

# Mexican Prison Reforms: Rights Guarantees or Parchment Guarantees?

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## I. Introduction

Corruption. Overcrowding. Organized Crime. The prison system in Mexico has a long history of challenges, resulting in facilities fraught with serious human rights violations and no way to vindicate them. Over the past decade, the Mexican government has worked to resolve these challenges, most recently with legal reforms in 2008 and 2016. The reforms were primarily aimed at changing the criminal justice system to afford more substantial rights to criminal defendants during trial and reforming the prison system itself to ameliorate the grave issues within prison. While one notable benefit of the criminal justice reforms has been a decrease in the prison population by nearly one fifth,<sup>1</sup> human rights abuses, corruption, and organized crime remain endemic.

This paper explores the Mexican prison conditions, past and present, that provided the impetus for dramatic reform. Through various statutory and constitutional reforms, Mexico has put the critical legal pieces in place to prevent the kind of human rights abuses that have plagued the country's prisons for years. A 2008 constitutional reform, a 2016 prison reform bill, and juvenile justice reforms have marked important steps toward an end goal of a less-crowded prison system that ensures the respect for the human dignity of all prisoners. Thus far, however, theory has not always translated into practice, and key impediments to the full vindication of human rights for Mexican prisoners remain. Only time will tell if the reforms, protective of human rights in theory, will translate to something more than parchment guarantees in reality.<sup>2</sup>

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<sup>1</sup> Christine Murray and Lizbeth Diaz, *Mexico prison population drops as police, prosecutors bungle cases*, REUTERS (Dec. 21, 2017), <https://www.reuters.com/article/us-mexico-prisons/mexico-prison-population-drops-as-police-prosecutors-bungle-cases-idUSKBN1EG017>.

<sup>2</sup> As used in the United States, a “parchment guarantee” signifies something that is just words on paper with no real-life impact and is derived from the framers of the United States Constitution. Strictly considered, “parchment barriers” was the term used by Madison in reference to the questionable notion that a Bill of Rights, or something approaching it, is in itself a sufficient barrier against the steady encroachment of centralized government power upon individual liberty. See THE FEDERALIST No. 48.

## II. Background on Prison Conditions

Much like the United States, Mexican prison history is marred by the inhumane treatment of prisoners, and a mindset that people who commit crimes deserve such treatment. Like the United States, Mexico has both state and federal legal systems, and thus it has both state and federal prisons. As will soon become clear, this dual system has important effects on Mexican prison conditions.

Beginning in 1871, President Benito Juarez attempted to reform prisons to align with rehabilitative goals and promote the humane treatment of prisoners; however, the country lacked resources and the reform was ineffective.<sup>3</sup> Consequently, for the greater part of the 20<sup>th</sup> Century, the belief that an offender's crime was a sign of that person's underlying degeneracy served as justification for the systemic inhumane treatment of prisoners across Mexico.<sup>4</sup>

Things began to change for the better. In 1966, almost a century after President Juarez's failed reforms, Mexico took an important step forward and joined the United Nations in signing minimum human rights standards for criminal offenders.<sup>5</sup> While there were some efforts to comply with these standards, there was still the underlying cultural stigma that came with committing the crime. The UN standards did not change the fact that those who committed crimes were still viewed as "outsiders" that did not belong in Mexican society.<sup>6</sup> Indeed, a 1979 survey revealed that only a third of Mexico's federal prisons met the humanitarian standards set by the UN.<sup>7</sup>

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<sup>3</sup> J. Olivero, *Mexico, Comparing Prison Systems*, 8 INTERNATIONAL STUDIES IN GLOBAL CHANGE 100 (Nigel South & Robert P. Weiss, 2014).

<sup>4</sup> Miguel Sarre, *Art. 18: Ejecución de Sanciones y Medidas Penales Privativas de la Libertad*, INSTITUTO DE INVESTIGACIONES JURÍDICAS, 1840 (2013), <https://archivos.juridicas.unam.mx/www/bjv/libros/8/3568/25.pdf>.

<sup>5</sup> Interview with Francisco J. Olavarria, Advisor, Consulate General of Mexico in Chicago (Mar. 19, 2018).

<sup>6</sup> Sarre, *supra* note 4, at 1840.

<sup>7</sup> Interview with Francisco J. Olavarria, Advisor, Consulate General of Mexico in Chicago (Mar. 19, 2018).

In recent history, prison conditions throughout the country have varied according to location and the characteristics of the inmate. One purpose of the Ley Nacional de Ejecución Penal (LNEP), passed in 2016, was to create and enforce more uniform standards for prison conditions throughout the country. This section discusses prison conditions that were common across the country prior to the passage of that major reform, and highlights the particular challenges relating to corruption in the system, women inmates, and juvenile inmates.

#### **A. Corruption in the Prison System**

Prior to the 2016 prison reform, a person's experience as an inmate in a Mexican prison depended on his ability to bribe his way through the prison administration. Miguel Sarre, a key drafter of the LNEP, put it this way: "there's a justice problem more than a conditions problem. . . conditions are a matter of justice."<sup>8</sup> Furthermore, the lack of sophistication and resources in the system leaves room for corruption to flourish. Sarre described a primitive system of accounting for prisoners in which people are vaguely counted in each room three times a day.<sup>9</sup> According to the National Human Rights Commission, Mexican prisons "have unhygienic conditions in bedrooms, kitchens and dining rooms, among other problems."<sup>10</sup> One researcher for Mexico Evalúa, a think tank working on justice issues in Mexico, observes that "as the government is not able to provide these basic conditions, the [prison] authorities take advantage to offer it as a privilege within prisons."<sup>11</sup> Thus, poor conditions create the environment for corruption to proliferate.

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<sup>8</sup> Interview with Miguel Sarre, Co-Author of the LNEP Draft (Mar. 26, 2018).

<sup>9</sup> *Id.*

<sup>10</sup> Mayela Sanchez, "It's a Spending Spree: Corruption Reigns in Mexico's Prisons," GLOBAL PRESS JOURNAL (Dec. 3, 2017) <https://globalpressjournal.com/americas/mexico/spending-spree-corruption-reigns-mexicos-prisons/>.

<sup>11</sup> *Id.*

It remains to be seen if the prison reform, aimed in part at combatting issues of corruption, will be able to achieve that lofty goal. Indeed, “bribery in the prison system is widespread and chronic.”<sup>12</sup> Attorneys working for a human rights clinic at Instituto Tecnológico Autónomo de México (ITAM) explained that prisoners need to pay for everything—including basic needs like soap, food, and warm water.<sup>13</sup> Sarre echoes this observation and explained that one can tell what the experience is like in prison by observing the lines of visitors, as they are carrying food, clean water, and toilet paper for their imprisoned loved ones.<sup>14</sup> Perhaps the most concrete example is provided by The Global Press Journal, which reported on a woman who went by A.M. visiting her husband in Mexican prison:

Her husband has to pay bribes, too, so A.M. brings 300 pesos (\$16.16) or more for him every time she visits. He in turn hands over 5 pesos (25 cents) to guards at each of his three daily roll calls, and he pays 50 pesos (\$2.70) every week, ostensibly to keep the electricity on in his cell, and another 50 pesos to access water – both fees that go to an inmate who controls the cell. If he fails to pay, he’d likely face violence or other consequences, A.M. says.<sup>15</sup>

Because of the pervasive corruption, the prison administration is intertwined with powerful inmates, so the average prisoner has to be prepared to bribe both prison guards and other prisoners.<sup>16</sup> For women’s prisons, the inmate who controls the prison is referred to as the prison “mama” who takes the bribes and gives the money to guards and the prison administration.<sup>17</sup> Some prison yards have “VIP areas” where an inmate must pay the prison mama to be in that area of the yard. If they do not pay the fee, they subject themselves to other

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<sup>12</sup> *Id.*

<sup>13</sup> Interview with Héctor Pérez and Gabriela Benitez, Clínica de Interés Público, Instituto Tecnológico Autónomo de México (ITAM) (Mar. 28, 2018).

<sup>14</sup> Interview with Miguel Sarre (Mar. 27, 2018).

<sup>15</sup> See Sanchez, *supra* note 10.

<sup>16</sup> Interview with ITAM (Mar. 28, 2018).

<sup>17</sup> *Id.*

parts of the yard that are more dangerous.<sup>18</sup> When asked how inmates rise to power within the prison, Sarre posited that they do so through the use of physical power, leadership, and establishing gangs.<sup>19</sup>

In addition to exploiting poor conditions, organized crime allows corruption to flourish. In the most extreme, organized crime effectively runs some prisons.<sup>20</sup> A former public official of the state of Nuevo Leon stated in response to a tragic prison riot that “[t]he problem is that the majority of Mexican prisons are out of control. They are run by organized crime and the prisoners themselves.”<sup>21</sup> This leads to both extremely dangerous living conditions and huge disparities in those conditions depending on a person’s gang status and relationship to the prison administration. For example, in a prison in Gómez Palacio in the state of Durango, the prison administration struck a deal with drug cartel prisoners and bribed them to leave the prison at night to commit crimes and return to the prison to split the spoils with the administration.<sup>22</sup> In Coahuila, a northern state, the Los Zetas drug cartel used a prison “to torture and kill its adversaries and kidnapping victims.”<sup>23</sup>

The corrupt power structures in Mexico’s prisons have fueled inter-inmate violence: “according to Mexico’s National Human Rights Commission (Comisión Nacional de los Derechos Humanos, CNDH), 82% of the 1,737 violent incidences that occurred in prisons throughout Mexico in 2014 were due to infighting among inmates.”<sup>24</sup> While this figure may be skewed by the fact that violence against inmates committed by guards often goes unreported due

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<sup>18</sup> *Id.*

<sup>19</sup> Interview with Miguel Sarre (Mar. 27, 2018).

<sup>20</sup> Interview with ITAM (Mar. 28, 2018).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See Sanchez, *supra* note 10.

<sup>24</sup> Kimberly Heinle, *Gang Violence, Overcrowding, Corruption Underpin Deadly Topo Chico Prison Riot*, JUSTICE IN MEXICO (March 6, 2016), <https://justiceinmexico.org/tag/prison-riot/>.

to fears of retaliation, it reflects a significant risk factor for anybody spending time in prison. Nuevo León, a northeastern state, has had a bloody history of dangerous prison riots fueled both by overpopulation and gang-related corruption.<sup>25</sup> Twenty-two prisoners were killed during incidents of inter-prison violence in Nuevo Leon 2011.<sup>26</sup> Then a fight between rival cartels in the Apodaca prison in 2012 led to the death of forty-four prisoners.<sup>27</sup> In September 2015, a Mexican cartel leader was killed in a prison in Monterrey, Nuevo Leon along with eleven other inmates involved in the fight.<sup>28</sup>

Mexico saw one of the most deadly prison riots in recent history in February of 2016, as forty-nine prisoners in the Topo Chico prison of Monterrey died because of a fight for control of the prison amongst rival gangs.<sup>29</sup> The inmates were reportedly able to get ahold of “knives, razors, bats, clubs, and other homemade weapons” and “also set fire to part of the prison.”<sup>30</sup> The Mexican government reportedly employed the “combined effort between the Mexican Army (Ejército), Navy (Secretaría de Marina, SEMAR), and Federal Police (Policía Federal, PF) to get the brawl under control.” Some reporters note that the Topo Chico prison was 35% overpopulated at the time and posit that overcrowding “fuels the environment for riots.”<sup>31</sup> In response to the incident, Nuevo León Governor Jaime Rodríguez Calderón blamed the prison conditions: “We are living through tragedy due to the conditions in the prisons.”

Perhaps not surprisingly, the “tragedy” caused by the conditions was not shared equally amongst all Topo Chico prisoners. The deadly 2016 fight led to the discovery of “luxury cells” in

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Kimberly Heinle, *Gang Violence, Overcrowding, Corruption Underpin Deadly Topo Chico Prison Riot*, JUSTICE IN MEXICO (March 6, 2016), <https://justiceinmexico.org/tag/prison-riot/>.

<sup>31</sup> *Id.*



the prison.<sup>32</sup> These were spaces reserved for inmates who were organized crime leaders. It was reported that these luxury cells had “king-size beds, large TVs, mini-bars, air conditioners, mobile saunas, and more.”<sup>33</sup> Some prisoners struggle to meet basic needs of acquiring food, water and soap, while others have their own cells complete with saunas. Under such conditions, violence seems inevitable.

The role that bribery plays to run the prison extends to the prison visitors as well. Visitors, in at least some prisons, are subjected to invasive searches, but may be able to pay a guard to avoid them.<sup>34</sup> Attorneys at the human rights clinic in Mexico City report that visitors are stripped entirely naked and searched for contraband.<sup>35</sup> Even after the search, bras are not allowed in prison because the underwire can be used as a “weapon.”<sup>36</sup> In the Global Press Journal story about the woman visiting her husband in prison, “A.M.” avoided leaving the prison or removing her bra to get inside by paying the prison guard 10 pesos.<sup>37</sup> During that same visit, A.M. had to pay 10 pesos to a guard “who checked the food she carried and 20 pesos (about \$1) to a guard who gave her a visitor’s pass. She paid to sit at a table and paid to warm up the food she brought for her husband. She even paid inmates to notify him that she’d arrived.”<sup>38</sup>

In addition to being subjected to invasive searches and paying their way through the system to see their loved ones, visitors sometimes must travel far to get to the prison because of the administration’s disregard for the location of a prisoner’s home when they assign them to a particular facility.<sup>39</sup> This is especially problematic for special prisoner populations that represent

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Interview with ITAM (Mar. 28, 2018).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See Sanchez, *supra* note 10.

<sup>38</sup> *Id.*

<sup>39</sup> Interview with Miguel Sarre (Mar. 27, 2018).

a minority within the greater prisoner population—there was an attempt to make one centralized federal women’s prison facility in the country that would require families from all over Mexico to travel hundreds of miles to visit their imprisoned loved ones, for the convenience of the prison administration.<sup>40</sup>

As shown by the foregoing, there has been some reporting on the corruption inside of prisons. Nevertheless, corruption is difficult to address given the persistent underreporting by prisoners and persistent denial by prison officials. In 2016, the Instituto Nacional de Estadística y Geografía, the national institute for statistics and geography, collected first-of-its-kind data on the scope of corruption in Mexico’s prisons. That study showed that 94% of prisoners who admitted to having experienced corruption in the prisons “also said that they didn’t report those incidents, usually because they feared reprisals, believed it would be useless or considered bribery a common practice.”<sup>41</sup> That study also showed that prisoners in Mexico City, which has the highest concentration of prisoners in the country, “experience corruption at about two times the rate of prisoners elsewhere.”<sup>42</sup> In 2017, the undersecretary of Mexico City’s prison system, Antonio Hazael Ruiz Ortega, refused to acknowledge that corruption was pervading the system: “[t]here are complaints, but that doesn’t mean they happen.”<sup>43</sup> He further answered “no way” to

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<sup>40</sup> *Id.*

<sup>41</sup> *See* Sanchez, *supra* note 10.

<sup>42</sup> *Id.* One factor that may be skewing this data is that the Mexico City prison population is comprised of different people from various backgrounds and social groups such that the prisons are less controlled by existing gangs from the outside than in the Northern states. Interview with Miguel Sarre (Mar. 27, 2018). While corruption and bribery among the prison administration may be rampant in Mexico City, there may be less fear of retaliation from highly organized criminal organizations running the prison, and so that population may be more likely to report corruption. Another consideration for interpreting this data is that the resistance to reporting corruption means we don’t really know the extent of the bribery happening anywhere.

<sup>43</sup> *Id.*

the question of whether those who report corruption are met with retaliation by the prison administration.<sup>44</sup>

## **B. Women's Prisons**

Because of the sexism and misogyny that pervades Mexican society, women who are imprisoned in Mexico face uniquely inhumane conditions.<sup>45</sup> While men who commit crimes are often still accepted by their families because their crimes are associated with masculinity and strength, women who commit crimes are rejected by their families and by society.<sup>46</sup> Attorneys for the human rights clinic at ITAM in Mexico City, who are working on a women's prison conditions project, explained that it is "socially not allowed that women can commit crimes."<sup>47</sup> This cultural mindset puts women in prison, holds them there for too long, and makes their lives inside miserable. To add insult to incessant injury, through this process they are often abandoned by their families.<sup>48</sup> Their families punish them with abandonment for being bad mothers and women.<sup>49</sup> This compounds the already brutal prison conditions because family members on the outside are often the only source of "commodities," such as toilet paper, for prisoners.<sup>50</sup>

As the ITAM attorneys shared, there are "so many women in prison because they're women, not because they committed the crime."<sup>51</sup> For example, many women are in prison for being an accomplice to kidnapping because they somehow supported a man in committing that crime.<sup>52</sup> Public Radio International told the prototypical story of Nancy Polanco Najera, who was

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<sup>44</sup> *Id.*

<sup>45</sup> Interview with ITAM (Mar. 28, 2018).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

sentenced to forty years in prison for being an accomplice to a kidnapping committed by her father: “she claims she’s innocent—that her father was mixed up with a gang, and she wasn't involved.”<sup>53</sup> Similar to women in the United States, many women in Mexico get involved with the criminal system because they used violence in self-defense against their partners, but Mexican courts do not consider violence against them as a mitigating circumstance.<sup>54</sup> The ITAM clinic attorneys recounted that a prosecutor accused a woman of killing her baby when she gave birth in her bathroom but had not known she was pregnant.<sup>55</sup> She fell unconscious when she went into labor and the baby did not survive.<sup>56</sup> She was charged with murder, and at her trial the prosecutor argued that “not even a dog would do this,” while her public defender said nothing.<sup>57</sup> Public defenders are less interested in zealously defending women because of the cultural stigma.<sup>58</sup> In a system where a prisoner needs an advocate to successfully assert her rights, women prisoners in Mexico find themselves completely disempowered.

The prison system is not structured to accommodate the basic needs of women. Regarding medical needs, for example, prisons do not even consider screening for breast cancer.<sup>59</sup> Women prisoners do not receive gynecological exams, despite the fact that sexual exploitation and beatings by guards is rampant in women’s prisons.<sup>60</sup> The Human Rights Commission of Mexico City made particular recommendations in response to findings of human

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<sup>53</sup> Jasmine Garsd, *As more women are incarcerated in Mexico, so are their babies*, PRI (Apr. 5, 2018), <https://www.pri.org/stories/2018-04-05/more-women-are-incarcerated-mexico-so-are-their-babies>.

<sup>54</sup> Interview with ITAM (Mar. 28, 2018).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Interview with ITAM (Mar. 28, 2018).

trafficking from inside the prison; guards sold female prisoners to male prisoners when they came in contact with each other in transit.<sup>61</sup>

Most of these women have no access to private lawyers because of abandonment of families—if they do not have anybody on the outside, they can’t vindicate their rights.<sup>62</sup> Furthermore, from the perspective of the attorneys at ITAM, most public defenders are overworked, under-resourced, and unwilling to zealously advocate for a woman who has been charged with a crime.<sup>63</sup> The lack of awareness of legal rights by women in prison presents a major problem.<sup>64</sup> Women do not know about their legal situation, where they are in the legal process, or the legal resources available to them, if any.<sup>65</sup> Because of being in a culture that has dismissed and oppressed them, they do not seek out the benefit of human rights.<sup>66</sup> The ITAM clinic notes that there is a “big difference” between men and women in prison as to vindicating rights.<sup>67</sup>

In theory, prisons have programs available to prisoners for the purposes of supporting personal development needs while behind bars.<sup>68</sup> ITAM shared that the program of activities contemplates medical, psychosocial, and educational programming.<sup>69</sup> But the reality is that the program does not attend to the needs of incarcerated women. In at least some women’s prisons, the highest educational training offered is at the elementary school level.<sup>70</sup> Regarding vocational training, women are offered a much narrower set of options in prison than men—whereas men

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Interview with ITAM (Mar. 28, 2018).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Interview with ITAM (Mar. 28, 2018).

<sup>70</sup> *Id.*

may be offered manufacturing or trade training and receive pay in prison, women might only be offered domestic skills for lower paying jobs on the outside and may not be paid at all while incarcerated.<sup>71</sup> Furthermore, when women do get out, they face discrimination in the employment market against former prisoners.<sup>72</sup>

Prior to the 2016 reform, women were permitted to have their children live with them in prison until age six, and now after the 2016 reform (which was aimed at addressing overcrowding in prisons), women can have their children with them in prison until age three. According to the National Human Rights Commission of Mexico (CNDH), there were 618 children living in Mexican prisons in 2016.<sup>73</sup> This practice is justified by the idea that “keeping babies with their mothers is the most humane option” and that it is important for children to develop an attachment to their primary caregiver.<sup>74</sup>

The ITAM clinic shared that some prisons have managed to prohibit women from keeping their kids despite this right. For women whose families have abandoned them while they are in prison, their children become wards of the state if they are not allowed to stay with their mothers, or if they age out.<sup>75</sup> Public Radio International interviewed Ana Pecova, the director of Equis, a women’s rights organization, who explained what happens to these children:

We have a very complicated situation in Mexico because there aren’t really institutions, like in the US, social service institutions that follow up on what happens to a kid when his mom is incarcerated. . . . So, there’s this situation where no one knows where the kids are. Some kids live with these women, in prison. But some women have to leave the kid with family. A brother, a neighbor. Some women don’t even have that, and the kids end up in orphanages, nunneries.<sup>76</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See Garsd, *supra* note 53.

<sup>74</sup> *Id.*

<sup>75</sup> Interview with ITAM (Mar. 28, 2018).

<sup>76</sup> See Garsd, *supra* note 53.

When families are available to take the children to visit their mothers in prison, the children may do so, but this is a right for the child and not the mother.<sup>77</sup> For impoverished families and those who may have absorbed some of the views about the low value of women who have committed crimes, the cost of bringing a child to the prison and paying the various bribes to the guards may outweigh the benefit. The ITAM clinic found that there is also a disincentive to bringing children to visit their mother in prison when those children are forced to strip down for contraband checks at the door.<sup>78</sup> Some women would rather discontinue contact with their children to protect them from the psychological trauma that invasion might cause.<sup>79</sup>

As with male prisoners, fear of retaliation keeps many female prisoners from making complaints, and perhaps more so than with men because of the cultural perception of women prisoners.<sup>80</sup> The ITAM clinic put it simply: if you are a prisoner and you complain against the state, you will be beaten and will have your visits restricted.<sup>81</sup> Furthermore, if these women internalize the idea that they lack value for being bad women, then they may not assert their human rights because they do not believe they deserve them.

### **C. Juvenile Detention Facilities**

Over the last twenty years, Mexico has attracted attention for human rights abuses against juvenile prisoners, finally leading to the passage of a national juvenile justice law in 2017. Before that time, the country lacked national standards regarding whether youth could be detained, for what kind of defenses, and for how long before trial and as a sentence.<sup>82</sup> An

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<sup>77</sup> Interview with ITAM (Mar. 28, 2018).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Interview with Doug Keillor, Justicia Juvenil Internacional, México A.C. (Mar 12, 2018).

estimated 40 to 45% of juvenile prisoners awaiting trial.<sup>83</sup> The National Human Rights Commission of Mexico (CNDH) has gathered data on detainment and human rights violations in youth prisons, documenting abuses that included “violations of the right to receive dignified treatment, the right to development, the right to health, and the right to non-discrimination.”<sup>84</sup> One juvenile detention center allegedly had a practice of waking up the youth “at 4:00 a.m. every day to cook 3,300 pounds of tortillas for adult inmates at a nearby prison.”<sup>85</sup> The reports continued:

In a detention center in Veracruz, children had not been separated by age or severity of crime and two seven-year-old boys were found living with 18-year-old adolescents. In a center in Sonora the children were forced to sleep on cement slabs because there were no mattresses. In Chiapas, the staff reported that the detention center often experienced water shortages. In Nuevo Leon, the facility was severely understaffed with only one social worker for 188 children.<sup>86</sup>

The safety risks were not only an issue in state facilities but also federal facilities. In 2005, one youth in a federal juvenile facility died from an assault by another inmate after doctors misdiagnosed him.<sup>87</sup> In 2004, a fifteen-year-old who was detained with adult inmates died from a severe beating by one of these adult inmates.<sup>88</sup>

Doug Keillor, Executive Director of Juvenile Justice Advocates International, has toured and observed the conditions of 35 youth detention centers throughout Mexico.<sup>89</sup> He explained that a CNDH report showing that 76% of juveniles reported being physically mistreated or beaten includes time spent with the cops before getting in patrol car or while being moved to

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<sup>83</sup> *Id.*

<sup>84</sup> *Mexico’s National Human Rights Commission: A Critical Assessment*, HUMAN RIGHTS WATCH. (Feb. 12, 2008) <https://www.hrw.org/report/2008/02/12/mexicos-national-human-rights-commission/critical-assessment#page>.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Interview with Doug Keillor (Mar. 12, 2018).



pretrial detention.<sup>90</sup> There has not been enough research into specifically gathering data from that time frame. He also explained that conditions vary across different facilities and states, but in general all facilities are under-resourced.<sup>91</sup> For example, many facilities lack a computer infrastructure for documenting and accounting for the youth.<sup>92</sup> Most of the facilities are structured as several buildings inside a compound.<sup>93</sup> Some have fields for play, gardens, or other outdoor spaces while others in the city lack any physical space at all.<sup>94</sup> Most of the sleeping arrangements are dormitory-style, and were overcrowded prior to the reform.<sup>95</sup>

Mental illness is a common issue inside juvenile detention centers, and facilities will commonly have a psychologist on staff.<sup>96</sup> Keillor explained that this person does not have the same credentials as a psychologist in the United States; they may have no more than a college degree and lack the respect from within the institution to have their recommendations heeded by the guards.<sup>97</sup> For example, the psychologist may make a recommendation that a youth have a certain number of appointments, be removed from isolation,<sup>98</sup> or receive a certain type of medication, but the recommendations are often ignored.<sup>99</sup>

Much like the adult penal system, corruption pervades the juvenile detention system. For the juvenile inmate to receive any kind of benefit—from a visitation from parents or friends, receiving basic need, to getting out of solitary confinement—the inmate or their families need to

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Interview with Doug Keillor (Mar. 12, 2018).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Prolonged solitary confinement is illegal in Mexico, and facilities that are questioned about its use will vehemently deny it. Keillor asserts that solitary confinement is used in Mexican prisons and in juvenile facilities, but that because it is an illegal practice it is hard to research and track. *Id.*

<sup>99</sup> *Id.*

pay.<sup>100</sup> In Keillor’s experience, this kind of corruption is pervasive across the facilities he’s visited, with some of them running entirely through bribery.<sup>101</sup>

Much like in adult systems, Keillor shared that day-to-day abuses of the youth are not reported, nor do they become the source of an investigation.<sup>102</sup> Thus, it is difficult to vindicate the rights of juvenile inmates. The Human Rights Commission will get involved if major offenses, such as rape or exchanging sex for drugs, come to light, but not when it comes to daily abuses that are perceived as commonplace.<sup>103</sup> Like women in prison, youth are often unaware of their rights, and public defenders who are stretched thin are less likely to consider the objectives and desires of the youth than they are to push the case along.<sup>104</sup>

### **III. Reforms: Forging A Path Forward**

As evident from the foregoing, Mexico’s prisons are hotbeds of human rights abuses. These systemic issues served as an impetus for reform. Starting with major criminal law reform bill in 2008, Mexico began a series of legal changes that affected the prisons system across the country. The following is a discussion of the 2008 bill, the 2016 prison reform bill, and juvenile detention reforms.

#### **A. 2008 Criminal Law Reform: Nuevo Sistema de Justicia Penal**

The 2008 reform bill—the Nuevo Sistema de Justicia Penal—represented a fundamental change in the protections afforded to criminal defendants in Mexico.<sup>105</sup> As interviewees

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<sup>100</sup> *Id.*

<sup>101</sup> Interview with Doug Keillor (Mar. 12, 2018).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Octavio Rodríguez Ferreira and David A. Shirk, *Criminal Procedure Reform in Mexico, 2008–2016: The Final Countdown for Implementation*, JUSTICE IN MEXICO: UNIVERSITY OF SAN DIEGO (Oct. 2015), [https://justiceinmexico.org/wp-content/uploads/2015/10/151008\\_FINALCOUNTDOWN\\_Full-Finallow-res.pdf](https://justiceinmexico.org/wp-content/uploads/2015/10/151008_FINALCOUNTDOWN_Full-Finallow-res.pdf).; see also Shannon K. O’Neil, *Mexico’s Judicial Reforms, Four Years Later*, COUNCIL ON FOREIGN RELATIONS, (May

confirmed, the 2008 reform improved prison conditions, even if that was not the primary goal. Prior to 2008, the presumption of innocence was not explicitly recognized in Mexico's constitution.<sup>106</sup> In fact, one attorney explained that the unspoken rule was that defendants were effectively presumed guilty.<sup>107</sup> Moreover, there were few judicial checks on the ability for prosecutors to investigate and prosecute crime,<sup>108</sup> as coerced confessions were common.<sup>109</sup> Finally, Mexico primarily used a “inquisitorial” system that prioritized written briefing over in-court procedures, and thus there was not an effective means to cross examine witnesses to the accused.<sup>110</sup> This system was inherently inefficient and contributed to a significant backlog of cases.<sup>111</sup>

Perhaps worst of all, there was no time limit on pre-trial detention, and it was possible for defendants to linger in jails for even fifteen years before trial.<sup>112</sup> Of Mexico's total prison population in 2011—before the prison reform began to be implemented in earnest— 40% of

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23, 2012), <https://www.cfr.org/blog/mexicos-judicial-reforms-four-years-later> (“The reforms are designed to improve public security and the administration of justice, moving Mexico's courts from a system of written evidence to one of oral trials and bolstering due process rights for the defendant by ensuring the presumption of innocence and better access to an adequate defense.”).

<sup>106</sup> Clare Ribando Seelke, *Supporting Criminal Justice System Reform in Mexico: The U.S. Role*, CONGRESSIONAL RESEARCH SERVICE (March 18, 2013), at <https://fas.org/sgp/crs/row/R43001.pdf>. (“Although the 1917 Mexican Constitution contained individual guarantees (for victims and the accused) and provided for the presumption of innocence and jury trials, many of those provisions were never implemented.”).

<sup>107</sup> Interview with Alfonso Jiménez, Attorney, Mexico City (Mar. 29, 2018).

<sup>108</sup> Octavio Rodríguez Ferreira & David Shirk, *Mexico's Badly Needed Justice Reforms Are In Peril*, SAN DIEGO TRIBUNE (Aug. 11, 2017), <http://www.sandiegouniontribune.com/opinion/commentary/sd-mexico-justice-utak-commentary-20170811-story.html> (opining that the pre-reform system “gave criminal defendants very limited access to an effective legal defense, which in turn allowed police and prosecutors to conduct sloppy investigations and frequently violate suspects' rights”).

<sup>109</sup> Seelke, *supra* note 106, at 2 (“Under the traditional system, prosecutors have wide latitude during the investigatory stage of a case to gather evidence however they deem appropriate that is then submitted to judges in a written dossier that is rarely challenged.”).

<sup>110</sup> Michelle Mark, *Mexico Has Spent 8 Years Overhauling Its Dysfunctional Justice System, But It May Need 11 More to Fix the Mess*, BUSINESS INSIDER (May 7, 2016), <http://www.businessinsider.com/mexico-needs-11-more-years-to-reform-justice-system-2016-5>. (“Mexico's old justice system operated under an inquisitorial model, meaning that trials were closed to the public and conducted primarily using written evidence and arguments.”).

<sup>111</sup> Interview with Marcelino Miranda, Consul for Legal Affairs, Consulate General of Mexico in Chicago (Mar. 19, 2018).

<sup>112</sup> Interview with Ana Aguilar García, Director of Projects, Instituto de Justicia Procesal Penal (Feb. 15, 2018).

prisoners were awaiting trial.<sup>113</sup> Rampant use of excessive pre-trial detention is especially problematic for the success of one's trial. Pre-trial detainees often give involuntary confessions due to "torture and physical abuse," and they are subject to both evidence manipulation and the extraction of bribes.<sup>114</sup> In part, the use of pretrial detention was intentional, as the country appeared to use "preventive detention" to keep individuals in organized crime in jail out of fear that they may be acquitted.<sup>115</sup>

These issues, coupled with the high success rate for criminal convictions,<sup>116</sup> contributed to the persistent overcrowding problems that plagued the country for decades.<sup>117</sup> Indeed, Mexican prisons were over capacity by 23% 2011.<sup>118</sup> Overcrowding provided opportunities for exploitation given the finite resources of each prison, as "[p]risoners often had to bribe guards to acquire food, medicine, and other necessities."<sup>119</sup>

The 2008 reform successfully addressed issues of overcrowding. As one lawyer explained succinctly, if not hyperbolically, the "jails are basically empty now."<sup>120</sup> As of December 2017, there were around 203,000 prisoners in prisons across Mexico, down from 235,900 in June 2016.<sup>121</sup> As of now, the prison system is under capacity at just under 98 percent.<sup>122</sup>

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<sup>113</sup> *Mexico 2012 Human Rights Report*, United States Department of State, at 13, available at <https://www.state.gov/documents/organization/204674.pdf>.

<sup>114</sup> Ferreira and Shirk, *supra* note 105, at 8.

<sup>115</sup> Seelke, *supra* note 106, at 3–4.

<sup>116</sup> *Id.* at 2 (noting that "85-90% of crimes brought to trial result in conviction"). *See also id.* (noting that "[t]he likelihood of a guilty verdict is particularly high for cases involving poor people who have committed minor offenses.")

<sup>117</sup> *See* Seelke, *supra* note 106.

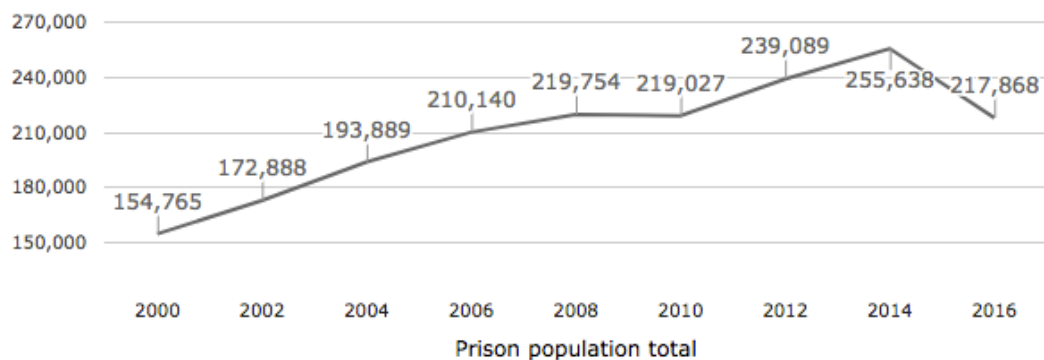
<sup>118</sup> *Id.* at 3.

<sup>119</sup> *See Mexico 2012*, *supra* note 113, at 7.

<sup>120</sup> Interview with Alfonso Jiménez (Mar. 29, 2018).

<sup>121</sup> Joshua Partlow, *How a U.S.-backed Effort to Fix Mexico's Justice System Led to Turmoil*, THE WASHINGTON POST (Dec. 29, 2017), available online at [https://www.washingtonpost.com/graphics/2017/world/torn-apart-by-drug-violence-mexico-aims-to-reform-justice-system/?utm\\_term=.bd819c5d1c08](https://www.washingtonpost.com/graphics/2017/world/torn-apart-by-drug-violence-mexico-aims-to-reform-justice-system/?utm_term=.bd819c5d1c08).

<sup>122</sup> World Prison Brief, *Overview of Mexico*, INSTITUTE FOR CRIMINAL POLICY RESEARCH, available online at <http://www.prisonstudies.org/country/mexico>.



Source: World Prison Brief, Institute for Criminal Policy Research

A number of factors account for this drop. First, the reform grants defendants an explicit presumption of innocence.<sup>123</sup> At least for one attorney who brings criminal cases on behalf of victims’ families, the presumption of innocence means that he is bringing less prosecutions because of a lack of evidence.<sup>124</sup> One public defender in Morelos, a state just south of Mexico City, states that guilty verdicts have dropped from 70 to around 40% of cases.<sup>125</sup>

Second, and relatedly, Mexico has adopted robust criminal procedure protections that grant criminal defendants rights that they did not have before.<sup>126</sup> Mexico has incorporated versions of the Exclusionary Rule from the United States,<sup>127</sup> in that courts exclude evidence obtained illegally and confessions made outside the presence of one’s attorney. In part, this reflects the reform’s emphasis on “creat[ing] a system that involves a more equal balance of power between prosecutors and defense attorneys and a more active role for judges.”<sup>128</sup> As a

<sup>123</sup> See Mark, *supra* note 110.

<sup>124</sup> Interview with Alfonso Jiménez (Mar. 29, 2018).

<sup>125</sup> Interview with Gerardo Manrique López, Public Defender, Morelos, Mexico (Mar. 27, 2018).

<sup>126</sup> See Partlow, *supra* note 121. (“Now, police can’t enter houses as easily without a warrant, which are often hard to get. Suspects have the right to remain silent; police must justify stops and searches. If there is the ‘smallest error’ in paperwork or a delay getting a detainee before a judge...a ‘criminal, a kidnapper, a killer, gets set free.’”)

<sup>127</sup> See, e.g., *Mapp v. Ohio*, 368 U.S. 871 (1961).

<sup>128</sup> See Seelke, *supra* note 106, at 5.

practical matter, these protections mean that fewer arrests have taken place, and accordingly, fewer people are going to jail.<sup>129</sup>

Third, pretrial detention is now limited to only two years, and thus defendants are “not staying in jail for very long.”<sup>130</sup> This rule is nearly categorical<sup>131</sup> and applies even if the defendant is mid-trial at the two-year mark.<sup>132</sup> To be sure, the pretrial detainee population as a percentage of the total remains high at around 38%.<sup>133</sup> However, this is in part because the 2008 reform has not been completely implemented across states; the fact that the total percentage remains high is likely due to the fact that use of pre-trial detention has actually *risen* in states that have not yet implemented the reform.<sup>134</sup>

Fourth, and finally, the 2008 reform gives judges the opportunity to use concepts like alternative dispute resolution and restorative justice so that some defendants may avoid jail time at best and receive reduced sentences at worst. For example, the reform “includes plea bargaining and alternative justice mechanisms that may result in compensation agreements between victims and perpetrators.”<sup>135</sup> For some misdemeanor offenses, defendants may simply pay fines to the state, thus allowing them to escape prison time entirely.<sup>136</sup>

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<sup>129</sup> As explained by Guadalajara’s police chief, 100 arrestees went to jail on average before the 2008 reform was fully implemented. That figured is now done to “10 to 15.” Moreover, judges have only issued 50 arrest warrants from June 2016 to December 2017, despite the fact that “there are 1,300 crimes per month.” See Partlow, *supra* note 121.

<sup>130</sup> Interview with Ana Aguilar García (Feb. 15, 2018).

<sup>131</sup> A key exception is for organized crime, as prosecutors can seek an “arraigo” to delay the release of detainee involved in organized crime where it proves that continued detention “is necessary for the success of the investigation, or the protection of persons or legal rights, or when there exists a justified risk that the accused will evade justice.” Article XVI, Reforms to the Political Constitution of the United Mexican States (2008). Though limited to 40 days, the prosecutor may delay that time an additional 40 days if the “prosecutor shows that the reasons persist that gave rise to the arraigo.”

<sup>132</sup> Interview with Ana Aguilar García (Feb. 15, 2018).

<sup>133</sup> World Prison Brief, *Overview of Mexico*, INSTITUTE FOR CRIMINAL POLICY RESEARCH, at <http://www.prisonstudies.org/country/mexico>.

<sup>134</sup> See Seelke, *supra* note 106, at 10 (noting that pre-trial detention rates have “risen in non-reform states”).

<sup>135</sup> *Id.* at 5.

<sup>136</sup> Interview with Francisco J. Olavarria, Advisor, Consulate General of Mexico in Chicago (Mar. 19, 2018).

## **B. 2016 Prison Reform: La Ley Nacional de Ejecución Penal**

Although the 2008 criminal justice reforms marked progress towards a system that protects prisoners' rights, an explicit recognition of those rights was lacking. In 2011, Article 18 of the Mexican Constitution was reformed to state in relevant part that: "The penitentiary system will be organized on the basis of *respect for human rights*."<sup>137</sup> Although respect for the human rights prisoners was now part of the constitution, prison conditions remained bleak.

On April 27, 2016, Mexico's senate, acknowledging a failed prison system, unanimously approved a bill aimed at drastic prison reform.<sup>138</sup> Senator Fernando Yunes Márquez, the head of the Senate Justice Committee, expressed his hopes that the legislation will ensure that prisons "will no longer be nests of violations of the rights that our constitution guarantees."<sup>139</sup> The National Penal Enforcement Law (LNEP) has at its core the concept of human dignity and that prisoners should be treated as subjects, not objects.<sup>140</sup> The LNEP marks a drastic change from the old penal system, implicating practical challenges that will make implementation a long and arduous process. There is no doubt, however, that the adoption of the LNEP marks an important step forward for prisoners and the vindication of prisoners' rights in Mexico.

### **i. A Comprehensive Reform**

The LNEP offers a comprehensive and dramatic restructuring of Mexico's prison system. The LNEP dictates all the rules that must safeguard the human rights of the people who have been sentenced, delegates responsibility among various actors involved in the penal system, outlines the mechanism by which violations of prisoners' rights can be vindicated, and regulates

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<sup>137</sup> Artículo 18 Constitución Política de los Estados Unidos Mexicanos (emphasis added).

<sup>138</sup> Mike LaSusa, *Mexico Senate Unanimously Approves Prison Reforms*, INSIGHT CRIME (Apr. 28, 2016). Available online at <https://www.insightcrime.org/news/brief/mexico-senate-unanimously-approves-prison-reform/>.

<sup>139</sup> *Id.*

<sup>140</sup> Interview with Miguel Sarre (Mar. 26, 2018).

a strategy by which to achieve a fair punishment. The guiding principles of the penitentiary system, as outlined by Article 4 of the LNEP, are dignity, equality, legality, due process, transparency, confidentiality, publicity, proportionality, and social reintegration.<sup>141</sup> The Law conceptualizes people deprived of liberty as owners of their constitutional rights and subjects in the penal system. This conceptualization is a radical shift in criminal enforcement, to consider people subjects, rather than objects.<sup>142</sup>

The LNEP is uniquely comprehensive, consisting of 207 articles divided into six titles. For the scope of this paper, discussion will be limited to the affirmative rights guaranteed to prisoners and the mechanisms by which prisoners can vindicate human rights abuses they endure while incarcerated.

*a. Enumerated affirmative rights*

In order to ensure human dignity is at the center of the prison system, the LNEP makes an attempt to list the important positive rights of incarcerated individuals. The affirmative rights guaranteed to prisoners through the LNEP are found in Article 9 and include the right to: dignified treatment by prison staff; preventative health care and adequate medical care; receive nutritious, sufficient, and quality food; stay in designate rooms according to considerations in Article 5; be informed of your rights and duties from the moment you are incarcerated; receive a permanent supply of water for consumption and personal care; receive a supply of necessary toiletries; visitation; make complaints in writing, and in urgent cases by any means; guarantee their moral, physical, sexual, and psychological integrity; participate in the development of an

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<sup>141</sup> Artículo 4 de la Ley Nacional De Ejecución Penal (LNEP) (June 16, 2016).

<sup>142</sup> Manuel Vidaurri Aréchiga, *Aproximación General a la Nueva Ley Nacional de Ejecución Penal Mexicana*, ELECTRONIC JOURNAL OF CRIMINAL STUDIES AND SECURITY 4 (2017), available online at <http://www.ejc-reeps.com/Manuel%20Vidaurri.pdf>.



individualized activity plan; and to all rights provided for in the constitution, treaties, and other applicable legal provisions.<sup>143</sup>

The LNEP, in recognizing that women are differently situated from male prisoners, enumerates additional positive rights for women prisoners. These additional rights are outlined in Article 10 and include the right to: motherhood and lactation; receive direct treatment from female staff and to be examined by female medical professionals except in emergency situations; adequate facilities and hygiene products required for a dignified and safe stay; receive a comprehensive medical examination upon admission to a prison to determine specific health care needs; receive medical attention; maintain custody of children under three years of age; receive adequate and healthy food for children; receive education, clothing, and pediatric care for children.<sup>144</sup> The prison authority may also grant an extension past the three year mark for children with disabilities, with the principle that the best interests of the child be considered.<sup>145</sup>

These positive rights are aimed at protecting both the human dignity and the personal autonomy of prisoners.<sup>146</sup> In particular, the activity plan contemplated by the LNEP is meant to offer incarcerated persons a means to determine which activities (based on what is available and what should be available within reason) the prisoner would like to participate and when, offering some level of control in an environment otherwise devoid of personal choice.<sup>147</sup> A stated central goal of the prison system is a kind of common good in prison, which would allow personal fulfillment of inmates' legitimate life expectations. This goal is unachievable "without dignified living conditions" and the ability of prisoners to have some level of autonomy over their own

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<sup>143</sup> Artículo 9 de la LNEP.

<sup>144</sup> Artículo 10 de la LNEP.

<sup>145</sup> *Id.*

<sup>146</sup> Interview with Miguel Sarre (Mar. 26, 2018).

<sup>147</sup> *See* Artículo 104 de la LNEP.

lives.<sup>148</sup> The LNEP framework considers this and enumerates the positive rights that should theoretically achieve Mexican prisons under the legality.

***b. Execution judges and bringing claims***

A remarkable novelty of the LNEP is the office of “Execution Judge” established by Article 24 of the LNEP. Execution Judges are an essential part of the reform, as they are established to resolve any controversies that arise out of the application of this Law.<sup>149</sup> A separation of power concern underlies the creation of the Execution Judge and the idea of bringing the judiciary into the prison system to act in an oversight capacity.<sup>150</sup> As Miguel Sarre explained, prisons are meant to be assigned to an Execution Judge who will serve as an expert on that prison and any human rights abuses within—including whether or not the prisoners are actually afforded the positive rights enumerated in the LNEP.<sup>151</sup> If the administration is in charge of both oversight and addressing human rights abuses, then the same body would act as judge for its own hearing. With the reform, a prison is instead assigned an Execution Judge to be a neutral adjudicator to hear prisoners’ rights cases. The role of the Execution Judge, and her empowerment to actually fulfill her duties, is vital to the success of the LNEP.<sup>152</sup>

The powers of the Execution Judges are enumerated in Article 25. The Execution Judges have the power to: guarantee prisoners their fundamental rights provided for in the LNEP; guarantee the sentence is executed according to its terms; ensure prisoners suffering from chronic mental illness be given treatment; resolve all incidents (need to look up how to actually

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<sup>148</sup> Miguel Sarre and Gerardo Manrique López, *Derecho de Ejecución Penal: Antecedentes Nacionales y Referentes de Fuente Internacional*, 17 DERECHOS DEL PUEBLO MEXICANO 723, 737 (2016).

<sup>149</sup> Artículo 24 de la LNEP.

<sup>150</sup> Interview with Miguel Sarre. Mar. 26, 2018.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

translate this one); guarantee prisoners have defense counsel in the execution procedure; apply the most favorable law to prisoners; establish conditions of conditional freedom (like parole); and impose appropriate means of compulsion to enforce decisions.<sup>153</sup>

The LNEP also lays out the framework for how controversies come before an Execution Judge. Article 115 explains that in an urgent case, the person bringing the claim may go directly before the Enforcement Judge.<sup>154</sup> In such cases, the Execution Judge will immediately enjoin the act and, in cases where prison authorities have refused something, can order the prison authorities to take action.<sup>155</sup> The Execution Judge makes a determination of urgency.<sup>156</sup>

Articles 116–117 articulate the process by which prisoners can bring non-urgent controversies in front of Execution Judges. Article 116 enumerates the controversies Execution Judges will hear, which include: conditions of confinement; plan of activities and issues related to it that imply a violation of fundamental rights; the rights of individuals who have entered the prison as visitors; public and private defenders; defenders in courts of amparo; observers from civil society organizations; the duration and modification of a penalty; and the duration and modification of a security measure.<sup>157</sup> Notably, the LNEP gives a cause of action to parties other than a prisoner, allowing a wide range of parties to bring cases to the Execution Judge. Articles 117 and 118 detail the logistics associated with bringing a claim enumerated in Article 116.

Article 117 explains that disputes over conditions of confinement and the activity plan must first go through an administrative petition process in the control of the prison administration, much like the administrative grievance procedure prisoners must exhaust in the

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<sup>153</sup> Artículo 25 de la LNEP.

<sup>154</sup> Artículo 115 de la LNEP.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Artículo 116 de la LNEP.

United States, before the dispute can be brought to an Execution Judge.<sup>158</sup> However, the Article also establishes that disputes over the transfer of an inmate for an urgent reason do not require a prisoner to first attempt to solve the issue internally.<sup>159</sup> As delineated in Article 118, if a prisoner wishes to challenge a prison administration's decision in regards to the length of a prison sentence or a modification of the sentence, his defense counsel is authorized to appear before the Execution Judge.<sup>160</sup>

By instilling in Execution Judges a great deal of authority over the integrity of the prison system, the LNEP theoretically removes potentially abusive power from the prison administrations to run facilities rampant with human rights violations. While only time will tell if the Execution Judge has enough power to ensure the human dignity of every person deprived of liberty in Mexico, the framework is nonetheless revolutionary.

## **ii. How the 2008 Reform Compliments the 2016 Reform**

Of course, addressing the issues of overcrowding by stemming the tide of people going to prison is only one step. For those individuals that are both in prison and will stay there for the long-term, the 2008 reform supplements the work that the 2016 reform has done to vindicate the rights of prisoners.

The transition from the inquisitorial system to the accusatory system has helped to improve the processes through which prison conditions can be remedied. In theory, the 2008 reform will aid in the efficiency of addressing claims since the written system was susceptible to significant backlog issues.<sup>161</sup> In addition to making claims resolution more efficient, the oral

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<sup>158</sup> Artículo 117 de la LNEP.

<sup>159</sup> *Id.*

<sup>160</sup> Artículo 118 de la LNEP.

<sup>161</sup> See Seelke, *supra* note 106, at 2 (“The judicial system itself has long been plagued by long case backlogs”); Mark, *supra* note 110; Partlow, *supra* note 121 (citing the problem with “massive” judicial backlogs as a key motivator for reform”).

process will ideally aid prisoners in their ability to win claims. A public defender who, along with Miguel Sarre, spearheaded the 2016 reform efforts has said the transition from the written system to the oral system has helped to humanize prisoners in the judicial process because they are often actually in the court room.<sup>162</sup> The presence of the parties in the courtroom serves evidentiary functions as well. As he explained, if a prisoner brings a claim in front of an Execution Judge and says that they need medical attention, judges are better able to judge the veracity of this claim by observing how the prisoner appears in court.<sup>163</sup> Beyond that, prisoners now have the opportunity to question and cross-examine prisons officials who are parties to suit, providing the judge with the opportunity to assess their credibility in the event that they deny any wrongdoing.<sup>164</sup>

Though the 2008 reform has provided tangible benefits to prisoners that seek to vindicate their rights, it has not been entirely positive. Buy-in from judges has not been universal; some judges lament that they have to oversee an oral trial and would prefer to revert to the written system.<sup>165</sup> Moreover, judges accustomed to the old system are slowly learning their role in the process, and public defenders often have to educate them about the new law and the intricacies of the oral process.<sup>166</sup>

The growing pains of reform have not been limited to skeptical judicial officers. Some lawyers, including public defenders, who grew accustomed to purely written advocacy have abandoned their work out of concerns about oral advocacy.<sup>167</sup> Public defenders are accordingly

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<sup>162</sup> Interview with Gerardo Manrique López (Mar. 27, 2018).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*; see also Mark *supra* note 110 (quoting from an NGO official in discussing the “difficulty in helping Mexico's lawyers adapt to oral arguments” and that “[r]etraining an entire profession is no minor feat, and the lawyers are often reluctant to learn an entirely new method of arguing”).

overworked. The state of Morelos, for example, has a total of fifteen local public defenders for a state that includes over 1.8 million people.<sup>168</sup> This is hardly good news for those prisons that need lawyers in order to pursue their claims.

### **C. Juvenile Reform: La Ley Nacional del Sistema Integral de Justicia Penal para Adolescentes**

Mexico has also recently reformed its juvenile justice laws. The reform takes another step toward bringing Mexico's laws more in line with international standards, but like other reform efforts, it leaves unanswered questions of practicality and implementation.

#### **i. Background of Mexico's Juvenile Justice Laws**

The first comprehensive juvenile justice law in Mexico was a Law regarding Social Prevention and Juvenile Delinquency for the Federal District and Mexican Territories in 1928.<sup>169</sup> Under this original law, minors under 15 years old who committed delinquent acts could neither incur criminal responsibility nor be criminally processed; rather, they were placed under state protection and it was the state's responsibility to educate and rehabilitate them.<sup>170</sup> The law was often used to take custody of neglected or vagrant children, rather than juveniles who committed a delinquent act.<sup>171</sup> The government did not, however, have any specialized capacity to deal with these children until 1964, when Article 18 of Mexico's Constitution was amended to require federal and state governments to establish special institutions for the treatment of juvenile delinquents.<sup>172</sup> This led to increasing specialization throughout Mexico which formed the basis for further reform.

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<sup>168</sup> Interview with Gerardo Manrique López (Mar. 27, 2018).

<sup>169</sup> Martha Frias Armenta, *Juvenile Justice in Mexico: Recent Reforms Shift into a More Punitive System* (2014), Paper presented at the annual meeting of the The Law and Society Association, Hilton Hawaiian Village Resort, Honolulu, HI. Available online at <http://www.mdpi.com/2075-471X/3/3/580/htm>.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

Indeed, following Mexico's first national conference for those working with juvenile offenders in 1973, a new law was passed in 1974 that emphasized preventive, non-punitive treatment of minors. Under this law, children under 18 who committed delinquent acts were not considered criminals because they were thought to be incapable of understanding criminal law.<sup>173</sup> The state, rather than punish juvenile offenders, would assume *parens patriae* ("parent of the country") and become the legal guardian of the child, replacing the parent.<sup>174</sup> The rationale was that the parents failed in their responsibility of educating the child when the child committed a crime, so the responsibility went to the state to determine matters of the child's education and treatment.<sup>175</sup> Notably, this approach treated children as objects to be protected by the state; there were no procedural or due process rights granted to the child. Those rights were viewed as unnecessary because the state was purportedly helping, not punishing, the child.<sup>176</sup>

## ii. Article 18 Amendment

Another large-scale reform occurred in 2005, when Article 18 of Mexico's Constitution was amended again to establish a comprehensive system of justice for juveniles between 12-18 years old who had committed a crime. The goal of this amendment was to finally give juveniles due process rights, and it carried two basic policy objectives: (1) to separate juvenile delinquents from adults so they would not be negatively influenced, and (2) to treat juvenile delinquents differently from adult offenders.<sup>177</sup> Article 18 provided the State a range of "measures" to use with juveniles for educational, not retributive, purposes.<sup>178</sup> These measures were designed to

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<sup>173</sup> Luis Rodríguez-Manzanera. *Criminalidad de Menores [Criminality of Minors]*. MEXICO CITY: EDITORIAL PORRUA, 367-85 (1997).

<sup>174</sup> Frías Armenta, *supra* note 169.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

provide for “the familiar and social rehabilitation of the adolescent to reach a complete development of her/his person and capacities.”<sup>179</sup> All measures had to be proportional, which moved Mexico’s laws in line with Article 40 of the International Convention on the Rights of the Child (CRC).<sup>180</sup>

Measures ranged from verbal warnings to institutionalization, with institutionalization being the most severe punishment. States could deprive juveniles of their freedom in other ways, such as via house arrest, free-time arrest, a semi-open system, and weekend arrest.<sup>181</sup> If the state wanted to fully institutionalize juveniles, the new law put strict limits in place. Detention was only permitted for juveniles older than 14 years old who committed a felony.<sup>182</sup> Further, institutionalization was meant as a measure of last resort and had to be for the lowest amount of time possible, with a hard cap on a five-year maximum sentence (the previous maximum was anywhere from 5-20 years, depending on the state).<sup>183</sup> The reform had a fundamental goal of decreasing prison overcrowding, and it worked: there were fewer juveniles in jail after the reform.<sup>184</sup> The juveniles that were released as a result of the reform, however, lacked follow-up treatment or rehabilitation, and there was no individualization or case-by-case analysis of specific needs for those released juveniles.<sup>185</sup> Additionally, for those juveniles that remained

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<sup>179</sup> Congreso de la Unión, *Poder legislativo de los Estados Unidos Mexicanos*, CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS (Political Constitution of the United Mexican States).

<sup>180</sup> Convention on the Rights of the Child (2009). Ratified by Mexico in 10 August 1990.

<sup>181</sup> 23 states in Mexico (a majority) use house arrests, 11 states use free-time arrests, 16 states use semi-open systems, and 12 states use weekend arrests; Rubén Vasconcelos-Mendez, *La justicia para Adolescentes en México: Análisis de las leyes Estatales*; MÉXICO CITY: INSTITUTO DE INVESTIGACIONES JURÍDICAS DE LA UNAM, 2009.

<sup>182</sup> Frías Armenta, *supra* note 169.

<sup>183</sup> Interview with Doug Keillor (Mar 12, 2018).

<sup>184</sup> *Id.*

<sup>185</sup> Frías Armenta, *supra* note 169.



institutionalized, many troubling issues persisted, ranging from physical abuse to widespread corruption among prison guards.<sup>186</sup>

### iii. Law of Justice for Adolescents

It was with this abuse and corruption in mind that every state in Mexico enacted the “Law of Justice for Adolescents” in 2006. This law established a new paradigm, formalizing a view of children as possessing inherent human rights, replacing the old view of children being viewed as objects requiring protection.<sup>187</sup> These included: the right to be informed of due process at each stage of the proceedings, the right to privacy, the right against self-incrimination, the right to have parents at all stages of the proceedings, the right to an interpreter, the right to an “expeditious, complete and impartial” trial, the right to confront and cross-examine witnesses, the right to nondiscrimination, and the right to appeal.<sup>188</sup>

With the recognition of these inherent rights came a new adversarial system: a special prosecutor would now lead the investigation, while a Juvenile Judge handed down the sentence after weighing the evidence.<sup>189</sup> This replaced the old system in which a counselor was responsible for both the investigation and the judgment.<sup>190</sup> The goals of the new adversarial system were to help protect juveniles’ new due process rights and to maintain impartiality during the proceedings.<sup>191</sup> It is unclear, however, whether the adversarial system will accomplish these goals.

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<sup>186</sup> Interview with Doug Keillor (Mar. 12, 2018).

<sup>187</sup> Frías Armenta, *supra* note 169.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Alfredo Dagdug-Kalife, “Aspectos procesales de los asuntos de menores infractores.” *Derecho Penal. Memoria del Congreso Internacional de Culturas y Sistemas Jurídicos Comparados*. 180, 180-206 MÉXICO CITY: INSTITUTO DE INVESTIGACIONES JURÍDICAS UNAM (2005).

While Mexico’s recent juvenile reforms bring the law in line with international requirements, it remains to be seen whether the basic goal of providing protection for children will be achieved. Fair to say, the reform is a step in the right direction: it has already drastically reduced prison populations, put in place stricter limits on juvenile detention, formally recognized juveniles’ inherent due process rights, opened up the judicial process to alternative forms of justice, and oriented the resolution to the “best interests of the child.” Whether these due process rights amount to anything more than a parchment guarantee, however, will largely depend on the capabilities of the juveniles’ legal representation, and the legal system’s ability to give that representation a fair chance at advocating, regardless of the juvenile’s means.

#### **IV. A Long Road to Results**

##### **A. Challenges to the 2008 Criminal Justice Reforms**

The 2008 reform is just two years removed from its implementation deadline of June 2016.<sup>192</sup> Implementation has been a slow process; one month out from its deadline, only twenty-four of Mexico’s thirty-two states had fully implemented the 2008 reforms.<sup>193</sup> The federal government lagged even farther behind due to delays in crafting a new federal rules.<sup>194</sup> All told, one think tank predicted it will take another decade to troubleshoot the issues, particularly given the disjointed dual implementation at the federal and state level and the “constant turnover” of prison administrators.<sup>195</sup>

The high percentage of pretrial detainees remains a key area of improvement that may prove to be an effective gauge toward reform’s progress in the near-term. It remains to be seen,

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<sup>192</sup> See *supra* note 108 and accompanying text.

<sup>193</sup> *9 More States Using New Justice System*, MEXICO NEWS DAILY (Mar. 1, 2016), available online at <https://mexiconewsdaily.com/news/9-more-states-using-new-justice-system/>.

<sup>194</sup> See *Seelke, supra* note 106, at 7 (“President Calderón did not propose a new federal criminal procedure code—a key element needed to guide reform efforts—until September 2011, three years after the reforms were enacted. The Mexican Congress did not enact a criminal procedure code during his term.”).

however, whether the new system can adequately protect the sanctity of the two-year limit or whether abuse of the “arraigo” system will allow high rates of pre-trial detention to persist.<sup>196</sup> Of course, to vindicate their right to limited pre-trial detention in the first place, prisoners need a lawyer to pursue claims on their behalf. This is especially problematic in light of the fact that the right to counsel is not evenly spread across all prison populations.<sup>197</sup>

Commentators have long highlighted the impunity in Mexico’s criminal justice system.<sup>198</sup> Indeed, even the most ardent defenders of prisoners’ rights insist that more people should be in prison than currently are.<sup>199</sup> Mexico’s newly established Exclusionary Rule, for better or worse, may only heighten impunity rates in the short-term. Yet this begs a question: if the police become more successful at investigating crimes and adopt quality control procedures to ensure that evidence is properly admitted at trial,<sup>200</sup> can Mexico’s prisons meet demand for more beds? Mexico’s overcapacity problems appear to be stabilized in the short-term,<sup>201</sup> but the 98% capacity leaves little room for flexibility. It is possible, then, that the 2008 reform will only offer

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<sup>195</sup> See *supra* note 109 and accompanying text. See also Interview with Javier Aguilar Morales, Consul for Legal Affairs, Consulate General of Mexico in Chicago (Mar. 19, 2018) (noting that coordination between Mexico and its 32 states has been particularly difficult).

<sup>196</sup> See *supra* note 131.

<sup>197</sup> Interview with ITAM (Mar. 28, 2018).

<sup>198</sup> Estimates vary as to how often crimes go unpunished. See, e.g., Jose Luengo-Cabrera & Tessa Butler, *Impunity in Mexico: A Rising Concern*, UNIVERSITY OF SAN DIEGO-JUSTICE IN MEXICO, available online at <https://justiceinmexico.org/impunity-mexico-rising-concern/> (“The failure or inability to penalize criminals in Mexico is a widespread phenomenon. In 2016, it was estimated that only 9 out of every 100 crimes resulted in convictions.”); Seelke, *supra* note 106, at 1–2 (citing the fact that only 20% of homicides result in convictions and that “less than 25% of crimes in Mexico are reported and, of those, only a small number are investigated and prosecuted, implying that only a small portion of the country’s crimes are seriously addressed”); see *supra* note 108 (stating that “as many as 90 percent of homicides went unpunished”).

<sup>199</sup> Interview with Miguel Sarre (Mar. 26, 2018). Professor Sarre made clear that Mexico’s prisons are not overpopulated, but overcrowded. To the contrary, Sarre asserts that Mexico’s prisons are actually *underpopulated* since a significant amount of crimes go unpunished.

<sup>200</sup> Cf. Ferreira and Shirk, *supra* note 108 (“[I]f properly implemented, the new system will gradually raise the bar for Mexican police, criminal investigators and prosecutors to do their jobs more effectively. In the long run, if they succeed, more criminals will wind up in jail—or, preferably, be deterred from committing crimes in the first place.”).

<sup>201</sup> See *supra* note 120 and accompanying text.

a brief respite from the overcrowding conditions that can be exploited by prison guards for personal gain.<sup>202</sup>

## **B. LNEP Implementation Challenges**

The adoption of the LNEP marks a dramatic shift in the way prisoners' rights are protected in Mexico. Unsurprisingly, the shift has created practical challenges. While the official deadline for implementation is not until November 2018, the key challenges identified among practitioners interviewed were largely the same and will likely persist.

### **i. A Major Shift in Consciousness**

Successful implementation of the LNEP requires actors at all levels of the criminal justice system and the penal system to separate individuals from their underlying criminal offense, and the injustices they may face while incarcerated. Judges, attorneys, and society alike will have to experience a major shift in consciousness for the LNEP to succeed.

According to one public defender and scholar who worked on drafting the LNEP, “[w]e need to get people to think about due process inside of a prison. That’s something new. It’s a strange concept that takes some culture change. The old way of doing things is to say that they’re inside prison for a reason, so just forget about them. Even some public defenders think that way.”<sup>203</sup> Some judges are in accord. When asked about the reforms, a local judge in the state of Morelos explained, “I’m frustrated about the resistance of the state and other judges to see people as people. But I’m hopeful about the work being done in the academy to change this philosophy and see human dignity everywhere, even for the people in prison.”<sup>204</sup>

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<sup>202</sup> See *supra* note 16 and accompanying text.

<sup>203</sup> Interview with Gerardo Manrique López (Mar. 27, 2018).

<sup>204</sup> Interview with Judge Leticia, Local Judge, Morelos, Mexico (Mar. 27, 2018).

While respecting the human dignity to prisoners will require a change in consciousness, women constitute a particularly vulnerable group given the social stigma surrounding women and crime. According to a public interest attorney working specifically with incarcerated women, the prevailing belief is that women should not be committing crime.<sup>205</sup> Once a woman is incarcerated, she is often abandoned by her family because of the stigma of committing a crime.<sup>206</sup> Consequently, there are multiple shifts in consciousness that will need to occur in order to see the LNEP serve its intended purpose of bringing dignity and human rights to all incarcerated persons.

## **ii. Knowledge and Training**

A major concern is a lack of knowledge. Across the board, knowledge of the new law is lacking. That includes prisoners who do not yet know their rights, and perhaps worse, lawyers and judges who are unaware of their responsibilities.

Judge Leticia, when asked about the balance of her case load between prisoners' rights cases and criminal prosecutions, said there are currently more criminal prosecutions than prisoners' rights cases on her docket.<sup>207</sup> In her view, this is due to a lack of knowledge among lawyers and prisoners, which makes bringing cases impossible.<sup>208</sup> In her estimation, if more lawyers knew about and applied the LNEP, each judge would have substantially more prisoners' rights cases than criminal prosecutions. Yet that is not the case, even in Morelos where the LNEP has been fully implemented.<sup>209</sup> Gerardo Manrique López, a public defender in the state of

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<sup>205</sup> Interview with ITAM (Mar. 28, 2018).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

Morelos also expressed concern that prisoners have no idea that the law has changed.<sup>210</sup> He attributes this largely to the fact that wardens and prison administrations do not want prisoners to know.<sup>211</sup> Other practitioners expressed similar concerns that knowledge among prisoners is lacking.<sup>212</sup> Another issue in Mr. López's estimation is the lack of training among practitioners.<sup>213</sup> While efforts are being made, there is a long way to go before Mexico sees a system equipped to bring the ambitions of the LNEP to fruition.

### **iii. Empowerment of the Judiciary**

The success of bringing a system of due process into the prisons depends in large part on the empowerment of the judiciary.<sup>214</sup> There are substantial obstacles to this empowerment, however. According to Judge Leticia, stakeholders who prefer the current system are resisting change.<sup>215</sup> Prison administrators claim reforms are impossible and push back against any effort to change.<sup>216</sup> Administrators view judges as outsiders, and are not receptive to the new oversight mechanism contemplated by the LNEP.<sup>217</sup> Additionally, if judges lack confidence in their ability to create change, there is a risk that they will simply take the word of administrators that changes are impossible.<sup>218</sup> Furthermore, judges only have power to resolve issues in the cases before them. Both Judge Leticia and Sergio Sibaja, a judge in Mexico City, expressed this constraint as a major frustration in their role as judges attempting to carry out the goals of the reform.<sup>219</sup>

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<sup>210</sup> Interview with Gerardo Manrique López (Mar. 27, 2018).

<sup>211</sup> *Id.*

<sup>212</sup> Interview with ITAM (Mar. 28, 2018).

<sup>213</sup> *Id.*

<sup>214</sup> Interview with Miguel Sarre (Mar. 26, 2018).

<sup>215</sup> Interview with Judge Leticia, Local Judge, Morelos, Mexico (Mar. 27, 2018).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> Interview with Judge Leticia; Interview with Judge Sergio Sibaja. (Mar. 28, 2017).

Because prisoners face a risk of retaliation if they bring claims, Judge Leticia knows there are complaints that she will never adjudicate.<sup>220</sup>

Judge Leticia also shared her frustrations with the implementation of the LNEP. First, the formality that has been baked into proceedings, in her estimation, creates barriers for judges to address the underlying problem. Instead, judges become limited by the formality and the process becomes inefficient. Additionally, she is frustrated with the new aspect of the LNEP that does not allow judges to visit the inside of prison. While the purpose of this requirement is for Execution Judges to maintain neutrality,<sup>221</sup> Judge Leticia preferred having the ability to visit a prison to make direct contact with prisoners instead of waiting for complaints to be filed.<sup>222</sup>

#### **iv. Resources**

Although the LNEP is “state-of-the-art,” one organization asserts that the legislators who improved it forgot a crucial component: resources.<sup>223</sup> José Abel Saucedo Romero, the head of the Directorate of Prevention and Social Reintegration for the state, has criticized the reform for failing to account for where the country will get the financial capital to pay for the reform, calling it a “first world law with third world infrastructure.”<sup>224</sup> Romero claims, “I would say the new law is magnificent, but the legislators forgot that it was not just about making the law, but providing the financial mechanisms to do what the law asks for.”<sup>225</sup>

According to Romero, Mexico should have first made necessary changes to the infrastructure and then applied the new law.<sup>226</sup> However, those who fought for the

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<sup>220</sup> Interview with Judge Leticia. (Mar. 27, 2018).

<sup>221</sup> Interview with Gerardo Manrique López (Mar. 27, 2018).

<sup>222</sup> Interview with Judge Leticia (Mar. 27, 2018).

<sup>223</sup> Redacción AFmedios, *Ley Nacional de Ejecución Penal Pone en ‘Aprietos’ a Reclusorios en el País*, AFMEDIOS (Oct. 5, 2017), available online at <http://www.afmedios.com/2017/10/206838/>.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

implementation of the new law argue that this is a limited, administrative perspective. Instead, they argue, a justice and human rights approach demanded implementing the law as the means to get the necessary resources, not the other way around.<sup>227</sup> While there is no doubt that resources and infrastructure are a critical component in the successful implementation of the law, there is disagreement among the scholars and practitioners interested in upholding human dignity about whether Congress jumped the gun. Not a single party interviewed expressed a sentiment that the LNEP is premature. Judges and attorneys alike, though mindful of the implementation challenges, agreed that the law represents powerful change to the status quo. Even the parties that described the most difficult challenges in applying the LNEP to ensure prisoners' rights agreed that passing the law was a necessary step in the right direction for Mexico.<sup>228</sup>

### **C. Challenges to the Juvenile Justice Reforms**

Like the 2008 criminal justice reforms and the 2016 penal system reform, the Law of Justice for Adolescents also faces significant barriers to successful implementation. First, the economic status of the juveniles will have a significant impact on the outcome of the proceedings.<sup>229</sup> This is because many juveniles must pay for their own lawyer. While the state does provide free public defenders for all adolescents who need them, there are only five public defenders for 500 juvenile delinquents in each Mexican state.<sup>230</sup> This sets up a tremendous imbalance between the prosecution, which has all the resources of the state behind it, and the juvenile, who has only an overworked public defender.<sup>231</sup> In many cases, the juvenile doesn't even have an opportunity to meet his or her lawyer until the trial.<sup>232</sup> Thus, there is a problem with

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<sup>227</sup> Interview with Miguel Sarre (Mar. 26, 2018).

<sup>228</sup> Interview with ITAM. (Mar. 28, 2018).

<sup>229</sup> Interview with Doug Keillor (Mar. 12, 2018).

<sup>230</sup> Frías, *supra* note 177.

<sup>231</sup> *Id.*

<sup>232</sup> Interview with Doug Keillor. (Mar. 12, 2018).



actually protecting the juvenile's due process rights in practice, even if they are guaranteed in theory.

Second, it is unclear whether the adversarial system is more impartial than the prior system. In the prior system, a counselor (who had a mandate to be impartial) was in charge of the investigation, while in the adversarial system, the prosecutor controls the proceedings and production of evidence.<sup>233</sup> The adversarial system attempts to maintain impartiality by having a Juvenile Judge hand down the sentence, but if the production of evidence is biased towards the prosecution, the sentences will likely be as well. Further, the Juvenile Judge has the authority to define a "felony," which is one of the requirements to send a juvenile to an institution. Since the Juvenile Judge has this power, institutionalization is still at the whims of the judge and is not necessarily a measure of last resort in practice.<sup>234</sup> Thus, there are still concerns over impartiality of the proceedings by both the prosecutor and the Juvenile Judge.

The new law attempts to control the whims of the Juvenile Judge by incorporating language that states everything must be done for the "best interests of the child."<sup>235</sup> While this was previously defined under old Mexican law as the State's *parens patriae* power to determine what was best for the child, the new law says the Juvenile Judge must take the child's wishes into account when determining the outcome, as well as the child's physical and mental health.<sup>236</sup> This aligns with the international CRC, which states: "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters

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<sup>233</sup> Frías, *supra* note 177.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”<sup>237</sup>

However, the aforementioned concerns regarding the imbalance between private prosecutors and overworked public defenders still cast doubt over how the “best interests of the child” will be implemented. There is a fear that public defenders are “just a required cog in the machinery” to assure due process is met, and that overworked public defenders aren’t capable of effectively advocating for the best interests of the child—especially when they are just meeting them at the trial and have a case load numbering in the hundreds.<sup>238</sup> Contrast this with a private prosecutor’s control over production of evidence, and it’s easy to see how imbalances are a concern.

The Law of Justice for Adolescents opened up the possibility of alternative forms of justice that could be implemented as a compromise between the accused juvenile and the aggrieved party, such as restorative justice. As the State of Nuevo León defines it, restorative justice is a “voluntary juridical act conducted between the victim and the accused children that results in the solution of the conflict through any suitable mechanism.”<sup>239</sup> This can also be mediated by the surrounding community or the juvenile’s school.<sup>240</sup> The benefits to such a mediation are clear: it frees up the justice system by allowing the affected individuals (who know the circumstances best) to handle the resolution, and reduces the ongoing strain on the courts to process so many cases. It also allows the victim to take more of an active role in the resolution of the dispute, because there is no prosecutor nor Juvenile Judge controlling the proceedings, as

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<sup>237</sup> Article XII, Convention on the Rights of the Child (2009). Ratified by Mexico in 10 August 1990.

<sup>238</sup> Interview with Doug Keillor (Mar. 12, 2018).

<sup>239</sup> Congreso del Estado de Nuevo León. *Poder Legislativo del Estado de Nuevo León*. LEY DEL SISTEMA ESPECIAL DE JUSTICIA PARA ADOLESCENTES DEL ESTADO DE NUEVO LEÓN. Available online at [http://www.hcnl.gob.mx/trabajo\\_legislativo/leyes/pdf/LEY%20DEL%20SISTEMA%20ESPECIAL%20DE%20JUSTICIA%20PARA%20ADOLESCENTES%20DEL%20ESTADO%20DE%20NUEVO%20LEON.pdf](http://www.hcnl.gob.mx/trabajo_legislativo/leyes/pdf/LEY%20DEL%20SISTEMA%20ESPECIAL%20DE%20JUSTICIA%20PARA%20ADOLESCENTES%20DEL%20ESTADO%20DE%20NUEVO%20LEON.pdf).

<sup>240</sup> *Id.*

there would be in court. A mediation-backed restorative justice resolution will also proceed much more quickly than a court case, which could take years to resolve.

But, there are issues with this model as well. Mexico's juvenile justice laws are already a patchwork across its many states—further decentralizing the decision-making to a restorative justice model would risk even more inconsistencies and create disparate outcomes depending on a juvenile's background.<sup>241</sup> Yet, disparate outcomes already exist in the court system because of the quality of private versus public legal representation in Mexico, so this may not be a significant drawback. The success or failure of alternative forms of justice like restorative justice will depend on the community's engagement and investment in social solutions.

Whether the Law of Justice for Adolescents succeeds in its goals to protect the rights of the child will also depend on community involvement. More than half of Mexican children currently live in poverty, and they need more social services.<sup>242</sup> For the legal reform to live up to its purported goals, the Mexican legal system needs to advance beyond simply assuming control of vagrant or neglected youth, like it did back in 1928. The reform provides the opportunity for communities, schools, the family, and the juvenile to have some impact on the outcome of juvenile justice cases. The question remains of whether there is really a demand for solutions to juvenile delinquency, or if the state will just end up taking control of juvenile delinquents yet again.

#### **D. Current State of Prison Conditions**

##### **i. Corruption**

Given the pervasiveness of corruption in prisons and the way it has affected conditions and fueled violence, one might assume that the 2016 prison reforms were constructed to

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<sup>241</sup> Interview with Doug Keillor (Mar. 12, 2018).

<sup>242</sup> Frías Atema, *supra* note 169.

specifically target corruption. The word corruption is nowhere in the new law, however. When asked why, Miguel Sarre explained that addressing corruption is about giving judges control of the prisons.<sup>243</sup> The administration and warden need to be under the control of the judge who needs to understand herself as being in control of the prison.<sup>244</sup> The law addresses corruption by attempting to place the institution and administration under the control of the law through the judges.<sup>245</sup>

The enactment deadline for the 2016 Prison Reform is November 30, 2018. For Sarre, the greatest barriers to meeting that deadline and addressing corruption is making judges feel empowered.<sup>246</sup> This requires training and a change of mindset about the purpose of prison.<sup>247</sup> The notion of prisons being like a treatment center places deference in the hands of the administration rather than seeing what goes on inside as a matter of justice where prisoners are people who have rights.<sup>248</sup> Héctor Pérez with the Human Rights clinic at ITAM says he is “optimistic about the reform.”<sup>249</sup> But he qualifies that the old system is so bad that in his mind it cannot get worse through the reform.<sup>250</sup> He sees the corruption slowly improving, but believes that another sixteen years or so need to pass before Mexico will see results.<sup>251</sup> One attorney with ITAM responded candidly to the question about the reform’s ability to improve corruption; she shared that judges and prosecutors still fail to see that prison should be the last resort, and that they still want to put

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<sup>243</sup> Interview with Miguel Sarre (Mar. 26, 2018).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> Interview with ITAM (Mar. 28, 2018).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

people in prison as a first option.<sup>252</sup> Her perspective is especially informed by her work in women's prisons.

## **ii. Women**

According to an attorney with ITAM, women prisoners lack access to the benefits of the 2016 law.<sup>253</sup> While she agrees that the reforms were necessary and important, the real problem lies with changing the culture that pervades judges and lawyers.<sup>254</sup> In her experience, even post reform, the judges and lawyers are not changing their attitude towards women prisoners and their rights.<sup>255</sup> For example, regarding parole, because of the stigma associated with being a woman who committed a crime, judges think that women should not be released because they're not "rehabilitated".<sup>256</sup> Without that change in culture, the reform will not be helpful to prisoners.<sup>257</sup> This perspective aligns with Miguel Sarre's assertion that judges will be the key to improving conditions; if those judges have a prejudice against women who have committed crimes, then the conditions for women will not be solved by the reform.

## **iii. Juveniles**

The main benefit of the 2016 reform to juveniles that Doug Keillor can report is that the facilities are far less crowded.<sup>258</sup> The fact that youth cannot be detained pre-trial for more than five months and cannot be sentenced to more than five years already has made a difference.<sup>259</sup> While overcrowding is no longer the central problem, "now the biggest issue is how they're

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<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> Interview with ITAM (Mar. 28, 2018).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> Interview with Doug Keillor (Mar. 12, 2018).

<sup>259</sup> *Id.*

treated.”<sup>260</sup> The mindset about youth in detention centers needs to be changed, and to solve that “political inertia is the problem.”<sup>261</sup> The cultural knee-jerk reaction of the key players in the system is still to use detention.<sup>262</sup> Keillor asserts that not all the judges are applying the new law in the most beneficial sense, but still finding ways to default to detention.<sup>263</sup> The next steps, in his mind, will not be updating laws but addressing how the laws are used; “the rubber hits the road when we get them to try to change their practice.”<sup>264</sup>

## **V. Recommendations and Conclusion**

Mexico has a unique opportunity to use the momentum generated by its recent criminal reforms to establish legal interpretations and standards of practice that will benefit prisoners in particular and society as a whole. Now is an opportune time for the country to focus on the goals of the reform, critically assess remaining barriers to achieving those goals, and establish procedures to overcome those barriers and achieve the reform’s goals in practice. The following are recommendations for educating and empowering the key players in the system to engage in practices that will ensure the ambitious reforms are both meaningful and effective.

As several interviewees explained, the 2016 reform bill is likely under-enforced given that most prisoners are ignorant of their legal rights under the new statute. This problem of under-enforcement is exacerbated because Execution Judges are reactive, not proactive, so they cannot actively seek to remedy violations of the law unless the prisoners actually bring a legal case. Until they are informed of their rights and connected to lawyers, the prisoners are essentially on their own. Mexico should consider creating a “know your rights” campaign aimed

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<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> Interview with Doug Keillor (Mar. 12, 2018).

at informing prisoners of their rights under the new statute. That could come, for example, in something as simple as mailing prisoners a succinct summary of their rights and of procedures to remedy grievances. It should also involve appointing enough public defenders specialized in execution as well as establishing requirements for them and judges to communicate to prisoners about their rights during sentencing.

Prisoners' rights should also be maintained by prison guards. Mexico can consider incorporating whistleblower statutes to incentivize prison guards to report ongoing instances of corruption or abuse. This incentive can be coupled with increased punishment for guards caught taking bribes; if the systematic problem of corruption and abuse is to be rooted out, it must be attacked through both incentives and sanctions. For prison guards who have been in their role since before the reforms, there may need to be heightened scrutiny to ensure that they are approaching their jobs with an understanding of prisoners as subjects, not objects.

Increased transparency will also allow the public to play a watchdog role in how prisoners are treated. Mexico can amend its prison procedures for visitors so as to not require full strip searches, as well as increase access for the general public beyond prisoners' immediate family members and attorneys. This increased transparency will simultaneously improve prisoners' conditions by allowing their family (including young children) to visit more often as well as keeping the public spotlight on prison conditions, so abuses cannot be simply ignored.

Judges also have an important role to play in prison reform. While some judges, such as Judge Leticia, are already strong advocates of prison reform, this perspective is not universal. Mexico can consider recommending or requiring that, independently from their official role, newly appointed judges visit prisons so that they fully understand the conditions when they

sentence someone to imprisonment; this will also instill an early consciousness of the need for prison reform in these judges so they can properly adjudicate prisoner complaints.

Finally, public defenders in Mexico face an insurmountable work volume with very little institutional support. Mexico can require its private criminal attorneys to take on a certain number of public defense cases to help distribute the workload so all of the accused receive adequate legal representation. This will also help spread awareness of the ongoing issues in prisons.

Through this multifaceted approach, Mexico can help guarantee the rights of prisoners and ensure that its ambitious legal reforms are followed to the fullest extent of the law, rather than being merely a “parchment guarantee.”



## Appendix

The following individuals were interviewed either in person or over the phone.

- Ana Aguilar García, Director of Projects, Instituto de Justicia Procesal Penal (Feb. 15, 2018)
- Alfonso Jiménez, Attorney, Mexico City (Mar. 29, 2018)
- Doug Keillor, Justicia Juvenil Internacional, México A.C. (Mar 12, 2018)
- Gerardo Manrique López, Federal Public Defender, Morelos, Mexico (Mar. 27, 2018)
- Judge Leticia, Local Judge, Morelos, Mexico (Mar. 27, 2018).
- Marcelino Miranda, Consul for Legal Affairs, Consulate General of Mexico in Chicago. (Mar. 19, 2018)
- Javier Aguilar Morales, Consul for Legal Affairs, Consulate General of Mexico in Chicago (Mar. 19, 2018)
- Francisco J. Olavarria, Advisor, Consulate General of Mexico in Chicago (Mar. 19, 2018)
- Héctor Pérez, Clínica de Interés Pública, Instituto Tecnológico Autónomo de México (ITAM) (Mar. 28, 2018).
- Miguel Sarre, Co-Author of the LNEP Draft (Mar. 26, 2018).
- Judge Sergio Sibaja, Local Judge, Mexico City (Mar. 28, 2018)
- Gabriela Benitez, Clínica de Interés Público, Instituto Tecnológico Autónomo de México (ITAM)(March. 28, 2018)