

2014

NGO Submission to the UN Human Rights Committee on the List of Issues Prior to Reporting for the Periodic Report of Mexico.



“Citizen Observatory of the Criminal Justice Reform” in Mexico aims to monitor, analyze, advocate, and disseminate information related to the Mexican constitutional reform of the criminal justice system and the constitutional recognition of international human rights standards. This project is a collective effort of four civil society organizations (Instituto Mexicano de Derechos Humanos y Democracia, A.C; Instituto de Justicia Procesal Penal, A.C.; Comisión Mexicana de Defensa y Promoción de Derechos Humanos, A.C.; Asistencia Legal por los Derechos Humanos, A.C.) that recognizes the importance of collaboration between human rights organizations in Mexico as well as the need to develop a different model of strategic coordination aimed towards a common objective.

Criminal Justice System Reform

This report provides an overview of Mexico’s historic 2008 judicial reform including an assessment of how the reform has been implemented thus far. It also provides information about the significant obstacles to the implementation of the Accusatory Criminal Justice System.

I. Suggested questions for the Human Rights Committee's List of Issues

Articles 14- Right to a fair trial

Q1. What concrete steps is the Government taking to measure the implementation at local and federal level?

Q2. According to the National Development Plan diagnosis on the implementation of the justice reform¹, what is the Mexican government doing to address the principal causes of the implementation delay like diversion of public funds to different purposes, the failure to adopt relevant legislation and the lack of in-depth training for justice sector operators?

Q3. Have any emblematic cases been resolved that might demonstrate the effectiveness of the implementation of the New Criminal Justice System?

Q4. What is the Government doing to provide suitable alternatives to imprisonment in order to reduce the high rates of incarceration in states with the New Criminal Justice System implemented and states under the old system?

Q5. What is the Mexican Government doing to review lengthy pretrial detention without court and investigation decisions especially on indigenous people², women³ and people with disabilities?

Q6. What measures is Mexico taking to ensure a fair trial on the new criminal justice system concerning indigenous people, people with disabilities, children and women?

Q7. According to the recent recommendations during the Universal Periodic Review⁴, what steps, including legislative amendments, have been taken to reduce the extensively use of pretrial detention?

¹ National Development Plan (2013-2018) <http://pnd.gob.mx/> page 34 (original: Spanish).

² A recent report (March, 2014) stated that there are 339 indigenous people deprived of liberty in federal prisons. 36 are incarcerated awaiting trial and five of them since 2003,2007,2008 (2) and 2009. This period in pretrial detention is unconstitutional because the maximum period of time to be under this measure is two years. *"Preventive custody shall never be extended over two years in any case..."* Article 19 (IX) Political Constitution of the Mexican United States.

³ In Mexico 53% of women deprived of liberty are on pretrial detention. January 2014.

⁴ Recommendations accepted by Mexico: 148.64 Bringing the penal system of the country in accordance with the international standards, in particular to cancel the current mechanism of preventive detention.

Criminal Justice System Reform

The State party should take steps to accelerate the implementation of the reform of the criminal justice system.

*Concluding observation number 14 of the Human Rights Committee
March 2010.*

Background:

1. Mexico passes the “Public security and Criminal Justice” constitutional reform, which entered into force on June 18th, 2008 and established an accusatory system of criminal justice.
2. Mexico criminal justice system is currently a inquisitorial system that facilitates the violation of the right to access to justice and due process.
3. In addition high levels of corruption and impunity have plagued Mexico’s criminal justice system. This situation was presented on the results of the National Survey of Victimization and Perception of Insecurity in 2012. Were 85% of the interviewees believed the criminal justice system to be corrupt. The preventive municipal police (67.9%), and the public prosecutors (65%) were identified as the most corrupt within the system.⁵
4. June 2016 has been established as the deadline to fully replace Mexico’s inquisitorial procedures at federal and state level to accusatory procedures. Implementing these radical changes has brought major challenges, including the need to: enact the relevant secondary legislation;⁶ build new court rooms; retrain legal professionals; update law school curricula and improve forensic technology.
5. The eight-years’ timeframe, although thought to avoid a systemic crisis of the justice system, has produced contradictions within the criminal justice system operations. In fact Mexico’s inquisitive system will continue to operate until all cases under the inquisitorial system are concluded. And 76% of the cases denounced in the first trimester of 2014 have been filed under the inquisitive system.⁷
6. Almost six years into the reform process, the implementation has been slow. As of March of 2013, the accusatory criminal trial system was fully operational only in 3⁸ states, partially operational in another 10⁹, was in process of being introduced in 6¹⁰ and in the planning stage in 13^{11, 12}.

**2010, Concluding Observations
of the Human Rights Committee,**

*However, it notes that this reform
has not yet been fully implemented.*

⁵ National Survey of Victimization and Perception of Insecurity (2012) carried out by the National Institute of Statistics and Geography (INEGI) in 2012. The aim of this survey is to inform the public about statistical estimates regarding the number of crime victims, as well as perceptions of public safety at the national level and the performance of the institutions responsible for protecting the public order.

⁶ Like the National Sentence Enforcement law

⁷ Local Index of crime provided by the Executive Secretary of the National System of Public Security (January to March 2014). National crimes reported: 255,065.

⁸ State of Mexico, Morelos and Chihuahua.

⁹ Baja California, Chiapas, Durango, Guanajuato, Nuevo León, Oaxaca, Puebla, Tabasco, Yucatán and Zacatecas.

¹⁰ Coahuila, Michoacán, San Luis Potosí, Tamaulipas, Tlaxcala and Veracruz

¹¹ Aguascalientes, Baja California Sur, Campeche, Colima, Federal District, Guerrero, Hidalgo, Jalisco, Nayarit, Querétaro, Quintana Roo, Sinaloa and Sonora.

¹² Mexico’s National report submitted during the Universal Periodic Review 2013.

7. Implementing the justice reform is a stated priority of the current Mexican Administration, being present throughout main public policies.¹³ Despite these public commitments practice begs to differ.

8. According to the National Development Plan diagnosis on the justice reform¹⁴, the principal causes of implementation delay were the diversion of public funds to different purposes, failure to adopt relevant legislation¹⁵, the lack of in-depth training for justice sector operators and general burocratic delay.

9. Recently, the Mexican government made a detailed scheme¹⁶ of outlining the stages of judicial reform implementation (table below). According to this scheme the 32 states will be operating the new criminal justice system by 2016. The government has estimated that full implementation of the reform will cost sixty-one billion pesos to make the needed changes in procedure and infrastructure.¹⁷

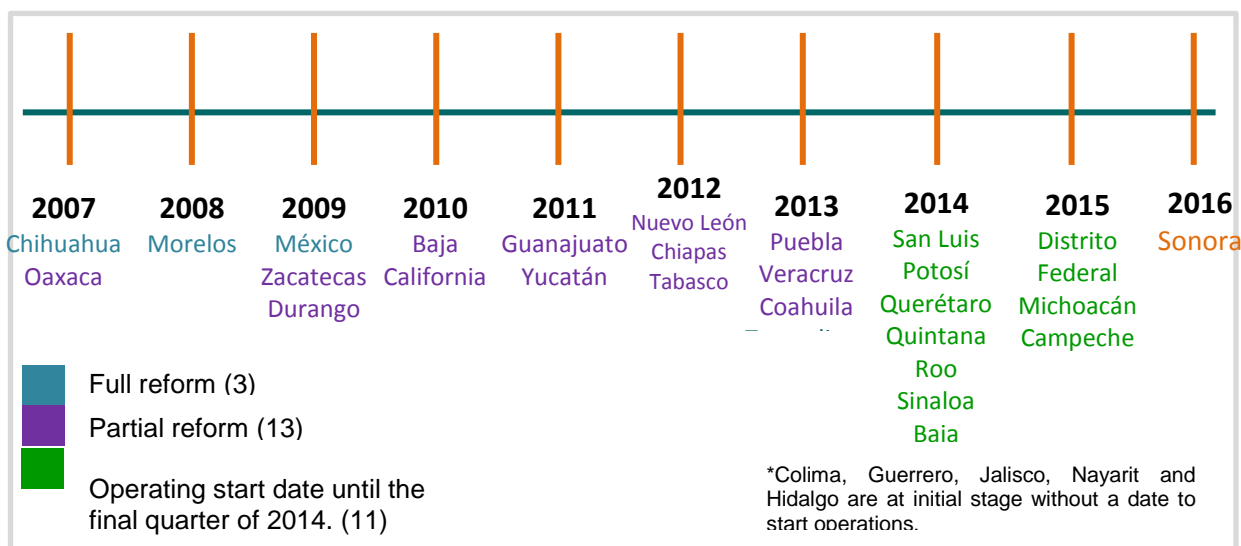


Table 1. Stages of Judicial Reform Implementation in Mexico's States

13. According to data compiled by an international NGO¹⁸, by the end of 2013 only 776 municipalities in Mexico have implemented the New Criminal Justice System (NCJS), which represents only 33% of the country's 2,459 municipalities. With a total country population of 119,991,953, and the amount of people living in such municipalities, it means that only a 33% of the Mexican population is living under the new system. Moreover if one considers that the State of Mexico, the highest populated state, is one of the three that have fully implemented the reform, therefore 41% of all Mexicans living under the NCJS are in the State of Mexico.¹⁹

¹³ Pact for Mexico and the National Development Plan (2013-2018).

¹⁴ National Development Plan (2013-2018) <http://pnd.gob.mx/> page 34 (original: Spanish).

¹⁵ From 2008 to December 2012, 22 of Mexico's 32 states (67%) had made amendments to their criminal procedure codes. Matthew C. Ingram, *Criminal Procedure Reform in Mexico, December 2012*.

¹⁶ According to report presented by the Mexican government to the Inter-American Commission on Human Rights on March 27th, 2014. During the hearing "Challenges in the Implementation of the Criminal Justice System in Mexico" on the 150 Period of Sessions.

¹⁷ According to report presented by the Mexican government to the Inter-American Commission on Human Rights on March 27th, 2014. During the hearing "Challenges in the Implementation of the Criminal Justice System in Mexico" on the 150 Period of Sessions.

¹⁸ Justice in Mexico is project from the University of San Diego California that conducts original research, promotes public discourse, and informs public policy related to the rule of law and security in Mexico.

¹⁹ Justice in Mexico report 2014. See: <http://justiceinmexico.org/2014/01/30/only-33-of-population-lives-under-the-new-justice-system/>

Proposed Question for List of Issues:

Q2. According to the National Development Plan diagnosis on the justice reform¹, what is the Mexican government doing to address the principal causes of implementation delay like diversion of public funds to different purposes, the failure to adopt relevant legislation and the lack of in-depth training for justice sector operators?

14. The Citizen Observatory of the Justice System – OCSJ (Observatorio Ciudadano del Sistema de Justicia) has identified political, social and economic issues that are affecting the implementation process in all levels.

Political Obstacles

15. In order to implement this reform, the Coordinating Council for the Implementation of the Criminal Justice System was established in 2008 to work towards fulfilling the commitment made by the Mexican government. The Technical Secretariat of the Coordinating Council for the Implementation of the Criminal Justice System (SETEC) was set up to design and execute policies, strategies and provide coordination between the Federation and the states.

16. Nevertheless, SETEC has not established sufficient leadership to set the course and pace of the overall process due its limited power to drive the states into the implementation process. Furthermore, it has dealt with the country's federal division, which means the implementation depends entirely on the pace and willingness of local authorities. Consequently, the development of the process has been irregular. For instance, the state of Jalisco, one of the two entities with the largest number of crimes²⁰ reported, has delayed the implementation of the reform until 2015 under the argument of budget constraints.

17. In addition, other circumstances influence the implementation process. The strong centralization of political resources and decision making, and the absence of effective coordination mechanisms between all institutional levels, have definitely contributed to deepen the social, political and economic contrasts between regions.

Economic Obstacles

18. Since 2010 SETEC subscribes every year several agreements in coordination with the states in order to give economic resources towards the execution of authorized projects. Every project proposal must be subjected to eight thematic focuses²¹ implemented by SETEC to supervise the process of incorporating the new criminal justice system in Mexico.

19. According to the Report on the Results of Public Spending²² in 2012 there were several irregularities on the spending of resources allocated for the implementation of the New Criminal Justice System. The

²⁰ 15,137 crimes were reported in Jalisco between January and March 2014. Local Index of crime provided by the Executive Secretary of the National System of Public Security 2014.

²¹ The eight thematic focuses are: planning, regulations, public management, institutional reorganization, information technologies and equipment, infrastructure, training, broadcasting and government transparency, assessment and monitoring.

²² The report is made by the Superior Audit Office and summarizes transactions, operations, and expenditures incurred with federal resources, base on the items authorized in the federal government-spending budget.

Superior Audit Office²³ found discrepancies that for almost \$300,000 USD. The irregularities ranged from training and infrastructure projects remaining unfinished at the end of 2012 despite there being appropriate funds allocated for the completion, to states failing to properly report major purchases, including furniture.

20. Meanwhile, some states digressed in their progress of implementation from 2012 to 2013 according to SETEC. Durango and Yucatán, for example, went from being partially operational advanced at the beginning of 2012 to partially operational intermediate in 2013.

21. The Superior Audit Office reported that SETEC's methodology to measure the level of progress on the implementation of the judicial reform was inefficient due to does not provided reliable information to classify the level of progress in the states. It also, conclude that all of these irregularities put at risk the viability of the new criminal justice system being fully operational by its constitutionally mandated deadline of 2016.²⁴ In order to solve the issues reported by the Superior Audit Office SETEC developed a new stratified classification methodology in 2014. This new methodology²⁵ stated low levels of progress on the implementation of the reform at local level and does not measures federal level. Even, the states with fully operational accusatory criminal trials obtained medium low level for example the State of Mexico.

Proposed Question for List of Issues:

Q. How does the Government is going to ensure that the new stratified classification methodology will provide accurate information on the implementation of the judicial reform at all levels?

Social Obstacles

22. Important insights into the challenges facing the reform effort are provided by a survey²⁶ conducted in nine states and interviewing justice sector operators (judges, prosecutors, and public defenders) as well as the general public. Data revealed a need for more public awareness campaigns, as well as outreach to system operators, on the reasoning of the reforms and what positive changes they seek to bring about.

23. The general public survey revealed that 74% of those polled had little or no faith in the criminal justice system. Some 89% of those surveyed knew nothing about the 2008 judicial reform. In Chihuahua and Morelos, two states that have already implemented the new criminal justice system, the percentage of interviewees who did not know their states had implemented a new justice system stood at 30% and 60% respectively, still rather high.

²³ The Superior Audit Office (SAO), a technical body attached to the Legislative Branch, carries out its external auditing function over the three Branches of Government, the constitutionally autonomous bodies, Mexican federal states and municipalities and individuals, when dealing with federal resources. The Superior Audit Office of Mexico was created to support the Lower Chamber in the exercise of its constitutional powers concerning the monitoring of the Federal Public Treasury's accounts.

²⁴ Report on the Results of Public Spending, 2012.

See: http://www.asf.gob.mx/Trans/Informes/IR2012i/Documentos/Auditorias/2012_0402_a.pdf (original: Spanish).

²⁵ The new methodology (2014) rates the level of progress on the implementation of the reform in the states on a scale from 1 to 10 with the following classification: **minimum** 1.0-1.4 (Jalisco, Federal District); **low** 1.5-2.9 (Colima, Sonora, Nayarit, Baja California, Guerrero, Campeche, Aguascalientes, Hidalgo, Tlaxcala, Tabasco, San Luis Potosí, Quintana Roo); **medium low** 3.0-4.4 (Querétaro, Baja California, Veracruz, Mexico, Chiapas, Oaxaca, Zacatecas) ; **medium** 4.5-5.9 (Guanajuato, Sinaloa, Tamaulipas, Puebla, Durango, Michoacán, Yucatán, Coahuila); **medium high** 6.0-7.4 (Morelos, Nuevo León); **high** 7.4-8.9 (Chihuahua); **optimum** 9.0-10.0 (none)

²⁶ *Survey of Judges, Prosecutors, and Public Defenders in Nine Mexican States 2011*, Trans Border Institute, University of San Diego. See: <http://justiceinmexico.files.wordpress.com/2010/07/justiciabarometro-judicial-survey.pdf>

24. A majority of justice sector operators surveyed thought that the traditional system functioned adequately, with judges more likely to express this sentiment than prosecutors or court appointed attorneys. In fact, 40% of justice operators thought that the passage of judicial reforms in 2008 was the result of pressure from “foreign governments and organizations” that sought to discredit the old system.

National Criminal Code Procedure and fundamental rights.

25. On February 5th 2014 with 407 votes in favor and 28 against and five abstentions Mexico’s Chamber of Deputies approved the National Criminal Code Procedure.²⁷ The Code was published on March 4th 2014, and will have to entry into force gradually before June 2016.²⁸ It will eventually replace the 33 codes that currently exist: the federal one and the 32 local ones.

26. Since the discussions at Congress it has been stated that the National Code has serious flaws that undermine the rights of citizens and establish the presumption of guilt on the innocent. Recently, the National Human Rights Commission, (CNDH) is trying to reverse some parts of the new National Code of Criminal Procedure which are considered to contradict citizens’ fundamental rights. The Commission refuted a total of 13 articles of the National Code, according to the unconstitutionality action²⁹ that it presented to the Supreme Court of Justice.

27. Most of the articles refer to the powers that the National Code gives to the police to carry out inspections of people or vehicles without a warrant, or to the Public Ministry (Attorney General’s Office) to freeze the assets of a detainee or order a cell phone company to locate a device linked to a crime in real time.

Bail conditions

28. One of the great challenges in Mexico and the region, as recognized by the Report on Pre-trial Detention in the Americas by the IACHR, is to solve the abuse of said measure. In Mexico around 41% of those deprived of their liberty have not been sentenced, that is over 100,000 people.

29. One of the causes for abuse of pre-trial detention in Mexico within the traditional justice system has been the restrictive regulatory framework, which does not provide alternatives to pre-trial detention, the decision is made in writing and is based on the classification of crimes as serious (automatic pre-trial detention) or not serious (bail pending trial as long as the detainee could deposit a guarantee for reparation of damage, fine and surety).

30. Under both options related to the decision of the merits of pre-trial detention within the traditional system the presumption of innocence is violated. Firstly, detention derives solely from the severity of the crime, rejecting the two legitimate reasons of flight or interference as established by the Inter-American system. Secondly, the interim bail under guarantee requires a warranty for reparation of damage and a fine from the initial phase of the process.

31. The reform process recognizes the abuse of pre-trial detention and regulatory aspects of the traditional system that cause that abuse. Therefore, the adversarial system is characterized by the presumption of innocence, which means that the defendant should be treated as innocent during criminal proceedings. To this end, criminal codes establish a series of bail conditions different to pre-trial

²⁷The code established uniformity in the application of criminal law across Mexico’s 31 states and the Federal District.

²⁸ Second provisional article of the National Code of Criminal Procedure, page 132.

²⁹ For now, the un-constitutionality action promoted by the CNDH does not have legal consequences. For this to occur, at least 8 of 11 justices would have to agree that the challenged articles are unconstitutional.

detention, leaving the latter as the exception. This mechanism is referred to as the precautionary model. Article 19 of the Mexican Constitution (CPEUM) provides in the first part of its second paragraph, the exceptional nature of pre-trial detention.

32. This exceptionality is taken into account by the Uniform Criminal Code (CNPP), published on March 5, 2014, in which article 155 provides for 14 precautionary measures or bail conditions, leaving pre-trial detention as a last resort. Likewise articles 168 and 169 of the CNPP establish both legitimate procedural risks that are recognized by the Inter-American system in order to impose pre-trial detention: the risk of flight and the risk of interference.

33. However, the second part of the second paragraph of article 19 of the CPEUM provides three additional cases for the imposition of pre-trial detention, which fall outside the Inter-American system, that are important to address. Firstly, it establishes risk to the victim as a procedural aim. It is noted that under procedural legislation protection measures exist that should be used to safeguard the integrity of the victim. Secondly, it establishes the validity of pre-trial detention for defendants who "are being processed or have been convicted of a felony." Thirdly, it establishes automatic pre-trial detention for a series of crimes or groups of crimes.

34. The origin of the imposition of automatic pre-trial detention has generated great impacts and tensions with the presumption of innocence and has not been able to meet exceptionality set by international standards. For example, in the state of Morelos, around 67% of the offenses for which the Prosecution exercised criminal action have been serious crimes.

35. That is, in 67% of the offenses where a judge has ruled on precautionary or bail measures, by law automatic pre-trial detention was imposed. In this regard, the parties did not debate nor was contradiction fulfilled because a flight risk was presumed solely based on the classification of the offense. Likewise this has not achieved compliance with the principle of exceptionality for the imposition of pre-trial detention.

36. The Observatory undertook monitoring of bail hearings in Morelos and Baja California, and found the following, in neither state is the exceptionality of pre-trial detention complied with.

37. In 2012, pre-trial detention was imposed on 67% of the people charged in Morelos, 33% received bail under conditions and in not one case was no condition or measure imposed. From January to June 2013, the percentage was similar with 64.6% receiving pre-trial detention, 34.6% bail conditions and 0.8% with no conditions.

This data means that in Morelos, exceptionality of pre-trial detention has not been achieved.

38. In 2012, pre-trial detention was imposed on 68.2% of the people charged in Baja California, 31.7% received bail under conditions and 0.1% no conditions. From January to June 2013, it was similar with 61.65% detained pre-trial, 38.03% bail with conditions and 0.32% none.

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