
Figure 6: Length of detention under *arraigo* (2006 - 2012)



Source: PGR (2013).

As shown by Figure 7 below, 3,166 *arraigos* were requested by prosecutors from December 2006 through December 2012, of which 2,939 were granted by judicial authority. Thus, only 277 requests were denied. When broken down by year starting in 2007,<sup>16</sup> the data shows that 2011 was the year with the most requests of *arraigo* by the MP with 708, and was also the year with the most *arraigos* granted by the judicial authority with 684. The number of requests held steady in 2012, declining by only about 2%. 2012 was also the year with the most requests denied (108), which almost equals the total number of denials during the five previous years (119). Comparatively, 2008 was the year with the least *arraigo* denials, as the MP turned down only 1% of the requests (See Figure 7).

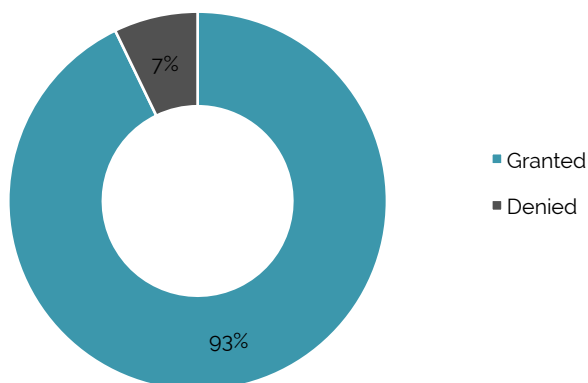
Figure 7: Number of *arraigos* requested by the MP (2007 - 2012)



Source: PGR (2013).

Overall, from 2007 to 2012 the percentage of *arraigos* denied by the judicial authority was just 7%, which indicates that once the MP submitted its request to the judicial authority, 13 out of 14 suspects were detained under *arraigo*. Of those 13, at least seven were held for more than the initially granted 40-day period (See Figure 8).

Figure 8: Granted and denied *arraigos* (2007 - 2012)



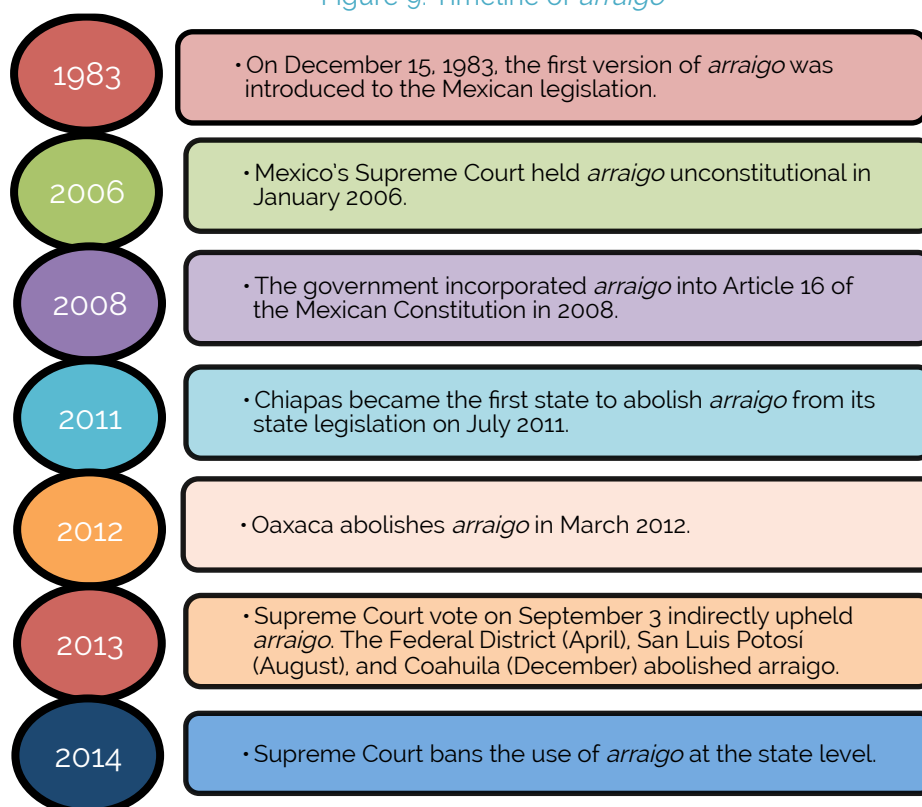
Source: PGR (2013).

<sup>16</sup> The data from 2006 is not considered here since it only reflects one month (December) of the entire year.

Unfortunately, we do not have official information on the number of cases where there were formal charges presented after a detention under *arraigo*, which would be helpful in measuring the effectiveness of the practice. Statements from Mexican authorities suggests that only 3.2% of all *arraigos* from 2011 to 2012 led to a conviction, which indicates that the margin of error could be more than 95%.<sup>17</sup>

What is clear is that, over the last year, the use of *arraigo* has come under renewed scrutiny and has been curtailed by both state laws and an important SCJN ruling in early 2014. Starting in 2011, five states moved to abolish the mechanisms through their own legislation before the SCJN decided in early 2014 that the use of *arraigo* could be used exclusively for federal crimes, thus banning its use at the state level.<sup>18</sup> Specifically, according to information from media outlets and confirmed by the authors through a review of state legislation, from 2011 through the end of 2013, Chiapas, Coahuila, the Federal District, Oaxaca, and San Luis Potosí abolished *arraigo*.<sup>19</sup>

Figure 9: Timeline of *arraigo*



<sup>17</sup> Lía Limón, undersecretary for Legal Affairs and Human Rights of the Secretariat of the Interior (Secretaría de Gobernación, SEGOB), reported that 4,000 people were detained nationwide under *arraigo* from 2011 to 2012 and only 129 people were prosecuted (Justice in Mexico, 2014).

<sup>18</sup> Some media reports claim that Hidalgo, Queretaro, and Yucatán had also done so, though there is no evidence in our review of local legislation in these states that such reforms had ever been approved or incorporated into state legislations.

<sup>19</sup> The Federal District abolished *arraigo* in September 2013, replacing it with a similar form of preventive detention, but now requiring judicial control (*detención con control judicial*), which allows for shorter detention periods than *arraigo* and the expectation that such cases will be handled entirely by the judiciary.

## 5. UNDERSTANDING THE HAZARDS OF *ARRAIGO*

The length and reasonableness of detention, access to counsel, judicial access, torture, and/or right to *habeas corpus* are all issues raised by human rights advocates and international organizations about the practice of *arraigo*. To explicate the concerns raised by human rights activists, a discussion of the major legal principles that *arraigo* may violate are outlined in greater detail below.

### 5.1 Notification and Length of Detention

In Mexico, the CPEUM authorizes public prosecutors to detain a suspect prior to being charged formally for up to 48 hours – or in organized crime cases, up to 96 hours – in a detention facility called “*separo*” before being presented to a judge, pursuant to Article 16. Prosecutors must present the detainee to a judge, “along with sufficient evidence to justify their continued detention, within the first 48 hours of their arrest (Department of State, 2011).” This is to allow the MP to gather sufficient evidence (i.e. probable cause) for formal charges against an accused (CFPP (Ref.), 1999). If this is not enough time to obtain probable cause, the MP can then petition the court for an order of *arraigo*.

This two-to-four-day period of detention without charge is *added on to* the 40-to-80-day period under *arraigo*, though they are not the same thing. Thus, a person can be held for up to a total of 84 days without being charged or informed of the charges against him or her.

In addition to the inherent violation of the right to be informed of the charges, this delay in notification of charges also directly impacts the right of judicial review. Without knowing the charges, there is no way to challenge the propriety of the detention based upon reasonableness.

### 5.2 Reasonableness of Detention

Under *arraigo*, organized crime suspects can be held for 40 days on the basis of allegations the detainee is a suspect of organized crime,<sup>20</sup> is a flight risk, is a risk to the community or to the investigation, or in order to assure a successful investigation. The law does not indicate what burden of proof is required to win an order of *arraigo*, and the federal criminal code allows it to be invoked “insofar as these measures are necessary.” “Necessity” appears to be supportable by the subjective suspicion of the public prosecutor, yet the criteria seem to have been more objective in the previous version of the Article 133 *bis* of the CFPP. Thus the

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<sup>20</sup> Being a suspect of organized crime is seriously cumbersome *per se*, since the definition of such crime is so broad that technically any minor robbery could become organized crime. Mexico has formally defined organized crime (*delincuencia organizada*) through the CPEUM, the Federal Criminal Code (Código Penal Federal), and Mexico’s special legislation to address organized crime, the Federal Law Against Organized Crime (Ley Federal Contra la Delincuencia Organizada) as a “de facto organization of three or more persons, [existing] in permanent or recurring form to commit crimes, according to the terms of the relevant area of the law” (Molzahn, Rodríguez, & Shirk, 2013).

standard appears to have gone from an objective “founded” risk standard (CFPP (Ref.), 1999), to a more nebulous “necessity” standard in 2009 (CFPP (Ref.), 2009).<sup>21</sup>

On March 22, 2010, the United Nation’s Human Rights Committee criticized the government’s failure to provide clarification regarding the requisite proof for an *arraigo* order (HR Committee, 2010). Perhaps the government could not offer a clear requirement because there is none to be found in either the criminal code or the Constitution.<sup>22</sup> In the prosecution phase of criminal proceedings, the MP has the burden of proving guilt, but with *arraigo*, there is no mention of reasonable suspicion, probable cause, clear and convincing evidence, or proof beyond a reasonable doubt. This lack of a clear standard of required proof makes judicial review for reasonableness impossible.

The lack of standard and the subjective powers of prosecutors to request *arraigo* orders led the Mexican Congress to regulate *arraigo* in the hopes of avoiding abuses in its execution. Thus, it was established that specialized judges should issue *arraigo* orders therefore requiring prosecutors to present enough reasons for the detention of criminal suspects.

The president of the Justice Committee at the Chamber of Deputies, Humberto Benitez Treviño of the Institutional Revolutionary Party (Partido Revolucionario Institucional, PRI), noted that Article 16 of the CPEUM establishes subjective measures to carry out *arraigos* as part of the investigation. According to him, the CPEUM provides that the MP has the power to hold one person for 40 days when deemed necessary for the investigation, and can extend it up to 80 if applicable under *arraigo*. This has become, according to Benitez, a matter of arbitrary detention with little substantiation. Thus, reforms approved by the Chamber seek to stop the sometimes arbitrary or extrajudicial detention, since they would otherwise have no ground (Contraste, 2011).

Furthermore, although the necessity requirement should limit the use of *arraigo* to exceptional circumstances where the measure is “necessary” for the success of a criminal investigation, the courts have not enforced this limitation thus far (Amparo 2500/2009-II, 2009; Amparo 1000/2009-4, 2009).

### 5.3 Access to Counsel and Incommunicado Detention

Although the right to an attorney is provided for in Article 20 of the Mexican Constitution, this right is applicable only once criminal proceedings are formally initiated.<sup>23</sup> Because *arraigo*

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<sup>21</sup> The word “*arraigo*” from the 1999 version of Art. 133 bis (CFPP (Ref.), 1999) was replaced in 2009 (CFPP (Ref.), 2009) with “preventive measures,” and “a founded risk of flight” was also replaced with “measures necessary” to avoid flight by the suspect.

<sup>22</sup> This deficiency was not corrected in the long-awaited National Code of Criminal Procedures (CNPP, 2014) approved by President Peña Nieto in March 2014. The CNPP 2014 uses the same “as necessary” standard as the 2009 of the CFPP.

<sup>23</sup> Such rights under the CPEUM do not specifically apply to detention under *arraigo*, but rather refer to the right to access counsel in pretrial detention. Once criminal proceedings have been initiated, those who cannot afford an attorney have the right to an appointed attorney. The judge is required to appoint one, and if he or she does not, the state will designate a public defender. In the case of organized crime, communications with third

detainees are not charged with a crime thereby avoiding the formal initiation of criminal proceedings, the right to counsel does not apply for an *arraigo* detainee.

Many detainees have filed complaints with the CNDH<sup>24</sup> alleging deprivation of counsel. Detainees have claimed to be beaten when they requested counsel, and medical records have confirmed such accusations (CNDH, 2009). The United Nations Subcommittee for the Prevention of Torture (SPT) gathered testimonies during its monitoring visit to Mexico in 2009, and documented that detainees were not allowed counsel or were denied access to counsel for several days following their apprehension (SPT, 2009, p. 55). In many of the *arraigo* detention facilities, there are cameras and microphones throughout so that private attorney-client meetings are not possible. This is the case at the Center for Federal Investigations (Centro Federal de Investigaciones, originally known as Centro Nacional de Arraigos), for example, where there are microphones and cameras in all zones of the building (SPT, 2009, p. 56).

In addition to being denied counsel, detainees are frequently held incommunicado (CNDH, 2009; 2008).<sup>25</sup> The U.N. subcommittee reported that under *arraigo*, people's liberty is deprived at extremely high levels, cutting them off from all communication, including of that with their families and attorneys (SPT, 2009, p. 55). Many detainees report being held incommunicado for days and even weeks (CNDH, 2009; AI, 2009).

#### 5.4 Judicial Access and Review

Practically speaking, there is little to no judicial access under *arraigo*. Detainees are not brought before a judge during the period of detention. A detainee can, if he or she is able to hire an attorney, file a challenge called an *amparo*, in which he or she can challenge the detention. A *juicio de amparo* or simply *amparo* "is literally a legal 'writ of protection' that provides an injunction blocking government actions that would encroach on an individual's constitutional rights" (Shirk, 2010). Detainees have gained some relief by filing such challenges; however, this avenue is generally open only to those who can afford to hire a legal counsel.

#### 5.5 Protection from Torture

In its 2009 monitoring visit to Mexico, the U.N. SPT found consistent patterns of torture connected to *arraigo* and highlighted several cases in its report. In the Center for Federal Investigations, for example, approximately one-half of all detainees had recently inflicted lesions upon their arrival at the center, "with an average of 17 lesions distributed over eight different parts of their bodies" (SPT, 2009, p. 56). In their interviews with the SPT, all of the detainees reported repeated beatings at the time of apprehension and identical patterns of

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parties can be restricted except for communications with their attorney pursuant to Article 133 of the CFPP ((Ref.), 2009).

<sup>24</sup> The CNDH is charged with monitoring human rights compliance and violations committed by government agencies or officials, investigating complaints of violations, and making recommendations in the cases of violations.

<sup>25</sup> Many other cases filed with the CNDH concern allegations of torture during detention. Presumably no defense attorneys were present during this time (CNDH 2010a; 2010b).



behavior during transport to the detention center. Medical files of 70 federal *arraigo* detainees' were examined, and 49% described recently inflicted lesions on the detainees' bodies upon their arrival at the center. "The number of lesions on the detainees and their distribution over the entire body corroborated in a clear and evident manner the different testimonials regarding police violence and mistreatment." One woman claimed the police repeatedly raped her after her apprehension, and her medical records confirmed genital inflammation and lesions in her genital area. The subcommittee also noted her panic during their interview (SPT, 2009, p. 57).

The CNDH has investigated numerous claims of torture committed for the purpose of obtaining confessions during detention by the PGR, as well as the Mexican military (CNDH, 2009, 2010a, 2010b). One victim who was detained under *arraigo* complained of harsh interrogations about any connections with people, drugs, and arms of which he allegedly had no knowledge while being beaten, held incommunicado, deprived of food and water, and asphyxiated six times (losing consciousness three times). The detainee said that when he asked for an attorney, he was beaten and a soldier pushed a pen in his right ear, causing him to lose his hearing. The injuries were corroborated by two medical examinations (CNDH, 2009).

In another case, four men were apprehended by the military on June 16, 2009, and held under *arraigo* in Tijuana military barracks for 41 days before being formally charged with a crime. They were held incommunicado for two weeks and "informed relatives they had suffered beatings, suffocation with plastic bags, mock execution, and sleep deprivation. According to the men, the only medical personnel available were military doctors monitoring the torture and resuscitating suspects when they lost consciousness (AI, 2009)."

In a highly publicized, unrelated case, between March 21-27, 2009, 23 police officers from Tijuana were apprehended in separate cases by military personnel, taken to the military barracks in Tijuana, and then detained under *arraigo* for 41 days (Olivares Alonso, 2009). The treatment described by all of the officers is similar to the treatment of the four men apprehended in June 2009, also detained at the Tijuana military barracks. The Tijuana police officers alleged they "were bound with tape around their head, hands, knees and feet for days, denied food for three days, beaten repeatedly, asphyxiated with plastic bags over their heads, and given electric shocks to their feet and genitalia. A military doctor was present to resuscitate those who collapsed or lost consciousness" (Olivares Alonso, 2009). One of the police officers described his treatment:

They taped up my eyes and hands; the tape cut the skin of my hands, I couldn't feel my fingers, then they rolled me in a blanket and began to beat me all over my body, between six men they beat me for an hour, I lost all sense of time; on six occasions I lost consciousness as I wouldn't sign what they wanted they kept on hitting me, I don't know for how long (...) they took off my boots and put my feet in a container of water, then they put in electric cables and that went on for hours (...) they put electric cables on my testicles (...) I felt like they were going to kill me (...) I couldn't take any more, I signed with my eyes taped up. Today I still can't feel the fingers in my right hand (Olivares Alonso, 2009).

Although the government claims that *arraigo* detainees enjoy the same due process as all other detainees, the evidence compiled by the U.N. SPT, the CNDH, and other national and international organizations demonstrates repeated and grave human rights violations are committed against detainees held under *arraigo*.

## 6. ARRAIGO IN INTERNATIONAL LAW

Mexico is not the only country that applies a regime of preventive detention. Other countries, especially under the flag of “preventing terrorism,” have developed their own forms of detention with certain similarities but evident differences from *arraigo*. There is a growing body of literature on similar regimes for detention-without-charge, a measure that has been used as nations confront the threats to its natural security, particularly terrorism. Sometimes referred to as administrative or “preventative detention,” Elias (2009) provides a useful explanation for the different terms:

There is no standard, internationally agreed-upon definition of preventive detention. Although there are exceptions, the term “administrative detention” is more frequently employed in civil law countries, and the term “preventive” or “preventative” detention is used more often in common law countries. This apparently innocuous distinction is nonetheless important, as the differing terms “administrative” and “preventive” are intrinsically value-laden, suggesting, in the case of the former, that detention is a tool of the administration or bureaucracy, and, in the case of the latter, that detention is necessary to “prevent” a potential threat or danger from occurring (Elias, 2009, p. 110).

Regardless of the term used, preventive and administrative detentions refer to detention without charge, and are contrary to basic human rights law and specific international conventions to which both Mexico and the United States are signatories. The Universal Declaration of Human Rights signed in 1949 establishes that liberty is a basic human right, and establishes the basis for limiting the use of detention to those circumstances where an individual has clearly violated the law. Article 9 of the International Covenant on Civil and Political Rights (ICCPR) of 1966 and Article 7 of the American Convention on Human Rights (ACHR) in 1969 specifically require that “an individual arrested or detained on reasonable suspicion of having committed an offense must be ‘informed promptly’ of the charge against him or her and ‘brought promptly’ before a judge or other officer authorized by law to exercise judicial power (HRW, 2010b).”<sup>26</sup>

<sup>26</sup> The ICCPR establishes a presumption of innocence in Article 14 (2) and (3). The relevant sections of the ICCPR regarding detention state: Article 9, 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. 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 and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment. 4. Anyone who is deprived of his liberty by arrest or detention shall be



A number of rights can be inferred from the ICCPR and other treaties surrounding detention:

- a. Right to prompt notification of charges (ICCPR Art. 9);
- b. Right to access to counsel (ICCPR Art. 14.3);
- c. Right to judicial review of the reasonableness of the detention (ICCPR Art. 9.4); and
- d. Right to a reasonable length of detention (ICCPR Art. 9.3).<sup>27</sup>

The ICCPR does provide for national emergencies and relieves nations that officially declare a state of emergency of their obligations under the treaty.<sup>28</sup> The standard for relief is high, however, as the “life of the nation” must be under threat in order to take advantage of this provision. Moreover, the measures taken must be confined to those “strictly required by the exigencies of the situation.”

International treaties such as the ICCPR are binding domestically in Mexico once they are signed by the executive branch, ratified by the Senate, and published in the DOF.<sup>29</sup> However, when considering questions of law where the application of constitutional treaties conflict with the Constitution, courts have been bound to give primacy to the Constitution. Thus, the Mexican Constitution has traditionally superseded international treaties, and the SCJN has always ruled in favor of holding the Constitution above treaties, including those regarding human rights.<sup>30</sup>

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entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

<sup>27</sup> Prohibitions against torture are also absolute and often relevant to the practices used when individuals are detained without charge. This prohibition is found in the ICCPR (Art. 7) and the ACHR (Art. 5.2), as well as the Convention against Torture and Cruel, Inhuman Punishment (CAT).

<sup>28</sup> Obligations vis-à-vis torture, slavery and *ex post facto* are non-derogable. According to the United Nations a non-derogable right is one that, “at least in theory, cannot be taken away or compromised. In human rights conventions certain rights have been considered so important that they are non-derogable: the right to life, the right to be free from torture and other inhumane or degrading treatment or punishment, the right to be free from slavery or servitude, and the right to be free from retroactive application of penal laws. These rights are also known as peremptory norms of international law or *jus cogens* norms. One might make a distinction between non-derogable rights, which cannot be compromised (or reduced), and inalienable rights, which cannot be taken away (UN, 2015).” Article 4 of the ICCPR provides: (1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. (2) No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

<sup>29</sup> Mexico acceded to the ACHR on March 2 1981 and to the ICCPR on 23 Mar 1981. Mexico ratified the CAT on Jan. 23, 1986. The ACHR contains the same protections as the ICCPR regarding arbitrary arrest, notification of charges, and the right to judicial review and access to counsel. (ACHR Art. 7) The treaties’ prohibitions against torture or cruel, inhuman, or degrading punishment or treatment are found at ICCPR Art. 7 and ACHR Art. 5(2).

<sup>30</sup> For more on this see, Justice in Mexico (2013b) and Shatz, Concha, & Magaloni (2007).

Nonetheless, the Calderón administration asserted that *arraigo* complies with the rights articulated in the ICCPR and other international human rights treaties to which it is a party (Mission of Mexico, 2011). A monitoring visit by the UN's SPT and reports from CNDH, suggested otherwise, finding a pattern of violations under *arraigo*, including denial of counsel, torture, and being held incommunicado.<sup>31</sup>

Moreover, the urgency of the debate over *arraigo* in Mexico was rekindled after the Inter-American Court of Human Rights (IACHR) sentencing in 2009 against Mexico in the case of the 1974 forced disappearance of Rosendo Radilla. The IACHR declared that military personnel accused of human rights violations shall be tried in civil courts rather than military tribunals, thus requiring Mexico to amend its legal system.

The Radilla case pushed the SCJN to analyze the authority of the IACHR in mandating Mexico to comply with its decisions. On July 14, 2011, after a long debate in the SCJN, the IACHR ruling was recognized as binding for Mexico and ordered the legislation to be amended in order to comply with the decision. Moreover, the SCJN decision on the Radilla sentence analyzed other important issues such as the 'diffuse control,' which allows federal and local judges to directly interpret the Constitution and international treaties in cases brought before them, an approach rejected for decades in Mexican law.

Article 1	
En los Estados Unidos Mexicanos todas las personas gozarán de los derechos humanos reconocidos en esta Constitución y en los tratados internacionales de los que el Estado Mexicano sea parte, así como de las garantías para su protección, cuyo ejercicio no podrá restringirse ni suspenderse, salvo en los casos y bajo las condiciones que esta Constitución establece.	In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights. Such human rights shall not be restricted or suspended, except for the cases and under the conditions established by this Constitution itself.
Las normas relativas a los derechos humanos se interpretarán de conformidad con esta Constitución y con los tratados internacionales de la materia favoreciendo en todo tiempo a las personas la protección más amplia. (Fragmento)	The provisions relating to human rights shall be interpreted according to this Constitution and the international treaties on the subject, working in favor of the protection of people at all times. (Fragment)
Source: CPEUM, 2011.	

As stated above, however, the new article lacked a general rule regarding conflicts between the Constitution and a human rights treaty, and which *corpus* should supersede. This lack of clarity generated contradictory rulings by federal courts, leading the SCJN to resolve the issue. In its ruling, the SCJN recognized that human rights included in international treaties

<sup>31</sup> One way the Mexican government could have avoided violating the ICCPR (putting aside the question of torture) is by declaring a national emergency and derogating from the treaties as England did when it enacted its Anti-Terrorism, Crime and Security Act of 2001 (Elias, 2009, p. 326). Clearly, the violence is extreme; however, Mexico did not declare a state of emergency, as this might have implied that the criminal organizations were winning the 'war' or might have been perceived as weakness.

have a constitutional status and that judges should always seek the most favorable right for the person. However, the court allowed maintaining certain restrictions to such rights included in the constitution and treaties when the restrictions are set forth by the Constitution, amongst which is *arraigo* (Justice in Mexico, 2013b).<sup>32</sup>

## 6.1 International Criticism of *Arraigo*

Because of the arbitrary nature of detention and prevalence of torture and other human rights violations under *arraigo*, it has received criticism and grabbed the international attention of numerous human rights organizations and bodies, from the United Nations to Amnesty International, and domestically from Mexico's CNDH to the CMDPDH, among many others.

The Calderón administration argued that torture should not be confused with *arraigo*, but rather that they should be maintained as separate issues (Gutierrez, 2010). However, the evidence shows a strong connection between *arraigo* and torture. As previously discussed, the intrinsic nature of *arraigo* not only makes the detainees 'vulnerable' to torture, but an alarming percentage of them 'are indeed' tortured while detained under *arraigo*. These human rights violations connected to *arraigo* motivated the Office of the United Nations High Commissioner for Human Rights (OHCHR) through the HR Committee to recommend to Mexico in 2010 to abolish it for the first time (HR Committee, 2010). However, the Mexican government openly rejected this suggestion (Mission of Mexico, 2011).<sup>33</sup>

Although Congress and the Peña Nieto administration are considering reducing the maximum detention time from 80 to 40 days, critics claim this does not go far enough. On April 25, 2013, Human Rights Watch (HRW) called for the complete elimination of *arraigo*. HRW Americas Director José Miguel Vivanco said, "[t]he practice of *arraigo* contradicts some of the most sacred principles of Mexico's Constitution, such as freedom from arbitrary detention; gives prosecutors a perverse incentive to deprive people of their liberty before thoroughly investigating them; and undermines basic safeguards against torture" (HRW, 2013). HRW also attacked the legality of *arraigo* in its 2010 report on Mexico.<sup>34</sup> Likewise, on December 8, 2009, Amnesty International issued a detailed report surrounding several cases of torture under *arraigo* stating:

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<sup>32</sup> In addition, the SCJN ruled that the jurisprudence of the IACHR is binding for Mexican judges even if the court did or does not expressly mandate or name Mexico in its ruling. This means that Mexican judges have to interpret all rulings of the IACHR, not just the ones in which Mexico has been or will be a party (Justice in Mexico, 2013b).

<sup>33</sup> The document justifies the procedure of *arraigo* and affirms that international criticisms against it do not reflect its current status in Mexico since it has been modified over the course of time (Misión Permanente, 2011).

<sup>34</sup> The report states, "In June 2008 Mexico passed a constitutional reform that creates the basis for an adversarial criminal justice system with oral trials, and contains measures that are critical for promoting greater respect for fundamental rights, such as including presumption of innocence in the constitution. Two provisions, however, violate Mexico's obligations under international law. The first allows prosecutors, with judicial authorization, to detain individuals suspected of participating in organized crime for up to 80 days before they are charged with a crime. The second denies judges the power to decide, in cases involving offenses on a prescribed list, whether a defendant should be provisionally released pending and during trial. The government has eight years to implement the reform" (HRW, 2010).

*Arraigo* is a form of pre-charge detention in which the suspect is not brought before a judge and is frequently denied access to family or an independent lawyer (of his or her choice). Suspects can be detained at locations which are not always recognizable as official detention centres. International human rights mechanisms such as the UN Working Group on Arbitrary Detentions (E/CN.4/2003/8/Add.3, 17 December 2002, para 45-50) and the Committee on Torture (CAT/C/MEX/CO/4, 6 February 2007) have referred to *arraigo* as a form of arbitrary detention in which detainees are vulnerable to torture. They have called for its elimination (AI, 2009).

As similarly expressed in a 2010 CMDPDH report submitted to the U.N. Committee on Civil and Political Rights (CCPR), “The prolonged period of *arraigo*, the detained person held *incommunicado*, and the unknown whereabouts of the *arraigo* locations generate a state of vulnerability and defenselessness for the detainee,” (CCPR, 2010). The reports from the victims and the eyewitness accounts of the CCPR show that both prolonged detention outside of judicial oversight and being held *incommunicado* can create an environment more prone for the torture of *arraigo* detainees.

José Miguel Vivanco also wrote that “[d]etention without charge for such a long period of time violates the fundamental right to liberty and security of the person and the associated protections against arbitrary detention enshrined in international law” (HRW, 2010b). In the letter to then-President Calderón, Vivanco wrote:

This proposed 80-day limit would be, by far, the longest of its kind in any Western democracy. In other countries, the limit for any form of pre-charge detention, or preventative detention, is generally less than seven days. In the context of combating terrorism, for example, the maximum period allowed for pre-charge detention in Canada is one day; in the United States, Germany and South Africa it is two days; in Italy and Spain it is five days; and in Ireland and Turkey it is seven days. The United Kingdom recently extended the time limit for pre-charge detention for certain terrorism related offenses to 28 days, making it the Western democracy with the longest pre-charge detention time. However, British courts have yet to adjudicate on whether this is consistent with human rights law, although previous case law indicates that such a long pre-charge detention period is not permitted (HRW, 2010b).

Not only does the length of detention exceed that in countries like Canada, Germany, and South Africa, the torture (beatings, rape, asphyxiation) and inhuman treatment documented by the U.N. SPT and CNDH in Mexico (CNDH, 2010b) is more egregious than what is documented in these other countries.<sup>35</sup>

## 6.2 The Mexican Judiciary's Deference to *Arraigo*

The judicial attitude in Mexico has shown a highly deferential approach to the incorporation of *arraigo* into the Mexican Constitution. On April 12, 2008, the Federal Council of Judges created a special type of court called the Federal Criminal Court Specialized in Warrants,

<sup>35</sup> Complainant alleging beating, asphyxiation, forcing water up the nose, and electric shock to the stomach by office of Assistant Attorney General for Special Investigation of Organized Crime (Subprocuraduría de Investigación Especializada en Delincuencia Organizada, SIEDO), in order to obtain a confession.

*Arraigos*, and Communication Interventions (Juzgados Federales Penales Especializados en Cateos, *Arraigos e Intervención de Comunicaciones*). The special judges in these courts have exclusive jurisdiction over all cases involving *arraigo*, as well as warrants, and electronic communication interceptions (Acuerdo 75/2008, 2008). In general, these special judges proved highly deferential to *arraigo* detentions made by the Mexican military and the PGR. Contrary to the intent of the legislature to limit the use of *arraigo* to those cases “*when necessary*,” the courts have willingly allowed its use more broadly, even when there has been sufficient proof to bring formal charges and initiate criminal proceedings.

In one case (See Case Study below), three suspects brought a federal *amparo* action challenging the use of *arraigo* order on the grounds of illegal deprivation of liberty. This case raised questions about the reasonableness of their detention, being held incommunicado, and mistreatment and torture. Since the suspects were caught in the commission (*en flagrante*) of illegal possession of firearms, the law allowed for them to be criminally charged immediately and begin the traditional criminal process.<sup>36</sup> Instead, the court’s affirmation of the *arraigo* order allowed the PGR to continue its investigation without having to provide legal protections, including counsel and access to the evidence gathered in the investigation.

Such cases demonstrate the willingness of the judiciary to affirm *arraigo* orders even when there is sufficient proof to bring formal charges and initiate criminal proceedings (Amparo 1000/2009-4, 2009).<sup>37</sup> While judicial sentiment appears to be changing, with the SCJN’s determination that state-level use of *arraigo* is unconstitutional, the persistence of *arraigo* as a law enforcement mechanism at the federal level leaves open the continued possibility of continued abuse. For this reason, a number of recommendations follow for consideration in the Mexican context.

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<sup>36</sup> “Where a suspect is caught in the commission of a crime, the judge who receives the detained must immediately ratify the detention or declare him or her free according to the law.” (CPEUM Art. 16). If a citizen detains a suspect, he or she must immediately deliver him or her to the authorities. The authorities must, without delay, present the detainee to the attorney general who will then file charges (Amparo 1622/2007-II-A, 2007).

<sup>37</sup> In this case, detainees, who were suspected “sicarios” (assassins) in the “Cartel del Milenio,” were caught at home in possession of numerous illegal firearms, ammunition, and illegal narcotics. The court agreed with the PGR that there was insufficient evidence to satisfy the “constitutional and legal requirements to legally proceed against the suspects but that during the detention period they would continue to gather proof that will allow the PGR to formally charge the suspects.”



#### 2009 CASE STUDY:

According to accounts by military officers, on September 4, 2009 three suspects were caught (*en flagrante*) in possession of numerous illegal weapons and ammunition reserved for the exclusive use of the Mexican military, including high caliber weapons, cartridges for various firearms, and radio transmitters. Armed with this evidence, the officers took the suspects to the military installation to "complete the paperwork," rather than to the PGR as required by law. The next day, before a request for a judicial order of *arraigo* was submitted, two of the three suspects confessed to participating in drug trafficking and implicated the third. Only then, armed with the declarations from the military arresting officers regarding possession of firearms and the confessions implicating all three suspects, did the PGR submit the request to the Sixth Specialized Federal Criminal Judge of Warrants, *Arraigo*, and Intervention of Communications (Amparo 1000/2009-4, 2009).

The complainants/detainees filed an *amparo* against the various authorities involved in their apprehension and detention, including the PGR and the federal police ("respondents"). They alleged torture, being held incommunicado, deprivation of liberty, and other mistreatment. The respondents denied all the human rights allegations except for the deprivation of liberty. The jurisprudence concerning *amparo* holds that if the respondents deny the allegations, the burden shifts the complainant to prove the allegations. Unless the complainant then proves the allegations, the issue is rendered moot and the proceedings cease as to that issue and continue regarding whatever remaining issues exist. Since the complainants did not prove the human rights allegations of torture and mistreatment, these issues were not addressed by the court. Since the facts surrounding the complainants' allegations were not included in the written opinion, we cannot discern what those allegations were or what proof was offered. The court accepted the respondents' denials, closed the proceedings as to those issues, and moved on to issue of the reasonableness of the *arraigo* order (Tesis 1.20.P.143 P., 2007).

The opinion focuses on the third requirement: whether *arraigo* was necessary to the success of the investigation, the protection of people or judicial property, or whether there was a founded risk that the accused would evade justice. In a display of deference to the military, the court stated, "...further, by their probative nature, personal backgrounds and independence of their position as members of the Mexican Army, they had complete impartiality, in addition to the fact that their declarations are clear and precise regarding the facts..." The court did not comment on the fact that the complainants/suspects were taken to the military installation rather than the Attorney General's Office, in violation of Article 16 of the Constitution and FCPP Article 133. It found the declaration more than sufficient to prove the necessity of *arraigo*, but insufficient for formal arrest (Amparo 1622/2007-II-A, 2007).

## 7. FINDINGS AND RECOMMENDATIONS

As famously noted by the Israeli Supreme Court in (*Marab v. IDF Commander*, 2002), succumbing to measures such as *arraigo* does not build a stronger state; rather, the adherence to the foundations of such state—its constitution and rule of law—fosters respect for the government and its institutions, and cements democracy.<sup>38</sup> Mexican SCJN Justice José Ramón Cossío Díaz channeled a similar sentiment in a 2007 ruling:

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<sup>38</sup> In the case of *Marab v. IDF Commander* (2002) the Israeli Supreme Court imposed a stringent standard for detention well beyond the question of reasonableness of the soldier who found suspicion: "The judge asks himself whether, in his opinion, there are sufficient investigative materials to support the continuation of the detention [...] Judicial detention is the norm, while detention by one who is not a judge is the exception" (Schulhofer, 2004, p. 1924). The court held the law and facts of the case are reviewed *de novo*. While Israeli courts remain highly deferential and have rarely released suspects detained by the military or the Israeli security services, this deference should not be confused with a rubber stamp. Schulhofer (2004) noted several high-visibility cases in which the Supreme Court struck down important security measures as a violation of civil rights.

[W]e live in a constitutional and democratic state. It seems to us that a constitutional and democratic state should remain as such regardless of the threats it receives; it makes no sense to sustain a democratic and constitutional state to make exceptions depending on which factors external to the Constitution influence it. It seems to us that the only viable state is that which has the capacity to, in spite of enormous phenomenon of crime which it experiences, maintain and respect the fundamental rights and from those rights combat the conditions of delinquency and crime, not the other way around (Acción de Inconstitucionalidad 20/2003, 2007).

Former President Calderón recognized that *arraigo* infringes upon the fundamental personal liberty of individuals, though urged Congress nonetheless to include it in the Constitution as a component of the 2008 judicial reform. Rather than enveloping *arraigo* in constitutional integrity as Calderón had hoped, however, the effect of incorporating it into the Constitution shrouded the new Constitution in a cloud of inconsistency and a lack of integrity.

### 7.1 Protecting the Integrity of the Constitution

The Constitution (Art. 20) includes two important provisions regarding torture and the use of evidence derived from torture or intimidation. First, it explicitly prohibits and criminalizes “intimidation or torture” on a detainee, as well as holding a detainee incommunicado. To help ensure that suspects are not intimidated or tortured into confessing, there is a prohibition of the admission into evidence of confessions made outside the presence of defense counsel. If enforced, this prohibition would remove any incentive on the part of the police to obtain a confession through improper or illegal means such as torture.

The incorporation of *arraigo* into the CPEUM thus contradicts the Constitution’s recognition of and explicit prohibition of the use of torture to extract evidence from detainees or arrestees in art. 20, and its explicit sanctioning of a procedure, which, by its secretive nature, encourages the torture that it prohibits. *Arraigo* enhances the incentive to torture in two ways:

- a. Although the Constitution prohibits the use against a defendant in a trial of a statement made by him or her outside the presence of counsel, the incriminating statement may be used against him or her to establish the evidence or proof, which is necessary to bring charges against the detainee. This provides great incentive to obtain incriminating statements by any means necessary.
- b. Second, according to Amnesty International and Mexican human rights organizations, confessions that are elicited through intimidation, coercion or torture “are indeed” used against the accused in court, thereby eliminating the deterrent effect in Article 20 to prevent torture.<sup>39</sup>

<sup>39</sup> “[*Arraigo* orders] undermine many of the safeguards enshrined in law to ensure effective judicial control of arrests and prevent unlawful and incommunicado detention, torture and ill-treatment, and other coercion. International human rights bodies have noted that *arraigo* encourages the use of detention as a means of investigation and repeatedly called for its abolition, both at the federal and local level, as it violates the presumption of innocence and creates a climate in which detainees are at risk of torture and other ill-treatment.” (AI, 2014).

## 7.2 Preserving the Right to Counsel

Another internal contradiction within the Constitution arises out of the new right to counsel articulated in Article 17. Although suspects have the right to counsel under Article 17, *arraigo* detainees are regularly denied access to such counsel. Because of the nature of interrogations under *arraigo*, the right to counsel is compromised even when a detainee is fortunate enough to have one present.

At a minimum, the measure of *arraigo* should be revised to allow for access to counsel from the moment a person is detained. Ultimately, however, it is difficult to see how a measure like *arraigo* should be used in any instance where an individual requires counsel, since this would imply the existence of some standing criminal charge.

## 7.3 Defending the Presumption of Innocence

*Arraigo* violates the presumption of innocence contained in Article 20 of the Constitution. When a person is detained under *arraigo*, a cloud of guilt encircles the detainee. In several *amparo* cases, the judges articulated presumptions of guilt rather than innocence.<sup>40</sup>

Furthermore, the deprivation of liberty without charge is a form of advance punishment without the benefit of criminal proceedings and the protections provided therein. The U.N.'s Subcommittee on Torture lamented the highly restrictive conditions in the *arraigo* centers as compared with housing conditions of convicted prisoners.<sup>41</sup> Even though *arraigo* detainees are in a procedural limbo (not charged but not free) and should therefore be afforded more liberty than those convicted, it is in fact the other way around. Given the high rate of release without charge of *arraigo* this highly restrictive deprivation of liberty is indeed advance punishment.

Detaining first and investigating later results in innocent people losing not only their liberty, but their reputations as well. To do so without any proof renders the presumption of innocence meaningless. It may have been politically expedient for the government to use the weight of the state against organized crime without any restrictions, but *arraigo* is nonetheless clearly a show of force by the government. On the other hand, as explained here, this show of force is not without cost to the integrity of the Constitution.

## 7.4 Strengthening Criminal Investigations

The judicial reform and 2008 amendments to the CPEUM have provided the Mexican justice system and particularly law enforcement a wide repertoire with which to combat organized

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<sup>40</sup> In one case, the judge stated that “understanding the extent of the investigation that continues against them, they would evade the action of justice if they were allowed to go free, since they know the illicit nature of the activities that are imputed to them (Amparo 2500/2009-II, 2009). In another, the judge found that the facts presented by the attorney general in support of his request for the *arraigo* order created the presumption that the suspect “has participated in a criminal group dedicated to the trafficking of persons of Chinese and Cuban nationality” (Amparo 50/2010, 2010).

<sup>41</sup> In addition to the human rights violations previously discussed, *arraigo* detainees are frequently chained at the hands and ankles, with video cameras and monitors throughout the facilities. SPT Report, *supra* note 41.



crime. As indicated above, these new tools include judicial authority for electronic eavesdropping or wiretaps, forfeiture of property and illegal proceeds, and the creation of law enforcement databases (Arts. 16, 21 & 22). With the reform and funding from the United States through the Mérida Initiative, law enforcement has allegedly more and better investigative tools than ever before, along with training on how to use these new tools provided by the Mexican government, and the U.S. Federal Bureau of Investigation (FBI) and Drug Enforcement Agency (DEA) (Merida Initiative, 2008).<sup>42</sup> These strong, effective police practices and training greatly reduce, if not eliminate, the need for *arraigo*, which is especially noteworthy considering that the targets of *arraigo* are those involved in organized crime.

With electronic surveillance, law enforcement can monitor communications between conspirators and follow their organizations more closely to obtain detailed intelligence. The details and extent of the organization's planned activity can be revealed through such communications, along with names, roles, and locations of participants. It can also provide reliable leads, as well as solid evidence to use against the suspects at trial without revealing to any of the participants they are being observed. Thus if a suspect plans on leaving the area, law enforcement may become privy to this through electronic monitoring and may be able to trail the suspect and arrest him or her before he or she absconds. If a suspect is detained under *arraigo*, on the other hand, co-conspirators may be tipped off to the investigation and may destroy evidence, change tactics, discard phones, email addresses, and otherwise generally cover his or her tracks to avoid detection and apprehension.

*Arraigo* can undermine the capacity building and efficiency of police investigators by providing a "shortcut" whereby law enforcement chooses not to develop leads or use investigative tools. These tools, such as electronic surveillance, wiretaps, physical surveillance, and other more sophisticated police investigation methods, could lead to the apprehension of a wider circle of suspects in many cases. By using *arraigo* in order to obtain confessions, the Mexican police apparatus risks remaining mired in incompetence, inefficiency, and corruption (Navarro Peraza, 2010).<sup>43</sup>

## 7.5 Complying with International Law

*Arraigo* violates international law, is inherently inconsistent with other important rights in the Mexican Constitution, and contravenes important features of judicial reform in Mexico. The judiciary's unwillingness to meaningfully check the executive's power makes *arraigo* especially dangerous at a time when Mexico is cementing democracy. By abolishing *arraigo*, the Mexican government would not weaken its security, but rather strengthen it.

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<sup>42</sup> The Merida Initiative to Combat Illicit Narcotics and Reduced Organized Crime Authorization Act of 2008 was passed by the U.S. House and Senate to provide assistance to the governments of Mexico and Central America to control illicit narcotics production, trafficking, and organized crime, as well as help build capacity of law enforcement forces and promote the rule of law. As of 2014, the United States has provided over \$2.4 billion in assistance (Seelke & Finklea, 2014).

<sup>43</sup> Gabriela Navarro Peraza, (2010) representative of the CNDH in Tijuana stated, "[i]f we had a police force which was trained scientifically, made up of police who were capable of conducting investigations first and detain later, the jails would not be full and we would not need *arraigo*."

## 8. CONCLUDING OBSERVATIONS

As has been suggested, the rule of law and an effective independent judiciary are key elements of any healthy democracy (Lutz & Sikkink, 2001; Handy, 2004).<sup>44</sup> The independence of the judiciary serves to hold the executive accountable and, as such, the judicial reform in Mexico was implemented, among other things, to create checks and balances to and have power sharing between the three branches of government (Edmonds-Poli & Shirk, 2012, p. 3). The push for a more liberal democracy in Mexico coincided at a time of grave threat to the security of the nation produced by organized crime. One of the government's responses to meet this security challenge was to make *arraigo* constitutional. *Arraigo* allows law enforcement valuable time to conduct investigations unimpeded by legal requirements of due process. *Arraigo* might therefore be considered a shortcut to the acquisition of valuable evidence against serious organized crime offenders.

Political corruption throughout Mexico's history and the incapacity of Mexico's judicial system to deal with it has created a deep distrust by the public. One symptom of this distrust is the public's reluctance to report crime and its belief that things will never change (Calderón, 2010). Rather than moving Mexico towards democracy, incorporating *arraigo* officially into the legal and political framework in Mexico limits basic democratic rights.

The Mexican government suggested its intentions to reform *arraigo*. On February 20, 2013, the federal government and the Mexican Senate opened debate on possible reforms to *arraigo* in recognition that its use has caused human rights violations and that its use must be limited. The Senate's Political Coordination Board (Junta de Coordinación Política, JUCOPO) stated that the issue was one of its priorities (Torres, 2013).

It is a welcomed step forward that the Peña Nieto administration is re-examining the use and limitations of *arraigo*. Leaving *arraigo* as it currently is places the citizen at the mercy of an authority that assumes the right to treat its citizenry as it wishes, ironically in the name of 'law and order.' Of course, criminal organizations do pose an enormous problem and threat to the State. Additionally, the corruption of the judiciary that allows and accepts bribery can make justice very hard to come by. Nonetheless, creating shortcuts like *arraigo* creates more damage than solutions. The detrimental effect of officially sanctioned human rights violations on legal reforms and the further democratization of Mexico should not be underestimated. *Arraigo* sends a message that, when given a choice between political and law enforcement expediency on the one hand, and commitment to fundamental rights and democracy on the other, expediency trumps Mexico's commitment to democracy.

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<sup>44</sup> In a healthy democracy, "the judiciary is supposed to stand with the executive and legislative branches as one of the three pillars of government" (Handy, 2004).

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