



## **The Fight Worth Fighting: Reforming the Mexican Criminal Justice System**

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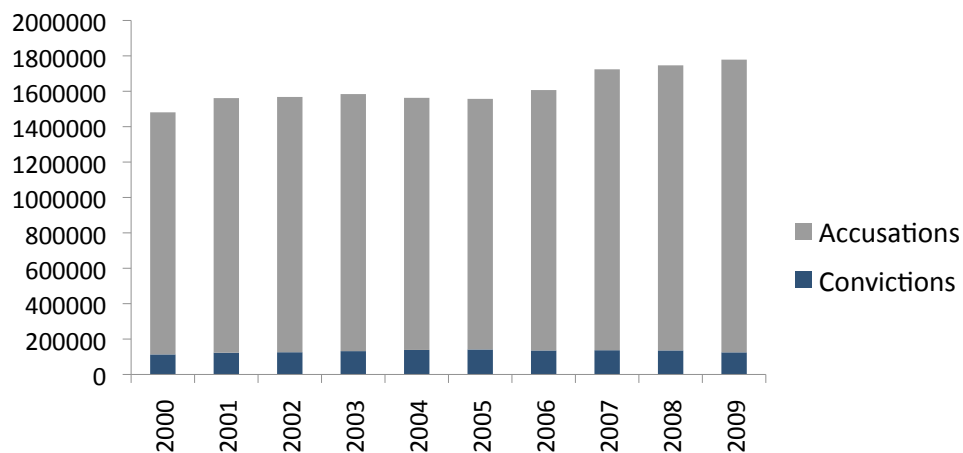
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During the ongoing presidency of Felipe Calderón, the Mexican Congress approved the most extensive reform to the criminal justice system in the history of the country. However, its implementation has been neglected as the government has primarily focused its attention on fighting the drug cartels. Therefore, while indicators of violence in the country have skyrocketed, the Mexican criminal justice system is still incapable of facing the problem.

### As Crime Rises, More Cases Remain Unsolved

As issues of public safety worsen throughout the country, Mexico’s penal system functions without institutions capable of modifying their authoritarian past. The judicial power and its investigative branch, the *Ministerio Público* (MP), were originally created under the PRI’s stronghold to solve the problems of a government-centered society that was able to deal with prevailing criminal organizations without relying on formal institutions. Today, the penal system is the same, yet the authoritarian, government-centric stabilizing function provided by the previous regime has disappeared. The result has been an increase in the number of crimes and an even lower prosecution rate; that is to say that the State’s ability to prosecute crimes at a higher delinquency rate has diminished.

### ACCUSATIONS V. CONVICTIONS 2000-2009



Source: CIDAC with INEGI's data.

### The Inability to Deal With More Complicated Crimes

By law, when the *Ministerio Público* is informed of a crime, it is obligated to prosecute. The MP does not distinguish between kidnappings and mobile phone thefts; both crimes are given the same attention and resources. However, this makes it easiest to prosecute crimes in which the felons are caught in the act; they require fewer resources and do not rely on the use of criminal intelligence. Hence the MPs and its *Policía Judicial* (investigative police) are not accustomed to building cases, rendering them inefficient at developing strategies to detain and prosecute suspects. The consequence is a MP with insufficient resources and experience –i.e. criminal intelligence– to deal with the most complicated cases, as well as gather evidence and build solid accusations that can withstand the judicial process and render condemnatory sentences.

## Most Crimes are not Prosecuted

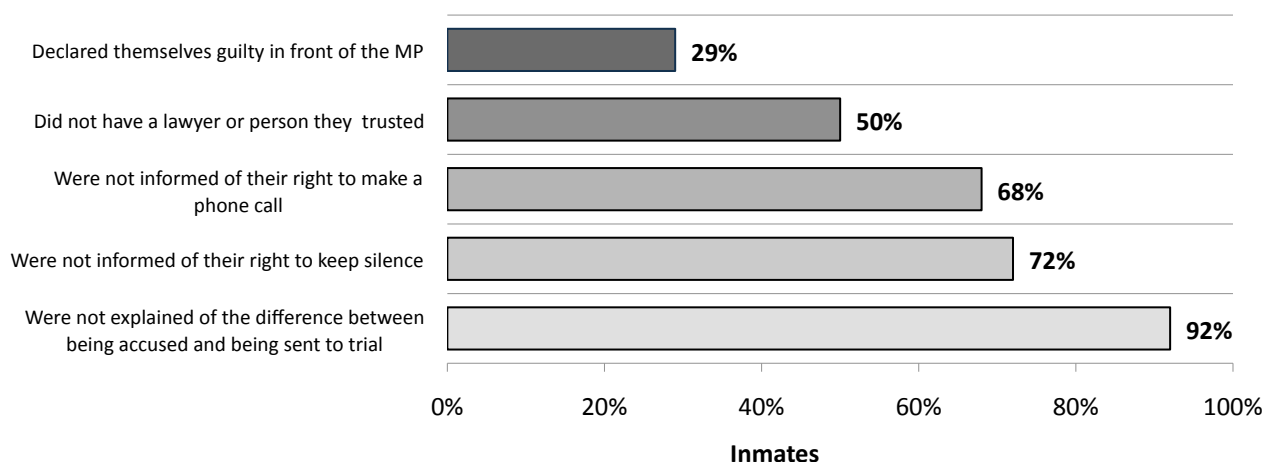
Over 80% of crimes that are solved and prosecuted by the MP involve catching criminals *in flagrante*. Not surprisingly, most of these arrests are for counts of theft. Nonetheless, even though theft accounts for six out of every 10 condemnatory sentences throughout the country, only four out of every 100 reported thefts is actually ever punished.

The problem worsens when considering the types of crimes being prosecuted under the current system. For instance, 68% of Mexico City's and the state of Mexico's convicts are serving time for theft, yet half of the objects stolen in those cases were worth less than two thousand pesos (approximately \$165 USD). This means the criminal justice system is very good at prosecuting petty theft but is incapable of prosecuting crimes with greater social consequences, such as homicides, kidnappings or extortions.

In a country where the probability of being punished for a crime is very low, crime turns out to be very profitable. Criminals are quick to realize that the benefits of crime outweigh the odds of being caught. For example, when the latter are high, a few years in prison can be very dissuasive. On the other hand, when odd of being caught are low, the dissuasive effect of long sentences as punishment disappears completely. For instance, the Mexican Federal Penal Code sanctions extortions with sentences that range from two to eight years in prison. Recently, different Mexican states passed reforms that harshen these sentences, yet, because the probability of being caught is just 0.05%, the cost to the criminal of committing extortion is in fact closer to zero. With this pattern repeating itself for all serious felonies, how can the cost of committing such crimes be raised? The answer is to prioritize prosecution and increase the likelihood of punishing (the most serious) crimes with the worst social consequences, thereby reducing impunity.

Reducing impunity would eventually translate into a greater number of condemnatory sentences. Such decisions are made by the judge, who decides between the arguments and evidence exposed by the prosecution (MP) and the defense (i.e. the suspect). Here, the sole responsibility of the judge is to determine if there is enough evidence to condemn or acquit the accused. It is never the function of the judge to accuse a defendant - this is the responsibility of the MP. But how can the prosecution build solid cases when they are overworked and have inefficiently allocated their resources?

## WHILE GIVING A FORMAL STATEMENT (2009)



Source: Encuesta a Población en Reclusión. CIDE. 2009.

## **A Confession Is Not Enough**

Four out of every 10 people detained by the investigative police are beaten or injured before being presented to the MP. Over 70% of the detainees are never informed of their right to remain silent and over 50% of the people arrested do not have a lawyer present while giving formal statements. The issue in these cases is not the figure itself, but the consequences it implies. For instance, in 2009 the Supreme Court acquitted 20 people accused of 1997 murder of peasants in Acteal, Chiapas because, they argued, the evidence put forward by the prosecution had been acquired illegally and witness statements had been concocted. Under these circumstances, it seemed reasonable for the judges to require more than a confession to back the accusations.

### ***The Case of Marisela Escobedo in Chihuahua***

Chihuahua is one of the few states that has begun the transition to the new criminal justice system. State judges were trained to conduct trials under very strict guidelines. However, as a consequence of the recent case of Marisela Escobedo, the new accusatory system has been put under scrutiny.

Marisela was shot last December after demanding justice for her daughter, Rubí Marisol, who was murdered in 2008. The alleged killer was sent to trial only to be acquitted by three judges pertaining to a penal court of first instance who were already working under the new accusatory system. The judges decided that there was insufficient evidence to convict the accused, Sergio Rafael Barraza, of Rubí Marisol's murder. In this case, despite acquiring a signed confession, the MP was unable to provide sufficient evidence for it to hold up in court. Today, people in Chihuahua and all over the country are asking themselves if the accusatory system is the best solution to impunity.

Evidently, the death of Marisela Escobedo must be accounted for. However, achieving justice unlawfully can lead to further injustices. Unfortunately the state legislature has granted a request to hold a political trial for the three judges in question.

In any case, as torture proves to be an effective means to eliciting confessions, truthful or not, confessions alone should not be sufficient evidence to convict a person standing trial. Again, the problem is not rooted in the acquittal of the defendant itself, but in the inability of the MP to investigate a crime, gather evidence and present a solid accusation or, at the very least, preserve the scene of the crime.

Finally, it must be remembered that being accused of committing a crime and being found guilty are very different things. Mexico recognizes that everyone has the constitutional right to a hearing and every judicial ruling must be the result of adequate due process, but in practice, this is not always upheld.

## **Alternative Methods for Resolving Petty Crimes**

The traditional approach to the criminal justice system in Mexico is rooted in the idea that the State is capable of punishing all crimes and incarcerating all felons. Notwithstanding, under the new accusatory approach, foreseen in a constitutional amendment approved by the federal Congress (19-06-2008), there is an array of non-judicial conflict resolution methods. Through these alternative mechanisms, delinquents of minor

offenses are able to directly compensate their victims or the damage to society through activities like community service. Under the accusatory system, petty theft cases can be handled without using up valuable resources that can be better allocated to investigating and prosecuting more serious crimes, such as homicide, kidnapping and extortion.

The idea behind the 2008 constitutional reform was to move from a mixed penal system to an accusatory system in eight years. Thus, by 2016, the whole country would be using the new system. Three years later, only nine states<sup>1</sup> have implemented the necessary reforms to accomplish this goal. There is still a long road ahead, and while the new system seems to employ good mechanisms for invigorating the rule of law –as can be observed in lessons from other countries– state governors and local congressmen do not seem willing to assume the costs of implementing local reforms. In many cases, the costs of implementation have not even been estimated.<sup>2</sup>

Accusatory system	Mixed system
Different branches of the judicial system investigate, prosecute and stand in judgement.	The Ministerio Público investigates, prosecutes and has influence over the presumed innocence or guilt of the accused.
The defendant is aware of his or her rights and has a right to be heard during the whole process. Silence does not indicate guilt. He or she has the same opportunity to participate in the legal process as the prosecution.	The accused is the subject of the investigation and does not participate in it. He or she is assigned a defence lawyer only when a charge has been brought against him or her. Silence may constitute a presumption of guilt.
Liberty pending trial is the rule not the exception.	Detention pending trial is the rule not the exception. Preventive prisons are a common precautionary measure.

### What Are the Benefits of the New System?

To rely on a professional MP has multiple advantages. Not only would it make it more likely that criminals would go to jail but it would also increase the probability that the innocent would not. When the prosecution is competent enough to build accusations based on hard proof and evidence that was obtained in a legal and just manner, there is no longer incentive to for present perjuring witnesses, obtain confessions through torture or plant evidence. Therefore, under these circumstances, when an accusation is presented in front of a judge, he or she will have enough evidence to decide whether or not the accused is guilty.

### The Answer Lies in Reforming the System’s Foundations

Reconstructing the upper floor of a building when it is already falling down is a bad idea. Even when the building is in need of remodeling, the focus should remain on the foundation. The same principle applies to the justice system. Until now, Mexico has only made isolated efforts to strengthen and clean up its police force, reform the MP and fight criminal organizations. However, the effects of these efforts on the lives of ordinary citizens have been minimal because the foundations of the problem have not been addressed. The fight worth

<sup>1</sup> Chihuahua, Baja California, Durango, Estado de México, Morelos, Nuevo León, Oaxaca, Yucatán, Zacatecas

<sup>2</sup> <http://www.setec.gob.mx/docs/dof131008.pdf>

fighting, and the only one that will help Mexico significantly and permanently reduce impunity throughout the country is, without a doubt, the complete and effective implementation of the 2008 criminal justice system reform.

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#### **About CIDAC**

With 25 years of experience, the Center of Research for Development (Centro de Investigación para el Desarrollo or CIDAC) is a not-for-profit, Mexican think tank that conducts research to propose viable policy options for Mexico's improved economic and social development. CIDAC develops proposals that contribute to strengthening the Rule of Law and creating favorable conditions for Mexico's economic and social development, as well as enriches public opinion with information and perspectives that can be drawn upon in society's decision-making processes.