Sandra Perdomo/Cuartoscuro

Silent march against crime, May 27, 2004.

When Impunity Is the Rule The Reform of Mexico's Criminal Justice System

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One of Mexico's gravest problems is insecurity, both physical and legal; the former because there is a high incidence of day-to-day violence in the countryside and the city alike, affecting both poor and rich; the latter because there is no appropriate legal framework to process social differences and violations of norms. The law as a rule for co-existence continues to be resorted to only exceptionally.

In the absence of legality as a model for behavior, different alternative solutions come to the fore; the simplest ones imply that many people just do not

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exercise their rights; the most serious ones presuppose the loss of property or even someone's life with practically no recourse whatsoever.

Diagnostic Analysis

A few figures can help to explain why this pessimistic panorama is the case. The most serious studies agree that fewer than 1 percent of all crimes committed are punished.[1] According to Guillermo Zepeda, author of the broadest study on impunity and the ineffectiveness of the criminal justice system in Mexico, only 3.3 percent of all criminal complaints result in an alleged perpetrator of a crime actually coming before a judge (simply coming before the judge, not necessarily being convicted); this means that in 96.7 percent of cases, impunity prevails.[2]

To a great extent, impunity is the result of low institutional effectiveness of Mexican police forces. Most arrests are made at the time the crime is committed or within the following three hours. According to a survey of penitentiary inmates, 48 percent said they were arrested only a few minutes (fewer than 60) after the crime was committed. Another 22 percent were arrested between the second hour and 24 hours after the crime.[3] That is, 70 percent were detained less than 24 hours after the commission of the crime. This means that the possibility that the police make an arrest after a longer time has passed is very low; this lets us infer that Mexican police may know how to do surveillance, but do not know how to investigate.

Strict compliance with arrest warrants is not a strong point with Mexican police either. In 2000, only 33 percent of arrest warrants were actually served; the year before, the figure was only 25 percent. In 2000, then, 253,539 arrest warrants were not served.[4]

Now, the short time span between the commission of a crime and arrest shows another dangerous trait of the Mexican criminal justice system: the police often make arrests without orders from a judge. Article 16 of the Constitution allows for the arrest of an individual when caught *flagrante delicto* or when there is no doubt that the case is urgent, as long the crime in question is classified as serious and a judge's order cannot be obtained. Approximately 40 percent of all detentions in Mexico are made without the arrest warrant that should be issued by a judge.[5] A great deal of imagination is not needed to see the danger this puts individuals in of being arbitrarily detained by the police, particularly if he or she lives or works in a poor neighborhood.

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While all this shows how unprotected victims are, the circumstances of detainees are far from idyllic. Seventy-one percent of all detainees in Mexico City's Federal District did not have the advice of a lawyer while under arrest and when coming before the "public ministry" or district attorney/arraignment judge.[6] Of the 30 percent who did have the support of counsel, the vast majority (70 percent) did not have the opportunity to speak to him or her privately. Once before the judge who hears the charges, 60 percent of detainees were not informed that they had the right to make no statement. During their preparatory statements before the legal authorities, one out of every four detainees was not assisted by counsel.[7] Eighty percent of detainees never spoke with the judge who condemned them, and in 71 percent of cases, the judge was not present during the prisoner's statement (in the judicial offices).[8] Obviously, the Mexican Constitution stipulates the prisoner's right to a lawyer from the moment he or she is arrested, as well as his/her right to make no statement (Article 20). And criminal procedural law demands the presence of the judge during the judicial proceedings.

This information justifies the idea that the criminal justice system is a wide network of ineffectiveness and corruption that can trap and process very few criminals. But, an important issue must be clarified if we are to have a true image of that network: who does the criminal justice system trap?

Most prisoners who have been tried, convicted and sentenced have committed crimes against property, particularly petty theft, or crimes against health, particularly drug dealing in small amounts (caught with less than U.S.$100 worth of drugs on their person, and half of those caught with less than U.S.$16 worth in their possession). Some analysts say that this shows that the police, rather than arresting real

drug dealers, are actually arresting consumers, probably to fill an arrest quota established by their superiors.[9] Also, the criminal justice system seems to basically trap first-time offenders: only 29 percent of those arrested had ever been convicted of any crime before.[10]

What we can conclude is that the criminal justice system processes first-time offenders who have been accused of petty crimes, and leaves the experts who commit crimes for substantial amounts at large. In Mexico's criminal justice system, those punished for "white collar" crime are truly the exception.

Reforms

Given this discouraging panorama, in late March 2004, President Fox presented an ambitious, very comprehensive bill to reform the justice system, focused particularly on the criminal justice system.

The bill covers constitutional issues and matters dealt with in regular legislation. It would be very complex to try to even summarize all the legislative reforms it proposes. I will limit myself to briefly commenting on some of the Fox bill's proposed amendments to the Constitution.

The proposed constitutional reform has two main objectives: a) strengthening fundamental rights of individuals involved, from one vantage point or the other, in criminal proceedings; and b) redefining the legal regimen of the institutions in charge of the investigation and prosecution of criminal offenses.

To achieve the first aim, the bill proposes a profound reform of the legal system for juveniles accused of committing a crime. Specialized bodies would be created, both in the field of prosecution and the administration of justice, that in all cases would put a priority on the minor's greater interest, as stipulated by the UN Convention on the Rights of the Child, of which Mexico is a signatory. Children under 12 would be exempted from all legal responsibility; children from 12 to 17 would be considered juvenile offenders; and only those from the age of 18 on would be tried as adults.

Another proposal is to amend Article 20 of the Constitution to include the presumption of innocence until found guilty for anyone accused of a crime. Although it may sound strange, Mexico's Constitution has not until now included the presumption of innocence despite its being central to any democratic justice system.

Currently, the Constitution stipulates that the accused can be assisted during his or her criminal proceedings by a "lawyer or trusted person." Prisoners being assisted by a "trusted person" has often meant a bad defense for the accused because it has meant that what the legal system knows as "*coyotes*," or non-lawyers who carry out the defense of the accused, are legal. Fox's reform proposes to eliminate the category of "trusted person" and stipulate that the only ones authorized to defend the accused be "certified lawyers" or, if the accused does not have the money to pay a lawyer or does not want to name one, public defenders.

The bill stipulates that any statement prisoners make before authorities other than judges is to be considered null and void, and therefore cannot be entered into evidence against the accused. If the accused has not been assisted by a lawyer, any statement made before a judge would also be considered null and void. This reform is important because mistreatment and undue pressure continue to be practices in Mexico in many cases during interrogation (in some cases, torture is even used; although it has notably decreased in recent years, unfortunately, it has still not completely disappeared from police interrogations).

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The second aim of the bill is to change the legal system regarding the bodies charged with the prosecution of justice. Today, the public is very concerned with suspicions that district attorney's offices act more based on political than legal considerations (to be sure, these suspicions exist in many countries). To eliminate these —to a certain extent well founded— suspicions, the proposal is to create autonomous bodies that would replace the *procuraduría* (Attorney General's Office) on both the federal and state level. This is an idea that has been proposed for years by prestigious jurists from the UNAM Institute for Legal Research and has been widely known in comparative law. The bill proposes the creation of autonomous bodies called *fiscalías* (prosecutors) for both the federal and state governments.

If the reform is approved, it would fall to the president to nominate the "*Fiscal General de la República*" (general federal prosecutor), subject to Senate ratification. The appointment would last five years and the term could be extended another five years. In contrast with the current posts of attorney general or district attorney, the prosecutor could only be removed by impeachment, the elimination of immunity and a criminal trial, or impeachment and a political trial in the Congress: in effect, he/she practically could not be removed from the post.

In addition to establishing the post of general prosecutor, the bill would create circuit prosecutors whose jurisdiction would cover a specific territory. The circuit prosecutors would also be nominated by the president on the basis of a proposal from the general prosecutor, contingent on Senate ratification; they would be in office for four years, and could repeat their terms once.

One of the dilemmas that the writers of the bill had to face was what to do about the judicial (or investigative) police (today called the Federal Investigations Agency, or AFI), currently operating under the aegis of the Federal Attorney General's Office. That is, could the new autonomous body called the general federal prosecutor's office have a police force under its command? The bill answers this question in the negative, proposing that federal police forces unify under the existing Ministry of Public Security. This does not seem to be the best choice and, in fact, is one of the issues academics have criticized most in the bill.

One of the bill's most worrisome (or least fortunate) proposals is linked to allowing the law to establish a criminal legal regimen for fighting organized crime. We already have a "Law against Organized Crime"; but experts have questioned several of its articles as unconstitutional.[11] The idea of letting legislators create a series of criminal rules applicable only to organized crime, thus creating an exceptional criminal subsystem, is very dangerous and could pose grave risks for the fundamental rights of everyone living in Mexico.

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Conclusion

In any case, Mexico's criminal justice system is the subject of a great deal of dissatisfaction. Probably no single reform could do away overnight with decades of incapability, negligence and corruption. But we have a duty to try to generate institutional changes in the field of justice because the worst thing that can happen is that things remain as they are.

Wiping out the ominous statistics that I mentioned in the first part of this article will depend on the quality of the changes we make and their commitment to the fundamental rights of everyone involved in criminal procedures (people brought up on charges, victims, those convicted of a crime, minors, etc.). To ensure a successful conclusion to this process, it is important that the public be acquainted with the reform proposals and, as far as possible, follow the discussion that has already begun in the legislature. VM

Notes

[1] Marcelo Bergman, comp., *Delincuencia, marginalidad y desempeño institucional. Resultados de la encuesta a población en reclusión en tres entidades de la República Mexicana* (Mexico City: CIDE, 2003), p. 32.

[2] Guillermo Zepeda Lecuona, *Crimen sin castigo. Procuración de justicia y ministerio público en México* (Mexico City: CIDAC/Fondo de Cultura Económica, 2004), p. 220.

[3] Marcelo Bergman, op. cit., p. 45.

[4] Zepeda, op. cit., pp. 205-206.

[5] Zepeda, op. cit., p. 245.

[6] In Mexico's criminal justice system, the "public ministry" is the first body before whom a detainee is presented; a mixture of the district attorney and the arraignment judge who first hears the case, the "public ministry" decides if there has been a crime and whether sufficient evidence exists to charge the detainee and hold him/her over for trial. [Editor's Note.]

[7] Zepeda, op. cit., pp. 252-253.

[8] Marcelo Bergman, op. cit., p. 47.

[9] Ibid., p. 36.

[10] Ibid., p. 38.

[11] The most complete study on this issue as far as I know is the one by Sergio García Ramírez, *Delincuencia organizada*, third edition (Mexico City: UNAM/Porrúa, 2002).