



Setbacks are frequent in administrative and judicial procedures aimed at shattering criminal conspiracies organized by drug-traffickers.

Conditions for the exercise of the respective professional public services are unpredictable and huge disparities obstruct effective binational cooperation.

Skepticism, despair, and corruption prevail, eroding the moral authority of the State.

In this context, the great difference between the US and Mexican judicial cultures, in spite of their geographical proximity and intense demographic, economic and cultural interaction, may be the most formidable obstacle.

The existing differences between the two judicial cultures do not entirely exclude common denominators. The Constitution of the United States and its influence on the evolution of universal judicial culture was particularly significant in the constitutional makeup of independent Mexico in the 19th century.



Incinerating marijuana in Chihuahua.

Marco A. Cruz/Imagenlatina.

Parallels are evident in the sense of a constitution establishing a sovereign union or federation of states, and defining and guaranteeing the obligation of its respective powers, both to protect the "Bill of Rights," and safeguard "individual guarantees" in Mexico, via a federal judicial system headed by a supreme court and organized into circuits and districts.

A parallel exists, too, in the constitutional theory of Montesquieu's balanced division of powers safeguarding "the spirit of laws", and in the concept of universal suffrage to sustain all constitutional power.

There are similarities in the organization of investigation and accusation through Attorney General's Offices, dependent on executive power, and with the monopoly of the exercise of penal action by its agents.

Legal rationale and education are quite different in the two legal cultures. The legacy of European style codification, with its legislative restrictions on discretionary legal acts, and the weight of doctrinal judicial dogma make Mexico's prevailing deductive judicial reasoning (from abstraction to reality), highly formalistic. This contrasts with the realism prevalent in US legal culture, aimed at inductively persuading a jury of peers and a powerful judge, that the reality under trial must conform to relative interpretive legal precedents in the application of the Law. Law is taught in Mexico from textbooks based on the description of legal hypotheses and the analysis of their application to general theory and doctrine. In the US, the law is taught from texts of judicial reasoning. The study of law in Mexican universities does not require a prior university degree and is conceived of as an abstract social science, whereas in the US, a pre-law degree is required and the law is seen as a highly instrumental profession.

Professional practice is licensed differently in the two nations. In



A training jump.

Mexico, the government Department of Public Education issues a license which allows a university law student to practice after graduation. In the US the final authorization to practice law is obtained by passing a state bar exam.

Our legal cultures need to interrelate, get to know and enrich each other, so that the law and its fulfillment, not abuse and the traffickers, become the effective agents of binational interrelation.

### **A new approach and the distribution of federal, state and local power to combat the drug trade**

Trafficking in illicit drugs is a federal offence in Mexico. The federal Congress has exclusive power to formulate penal policy and legislate against illegal trade, and the office of the Attorney General of the Republic pursues offenders under such laws through the Federal Judicial Police.

All other federal authorities, including military, local and state authorities, merely serve as "auxiliaries" to the Attorney General's Office. Under the Mexican Constitution only federal and state judicial police are legally empowered to investigate

offences. All others are considered "preventive police" who cannot interrogate suspects or detain them, unless caught in the act.

In contrast, the US Congress and state legislatures possess concurrent powers to hand down penal ruling. Federal and state authorities also possess concurrent powers to pursue the delinquent and investigative competence extends to local police as well. The constitutional power and autonomy of state and local authority make it almost impossible to draw up a coherent national drug-trafficking policy in the United States.

Mexico's federally centralized power of prosecution could be the basis for a coherent national policy. However, the ambiguities of "auxiliary" competence in these matters tend to prevent it from becoming a reality. The constitutional autonomy of state authorities combined with the administrative hierarchies of the military, and state and federal police authorities, prevents the formulation of a unified national policy.

A new approach is clearly needed. The principle underlying empowerment for such a new approach should be the specialization and exclusive competence of Mexico's Federal Public Prosecutor's Office (Ministerio Público Federal) and of the Federal Judicial Police to investigate and arraign offenders in drug-related crimes.

### **The new approach and the federal public prosecutor's office (Ministerio Público Federal)**

The new approach requires a restructuring of the permanent anti-drug campaign. Since President Miguel de la Madrid's administration, a unique effort has been made to modernize and professionalize the administration of justice and broaden the protection of individual guarantees under the Constitution.

The territorial organization of the Federal Public Prosecutor's Office was radically reorganized and the decision-

making process in the exercise of penal policy was decentralized. The Constitution and penal legislation were reformed to eliminate loopholes in the typification and appropriate penalization of corruption in the public service. The Code of Penal Procedure was also reformed in order to better protect human rights.

However, the permanent campaign against the drug-trade, has absorbed the attention of the Attorney General's Office, while progressively consuming more and more of its budget. There is clearly an inverse relation between this tendency, and the office's modernization aimed at improving its capability to identify, investigate and proceed against ever-burgeoning federal crime. Paradoxically, it is the drug-trade itself that appears to have benefitted most from this disparity.

The problem lies in the fact that the permanent anti-drug campaign is mainly concerned with destroying drug producing crops, which has little to do with the constitutional competence of the federal Attorney General's Office, whose principal responsibility is the pursuit of offenders against the safety of the Mexican population according to prevailing priorities.

The basic design of the permanent campaign against the drug-trade is the

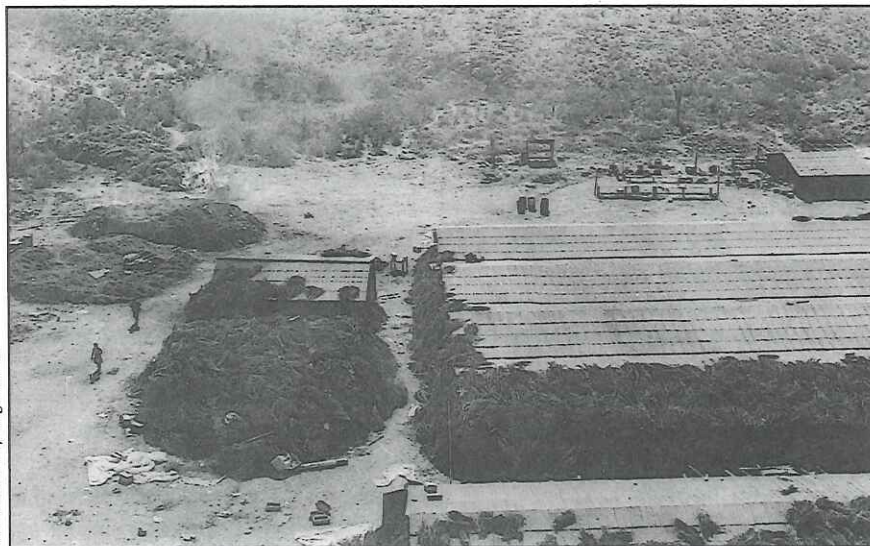
result of mistaken economic theory derived from the US international narcotics control program, which assumes that destruction of narcotic producing crops outside the US will prevent consumption within its borders.

Mexico is not an investigative or police state, but rather an under-investigated and under-policed state by comparison with the US. Formal Mexican law has traditionally limited the bounds of the police and the Public Prosecutor's Office: there is a constitutional prohibition against investigations, which is seen as a demand for voluntary denunciation of a crime committed being necessary to start an investigation. Electronic recordings are of no probative value at a trial. Covert investigations and the testimony they generate are obstructed by both penal legislation and procedure. The concept of state witnesses or immunity from prosecution in exchange for incriminatory testimony by accessories to criminal conspiracy, granted by the Public Prosecutor's Office, does not exist under Mexican law or procedure. Furthermore, the notion of a criminal enterprise and of criminal responsibility shared among its members, is considerably limited under the Mexican penal concept of "criminal association".



*Antinarcotics police in the field in the state of Veracruz.*

Marco A. Cruz/Imagenlatina.



Tons of confiscated marijuana at a processing plant in the state of Chihuahua.

All these legal instruments are fundamental to the identification, investigation and prosecution of modern organized crime. Their absence is a major source of abuse for most Mexicans, who have therefore no real means of availing themselves of protection under the law, and leaves them vulnerable to injustice, for only wealthy delinquents benefit from the limitations placed on the Public Prosecutor's Office.

#### The new approach and the police

The creation of a morally sound, professional, specialized and modern Federal Judicial Police, capable of investigating organized crime with transnational ramifications should be the cornerstone of the new approach to police organization. The focus on eradication has seriously distorted and damaged the capability of the existing Federal Judicial Police.

Ordinarily, the interception of large drug shipments or the destruction of large drug caches is the result of intelligence passed on to the Mexican judicial police by the US Drug Enforcement Agency. This brings about a distorted international division of police work which further atrophies the Mexican police's investigative capability: the DEA develops the

intelligence and carries out the inquiry, while Mexican authorities are left to arrest and confiscate.

There is nothing Mexico currently needs more than an honest, professional, responsible and effective police force to put teeth into the law. A new approach to the Federal Judicial Police ought to begin with adequate and competitive salaries in recognition of on-the-job risk and the high degree of professionalism and integrity required. Conditions for admission, training, promotion, and retirement can be developed from there. The foregoing should be combined with techniques of intelligence gathering, identification, documentation, records and accounts, as well as the theory and practice of investigating organized crime. Adequate equipment and facilities are an indispensable part of this modernization program.

#### The new approach and the Mexican penitentiary system

The Mexican penitentiary system is also remarkably backward in terms of the availability of security services able to appropriately handle organized criminals. They not only enjoy all sorts of privileges and continue to operate behind bars, but frequently escape.

Modernization is also essential here. It could begin with the federalization of a penitentiary for common offenders under the administration of a model unit, the creation and reproduction of which could develop into the modern federal penitentiary service Mexico so desperately needs.

#### The new approach and reciprocal legal assistance between Mexico and the US

There are about fifty bilateral agreements between Mexico and the US on matters related to trade in illegal drugs, with a recent Agreement on Reciprocal Legal Assistance awaiting ratification by the US Senate before coming into force. Domestic US legal concerns could lead this agreement to cause an even greater asymmetry in Mexico-US bilateral cooperation, to the detriment of Mexico. In addition, current asymmetry between Mexican and US public administration reduces the full benefits of reciprocal legal aid and bilateral cooperation. There is, moreover, a great imbalance between the US State and Justice Departments' demands for compliance by the Mexican government of contractual obligations, and the capacity of Mexico's Department of Foreign Affairs and Attorney General's Office to reciprocate.

In this context, the fundamental aim of the new approach is symmetry. Symmetry requires that existing terms of agreement be reviewed, to prevent Mexico from being tied to conditions that the United States is unwilling to undertake, and to give due consideration to requirements proposed by Mexico. Only thus can the modernization of Mexico's national security system and administration of justice be guaranteed. The immediate creation of a professional multidisciplinary administrative unit capable of interacting with the US judicial system is therefore indispensable to safeguard Mexico's rights. **M**