



July 25, 2016

JUSTICE IN MEXICO POLICY BRIEF

The State of Judicial Sector Reform in Mexico

By Nancy Cortés, Kimberly Heinle, Octavio Rodríguez Ferreira, and David A. Shirk

A NEW BEGINNING FOR MEXICO'S JUSTICE SYSTEM

It is well known that Mexico currently faces an extraordinary security and rule of law crisis, including elevated levels of crime and violence. Mexican law enforcement and military forces have been ineffective at best and, in the worst cases, are believed to have committed serious human rights abuses against civilians. Amid these developments, Mexican authorities have been engaged in a nearly decade-long effort to shift to a new model of criminal justice that went live throughout the country on June 18th, 2016.¹ Along with countless other organizations, Justice in Mexico at the University of San Diego has been working to advance the prospects for criminal justice reform since well before this new model, which was initially approved by the Mexican Congress in 2008. With Mexico's New Criminal Justice System (Nuevo Sistema de Justicia Penal, NSJP) now in effect, in this policy briefing we provide an assessment of Mexico's judicial sector reforms, the Mexican government's implementation efforts, and the remaining challenges and concerns. This policy briefing draws on previous and recent findings of Justice in Mexico to provide a concise overview and some of the policy recommendations that can help ensure the long-term success of recent reform efforts.

THE BASICS OF CRIMINAL JUSTICE REFORM IN MEXICO

Over the last three decades, a series of reforms to the criminal justice system have been implemented in Mexico. Beginning in 1980s, revelations of deeply rooted problems of police corruption led to a series of ongoing efforts to restructure Mexico's police and public security structures in search of a more professional model of law enforcement. In the 1990s, an era of newfound political uncertainty in Mexico, the federal government worked to strengthen the judiciary by introducing higher professional standards for judges, stronger powers of judicial review, new standards for judicial precedent, and greater judicial independence, as well as new criminal statutes to deal with the mounting threat of organized crime.

¹ Juan Montes, "Mexico Recasts Its Criminal Justice Process." *The Wall Street Journal*, May 31, 2016, <http://www.wsj.com/articles/mexico-recasts-its-criminal-justice-process-1464734884>.

By the 2000s, elevated levels of crime and violence led to further measures focused specifically on revamping the Mexican criminal justice system, following along the lines of progressive reforms that had been introduced elsewhere in Latin America. Although the administration of President Vicente Fox Quesada was able to pass reforms to the juvenile justice system in 2003, the Mexican Congress declined to pass a major judicial reform package that Fox introduced in 2004.² Nevertheless, the continental wave towards more effective justice systems inspired some Mexican states to enact their own reforms at the state level, specifically Nuevo Leon, Chihuahua, and Oaxaca.

Thanks in part to the success of these state level initiatives, the Mexican Congress revisited the issue and in June 2008 approved a package of legislative and constitutional reforms to establish a new model of criminal procedure, providing stronger due process mechanisms while also streamlining the handling of criminal cases.³ Collectively, these changes were intended to shift produce a shift from Mexico's traditional "mixed inquisitorial" model of criminal procedure to an "adversarial" model.⁴ The new system is described as adversarial because it allows both the prosecutor and the defense counsel for the accused to present evidence and arguments as equal parties before an impartial and independent judge.

The resulting "New Criminal Justice System" (*Nuevo Sistema de Justicia Penal*, NSJP) offers three principal advantages over Mexico's traditional mixed inquisitorial model. First, is the introduction of **greater transparency**. In Mexico's traditional mixed inquisitorial system, in most cases the presentation of evidence was cumbersome because it was reviewed by the judge behind closed doors, in the form of written affidavits (*actas* or *actuaciones*). This led to long delays—in some cases years—in the administration of justice, and often meant that judges engaged in *ex parte* communications with one of the parties, particularly the prosecutor, to gain an understanding of the case. Under Mexico's new adversarial model, the review of evidence will now take place primarily in public court proceedings, or "oral trials," complete with gavels—an instrument once unfamiliar in Mexico. These proceedings will allow both the prosecutor and the defense counsel for the accused are able to present and challenge the evidence and arguments brought before a panel of three judges. Court proceedings will be conducted live in real time with documented audio and video recordings; the defense attorney and prosecutor will have equal opportunity to litigate their cases; judges

² In April 2004, the Fox administration proposed a series of constitutional and legislative changes to modernize Mexico's criminal justice system. For a more complete discussion of the 2004 judicial reform package proposed by the Fox administration, See David A. Shirk & Alejandra Ríos Cázares, "Introduction: Reforming the Administration of Justice in Mexico," in Wayne A. Cornelius & David A. Shirk (eds.) *Reforming the Administration of Justice in Mexico*. (Notre Dame: University of Notre Dame Press, 2007).

³ The NSJP was incorporated into the Mexican legal framework on June 18, 2008, with the publication of the constitutional reform in the Official Journal of the Federation (*Diario Oficial de la Federación*, DOF).

⁴ The reform brought significant changes to the Constitution on issues of legality, legal certainty, access to justice, alternative and restorative justice, the prison system, pre-trial detention, presumption of innocence, criminal investigation, due process, public security, asset seizure or forfeiture, special detention regimes, labor conditions in public security, and legislative faculties of Congress in public security and organized crime. The reform package also modified Congress' responsibilities, and featured municipal development, labor, and public security provisions. The authors address these issues.

can review and digest evidence more efficiently; and there will be more participation from judges in the process (e.g., asking clarifying questions). Also contributing to greater transparency, the new system requires that a defense attorney be informed about every stage of the criminal investigation.

While much public attention has been paid to the oral trials component of the reform, the reality is that only about 10-15% of cases will wind up in court. The vast majority of cases will be resolved before trial through use of alternative means, such as mediation or restitution. This is important because it contributes to the second principle of the reform: **efficiency**. The traditional system required prosecutors to pursue all cases on their docket, which led to the long delays and enormous backlogs in prosecutorial investigations that has contributed significantly to the malfunctioning of the Mexican criminal justice system. Under the new system, prosecutors will be given more discretion in their prioritization of cases, so that they can focus on more serious crimes and disregard minor infractions that would place an unnecessary drain on departmental resources and undermine public's greater interest. Also contributing to the efficiency principle, the new system will allow prosecutors to negotiate sentences in exchange for a guilty plea, ideally allowing the prosecutor to secure an appropriate punishment without having to allocate the time and resources necessary to go to trial.

The third principle of the reform is **due process**, which lends greater fairness to the administration of justice. In Mexico's traditional criminal justice system, the procedures were heavily stacked against the accused such that, once a suspect was detained, there was an effective presumption of guilt. In too many cases, prosecutors abused their power, forcing confessions, extracting bribes, manipulating evidence, and ultimately the public's trust (*fe pública*) that they would conduct their duties in the best interest of both the victim and the accused.⁵ Moreover, the system was heavily biased against the poor, who too often could not afford to get a decent attorney, let alone bribe their way to freedom.⁶ Meanwhile, the use of mandatory, pretrial detention for a large number of crimes, including non-violent offenses, meant that most individuals accused of a crime—whether guilty or innocent—spent the entire criminal investigation and trial process behind bars.⁷ By official estimates, about 40% of all inmates in Mexico are in the “pre-trial” phase.⁸

⁵ State and federal prosecutorial and investigative police agencies exhibited disturbing patterns of corruption and abuse, including the use of bribery and torture, according to surveys of prison inmates. See Elena Azaola and Marcel Bergman. 2007. “The Mexican Prison System.” in *Reforming the Administration of Justice in Mexico*, edited by Wayne A. Cornelius and David A. Shirk. Southbend, IN; La Jolla, CA: Notre Dame Press; Center for U.S.-Mexican studies.

⁶ Elena Azaola and Marcelo Bergman, *Delincuencia, marginalidad, y desempeño institucional*, Mexico City: Centro de Investigación y Docencia Económicas, 2013.

⁷ The common assertion that criminals in Mexico are “guilty until proven innocent” has more to do with the relatively inflexible criteria for pre-trial release. Cossio *et al.*, *Mexican Law* (Oxford University Press, 2005), p. 358.

⁸ Zepeda found in 2009 that 95,406 out of 229,915 (41.5%) prison inmates in Mexico were pending a sentence. Guillermo Zepeda Lecuona, *Los mitos de la prisión preventiva en México*, Washington, D.C.: Open Society Justice Initiative, 2010, p. 8. <https://opensocietyfoundations.org/sites/default/files/mitos-mexico-20100801.pdf>.

Under the new system, defense attorneys and even victims will serve as a check on prosecutors. Anticipating that their actions and evidence presented could be challenged in court by the defense attorney, prosecutors will need to avoid violating suspects rights and build more solid cases. Also, to curtail prosecutorial abuse (e.g., undue duress, coercion, torture), the 2008 reforms denied the admissibility of a suspect's confession in court if the defense attorney was not present. At the same time, the reform gives victims new rights to appeal a prosecutor's inaction or decisions on a case, which will help to ensure that they prioritize cases in the public's interest. Thus, the strengthening of due process rights for both the defendant and the victim is an important element to promote greater adherence to due process under the new system.

In short, the 2008 reforms introduce key elements of the adversarial model of criminal procedure to Mexico's traditionally mixed inquisitorial system, with the goal of increasing transparency, efficiency, and due process. While it is often asserted that Mexico's new criminal justice system is similar to the adversarial model used in the United States, there are some important differences. As noted above, trials will be heard by a panel of three judges, rather than one, which could have the effect of increasing the cost and detectability of corruption. Any suspect hoping to bribe a judge would have to pay at least of two of the three individuals hearing the case, and if any of them refuses it will help to identify and curb such corruption efforts. Another difference is that Mexico's new system will not include the use of juries at any stage of the process, though juries were used in Mexico in the early 20th century. There are important concerns and criticisms about the use of juries even in the United States, and there are many factors— limited education, economic hardships, and potential threats to jurors from organized crime—that would make it difficult to establish a well-informed, representative, and independent body of jurors in Mexico.

III. MEXICO'S JUDICIAL REFORM IMPLEMENTATION EFFORTS

The transition to the new criminal justice system has required not only major physical upgrades at the federal and state levels (e.g., new infrastructure for courtrooms, professional training for judicial sector personnel, training for judges, private attorneys, and general education for citizens and civil society), but also numerous changes to federal codes and state level reforms. It is therefore not surprising that the reform was rolled out in a non-linear fashion throughout Mexico, as each state progressed at its own pace and the federal government worked simultaneously to prepare the federal code and financial resources necessary to implement and put into effect the reform, both sizeable tasks. Since passage of the reforms in 2008, Mexico's Ministry of the Interior (Secretaría de Gobernación, SEGOB) was responsible for shepherding the transition through its Technical Secretariat for Implementation of the New Criminal Justice System (Secretaría Técnica Para la Implementación del Nuevo Sistema de Justicia Penal, widely referred to as the "SETEC"), which helped to coordinate government agencies at the federal, state, and judicial district level, as we discuss below.

Federal Level Implementation Efforts

At the federal level, the implementation process was plagued by delays and insufficient resources for the first few years following the passage of the 2008 reforms. On the one hand, there were delays in pushing forward key elements of the reform, including the failure to pass a new federal code of criminal procedure during the administration of President Felipe Calderón (2008-12). On the other hand, there was a need for additional appropriations from the Mexican Congress to cover the costs of implementation, which were not foreseen at the time of the reform. However, the pace of implementation picked up under President Enrique Peña Nieto (2012-2018) of the Partido Revolucionario Institucional (PRI). In 2014, President Peña Nieto pushed through a new code of criminal procedure (see Text Box: 2014 National Code of Criminal Procedure), allocated significantly larger block grants to assist Mexican states in implementing the reform, and pushed forward the inauguration of the system in federal courts. Given concerns that a return of the PRI would roll back progress made under his predecessors, Peña Nieto's commitment to proceed with judicial reform and his efforts to comply with the timeline for implementation defied expectations.

2014 National Code of Criminal Procedure

Shortly after taking office, President Peña Nieto placed passage of a new code of criminal procedure among the key measures of a multi-party political accord known as the "Pact of Mexico" (*Pacto por México*). Listed as "Commitment 79," the proposal made a significant departure from the past by establishing that the new CFPP would be a uniform federal code (*código único*), a longstanding proposal in Mexico and Latin America. From there, a new National Code of Criminal Procedure (*Código Nacional de Procedimiento Penal*, CNPP) was drafted, establishing a common set of courtroom procedures for applying criminal law throughout Mexico.¹ The new code was eventually approved by the Mexican Senate on December 5, 2013—just days after the one-year anniversary of President Peña Nieto's inauguration—and by the Chamber of Deputies on February 5, 2014.¹ The new code was actively supported in the legislature by Mexican Senator Arely Gómez (PRI), who later became Mexico's attorney general.¹ From the perspective of reform implementation, the chief benefit was streamlining: the passage of a single, uniform code—as opposed to waiting for states to update their own individual codes—provided a universal blueprint for operating under the new system.

The Peña Nieto administration also devoted substantial material support to the implementation process. Under the Peña Nieto administration's SETEC appointee, María de los Ángeles Fromow Rangel, \$2.3 billion pesos (roughly USD\$169 million) were allocated in federal funds to the states for judicial reform implementation, a 90% increase over the last three years of the Calderón administration. In total, from 2010 through 2015, the Mexican government invested \$3.5 billion pesos (approximately USD\$189.5 million) through SETEC to the states, with the vast majority allocated during the Peña Nieto administration. The most funds were spent in the Federal District (DF), Baja California, and the State of México (Edomex), each receiving \$187 million pesos. Guanajuato (\$177 million pesos) and Nuevo León (\$154 million pesos) rounded out the top five states with the most funds received from

SETEC.⁹ Many of these funds were used to help construct infrastructure, including courtrooms and new technology, and to prepare for the needs of the new criminal justice system. Funds were also deployed for training justice sector personnel.

In all, nearly 70% of the total \$3.5 billion pesos invested between 2010 and 2015 went to half of Mexico's 32 states, leaving 30% divided between the remaining 16 entities. To support these efforts, SETEC worked to leverage resources from other sources, including the U.S.-Mexico security cooperation agreement known as the Mérida Initiative, as well as the National Infrastructure Fund of Banobras, goods seized by Mexico's Administration and Transfer of Property Service (Servicio de Administración y Enajenación de Bienes, SAE), and property donated by state governors. It is also important to note that SETEC's work to advance implementation included preparation and training efforts for judges, prosecutors, defense attorneys, law enforcement, and other key actors supporting the new criminal justice system.¹⁰

With regard to efforts to bring criminal courts at the federal level in line with the new system, in May 2013 the Federal Judiciary Council (Consejo de la Judicatura Federal, CJF) developed and released a well-structured, gradual Master Plan for Implementation over a three-phase implementation system to distribute cases to each judicial circuit based on case complexity, workload, and geographic region. According to this plan, by 2016, Mexico would have inaugurated 44 federal courthouses or Federal Criminal Justice Centers (Centros de Justicia Penal Federal), with at least one operating in all of Mexico's 32 states. However, the Master Plan for Implementation was eventually modified in recognition of the limited time remaining, given that fewer than half of the new federal courthouses and centers needed had yet to be constructed. Indeed, by May 2016, roughly a month before final implementation, there were still four states without Federal Criminal Justice Centers (Baja California, Guerrero, Jalisco and Tamaulipas), while the rest of the states had at least one such center.

The Federal Criminal Justice Centers are key to the new judicial system's success. Thus, one major concern about the move to full operation in June 2016 is that only 38% of all courtrooms within these centers had actually been utilized by that point. By the end of May 2016, 77 courtrooms were scheduled for operation, yet only 28 had held a judicial hearing. That said, the process of getting judicial centers up to speed was relatively swift. As of August 2015, judicial centers were operating in only eight states, and more than half of all cases (272 out of 485 cases) had been handled in Puebla. Cases heard leading up to full implementation of the system have been diverse in nature, dealing with issues involving firearms (57% of cases); hydrocarbon or oil related theft (20%); drug trafficking (9%); low level drug sales or possession (5%); smuggling (2%); and other (7%). Federal Criminal Justice Centers throughout the country will almost certainly need to make continued progress toward full and effective operation in the months following the June 18 implementation date.

⁹ Meanwhile, SETEC spent the least resources on Aguascalientes (\$43 million pesos), Nayarit (\$50 million pesos), Quintana Roo (\$52 million pesos), Baja California Sur (\$56 million pesos), and Querétaro (\$59 million pesos).

¹⁰ Particularly important in the success of the new system are law enforcement officers at the municipal level, as the more than 330,000 municipal police officers in Mexico are typically the first responders to a crime and are responsible for ensuring preservation of the crime scene and presenting testimony in court.

State Level Implementation Efforts

Notwithstanding federal initiatives, the judicial reform effort in Mexico was mainly rooted at the sub-national level, as the vast majority of crimes fall under state jurisdiction (also known as “local” jurisdiction, or *fuero común*). The actual process of implementation within the states constituted a patchwork, with most states staggering the implementation of the reforms by judicial district rather than all at once.¹¹ Some states also opted to limit the implementation of the reforms by category, starting first with crimes that are less grave and moving toward the inclusion of all categories. Ultimately, implementation at the state level can be divided into three categories: early adopters (pre-2008), post-reform adopters (post-2008 through 2015), and late-reform adopters (2016).

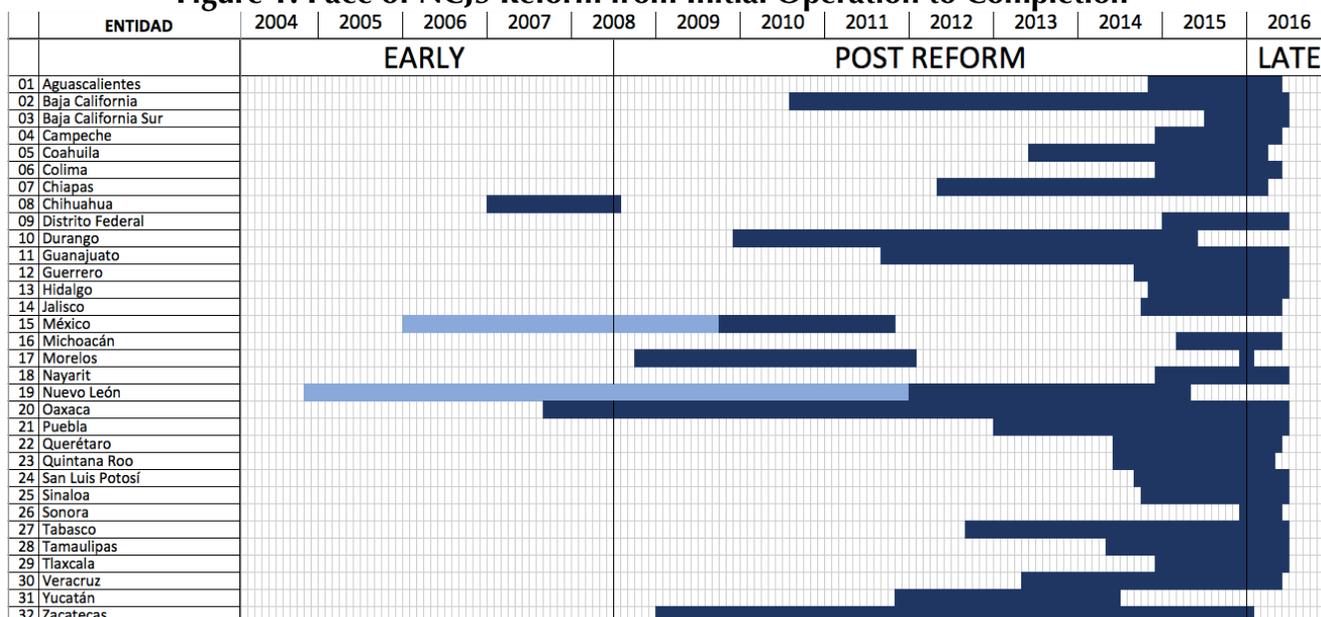
As noted, a handful of states had begun to implement oral, adversarial criminal procedures prior to the federally mandated reform in 2008: Nuevo León (2004), Chihuahua (2007), and Oaxaca (2007).¹² Following their examples, several other states approved their own state-level reforms without moving to implementation before the 2008 national reforms were approved: State of México (2006), Baja California (2007), Morelos (2007), Zacatecas (2007), and Durango (2009).¹³ These “cross-over” states straddled the early and post-reform periods and took longer on average than other states to move from adoption to operation, possibly due to the uncertainty that federal reform efforts created for policy makers in these states.

¹¹ Matthew Ingram, “State-level Judicial Reform in Mexico: The Local Progress of Criminal Justice Reforms,” Working Paper Series, San Diego, Justice in Mexico, 2010. www.justiceinmexico.org/uploads/Ingram-State-Level-Reform.pdf

¹² Indeed, in February 2005, Nuevo León became the first state to host a criminal trial using oral, adversarial proceedings in the case of a driver in an accident that killed one person and seriously injured another. “Concluyó en NL el primer juicio oral del México actual,” *La Jornada*, February 24, 2005.

¹³ In 2006, the State of México initially made only very minor changes to the criminal code by declaring that oral trials would be used, and subsequently revised its code substantially to make a more complete transition to an oral, adversarial criminal procedure.

Figure 1: Pace of NCJS Reform from Initial Operation to Completion



Source: Justice in Mexico compilation based on state legal registries (*Diarios Oficiales*) and various news reports. Note: The solid bar indicates the span of time from the date each state began to transition to the NCJS to the date the NCJS began to fully operate in all of the state’s judicial districts and for all types of crime.

Most states were post-reform adopters. In all, 29 states implemented oral, adversarial criminal procedures between 2008 and 2015, including the five “cross-over” states mentioned above (México, Baja California, Morelos, Zacatecas, and Durango). The bulk of Mexican states reformed and implemented during this six-to-seven year window, particularly in the latter years, given the Peña Nieto administration’s more active role to coordinate and fiscally support state level reforms through SETEC. In President Peña Nieto’s first three full years in office (2013-2015) the funds allocated to state level reform more than doubled the amount allocated in President Calderón’s last three full years in office (2010-2012). The influx of resources and attention under Peña Nieto was arguably successful, as the majority of states adopted and implemented the new reforms from 2013 to 2015 and all states were able to adopt and inaugurate the new system by June 18, 2016. Only two states—Baja California Sur and Sonora—moved to operation in the first half of 2016, just before the June 18, 2016 constitutional deadline.

For both post-reform and late-reform adopters, movement to the new system was slow or delayed in many cases, leading to concerns about the feasibility of meeting the 2016 deadline. Factors that deterred or inhibited implementation of the reform included state and local elections serving as distractions; skepticism and controversy over the need for reform; the influence of outside forces; and unrelated crime and violence in early-adopter states that undermined those states’ potential status as a role model to others.¹⁴ Most states also

¹⁴ Indeed, Justice in Mexico’s 2011 survey of judges, prosecutors, and public defenders in nine states found that there was widespread support for Mexico’s traditional system among judicial operators, as well as a fairly widespread perception that the reforms were the result of pressure from outside forces, particularly the United

employed a geographically staggered process of implementation by judicial district, and some states scheduled the introduction of new criminal procedures according to specific classifications of crimes. Thus not only was the state-level implementation non-uniform across each state, but also *within* each state, as described below.

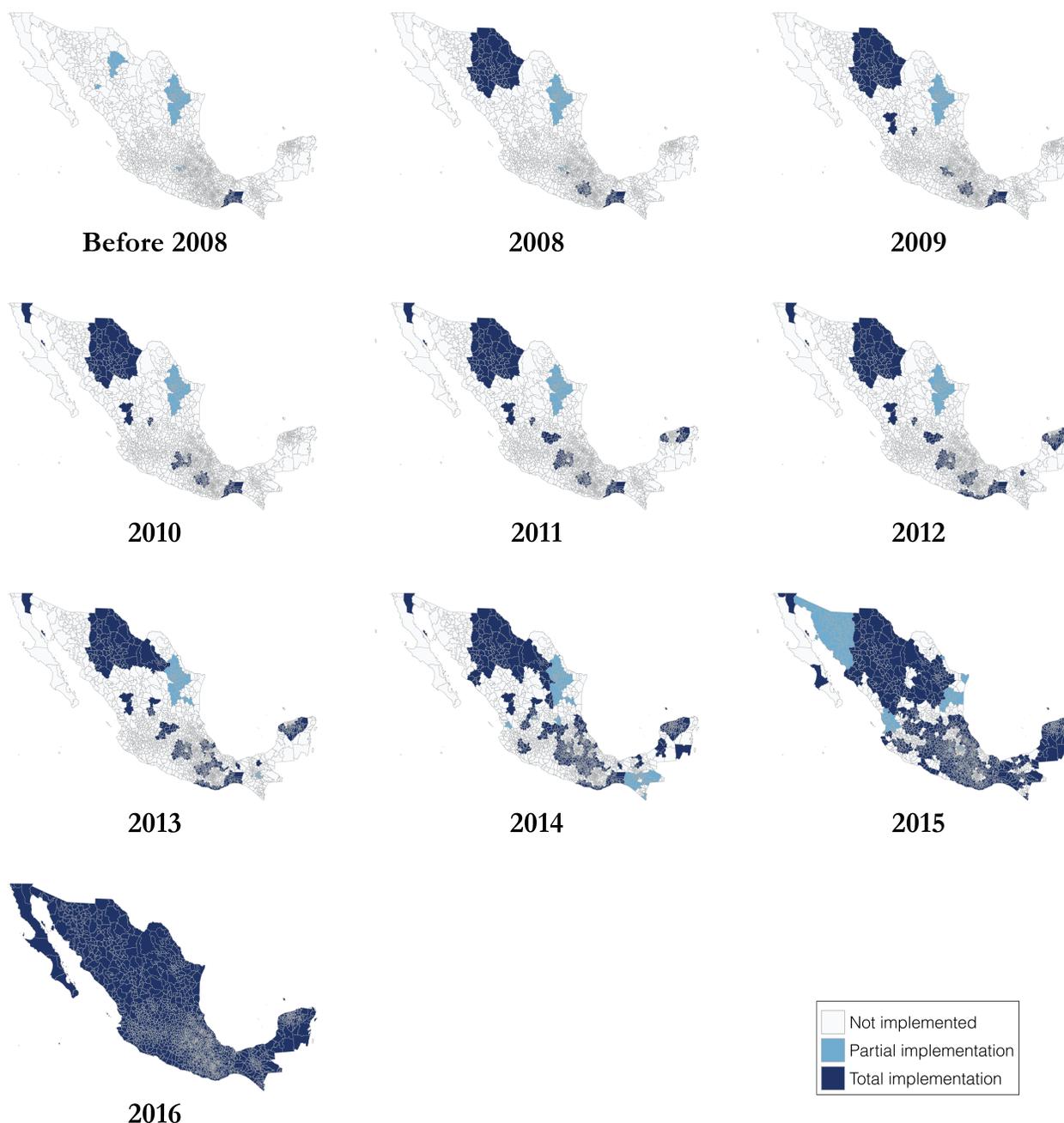
District Level Implementation

Obtaining information on the implementation at the judicial district level was difficult until recently, as the information was reported only sporadically at the state level and the federal government did not report these figures publicly until mid-2015. In an effort to monitor judicial reform, Justice in Mexico has worked to analyze implementation efforts at the state, municipal, and judicial district-level, focusing mainly on identifying two objective metrics: (1) the districts in each state in which oral adversarial procedures are employed, and (2) whether these procedures are applied fully or partially across all official categories of crime. These metrics do not provide an indication of the *quality* of implementation, but they help to measure the pace of implementation at the local level, thus providing a clearer picture of where and when reforms took place. They also provide an independent assessment to complement figures released by the government, specifically data released by SETEC in May 2015.¹⁵

States. Ingram, Rodríguez, and Shirk (2011), p. 97-105. See also: “Reforma judicial con sello gringo.” *Proceso*. Mexico City, 2008.

¹⁵ To obtain the necessary information, the authors reviewed federal government data, state legislative bulletins (*Diarios Oficiales*), newspaper articles, and government press releases that specified the judicial districts or municipalities moving to implementation, as well as the schedule for inaugurating the new system in those districts. The authors assigned a scale of 0 to 2 to indicate the level of implementation: 0 = no implementation of the new criminal procedures for any crime; 1 = implementation of new criminal procedures for some crimes; and 2 = implementation of new criminal procedures for all crimes. Since Mexico has over 2,400 municipalities and approximately 900 judicial districts, this process required many painstaking hours of data gathering and coding. The findings provided useful insights on which jurisdictions had become partially or fully operational under the new system.

Judicial District Level Mapping of Oral Adversarial Trial Reform Implementation, 2008-2016



Source: SETEC and various media sources. Maps by Octavio Rodríguez Ferreira. *Through June 2015.

The metric ultimately showed that sub-national judicial reform implementation was fairly limited in 2013, the first full year under the Peña Nieto administration. Only about 630 of the roughly 2,400 municipalities in Mexico (roughly 25%) were fully operating the reforms by the close of 2013. By June 2015, however, over half of all municipalities were in judicial districts fully operating under the new model of criminal procedure, and over half of all Mexicans lived in municipalities where the reforms had been fully implemented. Continuing to

progress, with less than one month until the constitutional deadline, 73.7% of all municipalities were under total implementation, with the remaining municipalities under partial implementation and/or pending. The bulk of municipalities that have at least begun implementation of the new reforms by May 2016 began implementing the system in 2014 (16% of all municipalities) and 2015 (18%). An additional 9% began in 2008, 4% in each of 2011 and 2012, and 6% in 2013. 3% of all municipalities launched implementation in 2016, just prior to the constitutional deadline.

Despite the strong push to fully comply, there are still potential challenges that could derail the implementation process. For one, some states have only transitioned to oral, adversarial criminal procedures for certain categories of crimes, thus other categories may still fall under the traditional judicial system processes. Additionally, similar setbacks that occurred at the state level can also arise unexpectedly to deter implementation at the local level (e.g., election distractions, skepticism, outside forces, and crime and violence).¹⁶ It is also unclear what federal agency will step in to coordinate, support, and monitor the development of the new criminal justice system after SETEC has fulfilled its objective of full judicial reform implementation. Similarly, there is uncertainty around how effectively the new system under the Unified Code of Criminal Procedure can be amended to address particular problems as they arise in individual states. These issues are considered below.

IV. REMAINING CHALLENGES AND ASSESSMENTS OF THE REFORM

In the lead up to the deadline for final implementation, Mexico's New Criminal Justice System generated public scrutiny and anxiety about the implications of moving to the adversarial model. Even among long-time champions and advocates of the new system, there was serious concern about the pace of the reform and the level of preparation among judicial sector personnel—including judges, court personnel, public defenders, prosecutors, and other law enforcement agents—who would need to operate under the new system. For example, at a major international conference hosted by Justice in Mexico at the University of San Diego on June 10, 2016, Mexican judges and judicial sector operators spoke candidly about their concerns about the lack of preparation for managing appellate cases under the new system.¹⁷ Meanwhile, Mexican law schools—the pipelines into the judicial sector—remain woefully behind in developing the curricula, infrastructure, and teaching methods needed to prepare future lawyers and judges with the proper legal foundation.¹⁸ Civil society representatives also

¹⁶ One such example of these setbacks can be seen in Michoacán, which was slated to begin operating the new system in August 2013. Due to concerns of being ill prepared for the new system, a yearlong delay in implementation, increased crime and violence from organized crime, the rise in paramilitary vigilante groups, the resignation of the state's governor, and the creation of a federal commission to assist in governing the state, Michoacán did not launch the new adversarial system until March 2015.

¹⁷ For this and other insights from the June 10, 2016 international conference, "Promoting the Rule of Law in Mexico," please see Khirin A. Bunker and Robert J. Bunker, "International Conference On Promoting The Rule Of Law In Mexico," *Small Wars Journal*, June 28, 2016. <http://smallwarsjournal.com/jrnl/art/international-conference-on-promoting-the-rule-of-law-in-mexico>

¹⁸ In full disclosure, this Justice in Mexico conference was part of a ground-breaking, three-year legal education partnership intended to promote training and academic exchange between the University of San Diego and

raised concerns about the need for greater oversight of judges and other judicial system operators to ensure against missteps or even corruption.

Among research organizations, there has been ample criticism of the government's implementation efforts. In May 2016, with about six weeks remaining before final implementation, the Center of Research for Development (*Centro de Investigación para el Desarrollo*, CIDAC), a Mexican think tank, published a 158-page report, entitled *Reporte de Hallazgos 2015*, on government efforts to implement the New Criminal Justice System throughout the country.¹⁹ One of CIDAC's most widely reported conclusions was that Mexico would need an additional eleven years after the June 18 deadline to reach an optimal level of operation.²⁰ Hence, the authors of the CIDAC report argue that current efforts to facilitate implementation of the reforms should be continued and even augmented. According to CIDAC, the implementation process has been characterized by frequent improvisation and "trial and error" that has led to a series of isolated actions by various institutions that have proved to be ineffective on a larger scale. As a result, the report urges the Mexican government to use the June 18 constitutional deadline to take stock and develop a more effective national strategy to advance the cause of judicial reform.

A subsequent report by the Washington Office on Latin America (WOLA), entitled *Mission Unaccomplished*, offers a similarly critical

The *Reporte de Hallazgos 2015* published by the Center of Research for Development (CIDAC) established an index to evaluate whether different states had met a set of "ideal" standards for implementation that were determined by CIDAC researchers with regard to the degree of inter-institutional coordination, the financial and budgetary resources that have been distributed amongst the states to facilitate the implementation process, the existence of instruments to measure the reform's impacts, and the overall national strategy for the reform's consolidation.¹ No state had met CIDAC's standards by the June 18 implementation deadline. According to the report, many states still rank well below CIDAC's ideal standard of the system's effective operation. Thirteen states had still not surpassed the 33% mark towards full implementation and only six states had surpassed the 50% mark. The CIDAC report acknowledges the massive distribution of funding through SETEC, but is critical of the lack of coordination across government agencies responsible for judicial reform implementation and the fact that SETEC's funding focused primarily on equipment and training, rather than the establishment of mechanisms to monitor and evaluate the future impact of reform efforts. The report also criticized the lack of information and progress on developing new protocols for police investigations related to the reforms. Just three states—Baja California, Campeche, and Oaxaca—indicated that they were operating under the new protocols for investigation mandated by the reforms.

—Prepared by Justice in Mexico Program Assistant, Rita Kuckertz.

Mexico's largest public university, the Universidad Nacional Autónoma de México (UNAM) funded by the U.S. State Department's Bureau of International Narcotics and Law Enforcement as part of the U.S.-Mexico security cooperation agreement known as the Mérida Initiative.

¹⁹ *Reporte de Hallazgos 2015*. Centro de Investigación para el Desarrollo, A.C. (CIDAC). 4 May 2016. See summary in text box prepared by Rita Kuckertz.

²⁰ See: Mark, Michelle. "Mexico has spent 8 years overhauling its dysfunctional justice system, but it may need 11 more to fix the mess." *Business Insider*. May 7, 2016; ; Méndez, Alfredo. "Pasarán 11 años antes de eficacia de nuevo sistema penal, alertan." *La Jornada*. May 4, 2016; "Nuevo Sistema Penal funcionará "en nivel óptimo" hasta dentro de 11 años, prevé CIDAC." *Proceso*. May 4, 2016.

assessment of the state of judicial reform implementation in Mexico. WOLA authors Maureen Meyer and Ximena Suárez Enriquez note the lengthy delays in implementation efforts at the federal and state level, the limited extent of training for judicial sector personnel (including public defenders and, especially, police and prison staff), and “alarming signs of repeating the old practices that obstructed professional investigations for decades.”²¹ Importantly, the report also notes that, after the reforms went into effect, the Mexican federal government issued an agreement which allows state governments to opt out of further “consolidation” of their state systems. Moreover, the WOLA report specifically highlights the continued practice of “arraigo” or detention without charge under special regime of criminal procedures for organized crime suspects.²²

While the CIDAC and WOLA studies offer a useful critique of the implementation process, it is important to consider the progress that has been made, as well as the alternative scenario. At the outset of the Peña Nieto administration, many feared that the return of Mexico’s former ruling party to power would lead to a reversal of judicial reform efforts. Instead, the Peña Nieto administration redoubled implementation efforts and actually accomplished much more rapid progress on federal and state level judicial reform than the previous administration. That said, the Peña Nieto administration may have overstepped its bounds by asserting on the SETEC website that judicial reform was a “mission accomplished.”²³ While understandably pleased at their success in meeting the constitutionally mandated deadline, Peña Nieto administration officials need to recognize that there is ample work to be done to ensure that the new criminal justice system is not only operational but properly functioning. This was, in fact, the message issued by President Peña Nieto and other officials who spoke at the inauguration ceremony hosted in Mexico City at midnight on June 18, 2016, the day the reforms went into effect nationwide. In his remarks, Peña Nieto noted that: “All representatives of the Mexican state are equally responsible for the success of the new criminal justice system. Only with a continuous process of learning and improvement can we correct failures and overcome the challenges that we will surely confront.”²⁴

Ultimately, a fundamental question is whether Mexico is committed to judicial reform, and whether the reforms underway will have the desired impact of improving the transparency, effectiveness, and fairness of the Mexican criminal justice system. In this regard, a new forthcoming study by Justice in Mexico offers some cause for cautious optimism. In the lead up to the June 18 deadline, Justice in Mexico worked with the Mexican polling firm Data-Opinion y Mercados (Data OPM) to conduct the second “Justiciabárometro” survey of more than 700 Mexican judges, prosecutors, and public defenders, building on a previous study

²¹ Maureen Meyer and Ximena Suárez Enriquez, *Mission Unaccomplished: Mexico’s New Criminal Justice System Is Still a Work in Progress*, Washington Office on Latin America Report, July 2016. https://wola.org/wp-content/uploads/2016/07/Mission-Unaccomplished-Justice-Reform-Mexico_WOLA.pdf.

²² For more on arraigo, see Janice Deaton and Octavio Rodríguez, *Detention Without Charge: The Use of Arraigo in Criminal Investigations in Mexico*, Justice in Mexico (San Diego: University of San Diego, 2015). https://justiceinmexico.org/wp-content/uploads/2015/01/150112_ARRAIGO_Final.pdf.

²³ <http://www.setec.gob.mx>.

²⁴ Francisco Reséndiz and Julián Sánchez, “Histórico, el cambio legal: Peña Nieto,” *El Universal*, June 18, 2016.

conducted in 2010. The 2016 Justiciabarómetro study is the largest ever survey of Mexican judges and was administered in twelve states at varying levels of progress in implementing the reforms. While the full survey report will be released in September 2016, there are a few preliminary results that are worth noting here because they demonstrate important progress and hope for the future of the new system.

First, there is overwhelming agreement that judicial reforms were needed. Demonstrating the widespread political support regarding the problems of the country's criminal justice system, more than three quarters of judges in the 2016 Justiciabarómetro survey agree that Mexico's traditional mixed inquisitorial system was in need of reform. Moreover, contrary to concerns that judges will reject the new system, the Justiciabarómetro survey finds substantial overall support for the reform among current Mexican judges. Indeed, there was a substantial increase in the number of judges (more than three out of four) who believe that Mexico's 2008 judicial reforms has begun to have positive results, compared to only 54% of judges in 2010.²⁵ Greater familiarity with the implications of Mexico's new system appears to have eased judges concerns about the new criminal justice system.

Second, while most responding to the 2016 Justiciabarómetro survey agreed that the new criminal justice system will not reduce crime, judges largely agree that the new system will help to increase transparency and reduce corruption. The study finds a widespread sense of expectation among judges that the 2008 reforms will help to reduce corruption. Indeed, there was a slight increase in the number of judges who believe the NSJP will help reduce corruption—more than three quarters in 2016—compared to 69% in 2010. Increased support for this view may be attributable to the generally improved views of judges toward the new system, or perhaps to a better understanding of the checks and balances being introduced under the new system (e.g the use of three judge panels and public, videotaped hearings) that could increase the cost and perceptibility of corruption.

Third, the 2016 Justiciabarómetro survey finds substantial turnover among judges since 2008, which may bode well for reforms. Current judges may feel more comfortable with the NCJS because most—roughly two thirds—were appointed to their positions around the time or sometime after the reforms were approved in 2008. The number of judges that had less than two years experience in their position more than quadrupled from 6% in 2010 to roughly one in four in 2016. The number of judges who have been in their current position for more than 10 years decreased from 36% in 2010 to less than a quarter in 2016. This represents a substantial amount of turnover on the bench, and may factor heavily in the willingness among judges to adapt to the new frameworks and procedures introduced by the New Criminal Justice System.

In short, the 2016 Justiciabarómetro survey provides a benchmark for evaluating views of Mexico's New Criminal Justice System from the bench and finds that there is surprisingly

²⁵ The number of judges who strongly agreed with this statement appears to have roughly doubled from the 19% who agreed in 2010, and the number of judges who strongly disagree dropped from 8% to about 2%.

strong support for recent reforms among judges. These data are reassuring because anecdotal accounts tend to focus primarily on the criticisms of individual judges and other legal actors with regard to the functioning of the new system, often emphasizing ways that the accusatory process favors the rights of the accused at the supposed expense of victims rights. These findings are also important because they dispel claims that one of the obstacles to reform is that judges and other judicial sector operatives are largely opposed to the new adversarial system. To the contrary, judges appear to be largely conscious and supportive of the benefits of reforms to Mexican criminal procedure, which arguably bodes well for the future of reform efforts over the long term.

V. POLICY RECOMMENDATIONS

The magnitude of the changes Mexico has undertaken to reform its judicial system is enormous, and the potential implications of this reform effort could yield major improvements over the coming years. It is remarkable and important that the reform has enjoyed generally strong support from all major parties, and there is an apparent consensus in favor of the reforms among key operators of the judicial system. That said, there is also real potential for Mexico's judicial reform effort to disappoint, particularly if tangible results are slow to materialize in terms of greater judicial efficiency and effectiveness. Thus, it will be important for authorities at the federal and subnational level to continue to work to strengthen the administration of justice in Mexico, and also to take pains to monitor and evaluate the results of these efforts to demonstrate the pace of progress and identify areas for improvement. In keeping with previous Justice in Mexico reports on judicial reform in Mexico, we offer the following four recommendations for the Peña Nieto administration, the Mexican Congress, and supporters of judicial reform in an effort to help achieve continued progress toward these goals.

A. The Institutionalization of Change

The new system arguably draws from a very different legal tradition than the one to which Mexican judicial system professionals are accustomed. Because adversarial systems are more typically found in common law systems, Mexico is venturing into new territory where the principles and mechanisms for achieving justice are somewhat different. Given Mexico's civil law tradition, judicial decisions will continue to be heavily determined by established legal codes, and less so by precedent-setting decisions in case law. Moreover, as noted above, because the new system will rely on a uniform code of criminal procedure at the national level and in all 32 state level judicial systems, the new system combines elements of the unitary and federal model of governance that could result in certain tensions and contradictions. For example, despite the uniform code of criminal procedure, state criminal codes continue to have different classifications for some crimes, which means that certain cases and sentences will be handled differently in certain states. What this implies is uncertain.

What is clear is that the new criminal justice system will require further modifications and improvements, which may be difficult to achieve because it will require a level of political

consensus at the federal level that may not exist when needed. Arguably, the political negotiation of Mexico's recent judicial reforms might not have been possible if not for the widespread perception of a severe public security crisis. As the urgency of Mexico's security crisis diminishes over time, it could become much more difficult for politicians and reformers to make changes to the uniform code of criminal procedure that will allow for continued refinement of the system. While some changes will surely be made over the next few years, the Mexican Congress should act now to establish an 8-year deadline for a comprehensive review of the National Code of Criminal Procedure in 2024, at which point jurists and legislators should work together to make revisions and modifications to address problems of implementation or performance at the national or state level. Such a deadline would cut across administrative terms, and would bind the federal and state governments to revisit the possibility of major constitutional changes that would be required in order to consolidate the reforms.

B. The Professionalization of the Judicial Sector

To be sure, the primary champions of justice and judicial system improvements are those who operate the system: judges, prosecutors, public defenders, police, technical staff, and other judicial system operatives. The new system is designed to challenge these actors by introducing checks and balances, and pitting interest against interest. Without dedicated measures and resources to increase their professional capacity, they will not be able to stand up to the test. Specifically, it will be important to ensure that judges, prosecutors, and public defenders continue to receive the necessary training to function in their new roles in the criminal justice system. As federal and international funding for such training diminishes over time, law schools and professional associations will need to take on greater responsibility in this regard. The federal and state governments can help to promote the professionalization of the entire judicial sector by beginning to establish incentives for legal professionals to acquire the necessary training and continuing education to properly operate within the oral, adversarial system. For example, the Mexican Congress or state legislatures could mandate that all judges, prosecutors, and public defenders must obtain a specific training to practice law under the new system or a specified number of hours of continuing education each year. To facilitate such training and continuing education, the Mexican government should direct funding to establish a system of accredited university programs that cover relevant aspects of oral, adversarial litigation, and offer government scholarships to support professionals and students who participate in such programs.

C. Monitoring Judicial System Performance

It will be necessary to monitor and evaluate the progress of judicial reform efforts over the long term to identify areas for improvement, and advocate for the necessary policy and administrative changes to achieve the fair and effective administration of justice. In this regard, government officials, judicial system professionals, and civil society will need to collaborate in providing and analyzing the necessary information to ensure that the criminal justice system continues to improve. In the United States, for example, the wave of rights-based criminal justice sector advances of the 1960s—such as *Miranda v. Arizona*—were followed by federal legislation and funding through the 1968 Law Enforcement

Administration Act (LEAA), which provided support for continued monitoring and improvement of judicial system functioning through the Bureau of Justice Statistics, the National Institute of Justice, and other government agencies. At the same time, the 1950s and 1960s brought important efforts by lawyers to establish standards for professional practice and ethics, including the introduction of mandatory bar exams and continuing education for attorneys. These specific steps may not be the right ones of Mexico today, but they illustrate the kinds of measures that might help to bolster Mexico's new rights-based, adversarial model of criminal justice that has begun to take root. The Mexican government agencies—such as the SETEC within the Interior Ministry or the Instituto Nacional de Ciencias Penales (INACIPE) within the Attorney General's Office—to generate and disseminate indicators of judicial system performance, and to provide grants to universities, research institutes, and nongovernmental organizations that can assist in the evaluation and assessment of the new criminal justice system.

D. Continuing International Support for Judicial Reform in Mexico

Lastly, as Mexico's security situation improves, current international efforts to strengthen the rule of law in Mexico will no doubt lose focus and shift to other priorities. However, it will be important for U.S. government agencies, private foundations, and international funding organizations to sustain their commitment to advancing criminal justice sector reform in Mexico. For one, the transformation of the Mexican criminal justice system will be a long term enterprise, perhaps taking as long as a generation to take hold. There will be a need for resources and new ideas to continue the progress that has been made so far. Investments in improving the Mexican criminal justice system will likely need to shift from the current emphasis on infrastructure, capacity building, and training to policy innovation and monitoring to help improve the system over time. For example, there will be a need to provide funding to support and incentivize legal watchdog organizations to advocate on the rights of victims, prisoners, and even operators in the criminal justice system. There will also be a need for support and protections of whistle blowers who call out illegal behavior on the part of government officials, including but not limited to legal representation or even political asylum. In this regard, the U.S. Congress should continue to support the efforts of USAID and other government agencies that have helped to advance the cause of judicial reform in Mexico. Also, international foundations should work to support non-profit organizations working in the field of judicial reform and human rights law, even after it becomes unfashionable to do so.

VI. CONCLUSIONS

Mexico's recent efforts to overhaul its criminal justice system constitute a major endeavor that lacks precedent in the country's recent history. Indeed, as the second largest country in the region, Mexico's transition to the adversarial model of criminal arguably constitutes the most substantial judicial sector reform adopted in the Americas in nearly a century. In less than eight years, tens of millions of Mexicans gained access to new legal rights and protections that were previously absent or impaired under the country's traditional inquisitorial model. In the long run, proponents believe that these newfound rights will help to protect against serious

problems that are presently pervasive in Mexico, including arbitrary arrest, prolonged pretrial detention, forced confessions, falsification of evidence, wrongful conviction, systemic corruption, and even torture and other human rights abuses by police, prosecutors, and prison officials.

Of course, no reform is a cure-all, and substantial further efforts will be needed to achieve these potential benefits. Moreover, in the seemingly unbearable course of the long run, the transition to Mexico's New Criminal Justice System will undoubtedly bring unexpected challenges and failures. Mexico is one step closer to reaching a more just society, but its path will no doubt remain long, steep, and sometimes rocky. Thus, the adoption of the New Criminal Justice System should not be seen as the end of the road. It is, however, a major crossroads on what will almost certainly prove to be a generation-long journey to improving the administration of justice in Mexico. The United States and others in the international community have played an important role as a partner on this journey and should continue to do so, as there are major benefits to strengthening the culture and rule of law in Mexico moving forward. Almost certainly, the theoretical benefits of the New Criminal Justice System will be lost in practice if the Mexican government fails to direct adequate attention and resources to the continued preparation, professionalization, and oversight of its judicial sector.



Justice in Mexico (www.justiceinmexico.org) works to improve citizen security, strengthen the rule of law, and protect human rights in Mexico. We generate cutting edge research, promote informed dialogue, and work to find solutions to address these enormously complex issues. As a U.S.-based initiative, our program partners with key stakeholders, experts, and decision makers, lending international support to help analyze the challenges at hand, build consensus about how to resolve them, and foster policies and programs that can bring about change. Any opinions expressed here are those of the authors and not necessarily those of the University of San Diego or our sponsoring organizations.