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DRUG VIOLENCE AND CONSTITUTIONAL REVISIONS: MEXICO'S 2008 CRIMINAL JUSTICE REFORM AND THE FORMATION OF RULE OF LAW

INTRODUCTION

[C]omo trabajadores de la información queremos que nos expliquen qué es lo que quieren de nosotros, qué es lo que pretenden que publiquemos o dejemos de publicar, para saber a qué atenernos. Ustedes son, en estos momentos, las autoridades de facto en esta ciudad, porque los mandos instituidos legalmente no han podido hacer nada para impedir que nuestros compañeros sigan cayendo, a pesar de que reiteradamente se los hemos exigido. Es por ello que, frente a esta realidad inobjetable, nos dirigimos a ustedes para preguntarles, porque lo menos que queremos es que otro más de nuestros colegas vuelva a ser víctima de sus disparos.¹

On September 16, 2010, a group of hit men open fired on a car carrying Luis Carlos Santiago, a twenty-one year old photojournalist for the Chihuahuan newspaper *El Diario*.² Santiago died immediately, becoming yet another casualty of the ongoing drug violence in Mexico that claimed more than 22,000 lives between 2006 and 2010.³ Following

1. Editorial, *¿Qué quieren de nosotros?* [*What Do You Want from Us?*], EL DIARIO (Sept. 18, 2010), <http://www.diario.com.mx/notas.php?f=2010/09/18&id=6b124801376ce134c7d6ce2c7fb8fe2f#> (Mex.).

As journalists we want you to explain what it is you want from us, what you will let us publish, and what you will not let us publish, so we can know what to expect. You are, in these moments, the de facto authorities in this city, because the efforts of the legal system cannot stop our partners from falling, regardless of our repeated requests. That is why, faced with this undeniable reality, we come to you, to prevent yet another one of our colleagues from becoming a victim of your bullets.

Id.

2. Rubén Villalpando & Gustavo Castillo, *El auto en que fue asesinado fotógrafo en Juárez era de visitador de la CEDH* [*The Car in Juárez in which the Photographer was Murdered Belonged to the Inspector for the CEDH*], LA JORNADA (Mexico City), Sept. 18, 2010, at 7; *Ataca grupo armado a dos fotógrafos de 'El Diario' de Juárez; muere uno* [*Armed Group Attacks Two Photographers from 'El Diario' of Juárez; One Dies*], LA JORNADA EN LÍNEA, Sept. 16, 2010, <http://www.jornada.unam.mx/ultimas/2010/09/16/ejecutan-a-reportero-graphico-de-el-diario-de-juarez> (Mex.).

3. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-837, MÉRIDA INITIATIVE: THE U.S. HAS PROVIDED COUNTERNARCOTICS AND ANTICRIME SUPPORT BUT NEEDS BETTER PERFORMANCE MEASURES 1 (2010) [hereinafter GAO REPORT].

Santiago's funeral, *El Diario* published an emotional plea on September 18 asking for a truce between organized crime leaders and the media (see above).⁴ Santiago's death represents a small example of the brutal violence associated with Mexico's seemingly endless drug war, which some have begun to consider "civil war."⁵

While intermittent drug violence has existed in Mexico for quite some time, since 2006 violent acts have "passed the tipping point to become a genuine threat to national security and democratic governance."⁶ This extreme rise in drug related violence is paired with an ineffective "police-justice-regulatory system,"⁷ creating strong public distrust of law enforcement throughout Mexico.⁸ As a direct result of Mexico's ineffective criminal justice system, impunity rates for all reported crimes have risen to approximately ninety-eight percent.⁹ Accordingly, in 2008, President Felipe Calderon passed a series of constitutional amendments aimed at reforming the Mexican criminal justice system through the implementation of accusatorial and oral criminal proceedings, similar to those employed in the United States.¹⁰ Ideally, these amendments would create a more transparent and efficient criminal justice system, capable of establishing "rule of law."¹¹ However, reform implementation has been slow moving.¹² Moreover, while the reform provides for a restructuring of the criminal system generally, it retains multiple special provisions for suspects accused of participating in organized crime.¹³ These

4. *¿Qué quieren de nosotros?*, *supra* note 1.

5. Ronald F. Wright, *Mexican Drug Violence and Adversarial Experiments*, 35 N.C. J. INT'L L. & COM. REG. 363, 363 (2010).

6. John Bailey, *Combating Organized Crime and Drug Trafficking in Mexico: What are Mexican and U.S. Strategies? Are They Working?*, in SHARED RESPONSIBILITY: U.S.-MEXICO POLICY OPTIONS FOR CONFRONTING ORGANIZED CRIME 327, 327-28 (Eric L. Olson et al. eds., 2010) [hereinafter SHARED RESPONSIBILITY].

7. *Id.* at 327.

8. *Id.*

9. COMM. ON FOREIGN RELATIONS, 111TH CONG. 2D SESS., COMMON ENEMY, COMMON STRUGGLE: PROGRESS IN U.S.-MEXICAN EFFORTS TO DEFEAT ORGANIZED CRIME AND DRUG TRAFFICKING, 5 (Comm. Print 2010) ("In other words, about 98% of perpetrators have not been brought to justice.")

10. See Constitución Política de los Estados Unidos Mexicanos [C.P.][Constitution], *as amended*, Diario Oficial de la Federación [DO], 18 de Junio de 2008 (Mex.).

11. Steven E. Hendrix, *The Mérida Initiative for Mexico and Central America: The New Paradigm for Security Cooperation, Attacking Organized Crime, Corruption and Violence*, 5 LOY. U. CHI. INT'L L. REV. 107, 111 (2008).

12. Bailey, *supra* note 6, at 328.

13. C.P. arts. 16, 18 (Mex.).

exceptions preserve many of the systemic flaws that have historically undermined rule of law in Mexico.¹⁴

This Note argues that in order to establish an effective rule of law, Mexico must significantly increase public confidence in its criminal justice system through the actual implementation of a transparent criminal justice system that respects individual liberties. This must be accomplished through the formation of an independent and transparent judiciary and a well-respected and empowered defense bar within an accusatorial procedural framework. While aspects of the 2008 constitutional amendments provide a foundation for this transition, the amendments also include provisions that limit the level of due process afforded to suspects involved in organized crime. Accordingly, without an efficient and successful implementation of the provisions that seek to establish an accusatory criminal justice system, the 2008 amendments threaten to further decrease rule of law in Mexico. Part I of this Note will provide a background of Mexico's criminal justice system prior to 2008. Part II will provide an analysis of the relevant 2008 amendments. Part III will discuss the implementation of the amendments and their effect on rule of law.

I. A MIXED SYSTEM

Generally speaking, the foundations of the Mexican criminal justice system were built upon the civil law traditions of Europe, particularly those of Spain.¹⁵ These civil law traditions focused on an inquisitorial model¹⁶ of criminal procedure that relied on an instructional judge to lead

14. See Jorge Rivero Evia, *¿Aseguramiento o Garantismo? El Derecho Penal del Enemigo en la Constitución Mexicana* [Assurance or Guarantee? Criminal Law and the Enemy in the Mexican Constitution], 27 REVISTA DEL INSTITUTO DE LA JUDICATURA FEDERAL 253 (2009) (arguing the 2008 constitutional amendments operate in a manner in which two systems are created, one for "citizens" and another for "enemies." Enemies are categorized by the constitution as those suspected of the most violent crimes or participation in organized crime. Those categorized as "enemy" suspects have significantly lessened human rights protections compared to "citizens").

15. David A. Shirk, *Justice Reform in Mexico: Change and Challenges in the Judicial Sector*, in SHARED RESPONSIBILITY, *supra* note 6, at 212–14.

16. There are three key aspects that highlight the difference between adversarial and inquisitorial justice systems:

1. inquisitorial systems have a far greater integration of the roles of the investigators, prosecutors and decision-makers than adversarial systems do;
2. the function of an inquisitorial system at all stages is to inquire into the truth of an allegation whereas the function of an adversarial criminal trial is to test whether the prosecutor can prove the specific allegation it has made; and

the investigation and to make determinations of guilt or innocence.¹⁷ However, following the Mexican Revolution, the 1917 Constituent Congress—the authors of the modern Mexican Constitution—strongly criticized the inquisitorial method for creating corrupt and arbitrary verdicts.¹⁸ Accordingly, the Constitution of 1917 abandoned many aspects of the traditional inquisitorial system and adopted a system more reminiscent of accusatorial models.¹⁹ Interestingly, however, the majority of these changes never took form²⁰ and the federal government did not adopt a new criminal code until 1931.²¹ This new criminal code was extraordinary in application because of its lack of adherence to both the 1917 Constitution and traditional notions of inquisitorial or accusatory procedure.²² Instead, the system employed inquisitorial procedures during the investigative stage, similar to those in existence prior to the implementation of the 1917 Constitution, with accusatorial procedures during final court proceedings, which served only symbolic significance.²³ This mixed procedural system blurred the division between judge and prosecutor, thereby requiring the accused to argue his case in front of an opposing party rather than a neutral and detached magistrate.²⁴ With limited exceptions, this system of criminal procedure remains in effect

3. inquisitorial system decision-makers tend to rely on information in a court file assembled without the significant limits imposed by evidentiary rules.

David M. Paciocco, *Understanding the Accusatorial System*, 14 CAN. CRIM. L. REV. 307, 308 (2010).

17. Shirk, *supra* note 15, at 214.

18. Diario de los Debates del Congreso Constituyente [Record of the Constitutional Congressional Debates], No. 12, at 263, 1 de Diciembre de 1916 (Mex.). In particular, the Congress called for a reform that would limit the excessive power of state judges, which the Congress viewed as a threat to justice and individual rights. *Id.* With respect to criminal justice, the Congress stated that while the 1857 Constitution included numerous procedural safeguards for the accused, in practice these safeguards were ignored leaving defendants subject to the “arbitrary and despotic discretion of the judge and even his secretary and clerks.” *Id.*

19. Carlos Rios Espinoza, *Redesigning Mexico's Criminal Procedure: The State's Turning Point*, 15 SW. J.L. & TRADE AM. 53, 56 (2008).

20. Espinoza, *supra* note 19, at 56.

21. Shirk, *supra* note 15, at 214. This new code was established under the *Código Federal de Procedimientos Penales* (Federal Code of Criminal Procedure) (“FCCP”). *Id.*

22. Espinoza, *supra* note 19, at 56–57.

23. *Id.* The accusatorial aspects of the trial phase of the criminal justice system, post 1931, lacked real significance because in most circumstances, all arguments would have already been made and decided upon during the investigative stage. *Id.* at 60. For more information, see *infra* Part I.

24. Espinoza, *supra* note 19, at 57.

throughout Mexico, where inquisitorial procedures continue to limit the due process rights of defendants.²⁵

What sets Mexico's procedural system apart from the majority of modern legal systems is the almost plenary power and expansive role of the public prosecutor.²⁶ Throughout the investigative process, the public prosecutor enjoys an almost unfettered freedom to collect and admit into trial any evidence he or she wishes.²⁷ Additionally, the public prosecutor often works unopposed by the defense bar during court proceedings, adding to the significant influence he or she has over convictions.²⁸ In fact, the system is such that "the prosecution evidence presented to the court has, by legal mandate, greater validity than the defense evidence so long as the prosecutors have complied with the certain formalities."²⁹

To better understand the role of the public prosecutor, an understanding of Mexican criminal procedure is necessary. Generally, and with limited exceptions, the procedural system is broken down into five phases: (1) *averiguación previa* (preliminary inquiry); (2) *preinstrucción* (indictment); (3) *instucción* (evidentiary phase); (4) *juicio* (trial); and (5) *sentencia* (sentencing).³⁰

A. *Averiguación Previa*

After a crime has been reported, the public prosecutor will begin a preliminary investigation known as the *averiguación previa*.³¹ During the preliminary investigation, the public prosecutor, with the assistance of the police, will work to compile sufficient evidence to establish the *corpus delicti*.³² During the investigative process, the prosecution collects

25. *Id.*

26. Wright, *supra* note 5, at 371–72.

27. *Id.* at 374.

28. See generally David Brennan, *Mexico's Twin Challenges: Reforming its Criminal Justice System and Combating Drug-Cartel Violence*, 51 ORANGE COUNTY L. 38, 40 (2009) (describing the deficiencies in the Mexican criminal justice system caused by the deference given to the discretion of the prosecutor, and the lack of an empowered defense bar).

29. Miguel Sarré & Jan Perlin, *Mexico*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 351, 352 (Craig M. Bradley ed., 2d ed. 2007). Evidence presented by the prosecutor is considered more credible than evidence presented by the defense due to a rebuttable presumption that the prosecutor objectively gathered evidence while operating in good faith. *Id.* at 387. This presumption, however, is often considered questionable because prosecutors frequently operate under a quota for court remittals. *Id.*

30. Shirk, *supra* note 15, at 220; Espinoza, *supra* note 19, at 58.

31. Shirk, *supra* note 15, at 220.

32. Espinoza, *supra* note 19, at 59. *Corpus delicti* is sufficient evidence to suggest a crime has actually been committed. *Id.*

evidence without supervision, acting both as the investigative authority and the magistrate.³³ This is due to an automatic rebuttable presumption that the prosecution's investigation is conducted in good faith and that the fruits of its investigation are credible and constitutionally valid.³⁴ This presumption creates a nontransparent investigative stage, open to abuse and corruption. The potential for abuse during the preliminary investigation has led many critics to "charge that the power and autonomy of the public prosecutor at this stage . . . is one of the major contributors to the abuses found in the traditional Mexican system, including forced confessions and mishandling of evidence."³⁵

During the preliminary investigation, the Mexican Supreme Court "has authorized the public prosecutor to issue orders to appear before him/her (*orden de presentación*)" for both suspects and witnesses.³⁶ While not related to the power to arrest, failure to appear will result in an arrest warrant.³⁷ Thus, in the eyes of the public, an order to appear operates identically to an arrest warrant.³⁸ Following the order to appear, the prosecutor may petition a judge to place the suspect in *arraigo* (preventative detention).³⁹ *Arraigo*, which occurs before any criminal charges are initiated, is often used as a mechanism of interrogation under the "logic of 'detain first and investigate later.'"⁴⁰ Detention under *arraigo* can range between house arrest⁴¹ and solitary confinement lasting up to eighty days.⁴²

B. *Preinstrucción*

Once the public prosecutor has gathered sufficient evidence to establish *corpus delicti*, he or she will compile the evidence against the suspect in a written dossier to be presented to the judge.⁴³ Because the pros-

33. Sarré & Perlin, *supra* note 29, at 352.

34. *Id.* at 387.

35. Shirk, *supra* note 15, at 220.

36. Sarré & Perlin, *supra* note 29, at 355.

37. *Id.* at 356.

38. *See id.*

39. *Id.* at 387.

40. Stephanie Erin Brewer, *Structural Human Rights Violations: The True Face of Mexico's War on Crime*, AM. U. HUM. RTS. BRIEF, Winter 2009, at 10.

41. Sarré & Perlin, *supra* note 29, at 356.

42. Shirk, *supra* note 15, at 232; C.P. art. 16 (Mex.). Prior to 2006, *arraigo* was common practice throughout Mexico. Brewer, *supra* note 40, at 10. However, in 2006 the Supreme Court of Mexico ruled that the procedure was unconstitutional. *Id.* Article 16 of the 2008 constitutional amendments overruled the 2006 decision by including a provision that explicitly makes *arraigo* procedures constitutional. Shirk, *supra* note 15, at 232.

43. Espinoza, *supra* note 19, at 59.

ecutor is responsible for decisions of admissibility, all evidence compiled in the dossier is considered to be credible and admissible and is only judicially reviewable upon appeal.⁴⁴ The prosecutor will also determine whether the suspect will be released on bail or detained during trial.⁴⁵ If the suspect is detained, as in the majority of circumstances,⁴⁶ the prosecutor has forty-eight hours to remit the suspect to the custody of the court.⁴⁷ During these forty-eight hours, the prosecutor may interrogate the suspect to compile any remaining evidence.⁴⁸ While the suspect must be alerted of his right to counsel, access to counsel or family members is often denied during the initial forty-eight hour phase under Mexico's interpretation of the "*principio de inmediatez*" ("procedural immediacy principle").⁴⁹ Following the forty-eight hour period, the suspect will be remanded to the court. The court will then examine the evidence gathered by the prosecutor to determine whether there is sufficient evidence to formally charge the suspect.⁵⁰

Before the suspect is formally indicted, the court will conduct a hearing called the *plazo constitucional* (constitutional term) at which time the judge will advise the suspect of his rights, consider the legality of the arrest, appoint defense counsel, and allow the suspect to make a statement.⁵¹ It is important to note, however, that because there is no "fruits of the poisonous tree doctrine" . . . evidence obtained directly as a result

44. Sarré & Perlin, *supra* note 29, at 372.

45. *Id.* at 372–73.

46. Shirk, *supra* note 15, at 221 n.46.

47. *Id.* at 373. Determinations of bail or pre-trial detention are left almost exclusively to secondary legislation, which links the determinations to the gravity of the crime for which the suspect has been accused. *Id.*

48. *Id.* at 364–69.

49. *Id.* at 365. The principle of procedural immediacy, as understood throughout Latin America, states that testimony presented in front of a judge holds greater weight than that given to police or prosecutors. Rep. on the Situation of Human Rights in Mexico, Inter-Am. Comm'n H.R., Report No. 7/100, OEA/Ser.L/V/II.100, doc. 7, rev. 1, ¶ 313 (1998) [hereinafter Human Rights in Mexico], available at <http://www.cidh.org/countryrep/Mexico98en/chapter-4.htm>. The Mexican judiciary, however, has interpreted the principle to create "a presumption that the first or 'most immediate' statement of the defendant after arrest should be given the greatest credibility." Joseph R. Crowley Program & Miguel Agustín Pro Juárez Human Rights Center, Special Report, *Presumed Guilty?: Criminal Justice and Human Rights in Mexico*, 24 *FORDHAM INT'L L.J.* 801, 828 (2001) [hereinafter *Presumed Guilty*]. In particular, statements made without preparation or assistance of counsel will be found the most persuasive at trial. Sarré & Perlin, *supra* note 29, at 365 n.50. Accordingly, the need to gather what is considered to be the most credible form of evidence will justify the denial of counsel during these initial phases of the investigation. *See id.* at 365.

50. Espinoza, *supra* note 19, at 59.

51. Sarré & Perlin, *supra* note 29, at 377.

of a search where the legal formalities are not complied with will be excluded from the trial, but not necessarily the evidence gathered as an indirect product of the illegal search.”⁵² Accordingly, even in the event of an illegal search or arrest, it is probable that the criminal proceedings will still proceed. Once charges are filed, the chance of a guilty verdict is significant considering the substantial weight of the prosecution’s evidence, and the defense’s relatively limited ability to rebut during the pre-instruction phase.⁵³

C. *Instucción*

An *instucción* (evidentiary stage) follows the formal indictment of the suspect.⁵⁴ During this stage, the judge or his staff will review the dossier provided by the prosecution and will hear testimony from witnesses. The defense is also able to present exculpatory evidence and testimony to the judge as well.⁵⁵ While opportunities exist for oral presentation of evidence, in most cases oral testimony will be presented only to the judge’s legal secretary or staff rather than directly to the judge.⁵⁶ Further, the prosecution is not required to present their witnesses for cross-examination; therefore the defense rarely has the opportunity to confront the evidence presented against him or her.⁵⁷ Finally, because of the disjointed and bureaucratic nature of the evidentiary proceedings, which can take years to conclude, suspects are often held in preventative detention for years at a time without receiving a final verdict.⁵⁸

D. *Juicio and Sentencia*

The *juicio* (trial) stage of criminal proceedings is a symbolic formality dating back to the accusatorial system suggested by the 1917 constitution.⁵⁹ During the trial, the prosecution and the defense are allowed to

52. *Id.* at 360. In the United States’ legal system, the “fruits of the poisonous tree” doctrine provides that all evidence gathered as a result of an illegal search or seizure must be excluded. *See Nardone v. United States*, 308 U.S. 338, 341 (1939); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

53. *See Shirk, supra* note 15, at 210 (stating that for cases that go to trial, the conviction rate in Mexico is approximately 85%).

54. Wright, *supra* note 5, at 370–71.

55. Espinoza, *supra* note 19, at 60.

56. Sarré & Perlin, *supra* note 29, at 381.

57. Espinoza, *supra* note 19, at 60.

58. Sarré & Perlin, *supra* note 29, at 377. In 2007, 40% of Mexico’s inmate population consisted of defendants who had not received sentences. EMILY EDMONDS-POLI & DAVID A. SHIRK, CONTEMPORARY MEXICAN POLITICS 308–09 (2009).

59. *See Espinoza, supra* note 19, at 56, 60 (The 1917 constitution addressed issues of “lack of judicial independence, [] opacity and lack of publicity in judicial activities, and

present oral arguments.⁶⁰ These arguments, however, are rarely persuasive because they almost never occur in the presence of the judge and all arguments will have already been adjudicated and presented in the court's dossier.⁶¹ At the conclusion of the arguments, a verdict and sentence will be announced, thus terminating the criminal proceedings.⁶²

Many commentators and human rights groups have cited these procedures as a primary cause for the current disarray of the country's criminal justice system.⁶³ A system without adequate procedural checks, in which the majority of power lies in the hands of a select few individuals, "leaves prosecutors (and police, judges, customs officials, and prison administrators) susceptible to bribery and corruption."⁶⁴ Corrupt practic-

human rights violations." Today, however, hearings are considered mere formalities separate from these fundamental concerns.).

60. *Id.* at 60.

61. *Id.*

62. *Id.*

63. See Gonzalo Reyes Salas, *Guidelines to Reform Mexican Criminal Procedure*, 15 SW. J.L. & TRADE AM. 83, 87–89 (2008) (arguing for a division of the material functions of the public prosecutor's office); Amnesty Int'l, *Mexico: Injustice and Impunity: Mexico's Flawed Criminal Justice System*, at 2, AI Index AMR 41/001/2007 (Feb. 2007) [hereinafter *Injustice and Impunity*], available at <http://www.amnesty.org/en/library/asset/AMR41/001/2007/en/910c403f-d3c5-11dd-8743-d305bea2b2c7/amr410012007en.pdf> (providing case studies to evidence issues within the criminal justice system); see also *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (describing the dangers associated with allowing the prosecutor to act as a magistrate).

64. Wright, *supra* note 5, at 373. In 2005, Lydia Cacho was arrested at the women's shelter she runs in Cancun, Quintana Roo, by judicial police from the public prosecutor's office in the state of Puebla. *Injustice and Impunity*, *supra* note 63, at 3. A journalist and women's rights activist, Cacho was arrested for allegedly defaming the reputation of a powerful executive from the state Puebla. *Id.* While under the custody of her arresting officers, Cacho reported being "at risk of sexual assault and enforced disappearance." *Id.* Two months after the arrest, "audiotapes were leaked to the media . . . [which] reportedly contained a telephone conversation in which the Governor of Puebla State agreed to organize the detention of Lydia Cacho on behalf of the business man" without probable cause. *Id.*

In May 2009, Mexican federal police detained twenty-seven public officials in the state of Michoacán, including several judges, ten mayors, the state prosecutor, and state police officers. Tracy Wilkinson, *10 Mayors, and Other Officials Detained*, L.A. TIMES (May 27, 2009), <http://www.latimes.com/news/nationworld/world/la-fg-mexico-mayors27-2009may27,0,1829460.story>. The state officials were suspected of maintaining ties with powerful drug cartels, including accepting thousands of dollars worth of bribes from the *La Familia* cartel, which operates out of the State of Michoacán and is suspected infiltrating local governments. Ken Ellingwood & Tracy Wilkinson, *Corruption Sweep in Mexico's Michoacán Unravels in the Courts*, L.A. TIMES (Dec. 12, 2010), <http://articles.latimes.com/2010/dec/12/world/la-fg-mexico-michoacan-20101212>. How-

es and general inefficiencies have led to a strong public distrust of the criminal justice system.⁶⁵ The expansive power of the public prosecutor has led to the “public belief that almost all of its actions [are] virtually fool proof in trial.”⁶⁶ According to a public poll conducted in March 2010, when asked how dangerous it would be to help the police in their city, seventy-two percent of Mexicans responded that it would be somewhat to very dangerous,⁶⁷ when asked about confidence in the police, more than one-third of Mexicans stated that they had little to no confidence in the police as an institution.⁶⁸ As a result of public distrust in the criminal justice system, Mexican citizens are often reluctant to turn to the courts, thereby furthering impunity for perpetrators and incentivizing corrupt practices.⁶⁹ Accordingly, public distrust and institutional corruption pose a direct threat to rule of law in Mexico.⁷⁰

II. 2008 AMENDMENTS

Mexico has a long history of drug related activity dating back to bootlegging in the early 1900s.⁷¹ Over the past hundred years, drug trafficking has continued to grow throughout Mexico, and by 1991 Mexican drug trafficking organizations were reportedly responsible for smuggling 300–350 tons of cocaine per year and approximately one-third of all heroin and marijuana into the United States.⁷² The destabilization of the Columbian drug cartels in the 1990s further fueled the Mexican drug trafficking organizations’ rise to power, as trafficking routes shifted away

ever, by December 2010, all but one of the suspects were released, possibly due to the public prosecutor’s unwillingness or incompetence in seeking convictions. *Id.*

65. Wright, *supra* note 5, at 373.

66. Salas, *supra* note 63, at 87.

67. *Percepción Ciudadana Sobre la Seguridad en México [Citizen’s Perception of Security in Mexico]*, CONSULTA MITOFSKY (Apr. 14, 2010), <http://www.consulta.mx/Estudio.aspx?Estudio=seguridad-mexico-mucd>.

68. *Id.*

69. EDMONDS-POLI & SHIRK, *supra* note 58, at 308. (“[C]orruption makes it possible for some to live outside the scope of the law. Once this precedent is set, everyone has an incentive to bypass or simply ignore the law, making it essentially irrelevant and society chaotic.”).

70. See Robert H. Tembeckjian, *Point of View: Judicial Reform and the Test of Time*, N.Y. ST. B. J., June 2010, at 43 (“Public confidence in the independence, integrity, impartiality and high standards of the judiciary . . . is essential to the rule of law.”).

71. Luis Astorga & David A. Shirk, *Drug Trafficking Organizations and Counter-Drug Strategies in the U.S.-Mexican Context* in SHARED RESPONSIBILITY, *supra* note 6, at 32–33 (Eric L. Olson et al. eds., 2010). (During the first half of the twentieth century, Mexican organized crime and smuggling rings created the foundation for drug trafficking as they smuggled marijuana, opiates, and alcohol into the United States.).

72. *Id.* at 33.

from the Caribbean and into Central America and Mexico.⁷³ Up until the past ten years, however, Mexico's drug trafficking organizations operated with relatively little violence due in part to a "working relationship" that existed between the drug trafficking organizations and the Institutional Revolutionary Party ("PRI"), which maintained a one party system in Mexico for over seventy years.⁷⁴ During this period, drug trafficking organizations were said to have operated with little resistance from the Mexican government.⁷⁵ Accordingly, this "'live and let live' approach . . . kept relative public peace and a semblance of law and order through the containment (rather than the destruction) of drug syndicates."⁷⁶

However, following the presidential victory of the rightwing National Action Party ("PAN") in 2000, and particularly President Felipe Calderon's victory in 2006, Mexico's attitude toward drug trafficking organizations has changed significantly.⁷⁷ Under increased political pressure from both Mexico and the United States, tens of thousands of Mexican troops were deployed across Mexico in an attempt to disrupt trafficking activity.⁷⁸ Faced with fewer trafficking routes, Mexico's drug organizations began to engage in a brutal turf war, with frequent attacks on the Mexican Army, Federal Police, rival drug trafficking organizations, and the public.⁷⁹ Since President Calderon's election in 2006, drug violence

73. Benjamin Kai Miller, *Fueling Violence along the Southwest Border: What More Can be Done to Protect the Citizens of the United States and Mexico from Firearms Trafficking*, 32 HOUS. J. INT'L L. 163, 174–75 (2009). Throughout the 1970s and 80s, the majority of cocaine in the United States was supplied by the Columbian Medellín and Cali cartels, which would smuggle drugs into the United States via the Gulf of Mexico. EDMONDS-POLI & SHIRK, *supra* note 58, at 311. However, after the death of cartel leader Pablo Escobar, and significant US interdiction efforts in the Gulf, power began to shift into the hands of the Mexican cartels who were able to bring cocaine from the Andean regions of South America, up through Central America, and into the United States via Mexico. *Id.*

74. JUNE S. BEITTEL, CONG. RESEARCH SERV., RL 40582, MEXICO'S DRUG-RELATED VIOLENCE I (2009).

75. *Id.* at 2.

76. Francisco E. González, *Mexico's Drug Wars Get Brutal*, 108 CURRENT HIST. 72, 73 (2009).

77. The 2000 presidential elections in Mexico marked the end of the seventy-one year rule of the Institutional Revolutionary Party ("PRI"), Mexico's left leaning political party. Astorga & Shirk, *supra* note 71, at 34, 40. Many commentators note a significant amount of cooperation between the PRI and drug trafficking organizations, which was disrupted by President Vicente Fox's 2000 win. BEITTEL, *supra* note 74, at 2–3; *see also* Astorga & Shirk, *supra* note 71, at 32–40 (describing the rise of Mexican drug trafficking organizations over the past one hundred years).

78. Brewer, *supra* note 40, at 7.

79. BEITTEL, *supra* note 74, at 3. In July 2010, drug violence in northern Mexico increased in intensity when a drug trafficking organization killed numerous police and

in Mexico has risen to such a high level that it has become a significant threat to the security of Mexico and the United States.⁸⁰

Accordingly, in 2008, the Mexican legislature passed a series of constitutional reforms that restructured the criminal justice system in order to target drug trafficking organizations and increase rule of law.⁸¹ These legislative reforms require all Mexican states to adopt a new system of criminal procedure, which focuses on oral/adversarial advocacy, accusatory principles, neutral and detached magistrates, and a more empowered defense bar.⁸² In theory, all of the states will be required to adopt this new procedural system before 2016.⁸³

The constitutional amendments attack drug trafficking organizations from multiple angles. Primarily, the amendments attempt to decrease corruption within the criminal justice system through the implementation of numerous procedural safeguards and a lessening of the plenary power of the public prosecutor.⁸⁴ Simultaneously, however, by constitutionalizing preventative detention and other questionable investigative techniques, the amendments significantly restrict the rights of those accused of participating in organized crime.⁸⁵ Thus, while the amendments include important advances towards establishing rule of law, they also contain “serious setbacks for human rights, publicized by the government as

medical workers by setting off a car bomb in Juarez, Mexico, just south of El Paso, Texas. William Booth, *Ciudad Juarez Car Bomb Shows New Sophistication in Mexican Drug Cartel's Tactics*, WASH. POST (July 22, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/21/AR2010072106200.html?sid=ST2010072106244>. Before triggering the bomb with a cell phone, “the assailants drew police and medical workers to the scene by leaving a bound, wounded man in a police uniform near an intersection and then calling in a false report that an officer had been shot.” *Id.*

80. LUGAR, *supra* note 9, at 2–3; *see also* Astorga & Shirk, *supra* note 71, at 31; Bailey, *supra* note 6, at 327.

81. Wright, *supra* note 5, at 363–64; C.P. (Mex.) The exact genesis of the reforms is debated. Significant parallels exist that suggest rises in drug violence and organized crime created a scenario in which reformation was necessary to establish a stronger rule of law. *See* Wright, *supra* note 5, at 380–84. However, other possible motivations exist including democratic governance, *id.* at 379–80, and pressure from the United States. *See* Evia, *supra* note 14, at 277–78; Luz E. Nagle, *On Armed Conflict, Human Rights, and Preserving the Rule of Law in Latin America*, 27 PENN ST. INT'L L. REV. 1, 19–21 (2008).

82. C.P. art. 20 (Mex.).

83. *Id.* art. segundo transitorio [second transitional].

84. *See id.* arts. 19–21; *see also* Shirk, *supra* note 15, at 222–23 (explaining the effect of the constitutional amendments).

85. *See* C.P. arts. 16, 18 (Mex.). The amendments also combat organized crime through the restructuring of the police force and the nation's investigative agencies. Shirk, *supra* note 15, at 232–33.

necessary measures in the war on crime.”⁸⁶ Aspects of these conflicting approaches will be discussed in turn.

Revisions to Article 20 of the constitution provide that, “criminal proceedings shall be accusatory and oral,” thus establishing a foundation to decrease the power of the public prosecutor.⁸⁷ Under the revised article, the entirety of the trial must take place in front of a judge “who is unfamiliar with the case . . . and the presentation of arguments and evidence will be open to the public, adversarial, and oral.”⁸⁸ Accordingly, the presumption of credibility afforded to the prosecution’s evidence will be abandoned, replaced by a system more reminiscent of the United States where decisions on admissibility are made by a neutral and detached magistrate (*juez de garantía*).⁸⁹ Further, decisions on admissibility will no longer take place *ex parte*.⁹⁰ Instead, both parties will have equal opportunities to orally argue admissibility in front of a *juez de garantía*.⁹¹ To ensure the neutrality of the judiciary, the amendments split the judicial process between multiple judges. After a *juez de garantía* rules on the admissibility of evidence, the case is handed to a trial judge (*juez de juicio oral*) who is unfamiliar with the investigative phase, and thus will only consider the admissible evidence presented through oral arguments by each party.⁹² At the termination of the trial, the *juez de juicio oral* will decide on the guilt or innocence of the suspect, and a third judge (*juez de ejecución de sentencia*) will preside over the administration of the sentence.⁹³ With limited exceptions, all of the above proceedings “will be tried in an open court.”⁹⁴

If implemented, the revised Article 20 would provide numerous advantages toward combating organized crime and corruption, and thus, establishing rule of law. Under the current procedural regime, the public prosecutor and judge’s autonomy enables potential corruption of officials within the criminal justice system, thus leading to a system of impunity in which organized crime participants may circumvent the law by bribing

86. Brewer, *supra* note 40, at 10.

87. C.P. art. 20 (Mex.).

88. *Id.* art. 20 § A.IV.

89. Shirk, *supra* note 15, at 227.

90. C.P. art. 20 § A (Mex.) (“The presentation of arguments and evidence will be open to the public, adversarial, and oral.”).

91. *Id.* art. 20 § A.V.

92. Shirk, *supra* note 15, at 227.

93. *Id.* at 17.

94. C.P. art. 20 § B.V (Mex.). Exceptions include reasons of “law, national security, public security, protection of victims, witnesses and minors, where classified information will be revealed, or when the court finds other fundamental reasons to justify an exception.” *Id.*

or threatening officers of the court.⁹⁵ Accordingly, by introducing more players into the procedural process, the revisions “offer more actors the power to influence the outcome at more stages of the criminal process.”⁹⁶ In particular, the introduction of multiple judges will counterbalance the power of each individual, and “enhance the distinction between the perspectives and function of the prosecutor and the judge.”⁹⁷ Ideally, by providing a system of checks, the constitutional amendments will be effective in combating the systematic failures of the criminal justice system that are responsible for creating corruption and decreasing rule of law in Mexico.⁹⁸

Further, the framework implementing oral and public trials will help create transparency and legitimacy in court proceedings, therefore ensuring a presumption of innocence.⁹⁹ The current inquisitorial system lacks a presumption of innocence for the defendant, due in part to the high level of evidence required of the prosecution during the pre-instruction phase, as well as the abundance of pretrial detentions.¹⁰⁰ However, by requiring adversarial arguments on the admissibility of evidence, and by limiting the use of pre-trial detention, the amendments help create a system in which guilty until proven innocent applies.¹⁰¹

95. *Injustice and Impunity*, *supra* note 63, at 7.

96. Wright, *supra* note 5, 378.

97. *Id.* at 377.

98. See EDMONDS-POLI & SHIRK, *supra* note 58, at 314–15 (Arguing that corruption in Mexico “may be driven by larger, systematic factors, rather than by intrinsically held beliefs and value systems”; and therefore, “Mexico’s ability to combat corruption will no doubt depend on its ability to reduce the relative costs for those seeking to subvert the law, both by better compensating public officials and by increasing the probability of punishment for those who make or take bribes.”).

99. Wright, *supra* note 5, at 381; see also Mérida Initiative to Combat Illicit Narcotics and Reduce Organized Crime Authorization Act of 2008, H.R. 6028, 110th Cong. § 121 (2008) (“It is the sense of Congress that, as a critical part of a joint, comprehensive security, counternarcotics, and organized crime initiative, the United States should support . . . anti-corruption, transparency, and human rights programs to ensure due process and expand a culture of lawfulness in Mexico.”).

100. EDMONDS-POLI & SHIRK, *supra* note 58, at 308.

101. See Shirk, *supra* note 15, at 223–27.

[M]ore than 40% of Mexico’s prison population (some 90,000 prisoners) has consisted of prisoners waiting in jail for a final verdict. . . . Under the new reforms, pre-trial detentions are intended to apply only in cases of violent or serious crimes, and for suspects who are considered a flight risk or a danger to society. Also, the new reforms require those held in pre-trial detention to be housed in separate prison facilities (away from convicted criminals), . . . for a maximum of two years without a sentence.

Id.

In conflict with the due process assurances of Article 20, Articles 16 and 18 create a “state of exception,”¹⁰² which limits the constitutional rights of persons suspected of involvement with organized crime.¹⁰³ Article 16 solidifies the practice of *arraigo*, by explicitly making the practice constitutional in cases of organized crime.¹⁰⁴ Accordingly, under the revised constitution, law enforcement may detain a person suspected of participation in organized crime for up to eighty days when the detention facilitates “the success of the investigation, the protection of people or legal property, or when there is a founded risk that the accused will otherwise escape justice.”¹⁰⁵ The eighty-day period is significantly longer than the limits on preventative detention in all other Western democracies.¹⁰⁶

Similar to Article 16, Article 18 further marginalizes organized crime suspects from all other criminals. The article provides that persons suspected of organized crime can be placed in special detention facilities located far from their homes.¹⁰⁷ Further, Article 18 authorizes “competent authorities” to restrict the communications of all persons suspected

102. A “state of exception” can be defined as a limitation placed on certain individuals’ constitutional rights in order to allow the state to combat an extraordinary emergency. Richard J. Wilson, *Supporting or Thwarting the Revolution? The Inter-American Human Rights System and Criminal Procedure Reform in Latin America*, 14 SW. J.L. & TRADE AM. 287, 293–94. A state of exception is generally limited to “time[s] of war, public danger, or other emergency that threatens the independence or security of a State.” Organization of American States, American Convention on Human Rights art. 27, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

103. C.P. arts. 16, 18 (Mex.); Brewer, *supra* note 40, at 10. Revised Article 16 defines organized crime, for the purpose of the constitution, as “an organization made of three or more people, with the intent of committing crimes in a permanent or repetitive manner.” C.P. art. 16 (Mex.).

104. Prior to the amendments, the practice was already common among prosecutors. Brewer, *supra* note 40, at 10.

105. C.P. art. 16 (Mex.).

106. Letter from José Miguel Vivanco, Exec. Dir. Americas Div., Human Rights Watch, to President Felipe Calderón, Mex. (Mar. 6, 2008), *available at* http://hrw.org/english/docs/2008/03/06/mexico18221_txt.htm.

The American Convention on Human Rights (Article 7, ACHR), the International Covenant on Civil and Political Rights (Article 9, ICCPR), and the European Convention on Human Rights (Article 5, ECHR) all 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.

Id.

107. C.P. art. 18 (Mex.).

or convicted of organized crime participation.¹⁰⁸ It is important to note that the restrictions created by the article apply equally to people simply accused of crimes and those who have actually been found guilty. Accordingly, the two articles taken together create a criminal justice system that prejudicially differentiates between citizens, without taking into consideration a presumption of innocence.

While the second transitory article of the revisions requires the thirty-one Mexican states to implement the reform by 2016, the implementation has been slow. Prior to the reform, six states implemented similar revisions to their state constitutions, yet in practice these states have not implemented any significant criminal procedure changes.¹⁰⁹ In particular, a lack of public trust, funding, and political will has hindered the process of judicial reform among the states.¹¹⁰ In Chihuahua, the state that is furthest along in establishing oral trials, implementation of the reform has been significantly hindered by drug violence.¹¹¹ This violence is so intense that many established lawyers and judges have either been killed or have fled in fear, leaving the implementation to be administered by a less educated and younger generation of jurists.¹¹² In fact, the Mexican newspaper, *El Universal*, reported that between 2008 and July 2010, various organized crime groups have been responsible for killing ninety-eight members of the Chihuahua State Attorney General's Office who had received training in the implementation of the procedural reforms.¹¹³ Accordingly, citing the public's adverse perception of the reforms, the Attorney General of Mexico, Arturo Chávez, stated that there have been failings in the states where the reforms have been initiated.¹¹⁴

108. *Id.*

109. Shirk, *supra* note 15, at 236. Chihuahua, Mexico State, Morelos, Oaxaca, Nuevo León, and Zacatecas adopted similar reforms prior to 2008, and in 2007, Chihuahua held its first oral trial. *Id.* Simultaneously, however, Aguascalientes, Baja California Sur, Campeche, Chiapas, Coahuila, Colima, the Federal District, Guerrero, Jalisco, Michoacán, Nayarit, Puebla, Querétaro, San Luis Potosí, Sinaloa, Sonora, Tamaulipas, and Veracruz still had yet to initiate any significant revisions by the beginning of 2010. *Id.*

110. See *Governor Express Concerns About the Viability of Justice Reforms*, JUST. IN MEX. NEWS REP., June 2010, at 18, available at <http://catcher.sandiego.edu/items/peacestudies/june2010.pdf>.

111. *Federal Officials Look Warily at Failings in Chihuahua Judicial Reforms*, JUST. IN MEX. NEWS REP., Aug. 2010, at 15 [hereinafter *Federal Officials*], available at http://justiceinmexico.files.wordpress.com/2010/10/2010-08-august_news_report_aug23_10.pdf.

112. *Id.*

113. Evangelina Hernández, *Narcoguerra Rebase a la Reforma Judicial*, EL UNIVERSAL (July 19, 2010), <http://www.eluniversal.com.mx/notas/696257.html> (Mex.).

114. Jorge Ramos Pérez, *Poderes se Reclaman Reforma Penal Fallida*, EL UNIVERSAL (Aug. 12, 2010), <http://www.eluniversal.com.mx/notas/701177.html> (Mex.).

While the majority of states have made at least some legislative revisions, implementation difficulties have been expressed throughout the country. Rodrigo Medina, governor of Nuevo León, recently expressed concern regarding the state's inability to quickly implement any significant reform because of economic constraints, and urged the 2011 congress to allocate more funds toward implementation at the state level.¹¹⁵ Additionally, Marco Adame, governor of Morelos, cited a lack of political will and support on the part of the federal government in aiding in the implementation in his state.¹¹⁶

III. ESTABLISHING RULE OF LAW

Effective implementation of Article 20 is essential in increasing rule of law in Mexico. Without the procedural safeguards provided for by Article 20, the limitations on suspects' rights in Articles 16 and 18 will create a significant threat to rule of law in Mexico. Accordingly, in order for the revisions to be successful, state procedural codes will require significant revisions.¹¹⁷ The infrastructure of the court system will need to undergo immense changes as well. Lawyers, judges, law enforcement officers, and court personnel will have to be trained in oral advocacy and detailed rules of evidence, and courtrooms will need to be remodeled to accommodate public hearings.¹¹⁸ Most importantly, however, in order for the revisions to be successfully implemented, corruption must be eradicated from the justice system and public confidence in the courts will have to increase significantly.¹¹⁹ This change is only possible through effective and practical implementation of the accusatory criminal justice system as provided for by Article 20.

115. Blanca Estela Botello, *Concretar Reforma de Justicia Requiere de Recursos, Dicen Gobernadores*, LA CRONICA DE HOY (May 26, 2010), http://www.cronica.com.mx/nota.php?id_notas=508577 (Mex.).

116. *Id.*

117. Shirk, *supra* note 15, at 234.

118. Brennan, *supra* note 28, at 45; Shirk, *supra* note 15, at 234, 238–39.

119. Herein lies the heart of the issue. Unfortunately, this reasoning is cyclical in nature in that the constitutional reforms are designed to eradicate corruption and establish rule of law, but are simultaneously hindered by the very issues that they are designed to remedy.

A. Rule of Law

Rule of law is a somewhat ambiguous concept, which has been defined and redefined on countless occasions.¹²⁰ The Secretary-General of the United Nations described rule of law as:

[A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹²¹

In its essence, rule of law can be separated into three essential elements:

First, the power of the State may not be exercised arbitrarily. This incorporates the rejection of “rule of man,” but does not require that the State power be exercised for any particular purpose. It does, however, require that laws be prospective, accessible, and clear.

Secondly, the law must apply also to the sovereign and instruments of the State, with an independent institution such as a judiciary to apply the law to specific cases. . . .

Thirdly, the law must apply to all persons equally, offering equal protection without prejudicial discrimination. The law should be of general application and consistent implementation; it should be capable of being obeyed. This presumes that the rule of law is more than simply “law in the books” and that these principles also apply to “law in action.”¹²²

120. For a discussion of the different approaches to defining the rule of law in a Latin American context, see Nagle, *supra* note 81, at 3–19; see also David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 HARV. HUM. RTS. J. 29, 30–33 (2006); Tonya L. Jankunis, *Military Strategists are from Mars, Rule of Law Theorists are from Venus: Why Imposition of the Rule of Law Requires a Goldwater-Nichols Modeled Interagency Reform*, 197 MIL. L. REV. 16, 29–60 (2008).

121. U.N. S.C., *The Rule of Law and Transnational Justice in Conflict and Post-Conflict Societies: Rep. of the Security-General*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004).

122. Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331, 342 (2008).

Thus, an effective legal system comprised of an independent and neutral judiciary and a well-trained bar, who can work in concert to uniformly enforce the law while simultaneously respecting individual liberties is essential to rule of law.¹²³

Rule of law is frequently evoked by NGOs and international agencies during the rebuilding of post-conflict societies.¹²⁴ Drug violence in Mexico is by no means equal to the violence in most post-conflict areas; however, the insurgent nature of the cartels presents circumstances best analyzed through a post-conflict lens.¹²⁵ While a strong justice system in Mexico is required to establish rule of law and thereby lower crime rates, the extreme violence that currently exists is preventing the justice system from working effectively.¹²⁶ Further, without an effective justice system, law enforcement is left with little option but to fight crime in an extrajudicial manner that often disregards due process and human rights. Thus, in confronting organized crime groups, Mexico “face[s] a difficult challenge in balancing respect for human rights while [simultaneously] conducting security operations.”¹²⁷ Even still, to establish an effective legal system capable of permanently quelling violence in the future, Mexico “must adhere to the primacy of the rule of law and respect for human rights over military and security objectives.”¹²⁸

Even prior to the rise in organized crime, Mexico lacked a judicial system capable of establishing rule of law.¹²⁹ “[L]egal proceedings in Mexico have, traditionally, been characterized by inefficiency, uncertainty, and the perception that the ‘contravention of the law is the daily rule ra-

123. Nagle, *supra* note 81, at 16.

124. See Tolbert & Solomon, *supra* note 120, at 30–33 (discussing the United Nations’ role in rebuilding post-conflict states through the implementation of rule of law).

125. See *id.* at 30 (“One should be careful not to create a false dichotomy between traditional rule of law development work and efforts to build the rule of law in post-conflict societies. In fact, many of the strategies employed in the former are also relevant in the latter.”). In September 2010, Secretary of State Hilary Clinton warned that the drug trafficking organizations in Mexico were “morphing into . . . what we would consider an insurgency.” *A Night to Remember, and to Forget: A Double Anniversary Amid a National Funk*, ECONOMIST (Sept. 16, 2010), http://www.economist.com/node/17043739?fsrc=scn%2Ftw%2Fte%2Frss%2Fpe&story_id=17043739. While President Obama quickly rebuffed Clinton’s analogy, *id.*, significant parallels can be drawn between insurgencies and the terror inducing tactics of the drug cartels, which include car bombings, kidnappings, and political assassinations.

126. *Federal Officials*, *supra* note 111, at 18.

127. Nagle, *supra* note 81, at 33–34.

128. *Id.* at 34.

129. See Robert Kossick, *The Rule of Law and Development in Mexico*, 21 ARIZ. J. INT’L & COMP. L. 715–17 (2004).

ther than the exception.”¹³⁰ Interestingly, however, from a formalistic perspective Mexico’s comprehensive legislation and codes provide the requisites necessary for establishing rule of law.¹³¹ Similarly, corruption aside, Mexico’s legislative systems are well structured and capable of effectively passing democratic legislation and reform, as evidenced by the recent amendments.¹³² However, the ambiguity and uncertain method in which Mexico’s laws are enforced threatens the fundamental aspects of due process, and thereby decreases public confidence in the justice system, thus impairing rule of law.¹³³

Recently, some signs of improvement of rule of law have been seen in Baja California, particularly in Tijuana where decreases in violent crimes have been reported.¹³⁴ Baja California was one of the first states to implement reform when it passed similar legislation to the 2008 amendments in October 2007.¹³⁵ Currently, oral trials are taking place in the Mexicali judicial district and there are plans to begin trials in the other four districts sometime next year.¹³⁶ The question, however, is whether the judicial reform was responsible for the decrease in crime.¹³⁷ Instead of judicial reform, many sources attribute the decrease in crime to extreme police tactics that have repeatedly been accused of human rights violations and torture.¹³⁸ Finally, while severe episodes of violence in

130. *Id.* at 715 (quoting Alberto Szekely, *Democracy, Judicial Reform, The Rule of Law, and Environmental Justice in Mexico*, 21 HOUS. J. INT’L L. 385, 388 (1999)).

131. See Nagle, *supra* note 81, at 11.

132. This is in contrast with the traditional post-conflict society in which a legislative system must first be established in order to effectively create a rule of law. See Tolbert & Solomon, *supra* note 120, at 41–44. Accordingly, Mexico is at an advantage in that it already has the foundation upon which an effective legal system can be built.

133. This ambiguous application of the law is precisely the distinction between the “law in the books” and the “law in action” discussed in Professor Chesterman’s third category. Chesterman, *supra* note 122, at 342.

134. Randal C. Archibold, *Marijuana Bonfire Celebrates a Fragile Calm*, N.Y. TIMES, Oct. 22, 2010 at A8 [hereinafter *Bonfire*].

135. David Shirk, *Mexicali Lawyers Begin Oral Advocacy Training Program*, JUST. IN MEXICO PROJECT (Sept. 10, 2010), <http://justiceinmexico.org/2010/09/10/mexicali-lawyers-begin-oral-advocacy-training-program>.

136. *Id.*

137. See *Bonfire*, *supra* note 134 (suggesting that the decrease could be the result of unlawful policing tactics); William Finnegan, *In the Name of the Law: A Colonel Cracks Down on Corruption*, NEW YORKER (Oct. 18, 2010), http://www.newyorker.com/reporting/2010/10/18/101018fa_fact_finnegan [hereinafter *Colonel*] (same).

138. *Colonel*, *supra* note 137 (attributing Tijuana’s decrease in crime to its police chief Colonel Julián Leyzaola Pérez, whose tactics were so extreme that once, after “[a]rriving at the scene of a shoot-out where one of his men had died, . . . he punched the corpse of a cartel gunman in the face.”).

Tijuana have been less frequent in the past two years, mass killings and shootouts are reemerging. Recently, in response to police seizing 135 tons of marijuana, drug traffickers killed thirteen people in a Tijuana drug rehab center.¹³⁹ Following the killings, the cartel members broadcasted messages over police radios threatening 135 more killings—a life for each ton seized.¹⁴⁰ These recent events suggest that violence has not actually decreased at all, but rather has been forced to the periphery of the public eye.¹⁴¹

The current events in Tijuana highlight the lack of rule of law in northern Mexico. While police and military forces are able to arrest or kill cartel leaders and establish temporary peace, without an independent and functional legal system, long-term peace cannot be achieved. In other words, without a legal system that is equally apt at policing public and government behavior, little exists to deter future corruption and prevent violence. The 2008 constitutional amendments provide a foundation for establishing a more robust rule of law, however, a delicate balance will be required between the efficient implementation of the amendments, and an effective means of combating organized crime violence. Unless the procedural safeguards provided by Article 20 are effectively implemented, escalating violence, extrajudicial police activities, and a decrease of individual rights will further decrease public confidence in the justice system, thereby threatening the rule of law. Accordingly, in order for the 2008 constitutional amendments to have a positive effect on rule of law, the implementation must be effective in modifying the legal institutions responsible for enforcing the law: the judiciary and the bar.¹⁴²

B. Putting the Amendments into Practice

David Tolbert and Andrew Solomon discuss the importance of establishing an independent and respected legal profession:

An independent legal profession comprised of a cadre of well-trained and ethical lawyers can ensure due process and protect fundamental rights by pursuing the necessary remedies when these rights have been infringed upon. Thus, lawyers can facilitate the public's confidence in the fairness and efficacy of the legal system, which is essential not only to the formal and institutional development of the rule of law, but also

139. William Finnegan, *Tijuana is no Longer the Drug War Exception*, NEW YORKER (Oct. 26, 2010), <http://www.newyorker.com/online/blogs/newsdesk/2010/10/tijuana-drug-violence.html>.

140. *Id.*

141. *Colonel*, *supra* note 137; Randal C. Archibold, *Massacre in Tijuana Recalls Worst Era*, N.Y. TIMES, Oct. 26, 2010, at A11.

142. See Tolbert & Solomon, *supra* note 120, at 44.

to instilling the values that make up the informal aspects of the rule of law in a democratic society.

[However], [l]awyers in many post-conflict societies, as well as those in former authoritarian countries, must first overcome structural impediments to the independence of their profession, including the existence of legislative frameworks that relegate the profession to a subservient position in a legal hierarchy dominated by the state prosecutor.¹⁴³

By establishing an adversarial criminal justice system, the 2008 constitutional amendments create a framework to significantly improve the role and prestige of lawyers in Mexico, particularly the defense bar. By decreasing the power of the public prosecutor and allowing for adversarial presentation of arguments, defense lawyers will no longer occupy “a subservient position” in the criminal justice system. However, legal education is imperative to properly achieve a well-balanced and efficient bar. This is because adversarial justice systems depend “on relatively equal skill and resources between the parties, making the role and competence of defense counsel of cardinal importance.”¹⁴⁴ Thus, while the amendments allow for a system in which defense lawyers play a more significant role, the implementation of the revisions will be dependent on the existence of well-trained lawyers with experience in adversarial procedures.

Accomplishing this goal, however, may prove to be difficult. The current state of Mexican legal education is disjointed and unorganized, due to a lack of oversight and licensing requirements,¹⁴⁵ and “[t]his total want of organization of legal education and qualification for practice, and the lack of organization of the profession, without any disciplinary procedures to ensure accountability, may have been the cause of the many ills in the administration of justice in Mexico over the years.”¹⁴⁶ Thus, for the implementation of the reform to be successful, a parallel reform of the Mexican legal education system is also required. This necessity is well

143. *Id.* at 48–49.

144. Paciocco, *supra* note 16, at 325.

145. See Luis Fernando Pérez Hurtado, *Content, Structure, and Growth of Mexican Legal Education*, 59 J. LEGAL EDUC. 567 (2010); Special Rapporteur on the Independence of Judges & Lawyers, *Civil and Political Rights, Including Questions of: Independence of the Judiciary, Administration of Justice, Impunity: Rep. on the Mission to Mexico in Accordance with Commission on Human Rights Resolution 2001/39*, ¶ 180, U.N. Doc. E/CN.4/2002/72/Add.1 (Jan. 24, 2002) (by Param Cumaraswamy) [hereinafter *Political Rights*].

146. *Political Rights*, *supra* note 145, ¶ 181.

recognized on national and international levels,¹⁴⁷ however, the task is significant and may take time.

In addition to the legal profession, “[a]n independent judiciary is a central pillar of the rule of law and in many ways a guarantor of the fundamental human rights of individuals and groups.”¹⁴⁸ Accordingly, in order to successfully bring about rule of law in Mexico, the amendments must establish an independent judiciary that is free from influence from both the executive branch and organized crime groups.¹⁴⁹ This, however, will not be simple. The Mexican judiciary has a long history of influence from the executive branch, particularly during the seventy-year rule of the PRI.¹⁵⁰ Additionally, even before the rise in organized crime violence, drug trafficking groups often physically threatened Mexico’s judiciary.¹⁵¹ Currently, the lack of transparency and public oversight of criminal proceedings provide an easy forum for these coercive influences to effect the judicial process.¹⁵² Ideally, by decreasing the power of individual judges and creating a more transparent system through oral trials, the amendments will significantly decrease opportunities for such influence to be asserted.

In particular, the amendments have the potential to reduce corruption in the judiciary by establishing a system that will review and monitor judicial activity. Within the judiciary, the creation of three separate judges,¹⁵³ which will preside over different aspects of an individual trial, will introduce additional actors into the system, thereby decreasing organized crime’s ability to assert influence over the trial through the corruption of an individual judge.¹⁵⁴ Additionally, by requiring court proceedings to be oral and public, the actions of individual judges will be placed under greater public scrutiny, which will not only ensure against misconduct, but will also increase public confidence in judicial decisions.¹⁵⁵ However, this judicial independence will only be achieved through substantial efforts to properly train all aspects of the criminal justice system in ad-

147. See H.R. 6028; CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., RL 40135, MÉRIDA INITIATIVE FOR MEXICO AND CENTRAL AMERICA: FUNDING AND POLICY ISSUES 22–23 (2009).

148. Tolbert & Solomon, *supra* note 120, at 45.

149. See *id.*

150. Kossick, *supra* note 129, at 750.

151. *Id.* at 763.

152. Wright, *supra* note 5, at 373.

153. See *supra* pp. 14–15.

154. Wright, *supra* note 5, at 378.

155. See Espinoza, *supra* note 19, at 80 (arguing that public access to criminal proceedings is essential to due process, and that because of a lack of public access “[o]ne of Mexican citizens’ most common claims is that the justice system is corrupt.”).

versary procedure.¹⁵⁶ Further, steps must be taken to secure the safety of judges and their families, so as to decrease the ability of organized crime to influence judicial will through physical violence and intimidation.

While an ideal implementation of the 2008 constitutional amendments would constitute a step toward improving the rule of law in Mexico, the amendments concurrently pose a significant danger of decreasing due process rights of persons suspected of participation in organized crime. Articles 16 and 18 of the amendments create significant limitations on the due process rights of organized crime suspects by making *arraigo* procedures explicitly constitutional,¹⁵⁷ and by limiting a suspect's ability to communicate with the outside world.¹⁵⁸ These threats to due process rights will substantially hinder efforts toward establishing rule of law in three ways.

First, Articles 16 and 18 establish a system in which suspects are divided into two separate classes with differing due process rights.¹⁵⁹ Compared to ordinary criminals, those suspected of participation in organized crime will receive significantly diminished due process guarantees, thus creating dueling criminal justice systems that operate independent of each other.¹⁶⁰ These dueling systems will violate one of the fundamental principles of rule of law, as described by Professor Chesterman, which requires a consistent implementation of the law free of prejudice and discrimination.¹⁶¹ Without consistent implementation of the law, the public will be unable to determine legal norms with certainty, thereby stirring distrust in the criminal justice system and causing societal chaos.¹⁶²

Second, while it may still be too early to tell whether the implementation of an accusatorial system under Article 20 will be successful, recent events suggest that the process is compromised by a lack of political will, continuing drug violence, and an unorganized legal education system.¹⁶³ Meanwhile, however, there is nothing restricting the implementation of Articles 16 and 18. The system of *arraigo* already existed prior to the constitutional amendments, and has been in common use by prosecutors

156. See LUGAR, *supra* note 9, at 5 (“In order for Mexico to transition its criminal justice system to an accusatorial system with oral trials by 2016, some argue that U.S.-funded judicial training programs, some of which are just getting started, may have to be significantly expanded.”).

157. C.P. art. 16 (Mex.).

158. *Id.* art. 18.

159. These being 1) those suspected of organized crime and 2) those who are not.

160. Evia, *supra* note 14, at 277.

161. See Chesterman, *supra* note 122, at 342.

162. Salas, *supra* note 63, at 92.

163. See *supra* Part II.

for a number of years.¹⁶⁴ Further, the restrictions on due process provided by Article 18 will be equally simple in implementation, particularly considering the already prevalent questionable methods of law enforcement already in practice.¹⁶⁵

Finally, by allowing the public prosecutor to bypass the safeguards of due process and judicial proceedings, Articles 16 and 18 will continue to perpetuate the expansive power of the public prosecutor. In doing so, the articles will threaten rule of law by enforcing the judiciary and the defense bar's subservient position to the executive branch.¹⁶⁶ By maintaining power within a single individual, these articles will allow for the same corrupt and violent influences that have plagued the Mexican criminal justice system for years. Accordingly, without significant steps taken toward efficient and successful implementation of an accusatory justice system, the 2008 constitutional amendments threaten to increase human rights violations, while creating a disjointed and uncertain criminal justice system lacking rule of law.

CONCLUSION

The 2008 amendments to the Mexican Constitution provide a framework for establishing an accusatorial justice system. Successful implementation of a transparent and efficient accusatorial system could significantly increase rule of law in Mexico at a moment in time when organized crime and drug violence runs rampant. However, over the past two years the implementation of the accusatorial system has been slow going. Meanwhile, additional constitutional amendments have created a system in which the due process rights of certain individuals are restricted by the actions of the public prosecutor, who continues to occupy a position of considerable discretion. Accordingly, it is imperative that sizeable steps are taken, both by the federal government of Mexico and the international community, to heighten rule of law by effectively implementing the revisions provided in Article 20.

Recently, the United States has recognized the need to heighten rule of law in Mexico through supporting the implementation of the constitutional amendments. In particular, Congress has noted that as a matter of joint national security interests between the United States and Mexico, the United States must support: "(1) programs of . . . United States agen-

164. Brewer, *supra* note 40, at 10.

165. *See id.*

166. *See* Kossick, *supra* note 129, at 715–17 (arguing that in order to establish rule of law in Mexico, there needs to be an independent judiciary and defense bar, which is able to work in an adversarial, rather than subservient, position to the public prosecutor).

cies focused on strengthening civilian institutions and rule of law programs in Mexico at the federal, state, and local levels; and (2) anti-corruption, transparency, and human rights programs to ensure due process and expand a culture of lawfulness in Mexico.”¹⁶⁷ Through funding from the Central American focused Mérida Initiative,¹⁶⁸ the United States provided Mexico with millions of dollars to train prosecutors and investigators in trial advocacy skills.¹⁶⁹ This funding was expanded in July 2010, when President Obama appropriated an additional \$175,000,000 for judicial reform, institution building, anti-corruption and rule of law activities in Mexico.¹⁷⁰ While this immense amount of funding is certainly a start in aiding the establishment of rule of law in Mexico, it will be imperative in the upcoming years to continue to focus on aiding Mexico in its implementation of the adversarial procedures provided for in the 2008 constitutional amendments.

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167. H.R. 6028 § 121.

168. The Mérida Initiative is a foreign assistance package, originally proposed to Congress in 2007, which is targeted at combating organized crime and criminal drug activity throughout Central America. Hendrix, *supra* note 11, at 112. In particular, the initiative is aimed at strengthening Central American countries’ “capacities in three broad areas: (1) Counter-Narcotics, Counterterrorism, and Border Security; (2) Public Security and Law Enforcement; and (3) Institution Building and Rule of Law.” *Id.* While the Initiative originally provided primarily military and law enforcement support, President Obama has recently refocused the Initiative to focus on “disrupting the operational capacity of organized crime [through] institutionalizing Mexico’s capacity to sustain rule of law.” Bailey, *supra* note 6, at 341.

169. GAO REPORT, *supra* note 3, at 8 (between September 2009 and March 2010, funding through the Mérida Initiative was used to train over 200 prosecutors and investigators in Mexico).

170. Supplemental Appropriations Act, Pub. L. No. 111-212, 124 Stat. 2324 (2010).

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