

## THE RULE OF LAW AND DEVELOPMENT IN MEXICO

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### I. INTRODUCTION

*“It is in the legal realm that we find many of the deepest weaknesses and greatest hopes for our age. It is in the processes of law, perhaps more than in economic institutions, that the greatest puzzles facing our societies lie.”<sup>1</sup>*

#### **A. The Rule of Law and Development in Mexico**

Article 17 of the Mexican Constitution requires that the impartation of justice be prompt, complete, impartial, and gratuitous. Notwithstanding this high standard, legal proceedings in Mexico have, traditionally, been characterized by inefficiency, uncertainty, and the perception that the “contravention of the law is the daily rule rather than the exception.”<sup>2</sup> The initial formation and subsequent regulation of lawyers and judges have, respectively, been ineffective and devoid of meaningful impact.<sup>3</sup> Access to the justice system has, for the most part, been

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1. Jeffrey D. Sachs, *Globalization and the Rule of Law*, Remarks at Yale Law School 1998 Alumni Weekend (Oct. 16, 1998), *at* <http://www.law.yale.edu/outside/html/Publications/pub-sachs.htm> (last visited Apr. 28, 2004).

2. Alberto Szekely, *Democracy, Judicial Reform, The Rule of Law, and Environmental Justice in Mexico*, 21 HOUS. J. INT’L L. 385, 388 (1999); Bureau of Democracy, Human Rights, and Labor, U.S. Dep’t of State, *Mexico Country Report on Human Rights Practices for 1996* (1997), *at* [http://www.state.gov/www/global/human\\_rights/1996\\_hrp\\_report/mexico.html](http://www.state.gov/www/global/human_rights/1996_hrp_report/mexico.html) (last visited Nov. 25, 2003) [hereinafter DOS-96] (noting that “[a]ccording to a reliable 1995 poll [of Mexican citizens], 75% of those surveyed felt that the justice system was riddled with corruption.”); *Mexico’s Political and Legal Environment for Doing Business: Hearings Before the House Committee of Small Business*, 103rd Cong. 2 (Feb. 25, 1993) [hereinafter *Hearings*] (statement of Christopher Whalen) (noting that Mexico’s laws are “almost always observed in the breach – unless it is convenient for the powers that be”).

3. JORGE CARPIZO, ESTUDIOS CONSTITUCIONALES 552 (1999) (noting that the “academic level” of law schools throughout Latin America “leaves much to be desired”); Jorge Vargas, *Contrasting Legal Differences Between the U.S. and Mexico: Legal Actors, Sources, Courts, and Federal Agencies*, in 1 MEXICAN LAW: A TREATISE FOR LEGAL

circumscribed along urban-rural and wealth-poverty lines.<sup>4</sup> Judicial proceedings are carried out in accordance with inefficient, highly formalistic, non-transparent, and corruption-inducing procedures.<sup>5</sup> Substantive laws and rulings are – to the detriment of citizens, merchants, and creditors alike – often overly-idealized,<sup>6</sup> obsolete, unclear,<sup>7</sup> and/or for sale.<sup>8</sup> Interlocutory and final decisions can, with the proper manipulation of the rules of law and procedure, be prejudicially partial and

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PRACTITIONERS AND INTERNATIONAL INVESTORS 1, 14 (Jorge Vargas ed., 1998) [hereinafter MEXICAN LAW] (noting that legal education in Mexico has reached an “alarming level of mediocrity”); *Report on the Mission to Mexico*, U.N. ESCOR, 58<sup>th</sup> Sess., Provisional Agenda Item 11(d), at 25, U.N. Doc. E/CN.4/2002/72/Add.1 (2002) [hereinafter UNSR] (reporting that “the law degree at universities is not standardized and most interlocutors agreed that the standards were mediocre”).

4. James E. Mahon, Jr., *Reforms in the Administration of Justice in Latin America: Overview and Emerging Trends*, in REINVENTING LEVIATHAN 251, 253-254 (Ben R. Schneider & Blanca Heredia eds., 2003); ANDREW REDING, DEMOCRACY AND HUMAN RIGHTS IN MEXICO 41 (1995), available at <http://worldpolicy.org/globalrights/mexindex.html> (last visited Nov. 7, 2004).

5. Alicia Ely Yamin & Ma. Pilar Noriega Garcia, *The Absence of the Rule of Law In Mexico: Diagnosis and Implications for a Mexican Transition to Democracy*, 21 LOY. L.A. INT’L & COMP. L.J. 467, 495 (1999) (characterizing Mexican legal institutions as “Byzantine”).

6. Mexico’s laws, for reasons stemming from the historic influences of Roman and Canon law on social, political, and economic notions of morality and justice, have traditionally been perceived as incorporating purportedly universal ideals and philosophically abstract principles without adequately taking into consideration the application and enforcement limitations associated with practical reality. KENNETH L. KARST & KEITH ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA 87-90 (1975).

7. Sergio López-Ayllón & Héctor Fix-Fierro, “*Faraway, So Close*”: *The Rule of Law and Legal Change in Mexico 1970-2000*, in LEGAL CULTURE IN THE AGE OF GLOBALIZATION 285, 318 (Lawrence Friedman & Rogelio Perez-Perdomo eds., 2003) [hereinafter *Faraway*] (noting the way in which judges have become proficient in using neutral language and precedent to avoid taking responsibility for their own decisions).

8. Linn Hammergren, *Legal and Judicial Institutions*, in MEXICO: A COMPREHENSIVE DEVELOPMENT AGENDA FOR THE NEW ERA 733, 739 (Marcelo M. Giugale et al. eds., 2001) (noting that Mexico’s laws should be “updated, simplified, and modified to bring them into consistency with contemporary reality”); Hugo de la Torre, *Pide carstens a estados cambiar leyes coloniales*, REFORMA, Apr. 3, 2003, at 1A, (reporting Subsecretary of the Treasury’s observation that Mexico’s legal framework, parts of which date to the colonial era, is impeding the development of markets); “Decreto por el que se Aprueba el Plan Nacional de Desarrollo 1995-2000,” D.O., 31 de Mayo de 1995, at 52 (stating that Mexico’s regulatory and institutional framework is not wholly suited to the expectations and circumstances of the global economy); *Hearings*, *supra* note 2, at 2 (noting it is still possible to purchase a favorable decision in “virtually any” Mexican venue).

delayed for years, while the subsequent execution of a judgment – dependent as it is on the involvement of executive branch officials – may hinge on factors completely extraneous to the interests of justice.<sup>9</sup> And, in what constitutes a reflection of Mexico’s political evolution over the better part of the twentieth century, the judiciary has been more independent in theory than in fact.<sup>10</sup>

Mexico’s failure to uphold the “rule of law” – a concept which, as used in this work, refers to the capacity of the judiciary to uphold, interpret, and enforce the principles and laws that (i) assure the constitutionally prescribed functioning of government and (ii) protect individual rights and property in a predictable yet equitable way – has far reaching developmental consequences. One fundamental example in this regard consists of the low level of confidence that Mexico’s citizens have in the ability of the Federal Judicial Power (the *Poder Judicial Federal*, or “PJF”) to guarantee equal justice under law. As Table 1,

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9. Linn Hammergren & Ana Laura Magaloni, Reporte final del proyecto financiado por el banco multilateral, estudio sobre el juicio ejecutivo mercantil en el distrito federal 11 (World Bank/PREM Report No. 22635, 2001) (noting that average time required to obtain a judgment in a *juicio ejecutivo* is seven months); World Bank, World Development Indicators 2003 at 266-267 (2003) [hereinafter WDI] (noting that the number of days required to enforce a contract and resolve an insolvency in Mexico are, respectively, 283 and 714); Organization of American States, Mexico Country Report (1998), at <http://www.oas.org> (last visited Sept. 10, 2003) (citing findings of the National Commission for Human Rights that “the average time taken for an accused person to be sentenced in a court of first instance is one year and ten months”); Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, Análisis y Propuestas de Reformas Mínimas para el Fortalecimiento del Sistema de Procuración y Administración de Justicia en México 7 (2002) [hereinafter CMDPDH] (noting that penal matters regularly take between two to five years to resolve); Robert M. Kossick, Jr. & Marcelo Bergman, *The Enforcement of Local Judgments in Mexico: An Analysis of the Quantitative and Qualitative Perceptions of the Judiciary and Legal Profession*, 34 U. MIAMI INTER-AM. L. REV. 435, 446-447 (2003) (noting belief of majority of respondents that the enforcement of a civil judgment in Mexico takes between one and three years). The speed with which legal proceedings are resolved in Mexico appears to be similar to that experienced in other Latin American nations. Nestor Humberto Martínez, *Rule of Law and Economic Efficiency*, in JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA 3, 9 (Edmundo Jarquin & Fernando Carrillo eds., 1998) [hereinafter Justice Delayed] (noting that with few exceptions a “regular civil trial” in Latin America takes more than two years”); MARK UNGAR, ELUSIVE REFORM, DEMOCRACY AND THE RULE OF LAW IN LATIN AMERICA 208 n.1 (2002) (noting that the average duration of a civil trial in Paraguay is more than five years). *Mexico’s Political and Legal Environment for Doing Business: Hearings Before the House Comm. on Small Bus.*, 103rd Cong. 1 (Feb. 25, 1993) (statement of Andrew A. Reding) (noting that “Mexico is unexcelled in proclaiming rights, but also in subjecting them to arbitrary interpretations, and withholding legal means of enforcement”).

10. Sallie Hughes, *Law and Disorder*, MEX. BUS., Mar. 1995, at 8.

*infra*, shows, the number of Mexican citizens expressing a lack of confidence in the legal system more than doubled between 1981 and 1997.<sup>11</sup>

**Table 1**

**Percent of Population with No Confidence in the Legal System**

Nation	1981	1990	1995-1997
Argentina	5.5%	29.2%	25.2%
Brazil	N/A	28.1%	23.8%
Chile	N/A	12.8%	17.9%
Mexico	12.0%	15.6%	25.3%
Spain	11.0%	12.9%	11.1%
USA	4.1%	8.6%	13.1%

Source: Bergman<sup>12</sup>

Plagued by doubts regarding the cost, timeliness, and fairness of legal procedures and remedies, Mexico's citizens and merchants frequently attempt to structure their personal and business affairs around informal and/or reputation-based networks of familial or personal contacts, thereby precluding the formation of the arms length credit and transactional relationships that lie at the heart of dynamic markets.<sup>13</sup> This long-recognized phenomenon (its intellectual roots can be traced

11. David Aponte & Jesús Aranda, *Tratan como Menor de Edad al Poder Judicial*, LA JORNADA, June 2, 1995, at <http://serpiente.dsgca.unam.mx/jornada/1995/jun95/950602/ministro.html> (last visited July 24, 2003) (reporting former Supreme Court Minister Juventino Castro's observation that the principal problem facing Mexico's judiciary is a lack of public confidence). Surveys conducted by the Federal *Cámara de Diputados* have detected an enduring, nation-wide sentiment that "justice does not exist in Mexico." "Iniciativa de Reforma al Código de Procedimientos Penales y a la Ley Orgánica del Poder Judicial de la Federación," *Gaceta Parlamentaria*, 21 de Noviembre de 2001, at <http://gaceta.diputados.gob.mx/Gaceta/58/2001/nov/20011122.html#Ini20011122Sotelo> (last visited Dec. 15, 2003) [hereinafter *Gaceta* 21 November 2001]. Diminished levels of citizen confidence are not unique to Mexico. Writing about Latin America at large, Nestor Humberto Martínez notes, "public trust in the justice system in our region is very low." Martínez, *supra* note 9, at 6.

12. Marcelo Bergman, *Confianza y Estado de Derecho*, CIDE/DTEJ4, 2002, at 17 (citing to data derived from the World Values Surveys for 1981, 1990, and 1995-1997).

13. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* 154-159 (2000) (noting willingness of citizens in countries with elegantly written but ultimately non-responsive laws to adopt informal solutions); Szekely, *supra* note 2, at 424 (noting that in Mexico,

at least as far back as Thomas Hobbes)<sup>14</sup> is implicated in the Center for Development Research's (*Centro de Investigación para el Desarrollo, A.C.*, or "CIDAC") observation that "In Mexico, illegality appears to be a constant. There is no absolute divorce between norms and daily conduct. We live with habitual legal uncertainty and insecurity. The strategy which dominates relations between citizens is that of non-compliance with agreements."<sup>15</sup>

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"[d]isputes are solved, in general, outside of the law . . ."); Robert Sherwood, *Judicial Systems and National Economic Performance*, in JUSTICE DELAYED, *supra* note 9, at 34 (noting that "in an economy with poorly functioning courts, private parties may resort to contractual practices which are less than efficient"); Alejandro Ascencio, *Genera Estado Derecho Crecimiento Económico Débil*, INFOSEL FINANCIERO, May 20, 2002, at <http://mx.plus.invertia.com> (last visited Dec. 16, 2003) (citing findings of GFBB study indicating that the weak state of the rule of law in Mexico conduces to fiscal evasion, corruption, piracy, restricted credit flows, decreased levels of investment, and lower levels of citizen well being). Though the establishment of trust- and reputation-based networks may not represent an efficient approach to development in the context of Mexico, relational capitalism has proved to be a practical alternative to ineffective State courts in other parts of the world. See John McMillan & Christopher Woodruff, *Dispute Resolution Without Courts in Vietnam*, 15 J. L. ECON. & ORG., 637-658 (1999); JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 3-17 (1983).

14. Richard E. Messick, *Judicial Reform: The Why, the What, and the How*, Address at the World Bank Conference "Strategies for Modernizing the Judicial Sector in the Arab World" (Mar. 15-17, 2002) <http://www.undp-pogar.org/publications/judiciary/messick/reform.pdf> (last visited Jan. 16, 2004) (relating Thomas Hobbes' notion that the absence of a reliable judicial system will make traders "reluctant to enter into wealth enhancing exchanges for fear that bargains will not be honored"). Social theorist Max Weber similarly thought that the existence of a rational system of law plays a crucial role in allowing individuals to order transactions in a predictable manner. Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 LAW & SOC'Y REV. 829, 831 (2000). Douglass North – the 1993 Nobel Laureate in Economics who is widely considered to be one of the leading spokesmen for the new liberal orthodoxy driving contemporary development thinking – builds on Weber's ideas when he argues that countries which do an effective job of protecting property rights and establishing predictable rules for the resolution of disputes provide a superior environment for economic growth. See DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE (1990). While the above described liberal orthodoxy has held sway in development circles for over a decade now, it has been clearly demonstrated that there are alternative approaches to accomplishing development. THEODORE H. COHN, GLOBAL POLITICAL ECONOMY: THEORY AND PRACTICE 335 (2003) (noting successful development experience of East Asia under the stewardship of strongly interventionist and collusive "developmental states").

15. Guillermo Zepeda Lecuona, *La Bancarrota Jurídica del Estado Mexicano*, EL ECONOMISTA, May 14, 2002, at [http://www.cidac.org/ingles/ingles\\_opinion\\_opinion\\_law.htm](http://www.cidac.org/ingles/ingles_opinion_opinion_law.htm) (last visited Jan. 20, 2004).

Another manifestation of this failure involves Mexico's capacity for sustainable development and international competitiveness.<sup>16</sup> Seemingly interminable legal proceedings, burgeoning dockets, outdated and/or unclear laws, and the generally lax sense of compliance hazard spawned by the combination of a weak enforcement record and a historical tendency to subjectively evaluate the moral worth and justness of legal norms and/or pronouncements<sup>17</sup> can elevate transaction costs, drain scarce resources, and, in certain instances, obstruct the effectiveness of government operations.<sup>18</sup> These outcomes can, in turn, restrain development by impeding factor accumulation, economic productivity, and financial deepening.<sup>19</sup> Negative perceptions regarding the levelness of the commercial and political playing fields and/or the degree of legal protection,

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16. Robert Sherwood, Geoffrey Shepherd & Celso Marcos de Souza, *Judicial Systems and Economic Performance*, 34 Q. REV. ECON. & FIN. 101-116 (1994) (noting that a "poorly functioning judiciary may reduce growth up to 15 percent"); Beatrice Weder, *Legal Systems and Economic Performance: The Empirical Evidence*, in JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN 21, 24 (Malcolm Rowat et al. eds., 1995) [hereinafter JUDICIAL REFORM] (noting that investor perceptions of judicial corruption and inefficiency account for 14% of the variance in economic growth rates in Latin America).

17. Latin America's traditionally cavalier attitude towards compliance with norms and/or pronouncements subjectively considered to be unjust is based on the notion that "*lex iniusta non est lex*" (an unjust law is not a law) and reflected in the classic Latin formula "I obey but I do not execute." BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 64 (1999). This perspective is likely rooted in St. Thomas Aquinas naturalistic teaching that unjust laws need not be followed. *Id.* The persistence of a cavalier attitude towards compliance in the context of Mexico is evident in the fact that approximately 60% of respondents in a 2001 survey conducted by the Fox administration agreed with the statement that "Unjust laws need not be complied with." INSTITUTO NACIONAL DE ESTADÍSTICA GEOGRAFÍA E INFORMÁTICA & SECRETARÍA DE GOBERNACIÓN, ENCUESTA NACIONAL SOBRE CULTURA POLÍTICA Y PRACTICAS CIUDADANAS 14-15 (2001) [hereinafter ENCUESTA].

18. Recognizing the low probability of enforcement associated with the Federal Tributary Administration's (*Servicio de Administración Tributaria*, or "SAT") 61% tax litigation loss record, many citizens do not comply with their fiscal obligations. MARCELO BERGMAN, LA CAPACIDAD DE RECAUDAR IMPUESTOS DEL GOBIERNO MEXICANO: ¿EL TEMA PREVIO A LA REFORMA FISCAL? 2 (CIDE, 2001) (on file with author) (noting that almost 50% of Mexico's potential tax revenue is lost to evasion, fraud, and other types of fiscal non-compliance). The lack of tributary revenue which results from this situation makes Mexico's level of government expenditure as a percentage of GDP one of the lowest recorded for OECD member nations. THOMAS DALSGAARD, THE TAX SYSTEM IN MEXICO: A NEED FOR STRENGTHENING THE REVENUE-RAISING CAPACITY 4 (Org. for Econ. Co-operation & Dev., Econ. Dep't Working Paper No. 233, 2000), <http://www.oecd.org/dataoecd/14/11/1884584.pdf> (last visited Nov. 8, 2004).

19. Martinez, *supra* note 9, at 3-4 (noting way in which the effectiveness of the administration of justice impacts FDI and savings rates).

which will be afforded tangible and intangible property rights,<sup>20</sup> can, furthermore, diminish the willingness of multinational companies to make the direct infrastructure investments and technology transfers which underlie Mexico's strategy of accomplishing international competitiveness and sustainable development through the generation of non-traditional employment opportunities (i.e., those associated with industries characterized by high value-added levels) and export-led growth.<sup>21</sup> The same basic line of thought applies to commercial lending and institutional investors. That is, once convinced of the essential ineffectiveness of public institutions, reasonably prudent international lending officers and portfolio managers can be expected to hedge against the elevated degree of risk by raising the cost of capital and/or re-directing credit flows to markets which do a better job of fitting into Thomas Friedman's "golden straightjacket."<sup>22</sup> The centrality of what Adam Smith referred to as a "tolerable" administration of justice to economic well-being is suggested by the correlation which exists between nations with high levels of confidence in their legal systems and GDP (see Table 2, *infra*).<sup>23</sup>

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20. U.S. copyright industry losses in Mexico reached an estimated \$731 million U.S. in 2002. U.S. TRADE REPRESENTATIVE, 2003 SPECIAL 301 REPORT 27, [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2003/2003\\_Special\\_301\\_Report/asset\\_upload\\_file665\\_6124.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2003/2003_Special_301_Report/asset_upload_file665_6124.pdf) (last visited Nov. 8, 2004). While Mexico's anti-piracy authorities conducted over 2,500 raids between 1993 and 1998, only 34 of these resulted in convictions (and no fine ever exceeded \$1,000 U.S.). INT'L INTELLECTUAL PROP. ALLIANCE, SPECIAL 301 RECOMMENDATIONS FOR 1999, at [http://www.iipa.com/rbc/1999/rbc\\_mexico\\_301\\_99.html](http://www.iipa.com/rbc/1999/rbc_mexico_301_99.html) (last visited Nov. 24, 2003). This performance makes Mexico's raids to convictions ratio one of the lowest in the world. *Id.*

21. Debrah R. Hensler, The Contribution of Judicial Reform to the Rule of Law 1, Address at the World Bank Conference "New Approaches for Meeting the Demand of Justice" (May 10-12, 2001) (transcript on file with author) (noting that "efficient economic markets require that all participants in the market know what standards their behavior will be held to, and have confidence that those standards will be applied uniformly."); Hughes, *supra* note 10, at 8 (noting that flaws in justice system create exorbitant costs for companies in need of quick and impartial settlements); Clara Ramirez, *Reclama Davidow certeza jurídica*, EL NORTE, Jan. 26, 2002, at 4A (reporting observation of former U.S. Ambassador to Mexico David Davidow that the perception of juridical security is an essential pre-requisite to American investment); MARIA DAKOLIAS, THE JUDICIAL SECTOR IN LATIN AMERICA AND THE CARIBBEAN: ELEMENTS OF REFORM 3 (World Bank Technical Paper No. 319, 1996) (reporting that most Latin American respondents in a multi-national survey consider the judicial system to be among the top 10 restraints to private sector development). *But see* JOHN HEWKO, FOREIGN DIRECT INVESTMENT: DOES THE RULE OF LAW REALLY MATTER? 4-6 (Carnegie Endowment for Int'l Peace Working Paper No. 26, 2002) (noting that "extensive overhaul of a country's legislative and institutional framework is generally not a necessary precondition to attract direct investment").

22. THOMAS FRIEDMAN, THE LEXUS AND THE OLIVE TREE 86-87 (Farrar, Straus and Giroux 1999).

23. *See* Martinez, *supra* note 9, at 3-4.

**Table 2****Confidence in Legal Systems and GDP**

Country	1994	
	Confidence in Justice System	Real Per Capita GDP (1991 US\$)
Mexico	22	7,170
Spain	41	12,670
United States	51	22,130

Source: Martinez<sup>24</sup>

The tendency for juridical certainty to go hand-in-hand with economic growth is additionally emphasized in the statement of Genaro David Gongora, the former President of the National Supreme Court of Justice (the *Suprema Corte de Justicia de la Nación*, or “SCJN”), that “confidence in our system of justice, judges, and laws is crucial if Mexican and foreign investors are to continue driving economic development and employment in our country.”<sup>25</sup>

Concerns regarding the capacity of the justice system to assure an efficient and accountable environment for the purpose of carrying out development-inducing programs and projects may, in a similar vein, cause today’s increasingly results-oriented bilateral donors and multilateral organizations to forego the extension of grants, discounted loans, and/or technical assistance. Diminished levels of international financial institution confidence in the justice system may, moreover, result in Mexico having to maintain an elevated contingency position under the global reserve system. The opportunity cost associated with this potential outcome is, of course, the socially beneficial investment that the government would otherwise make in the provision of public goods and services.<sup>26</sup>

The final consequence associated with this system takes Mexico directly to the dividing line between public order and governability under the rule of law, on the one hand, and political deterioration, disinvestment, and social discord, on the other. First, the Mexican legal system’s repeated failure to hold wrongdoers accountable for their actions in an expeditious and equitable manner communicates a socially dangerous message regarding the low level of risk

24. *Id.* at 9.

25. Abel Barajas, *Ven en la justicia factor de inversión*, REFORMA, Dec. 14, 2002, at 12A.

26. JOSEPH STIGLITZ, *THE ROARING NINETIES: A NEW HISTORY OF THE WORLD’S MOST PROSPEROUS DECADE 225* (2003).



associated with unlawful conduct. Referring to the breakdown which is occurring with respect to the corrective aspect of justice, one commentator recently noted that “in Mexico. . . crime is a career option that competes with others.”<sup>27</sup> This orientation, coupled as it is with the disparate way in which the justice system has customarily responded to serious crimes committed by wealthy and/or powerful individuals as compared to petty crimes committed by ordinary citizens, dilutes the legitimacy of formal law, accentuates tensions between social classes,<sup>28</sup> and exacerbates the sense of physical insecurity generated by the current state of economic stagnation.<sup>29</sup> Second, there has been a growing perception that the rules, procedures, and cost structures underlying Mexico’s legal system do not adequately respond to and/or align with the real and increasingly complex needs of society.<sup>30</sup> This situation is evident in the way that both the government and citizens have, over the past decades, demonstrated an increased willingness to search out and deploy extra-judicial solutions to pressing controversies.<sup>31</sup> Examples of this imputed lack of confidence in the capacity of the legal system to deliver justice include the expanding role of the military in affairs that otherwise

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27. Alejandro Ascencio, *Sale Barato en México Ser Delincuente Ante Leyes*, INFOSEL FINANCIERO, Feb. 7, 2002, at <http://mx.plus.invertia.com> (last visited Dec. 16, 2003) (noting that Mexican criminals make more money than salaried workers, pay no taxes, and stand a de minimis chance of capture); Sam Dillon, *Mexico Can’t Fathom Its Rising Crime*, N.Y. TIMES, June 28, 1998, at 4-1.

28. Stephen Zamora, *The Americanization of Mexican Law*, 24 LAW & POL’Y INT’L BUS. 391, 447 (1993) (noting that “[u]neven enforcement of laws has been prejudicial to Mexican society”); Kevin Sullivan & Mary Jordan, *Disparate Justice Imprisons Nation’s Poor*, WASH. POST, July 6, 2002, at A01 (reporting that 90% of serious crime in Mexico goes unpunished); Szekely, *supra* note 2, at 423 (noting way in which rules are “generally disobeyed both by authorities and by private citizens, which results in there being no certainty in social relations”).

29. Mary Jordan, *Mexicans Protest Soaring Crime*, at <http://theage.com.au/articles/2004/06/28/1088392599561.html?oneclick=true> (last visited Aug. 29, 2004) (reporting mass protests conducted throughout Mexico in response to the government’s failure to control lawlessness).

30. Juan Navarette, *Sobre la ley indígena: ¿Tenemos una democracia de segunda?*, EL ECONOMISTA, Aug. 3, 2003, at [http://www.cidac.org/ingles/ingles\\_opinion\\_law.htm](http://www.cidac.org/ingles/ingles_opinion_law.htm) (last visited Jan. 16, 2004) (citing example of way in which the *Ley Indígena* was, in its final form, rejected by those states with the largest concentrations of indigenous inhabitants).

31. This reality is reflected in the findings of several surveys conducted by the Mexican government. In 1998, for example, 66.6% of respondents approved of the statement “Where authorities cannot protect citizens, they have the right to take the law into their own hands and make justice for themselves.” Faraway, *supra* note 7, at 335; M.C. MIROW, *LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA* 182 (2004) (noting the way in which Latin American communities create systems of extra-legal norms as a means of preventing anarchy when the state does not effectively exercise its power).

pertain to the civilian sphere,<sup>32</sup> the rising level of politically motivated intra-governmental violence and hostage taking (consider, for example, the hostages taken by the *ejidatarios* in connection with the Atenco standoff), the ubiquitous presence of private armies, security forces, and/or vigilante groups, and finally, the alarming frequency with which both the urban and rural elements of society resort to “parallel” or “community” justice strategies involving the use of “lynchings.”<sup>33</sup>

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32. “Ejercito, Fuerza Aérea y Armada. Si Bien Pueden Participar en Acciones Civiles en Favor de la Seguridad Publica, en Situaciones en que no se Requiere Suspender las Garantía, Ello Debe Obedecer a la Solicitud Expresa de las Autoridades Civiles a las que Deban Estar Sujetas, con Estricto Acatamiento a la Constitución y a las Leyes,” 3 S.J.F. 436 (9a época 1996) (11-0 Supreme Court decision upholding deployment of military forces for purpose of assuring public security); *Militarized Democracy in the Americas*, NACLA REP. ON AM., Nov.-Dec. 1998, at 15 (noting that since the end of the cold war, Latin American militaries have assumed an expansive and multi-dimensional role in confronting drug trafficking, terrorism, insurgency, immigration, and refugee flows). The militarization of public security has resulted in an increased number of complaints involving claims of arbitrary detention, illegal interrogations, unauthorized searches, and wrongful destruction of private property. INTER-AMERICAN COMM’N ON HUMAN RIGHTS, REPORT ON THE SITUATION OF HUMAN RIGHTS IN MEXICO, at <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.cidh.oas.org/commission.htm> (last visited Nov. 8, 2004).

33. A non-comprehensive electronic search of the Mexican newspapers “Reforma” and “El Norte” indicates that there were at least thirty-eight attempted lynchings between July 2002 and July 2003 in the Mexican states of Nuevo Leon, Hidalgo, Tlaxcala, Puebla, Estado de Mexico, and Chiapas. Several of these resulted in death. This type of “opting out” activity is not new to either Mexico or Latin America. DOS-96, *supra* note 2 (noting that twenty-one Mexican citizens were publicly lynched between September 1995 and August 1996); Traci Carl, *Mexico Killings Spark Vigilante Debate*, Associated Press, at [http://story.news.yahoo.com/news?tmpl=story&u=/ap/20041124/ap\\_on\\_re\\_la\\_am\\_ca/mexico\\_mob\\_killing](http://story.news.yahoo.com/news?tmpl=story&u=/ap/20041124/ap_on_re_la_am_ca/mexico_mob_killing) (last visited November 24, 2004) (reporting community lynching of two federal agents); Ungar, *supra* note 9, at 217 (noting reports of ninety lynchings in Guatemala between January and September 1999 and sixteen lynchings in Ecuador between January and September 1999); Angelina Snodgrass Godoy, *When “Justice” is Criminal: Crime, Communities, and Lynchings in Contemporary Latin America*, presentation delivered at the Annual Meeting of the Latin American Studies Association, March 27-29, 2003 (on file with author) (noting that 164 lynchings were reported in Venezuela between October 2000 and September 2001).

## **B. The Silent Revolution**

Mexico's traditional legal system – the most distinctive features of which are sketched out in the preceding section – may have adequately responded to the requirements of a relatively passive society and a system of government (“*el sistema*”) which, despite its ostensible commitment to political plurality and a tripartite division of power, was dominated for seven decades by a hegemonic party, a meta-constitutional executive, and a federal Congress composed primarily of PRI loyalists (the “*levantados*”).<sup>34</sup> Under this state of affairs, Mexico needed judges and legal institutions not so much for the purpose of resolving disputes in an independent and public policy-oriented way but, rather, to provide the symbolic authority necessary for legitimating the artificially liberal and republican form of its government.<sup>35</sup> Consistent with the theory of structural determinism, this system operated, on balance, to preserve the power of the ruling elite relative to that of the masses. From the moment Mexico defaulted on its extensive and mostly dollar-denominated commercial borrowings (i.e., following the collapse of oil prices in 1981), however, it became increasingly apparent that the system was fundamentally incompatible with the needs of a country which, for the first time in its modern history, faced the prospect of having to learn how to build and manage consensus-based relationships in a policy environment characterized by economic liberalization, democratization, shifting inter-branch power dynamics, elevated flows of information, and an increasingly participatory civil society.

Between 1982 and 1994, a growing number of internal and external factors pointed to the inevitable necessity of reforming Mexico's federal justice system in accordance with an evolving political calculus. A listing of the most important developments and considerations propelling this transformative dynamic include: (i) the ruling party's steady loss of legitimacy (a process which began with the massacre at Tlatelolco in 1968); (ii) the structural adjustments required or advocated by international donors and/or lenders;<sup>36</sup> (iii) the

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34. It has been postulated that the passivity of Mexican society during this time reflected the general knowledge that communities which broke with or otherwise diverged from “*la línea*” (i.e., the “official” party line) ran the risk of being eliminated by PRI authorities from “the running for new roads, water systems, electric projects, or schools.” JULIA PRESTON & SAM DILLON, *OPENING MEXICO* 59 (2004) [hereinafter PRESTON & DILLON].

35. *Faraway*, *supra* note 7, at 288; Susana Berruecos, *The Mexican Supreme Court Under New Federalism: An Analysis of Constitutional Controversies (1995-2000)*, Address at the Centro de Investigación y Docencia Económicas 3 (Nov. 2002) (transcript on file with author); See CESAR CANSINO, *LA TRANSICIÓN MEXICANA: 1997-2000* (2000).

36. Principal donors are the World Bank, the IMF, the IDB, the EU, and USAID. USAID Rule of Law activities in Mexico are geared towards making the administration of justice more efficient, effective, and accessible. Its overall budget of \$4.2 million U.S. is being released in performance-based tranches. Margaret J. Sarles, *USAID's Support of*

ascendancy of liberal political and economic ideology in the wake of the Soviet Union's collapse; (iv) the successful reform of the electoral system and the subsequent emergence of meaningful political competition; (v) the example of other Latin nations; (vi) the transition from an enterprise model consisting of family-run businesses in state-protected industries to one characterized by enhanced competitiveness in increasingly free markets; (vii) the advent of administrative decentralization; (viii) the expanding web of treaty-based obligations incurred as a result of Mexico's decision to join multilateral and regional institutions and trading systems; (ix) the transactional interests of investors and creditors; (x) the criticisms contained within reports issued by international and non-governmental organizations; (xi) the intensifying demand for accountability with respect to political, electoral, and human rights abuses; (xii) the deepening complexity of the nation's socio-demographic profile (i.e., in terms of population size, education level, and average lifespan); and (xiii), the developing body of neo-institutional inspired thought regarding the linkage between efficient and confidence-inspiring legal systems and the attainment of downstream development goals.<sup>37</sup>

Beginning in 1987 and spilling over into 1988, Mexico initiated the long overdue and complicated process of modernizing its legal system by, *inter alia*,

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*Justice Reform in Latin America*, in THE RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM 47, 75 (Pilar Domingo & Rachel Sieder eds., 2001) [hereinafter Domingo & Sieder]; EUROPEAN UNION, MEXICO COUNTRY PAPER: 2002-2006, at [http://europa.eu.int/comm/external\\_relations/mexico/csp/02\\_06\\_en.pdf](http://europa.eu.int/comm/external_relations/mexico/csp/02_06_en.pdf) (last visited Jan. 9, 2004).

37. IBRAHIM F.I. SHIHATA, COMPLEMENTARY REFORM 5 (1997) (noting that the "rule of law is considered to be a pre-condition for establishing a market economy"); JOHN RAPLEY, UNDERSTANDING DEVELOPMENT 117 (2002) (noting that the successful operation of markets depends on the existence of appropriate institutional and regulatory conditions); Ricardo Hausmann, *Lessons from the Political Economy of Other Reforms*, in JUSTICE DELAYED, *supra* note 9, at 39-46 (arguing that there are "direct links between the justice system and economic development"); Edmundo Jarquin & Fernando Carrillo, *Introduction to JUSTICE DELAYED*, *supra* note 9, at v-xiii (noting that the "strengthening of the rule of law is crucial for achieving both democratic consolidation and economic efficiency"); Mahon, *supra* note 4, at 251 (noting that the "goodness of a country's laws and institutions explain much of its economic performance"); Hammergren, *supra* note 8, at 733 (noting that "we have ample, if partial, evidence that legal and judicial weaknesses can have a negative impact on certain critical economic, social, and political transactions"); WILLIAM PRILLAMAN, THE JUDICIARY AND DEMOCRATIC DECAY IN LATIN AMERICA: DECLINING CONFIDENCE IN THE RULE OF LAW 1, 1 (2000) (stressing importance of the judiciary's role in "laying the foundations for sustainable long-term economic growth, ensuring predictability in the marketplace, and facilitating the formation of a civil society economically independent of the regime in power").

relieving the SCJN of the burden of hearing *amparos de legalidad*,<sup>38</sup> simplifying the procedure for creating new court facilities, creating the electoral tribunal, enacting provisions designed to facilitate international procedural cooperation, permitting the application of foreign laws within its territory (thereby doing away, effectively, with the Calvo doctrine), and recognizing the extra-territorial validity of foreign judgments and arbitral awards.<sup>39</sup> These steps were reinforced by the Zedillo administration's 1994 introduction of an even more dynamic package of constitutional reforms geared towards strengthening the federal judiciary and the administration of justice.<sup>40</sup> Although the preceding consideration of the historical state of the rule of law and development in Mexico makes it clear that these reforms have not fully remedied the deficiencies of the federal justice system, their enactment has brought about the establishment of a more equitable balance of power between the coordinate branches of the federal government. This outcome is, by extension, significant in that it has presented the PJF with a unique opportunity to re-invent itself in the eyes of citizens and investors. Viewed against this backdrop, the 1988 and 1994 reforms mark the inception of and undergird what has come to be known as the Mexican judiciary's "silent revolution." Former SCJN President Genaro David Gongora put the logic underlying this juridically-centered process of government transformation into perspective when he observed:

The reform of the justice system can not be limited to the judicial authorities or its organic institutions. The justice system must, in the face of phenomena such as the globalization of the economy and the country's new political and social reality, have a reliable, solid, and efficient legal framework. This new framework must eliminate dysfunctional and obsolete norms and procedures if it is to have the

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38. An *amparo* is a "suit by an individual, whether Mexican or foreigner, filed in federal court against any Mexican authority (federal, state, or municipal) for an alleged violation of the constitutional rights of an individual." Jorge A. Vargas, *The Constitution of Mexico*, in MEXICAN LAW, *supra* note 3, at 60. *Amparos* can either be direct or indirect. "Ley de Amparo," D.O., 10 de Enero de 1936, arts. 114 and 158.

39. HÉCTOR FIX-FIERRO, LA REFORMA JUDICIAL EN MÉXICO: ¿DE DÓNDE VIENE? ¿HACIA DÓNDE VA? 251-257, at <http://www.juridicas.unam.mx/publica/librev/rev/refjud/cont/2/rjf/rjf15.pdf> (last visited Jan. 16, 2004).

40. It is additionally noted that a package of constitutional reforms focusing on the *Consejo de la Judicatura Federal* was introduced, as discussed in greater detail, *infra*, in 1999. The World Bank is simultaneously developing a U.S.\$28.21 million project geared towards facilitating state level judicial reform. WORLD BANK, INITIAL PROJECT INFORMATION DOCUMENT: REPORT NO. AB101, at <http://www-wds.worldbank.org/> (last visited Nov. 8, 2004).

capacity to receive and dispose of the controversies, concerns, and struggles which society currently generates.<sup>41</sup>

This logic has, finally, been conditioned by the growing acceptance of the thought that a second generation of institutionally-oriented reforms are needed to consolidate the gains derived from the economic and political liberalization processes carried out in the 1980s and 1990s.<sup>42</sup>

This work identifies the scope, analyzes the effectiveness, and explores the ideological significance of the strategies and actions which have been pursued during the past two decades for the purpose of strengthening the rule of law in Mexico and, consequentially, enhancing the country's prospects for development. To this end, the first part of the work critically evaluates, from the benchmarks of the recent judicial modernization experience of other nations and its own historical trajectory, the most salient reforms, practices, and decisions that have been realized, proposed, or rendered in Mexico with respect to (i) the formation and regulation of judges and lawyers; (ii) the independence and activism of the federal judiciary; (iii) the organization and administration of the PJJF; and (iv) the federal rules of law and procedure. Basic descriptive statistics are, where available, incorporated into this part of the work with an eye to bringing a degree of objective measurability to bear on issues and concepts which have, traditionally, been the object of qualitative analyses. This evaluation is supplemented by ad hoc recommendations of a practical nature drawn principally from the author's diverse experience in the field of international law.

Having situated, from a comparative perspective, the aforementioned reforms, practices, and decisions within the context of Mexico's past experience, present reality, and prospective goals, the work concludes by asking the fundamental question: "How have these changes, to date, impacted Mexico's development?" This question is taken up by examining the relationship between the federal government's program of judicial reform, on the one hand, and a select set of legal, socio-political, and economic performance indicators, on the other. Because performance indicators can be influenced by a broad variety of extra-judicial factors, this consideration is necessarily general. On the strength of the observations derived from this examination – and, notwithstanding the real advances which have been made in terms of strengthening judicial independence, the administration of justice, democracy, and macroeconomic stability – it is

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41. Suprema Corte de Justicia de la Nación, Informe de Labores 12 (1999) [hereinafter Informe-1999].

42. Dakolias, *supra* note 21, at 1 (noting the way that the initial process of structural adjustment has given rise to a second generation of institutionally-oriented reforms); Luis Pasara, *Reforma de la Justicia en América Latina: Lecciones Aprendidas*, BIEN COMÚN, at <http://www.fundacionpreciado.org.mx/seccion/articulo.php?> (last visited Dec. 3, 2003).

argued that Mexico's program of judicial reform has, almost twenty years after its inception, neither catalyzed the consolidation of the nation's historic process of socio-political and economic transition nor delivered the promise of sustainable development. This basic finding is, in turn, contrary to the "conventional wisdom" that second generation institutional reform, generally, and judicial reform, specifically, are the missing pieces required for the successful realization of Mexico's neoliberal development agenda.<sup>43</sup>

Faced with deteriorating living conditions, a diminished tolerance for withstanding the deprivation and "pain" which precedes the anticipated (yet still elusive) "gain," rising levels of disillusionment, and a deeply ingrained aversion to the civil unrest that has, historically, tended to result from weak and ineffectual leadership (the legacy of *la bola*, for example, still commands a prominent place in the national psyche),<sup>44</sup> Mexico, like so many other Latin American nations, finds itself being slowly pulled apart by the opposed forces of neoliberal continuity and its populist, authoritarian past. While it remains to be seen how this fundamental struggle for present and future ideological primacy will be resolved, there are several measures which could be taken to shift the balance in favor of institutionally-grounded liberalism. The most obvious step involves successfully conveying the ultimate objective of the present program of legal reform – i.e., the overhauling of fundamental notions regarding the distinct yet inter-related roles of judges, judicial councils, lawyers, bar associations, law schools, law students, NGOs, and citizen consumers in (i) consolidating the redistribution of power between the component branches of government and the people and (ii) creating a legal, social, and economic environment which conduces to private sector prosperity and security. The second measure which Mexico could pursue in this regard consists of taking aggressive action to ensure that both the risks and benefits of globalization are distributed on a more equitable basis.<sup>45</sup> The continued failure of liberal political and economic policies in Mexico – both in real and perceived terms – could, on the other hand, tip the balance in favor of the diverse mixture of groups whose primary common denominator appears to be their rejection of neoliberalism. This outcome would, to the extent it leads to increased levels of political instability, economic uncertainty, civil discord, and disinvestment, likely have an adverse impact on Mexico's short- and intermediate-term development prospects. The return of old style "stability-oriented" policies under the aforementioned circumstances could, on another level, result in not only

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43. Linn Hambergren, *Uses of Empirical Research in Refocusing Judicial Reforms: Lessons from Five Countries*, at <http://www1.worldbank.org/publicsector/legal/UsesOfER.pdf> (last visited Jan. 3, 2004).

44. "La bola" refers to the social chaos and political instability experienced during the duration of the Mexican Revolution.

45. AMY CHUA, *WORLD ON FIRE* 267 (2003) (noting the importance, in the context of societies with market-dominant minorities, of establishing a more equitable access to and distribution of public goods and services, income, and opportunity).

the premature termination of yet another period of attempted reform but, also, the communication of a potent message regarding the United States' weakening capacity for hemispheric leadership and ideological hegemony.<sup>46</sup> This turn of events would, it is finally argued, undermine the attainment of the intertwined goals of regional integration under a U.S.-centered FTAA and democratic deepening by emboldening those Latin American nations which have not already backed away from or otherwise become beholden to the Washington consensus to follow Mexico's example.<sup>47</sup>

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46. *Id.* at 229-234. An anti-American message is, in fact, already circulating in certain parts of the world.

47. The U.S. and Brazil are, with varying degrees of success, exerting direct and indirect pressure on targeted countries throughout the Americas in an effort to win support for their respective visions of hemispheric free trade (i.e., a hub-and-spoke model with Washington at the center versus the more neutral concept of a NAFTA-SAFTA docking configuration). Eduardo Gudynas, *Trade and Integration in the Americas: Regular FTAA or FTAA Lite?*, at <http://www.americaspolicy.org/columns/gudynas/2003/0311diet.html> (last visited Apr. 22, 2004); Christopher M. Bruner, *Hemispheric Integration and the Politics of Regionalism: The Free Trade Area of the Americas (FTAA)*, 33 U. MIAMI INTER-AM. L. REV. 1, 29-39 (2002).



## II. RECENTLY IMPLEMENTED, PENDING, AND RECOMMENDED REFORMS AND PRACTICES BEARING ON THE RULE OF LAW IN MEXICO

### A. The Formation and Subsequent Training of Lawyers and Judges

#### 1. Lawyers

“The law and lawyers are what the law schools make them.”<sup>48</sup>

“Just as all the elements of legal systems are interdependent, so are educational reform and development the lifeblood of judicial reform.”<sup>49</sup>

##### a. Initial Formation

##### i. The Cátedra Magistral

Mexican legal education has – for reasons stemming from the civil law’s Greco-Romanic roots, long-standing practice of codification, and historical aversion to *stare decisis* and judicial review – traditionally placed heavy emphasis on the study, classification, and memorization of conceptual theory, doctrine, and black letter norms. The non-interactive pedagogical technique (i.e., the so called “*cátedra magistral*” or “continental lecture” method) developed by civil law educators and passed down from one generation of legal scholar to the next only compounds the static quality of Mexican legal education.<sup>50</sup> Other comparative law scholars echo this point when they relate that the “basically academic” curricula followed by most Mexican law schools places little emphasis on teaching “lawyering skills or the use and applications of law in context.”<sup>51</sup>

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48. Stephen Wizner, *What Does It Mean to Practice “In the Interests of Justice” in the Twenty-First Century? The Law School Clinic: Legal Education in the Interests of Justice*, 70 *FORDHAM L. REV.* 1929, 1930 (2002) (quoting Justice Felix Frankfurter).

49. Neil Gold, *Legal Education in Changing Societies*, in *JUDICIAL REFORM*, *supra* note 16, at 113.

50. Little has changed in Mexico’s approach to the impartation of legal education since the sixteenth and seventeenth centuries. At that time, legal principles were “memorized and subjected to fine distinctions and mere glosses and commentary; a questioning mind and original observation had little place in the process.” Richard C. Maxwell & Marvin G. Goldman, *Mexican Legal Education*, 16 *J. LEGAL EDUC.* 155, 156 (1963).

51. James E. Herget & Jorge Camil, *The Legal System of Mexico*, in *MODERN LEGAL SYSTEMS CYCLOPEDIA* 62 (Kenneth Robert Redden ed., 1984); *Hacia donde va la enseñanza del derecho?*, *EL MUNDO DEL ABOGADO*, Apr. 2000, at 34-38 [hereinafter *Hacia*

In sharp contrast to the vibrant interchange of reasoned and substantiated ideas regarding issues derived from real world controversies which occurs in U.S. law schools, Mexican law professors – the great majority of whom are not full time academics but, rather, practitioner adjuncts<sup>52</sup> – have been known to “teach” a course on commercial law by simply reading, article by article, the contents of the Code of Commerce without making any corresponding attempt to explain and/or illustrate the theoretical underpinnings, developmental history, or practical application of the provisions under consideration.<sup>53</sup> When a Mexican law professor does actually add his or her own insight, students tend to place an exaggerated emphasis on capturing the articulated words verbatim, lest they lose points on a subsequent exam for not having perfectly memorized and regurgitated the original lesson. Such a system does little to develop either basic analytical and advocacy skills or, on a more fundamental level, an intuitive understanding of and appreciation for the living nature and transformative power of the law.

#### ii. New Reality, Updated Vision and Programming

While this approach to legal education may have worked in the context of the closed and non-competitive social, economic, and political environment which characterized Mexico’s structuralist inspired and protracted experience with state-led import substitution, it does not respond to the needs and circumstances of the country’s contemporary reality. Héctor Fix-Fierro touches on this point when he notes that the quantity and quality of legal professionals is – in spite of the fact that law has, as reflected in the increasing number of professional licenses issued, become the academic track most commonly chosen by university students (see

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*donde va*] (noting tendency of Mexico’s system of legal education to become lost in abstractions that have been irrelevant for over one hundred and fifty years); Memorandum from the Academic Secretary to the Committee for the *Proyecto de Licenciatura en Derecho* (Aug. 2000) (on file with author) (noting that “the formation of legal professionals in Mexico concentrates, fundamentally, on the theoretical and conceptual study of abstract norms while teaching methods emphasize the capacity for memorization”).

52. Herget & Camil, *supra* note 51, at 64 (noting that a “typical” Mexican law school will be staffed by 3-6 full time academics and anywhere from 20-50 part time teachers); Héctor Fix-Fierro, *Notes on the Impact of Lawyer Performance on the Administration of Justice in Mexico*, at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1023&context=usmex> (last visited Mar. 15, 2004) (noting that as of 2002, less than 140 of the 1,000 members of the UNAM’s law faculty are full-time).

53. Observation based on the personal experience of the author.

Table 3, *infra*) – insufficient for the purpose of “adequately sustaining Mexico’s new judicial infrastructure.”<sup>54</sup>

**Table 3**

**Number of Cédulas Profesionales Issued for the Practice of Law, 1970-2001**

Year	Quantity
2001	17,124
2000	13,585
1990	5,997
1980	2,250
1970	1,006

Source: SEP Information Request

This observation is further borne out by a market research survey conducted in August 2002 by *Valora Consultaría* involving the perceptions of practicing lawyers with respect to the desired “profile” of a new law school graduate, the key findings of which indicate a strong preference for practical problem solving, effective argumentation, and critical reasoning skills.<sup>55</sup> The perceptions of the professional community are reiterated, at the level of the contemporary classroom, in the gap which is emerging between students and faculty preferences with respect to the mixture of theory and practice imparted by Mexico’s largest program of legal education (see Table 4, *infra*). The ramifications of this perceived deficiency in the formation of legal professionals bears directly on the larger issues of judicial reform and the administration of justice in that an overabundance of inadequately trained lawyers constitutes a long-term impediment to the optimal operation of the legal system.

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54. FIX-FIERRO, *supra* note 39, at 310; Fix-Fierro, *supra* note 52 (reporting that 40% of state level trial court judges see the training of Mexican lawyers as “poor,” while 19% of state level trial court judges see the training of Mexican lawyers as “bad”).

55. Erick Aranda García, *Cambiando el Cauce de la Enseñanza del Derecho en México*, Address at the Inter-American Bar Association’s XXXIX Annual Conference “Cambios en el Derecho y Libre Comercio de las Americas” 5 (July 16, 2003) (transcript on file with author).

**Table 4****UNAM Faculty and Students Which Have a Negative View with Respect to the Balance between Theory and Practice in the Current Law Curriculum**

Law Faculty*	Law Students**
13.73%	26.84%

\*Based on a sample of 437 respondents

\*\*Based on a survey of 3,394 respondents

Source: Cauces<sup>56</sup>

There is, at present, a relatively clear consensus within the Mexican legal education community that the traditional system needs to change in a way that more effectively responds to the needs of society. This is not, in fact, a new concept in either Mexico or Latin America. The idea of reforming, with reference to positivistic theories, interdisciplinary methods, pragmatic practices, and activist perspectives derived from juridical heritages other than the civil law, traditional pedagogical techniques for the purpose of enabling Latin American legal systems to better meet post-World War II development challenges was introduced – with neither significant regard for the fundamental differences between donor and recipient legal cultures nor long-term success – first by corporate funded programs such as NYU’s Inter-American Law Institute (late 1940s and early 1950s) and subsequently by proponents of the law and development movement of the 1960s and early 1970s.<sup>57</sup> The consensus that currently prevails in Mexico becomes less

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56. UNIVERSIDAD NACIONAL AUTÓNOMA DE MÉXICO, *Consulta sobre el plan de estudios de la licenciatura en derecho de la facultad de derecho de la UNAM*, 2 CAUCES 68-70 (2003).

57. John H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline, and Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977); MIROW, *supra* note 31, at 188; Maxwell & Goldman, *supra* note 50, at 163 (noting that the Second Conference of Latin American Law Schools issued a “Declaration of Principles on the Teaching of Law” which included provisions calling for (i) the increased use of class discussion in lectures, (ii) the attainment of a better balance as between theoretical and practical knowledge, and (iii) the rejection of teaching practices which rely on rote memorization of doctrine and rules); JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* 249 (1980) (noting that although the case method marshaled occasional support, it was often “superficially employed, as a thin veneer of case law and student participation, grafted on a larger structure of doctrinal and formalistic law”).

clear, however, when it comes to the issue of the way in (and the extent to) which this change should be carried out.<sup>58</sup>

One of the most innovative attempts at overhauling legal education in Mexico involves the Center for Economic Research and Teaching's (*Centro de Investigación y Docencia Económicas*, or "CIDE") Hewlett Foundation-funded Program for Reforming Legal Education (*Programa de Reforma en la Enseñanza de Derecho*, or "PRENDE").<sup>59</sup> In what constitutes an attempt to break from the inertia associated with the theory- and memorization-driven *cátedra magistral* technique, the CIDE has endeavored to build, within the context of Mexico's overriding civil law tradition, a common law inspired program of legal studies based on the use of interdisciplinary and problem-solving-oriented cases derived, where possible, from cutting edge legal issues. Table 5, *infra*, documents, in this connection, the CIDE's emerging leadership position in terms of prioritizing course materials attuned to contemporary legal issues and practical seminars.

**Table 5**  
**Percentage of Curricula Consisting**  
**of Practical Seminars and Clinical Legal Education,**  
**Select Mexican Law Schools, 2002-2003**

Law School	Percent of Curriculum Pertaining to Emerging Areas of Law, Practical Seminars, and Clinical Legal Education
CIDE	21%
Universidad Panamericana	18%
UNAM	17%
Escuela Libre Derecho	10%
Iberoamericana	5%
ITAM	3%

Source: Erick Aranda Garcia<sup>60</sup>

58. See *Hacia donde va*, *supra* note 51, at 34; Imer B. Flores, *Algunas reflexiones sobre la enseñanza del derecho: Enseñar a pensar y a repensar el derecho*, 2 CAUCES 30 (2003).

59. This program is being developed with the assistance and participation of, *inter alia*, Stanford Law School and the Chile's *Universidad Diego-Portales*. Marta Vida de Gonzalez, *Teachers Without Borders*, NEWS FROM GOULD (Martin Daniel Gould Ctr. for Conflict Resol., Stanford, CA), at [http://www.law.stanford.edu/programs/academic/gould/newsletter/2003/teachers\\_without\\_borders.html](http://www.law.stanford.edu/programs/academic/gould/newsletter/2003/teachers_without_borders.html) (last visited Jan. 1, 2004).

60. Garcia, *supra* note 55, at 7-12.

Under this potentially standard setting program (indeed, the program is, in calling for the use of Mexico- and Latin America-specific case studies, so novel that the CIDE has had to generate proprietary “case books”), students prepare for class by reading a given fact pattern taken from either an actual or hypothetical controversy, together with the associated doctrine, laws, and jurisprudence and then, pursuant to a set of follow up questions, apply the relevant rules of law and procedure to the resolution of the problem. As described by Ana Laura Magaloni, the director of the CIDE’s Legal Studies Division (*División de Estudios Jurídicos*, or “DEJ”):

In class, the professor uses the same question guide so that the students discuss their own solutions and answers. The professor doesn’t give answers. Rather, the professor facilitates discussion. The students are thus situated within a horizontal discussion wherein all participants are required to propose, argue, and defend a position.<sup>61</sup>

In other instances, class consists of direct student participation in simulated negotiations, mediations, etc. Through these means, students are able to develop a clearer understanding of the work they will eventually do as attorneys.

Although it is premature to speak in conclusive terms about the long-term impact of the PRENDE on the impartation of legal education (the CIDE has yet to complete its first cycle of PRENDE scholars), it is generally thought that the program, to the extent it succeeds in simultaneously sharpening critical reasoning, argumentation, and problem solving skills and serving as a model for the country’s other reform-minded law schools, has the potential to improve the quality of professional services offered by forthcoming generations of Mexican lawyers. This outcome could, by extension, positively enhance the overall functioning of Mexico’s system of justice.

#### b. Impediments to the Formation of Lawyers

Notwithstanding the promise of programs such as the PRENDE, Mexico’s system of legal education continues, as a whole, to struggle with progress-impeding issues of both a structural and academic nature. These issues are problematic insofar as their persistence (i) threatens to dilute the effectiveness of the reforms which are currently being considered and/or undertaken with regard

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61. Erick Aranda García, *Entrevista con Ana Laura Magaloni Kerpel, Directora de la División de Estudios Jurídicos, Centro de Investigación y Docencia Económicas (CIDE)*, 2 CAUCES 44-51 (2003).

to the way in which Mexican law schools form future lawyers; (ii) suggests that Mexico's 196,000+ law students are,<sup>62</sup> as consumers of educational services, not receiving the full benefit of their investment; and (iii) precludes the downstream enhancement of the rule of law. Viewed against this background, the improvement of legal education is "fundamental" to the success of any program of judicial reform.<sup>63</sup> The details pertaining to the most serious impediments are set out below.

### i. Budgetary Limitations

Many Mexican law schools are unable or unwilling to pay their full-time employees salaries which either compete with those offered in the private sector or provide for a standard of living commensurate with the professional status of a professorship.<sup>64</sup> Consequentially, many Mexican law schools have a difficult time attracting and/or retaining qualified and motivated professional educators and support staff.<sup>65</sup> This outcome manifests itself in a number of ways. For example, individuals who are not "licensed" attorneys (i.e., that have not completed the requirements for their *cedula profesional* and otherwise lack the perspective gained through professional experience) may be given the primary responsibility for gathering the materials and writing up case studies which will be subsequently used in the classroom.<sup>66</sup> Similarly, the difficulty of attracting qualified permanent educational staff can result in a situation where an individual who has completed the requirements for his or her law license but never otherwise practiced ends up teaching a course as patently practical as "Advising Foreign Corporations on Doing Business in Mexico."<sup>67</sup> Last – and not surprisingly – there tends to be a general correlation between salary level and professional motivation. That is, the lower the salary received, the more likely it is that a professor will (i) not strive to

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62. ASOCIACIÓN NACIONAL DE UNIVERSIDADES E INSTITUCIONES DE EDUCACIÓN SUPERIOR, ANUARIO ESTADISTICO 2002, *at* [http://www.anuies.mx/principal/servicios/estadisticas/estadisticas\\_2002.htm](http://www.anuies.mx/principal/servicios/estadisticas/estadisticas_2002.htm) (last visited Jan. 23, 2004).

63. DAKOLIAS, *supra* note 21, at 54.

64. ALAN RIDING, *DISTANT NEIGHBORS: A PORTRAIT OF THE MEXICANS* 235 (1989) (noting the way in which exceptionally low salaries force doctorate level teachers to moonlight).

65. LIBRARY OF CONGRESS, *MEXICO COUNTRY REPORT*, *at* <http://lcweb2.loc.gov/frd/cs/mxtoc.html> (last visited Nov. 24, 2003) (noting concern about the quality of instruction imparted in Mexico's academic institutions).

66. Observation based on the personal experience of the author.

67. Observation based on the personal experience of the author. Alan Riding touches on the same point in a more general way when he notes that almost one-third of the 26,000 teachers and professors which worked for the UNAM in 1989 had less than two years of experience. RIDING, *supra* note 64, at 235.

design the most sophisticated, current, and challenging course program possible, (ii) be late for (or altogether absent from) his or her scheduled classes,<sup>68</sup> (iii) fail to honor posted office hours (or otherwise make time to help students outside of posted office hours), and/or (iv) take the time and make the effort to grade the papers of his or her own students. This situation works against the goal of strengthening the rule of law pursuant to, *inter alia*, the reform of Mexico's system of legal education by perpetuating – in the example which the unmotivated instructor unwittingly sets for malleable law students – a standard of professional under-achievement and haphazardness.

#### ii. Insufficient Curricular and Extra-Curricular Law Practice Related Activities

A critical component in the overall process of forming lawyers in the U.S. entails providing law students with the opportunity to participate in a number of structured and supervised curricular and extra-curricular legal activities including, for example, social justice clinics, law journals, moot courts and mock competitions, study abroad programs, and the law student divisions of local and national bar associations. These activities are beneficial in that they proactively enhance writing, research, and advocacy skills, reinforce knowledge, prepare students for future involvement with and leadership positions within the bar, inculcate a sense of social justice, and, most importantly, benefit the community. Such extra-curricular activities are, by way of contrast, often unavailable in Mexico. Despite excessive levels of poverty, an under-staffed and under-funded public defender's office,<sup>69</sup> and the essentially ineffective nature of the legal profession's approach to the provision of *pro bono* services, the overwhelming majority of Mexican law schools do not offer clinical legal education for the mutual benefit of the poor and their students. A similar situation holds with respect to the issue of law journals. It is, in a country which has experienced difficulty in producing disciplined and sophisticated legal research, analysis, and writing, astonishing to see how few student-run law journals exist.<sup>70</sup> Turning,

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68. *Id.* (characterizing teacher absenteeism as a "chronic" problem).

69. Despite the expansionary trend of the past few years (discussed in greater detail, *infra*), "the public defender system is not adequate to meet demand." U.S. DEP'T OF STATE, 2002 HUMAN RIGHTS REPORT 25 (2002) [hereinafter DOS-2002].

70. Maxwell & Goldman, *supra* note 50, at 170. Examples of law schools which provide their students with the opportunity to participate in a law review type activity include the UNAM ("Cauces") and the Escuela Libre de Derecho ("Pandecta"). Additional steps which could be taken to remedy this deficiency in terms of legal research and writing include providing teachers with extra



alternatively, to summer programming, most Mexican law schools, for reasons stemming from the formalistic control which the Secretary of Public Education (*Secretaría de Educación Pública*, or “SEP”) exercises over the design, sequencing, and validation of legal curricula (i.e., through a mechanism known as the *Plan de Estudios*), do not offer perspective-enhancing, for-credit, study abroad opportunities.<sup>71</sup> Finally, in spite of the ever increasing number of international and intra-regional moot courts and competitions, only a tiny percentage of Mexico’s law schools field teams. A prime example in this regard involves the way in which only three out of the 455 law programs currently operating in Mexico<sup>72</sup> participated in the 2003 Phillip C. Jessup International Moot Court Competition.

### iii. Inadequate Emphasis on Ethics and Professional Responsibility

The final aspect of Mexico’s system of legal education which has a potentially negative bearing on the downstream administration of justice involves the non-existent to de minimis emphasis which the typical law school curriculum places on the shaping of attitudes and values vis à vis the provision of instruction on ethics and professional responsibility. Even in a relatively progressive environment such as the CIDE’s PRENDE program, the incorporation of ethical and/or professional responsibility issues into the case studies has been something of a poorly developed afterthought. The treatment that this issue receives at other academic institutions is not much better. The majority of these do not require

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instruction, improving the out-of-classroom access of students to those teachers responsible for legal writing courses, introducing competitive, extra-curricular legal writing opportunities, strengthening the online researching capabilities of students (notwithstanding the fact that many Mexican law students have access to Lexis, most lack even a rudimentary understanding of the contents of the database), establishing and emphasizing a uniform and Mexico-specific system of legal citation (akin to the U.S. “Blue Book”), offering instruction with respect to the preparation of “real world” legal documents such as briefs, memoranda, and opinion letters, and making the physical facilities of law schools more conducive to sustained and serious scholarship.

71. One important exception involves the North American Consortium for Legal Education (“NACLE”). While this consortium does offer “for credit” study abroad opportunities, its beneficial impact is limited by the fact that program participation is restricted to law students enrolled at the ITESM, UNAM, and Universidad Panamericana. NACLE, QUESTIONS AND ANSWERS, at <http://www.nacle.org> (last visited Jan. 24, 2004).

72. Asociación Nacional de Universidades e Instituciones de Educación Superior, Catálogo de licenciatura y posgrado, at [http://www.anuies.mx/anuies/planes/cons\\_plan.html](http://www.anuies.mx/anuies/planes/cons_plan.html) (last visited Nov. 12, 2003).

their students to take a course in ethics or, if they do, restrict the content to theories and concepts which are unsupported by and disarticulated from examples derived from real world experience. Both the gravity of the problem and the scope of the current system's failure are evident in the way that (i) cheating and plagiarism go unpunished<sup>73</sup> and (ii) many new law school graduates enter the formal practice of law, holding themselves out as attorneys, when in fact they have not fully complied with all the requirements for a license (because it is fairly easy to bribe one's way out of the social service, it is the thesis requirement which is typically outstanding).<sup>74</sup>

It would be naïve, however, to suggest that there is an automatic correlation between quality of education and professional integrity. While an improved system of legal education would likely facilitate elevated levels of professional responsibility, the attainment of such an outcome would require supplemental initiatives and, more importantly, a genuine willingness to change the status quo. Examples of measures which could, in this connection, be taken to reverse the negative effects associated with the currently weak emphasis on ethics in the impartation of legal education include holding academic rule breakers publicly accountable for their actions, introducing codes of ethics and/or professional responsibility with clearly stated proscriptions and functional enforcement mechanisms (as discussed in greater detail, *infra*), and making attorney licensing contingent on demonstrated awareness and command of the subject matter (in much the same way that most U.S. law students are required to pass the Multistate Professional Responsibility Examination in order to obtain a law license). The latter actions would be beneficial insofar as they provided a framework of standards and, assuming enforcement, cases which law students preparing to enter the legal profession could use for the purpose of consolidating their understanding of ethical issues, seeing the law in action, and moderating their personal and professional conduct.

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73. Observation based on the personal experience of the author.

74. See UNSR, *supra* note 3, at 26 (noting that "the majority of undergraduates never complete their course, but nevertheless practice and even appear in court, often using the credentials of another lawyer who is properly licensed"). This practice is reflected in matriculation and licensing statistics maintained by ANUIES. In 1996, only 10,960 of the nation's 20,983 law school graduates – 52% – obtained their *cedula profesional*. Three years later, in 1999, only 14,682 of a total 24,396 law graduates successfully completed all the requirements for their *cedula profesional*. ASOCIACIÓN NACIONAL DE UNIVERSIDADES E INSTITUCIONES DE EDUCACIÓN SUPERIOR, ESTADÍSTICAS DE LA EDUCACIÓN SUPERIOR (2000), at <http://www.anuies.mx> (last visited Sept. 30, 2003) (on file with author).

### c. Continuing Legal Education

Mexican attorneys are “licensed” and subsequently regulated by the SEP’s *Dirección General de Profesiones*.<sup>75</sup> Unlike the obligation imposed on U.S. lawyers by state and federal bar associations, the SEP requires neither newly licensed nor actively practicing attorneys to take special introductory seminars or otherwise remain abreast of developments in the law by engaging in continuing legal education (“CLE”).<sup>76</sup> Consequently, many attorneys – especially the elder and more established members of the legal community – are unfamiliar with emerging regulatory frameworks (for example, those which pertain to e-commerce, e-government, intellectual property, etc.), contemporary trends and theories in Mexican jurisprudence, and/or evolving litigation and ADR strategies and tactics. The foregoing situation, to the extent it facilitates the practice of less than current lawyers, prevents Mexico’s legal system from attaining a maximum level of operational efficiency at the same time it adversely impacts the overall quality of representation received by consumers.

This is not to say, however, that CLE-type programming is not available in Mexico. Nothing could be further from the truth. Universities, primarily, and local bar associations, to a lesser extent, offer a broad variety of courses, post-graduate diploma programs, and seminars focusing on traditional and contemporary legal topics. Due to the fact that most of these non-obligatory CLE-type programs are offered principally for the purpose of making a profit, it is often the case that quality control with respect to invited lecturers and/or course materials is not as rigorous as it could or should be. The effectiveness of Mexico’s non-obligatory CLE-type programming in terms of keeping attorneys abreast of new developments in the law is, additionally, limited by the high cost of attending courses, post-graduate *diplomados*, and seminars. That is, only the most ambitious of attorneys or, less commonly, those lawyers associated with larger firms or the government, are able to afford the hundreds (and potentially thousands) of dollars charged for Mexican CLE type programs. In an outcome which again works to the detriment of both the efficient operation of Mexico’s

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75. “Ley Reglamentaria del Artículo 5 Constitucional, Relativo al Ejercicio de las Profesiones en el Distrito Federal,” D.O., 26 de Mayo de 1945, arts. 21 and 23 [hereinafter LRA5C].

76. Mexico’s largest bar association, the *Barra Mexicana, Colegio de Abogados* (“BMA”), does impose a CLE obligation on its members. The effectiveness of this requirement is, however, limited by the fact that membership in the BMA is voluntary. BARRA MEXICANA, COLEGIO DE ABOGADOS, LINEAMIENTOS DE EDUCACIÓN CONTINUA (2004), at <http://www.bma.org.mx> (last visited Aug. 1, 2004). According to the findings of the U.N. Special Rapporteur, only 2,000 of Mexico’s approximately 40,000 lawyers are members of the BMA. UNSR, *supra* note 3, at 25.

legal system and the quality of legal services received by consumers, lawyers associated with smaller firms and solo practitioners tend to be priced out of the CLE market.

## 2. The Federal Judiciary

“The rule of law can not be consolidated without judges that are prepared to do their part in upholding the justice system.”<sup>77</sup>

### a. Historical Patterns

Mexican judges have, historically, neither fulfilled the same role, nor enjoyed the same level of prestige, as their common law counterparts.<sup>78</sup> Seven decades of single party rule characterized by the concentration of power in the executive branch and the imposition of strict limitations with respect to the overall effect of court decisions significantly diminished the power and relevance of the federal judiciary. Low judicial salaries, in turn, left the best-trained and most capable young law graduates inclined to pursue careers in private practice.<sup>79</sup> Consequently, lawyers with uncompetitive institutional pedigrees, undistinguished records of professional experience, and/or modest socio-economic backgrounds

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77. FIX-FIERRO, *supra* note 39, at 253.

78. The differences between the roles and prestige of common and civil law judges is actually rooted in phenomena and experience which run much deeper than Mexico's modern history. Going back to Roman times, the judge (*iudex*) was not a “prominent man of the law” vested with “inherent lawmaking power” but, rather, a layman discharging an arbitral function in conformity with the formulae supplied by the *praetor* and the indispensable advice of the *jurisconsult*. The French revolution's consecration of the dogma of strict separation of powers reinforced this historical tradition by preventing judges from either directly or indirectly making law. Consequently, civil law judges came to be perceived as public servants that perform important but essentially uncreative functions. JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION*, 34-38 (1985); Michael C. Taylor, *Why No Rule of Law in Mexico? Explaining the Weakness of Mexico's Judicial Branch*, 27 N. M. L. REV. 146-148 (1997) (noting the way in which the federal executive strove to undercut judicial prestige between 1917 and time of the Zedillo administration); Edgardo Buscaglia, *Obstacles to Judicial Reform in Latin America*, in *JUSTICE DELAYED*, *supra* note 9, at 18 (noting that “surveys throughout the region indicate that judicial institutions have low prestige and are viewed as incompetent); JOSE RAMÓN COSSIO, *LA TEORÍA CONSTITUCIONAL DE LA SUPREMA CORTE DE JUSTICIA* 63-65 (2000) (noting the necessity of improving the status and prestige of the Ministers of the SCJN).

79. CARPIZO, *supra* note 3, at 551 (noting the pan-Latin reality of low judicial salaries).

tended to pursue careers on the bench.<sup>80</sup> This observation is corroborated, in part, by the findings of 1985 and 1993 judicial surveys that an average of 93.15% of Mexico's federal judges and magistrates graduated from what are generally considered to be inferior quality law programs (essentially the UNAM and other state level public universities).<sup>81</sup>

**Table 6**

**Academic Profile of PJF Judges and Magistrates**

Variable	1985*	1993**	2002-2003***
UNAM Law Graduate	41.8%	41.1%	31.5%
State Law School Graduate	52.3%	51.2%	61.0%
Total	94.1%	92.3%	92.5%

\* Based on a sample of 310 federal judge and magistrate profiles

\*\* Based on a sample of 260 federal judge and magistrate profiles

\*\*\* Based on analysis of 800 federal judge and magistrate profiles

Sources: MÉXICO SOCIAL,<sup>82</sup> CJF<sup>83</sup>

The weaker state of academic preparedness implicit in this outcome was compounded by the lack of effective training available to sitting judges. Though

80. Taylor, *supra* note 78, at 165.

81. 41.8% and 41.1% of Mexico's federal judicial officials were, according to surveys conducted in 1985 and 1993, graduates of the UNAM's law program. Grupo Financiero Banamex-Accival, MÉXICO SOCIAL 1992-1993: INDICADORES SELECCIONADOS 428-429 (1994) [hereinafter MÉXICO SOCIAL 1992-1993]. 52.3% and 51.2% of Mexico's judicial officials were, according to the same surveys, graduates of public, state run universities. *Id.*; *Hacia donde va*, *supra* note 43 (reporting constitutional scholar Jose Ramon Cossio's statement that "the UNAM and the UAM had a splendid epoch, but now they are myths. The renowned professors have left these institutions. The best teachers are now in the private schools"); Fix-Fierro, *supra* note 52, at 8 (noting that the "leading role" of the UNAM has "diminished in recent times"); Herget & Camil, *supra* note 51, at 62 (noting perceived deterioration in quality of legal education imparted by the UNAM); *Las Mejores Universidades: Compiten por la Excelencia*, REFORMA, Aug. 26, 2002 (noting that, according to a survey of more than 9,000 students, teachers, and employers, Mexico's top law schools are the Escuela Libre de Derecho, the Universidad Panamericana Campus Ciudad de Mexico, the ITAM, the Universidad Iberoamericana, and the Universidad La Salle). A student's choice of law program can, inasmuch as public law schools tend to provide a large percentage of the nation's prosecutors, judges, and magistrates, have a large influence on the future professional path of an attorney. Vargas, *supra* note 3, at 13. This concept is clearly illustrated by the fact that the majority of Mexico's Supreme Court Ministers are UNAM graduates.

82. MÉXICO SOCIAL 1992-1993, *supra* note 81, at 428-29.

83. CONSEJO DE LA JUDICATURA FEDERAL, DICCIONARIO BIOGRÁFICO, *at* [http://w3.cjf.gob.mx/sevie\\_page/](http://w3.cjf.gob.mx/sevie_page/) (last visited Oct. 3, 2003) [hereinafter CJF].

the Institute for Judicial Specialization (*Instituto de Especialización Judicial*, or “IEJ”) was set up in 1987 for the purpose of expanding the base of knowledge acquired by judges in law school, the extremely remedial nature of course offerings (including, for instance, “Writing and Grammar”) limited its impact.<sup>84</sup> The legacy of weak academic preparation and ineffective subsequent training is manifest in the pervasiveness of the perception that Latin American judges lack an adequate command of certain subject matters.<sup>85</sup>

b. Bolstering the Bench: The Compensation, Competitiveness, and Competence of the Federal Judiciary

The political and economic changes which Mexico has experienced over the course of the past twenty years have drawn attention to the pressing nature of the country’s need for an effective means of strengthening the rule of law. A central aspect of this evolving recognition has, in turn, focused on bolstering citizen confidence in the capacity of the legal system to deliver justice in an informed, expeditious, and impartial manner by elevating the competence of PJF judges and magistrates.

One strategy that has been pursued in this regard entails enhancing the prestige and desirability of a position on the federal bench with the hope of attracting a broader range of better-qualified candidates. While an empirical association has yet to be established, it has also been postulated that an improvement in judicial compensation would reduce the incentive which judges and magistrates have to engage in irregular acts. To this end, the PJF has raised the maximum monthly salary of judges and magistrates, respectively, from 48,235.00 pesos to 145,355.51 pesos (a 201% increase) and 52,232.00 pesos to 151,893.63 pesos (a 191% increase) between 1998 and 2004 (see Table 7, *infra*). The implementation of this strategy has resulted in PJF employees having the highest average monthly salaries in the federal government.<sup>86</sup> It has, furthermore,

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84. INSTITUTO DE LA JUDICATURA FEDERAL, ANTECEDENTES Y FUNDACIÓN, at <http://www.ijf.cjf.gob.mx/infogral/antec.asp> (last visited Aug. 1, 2004) [hereinafter IJF].

85. CENTER FOR U.S.-MEXICAN STUDIES, JUDICIAL REFORM AND LEGAL PROFESSIONALS, at <http://www.usmex.ucsd.edu/justice/judiciary.html> (last visited Dec. 4, 2003) (noting a “critical” lack of expertise and professionalism amongst the members of Mexico’s legal community); DOS-2002, *supra* note 69, at 23 (noting the lack of knowledge that judges have regarding, *inter alia*, international law); MARTHA A. FIELD & WILLIAM W. FISHER, LEGAL REFORM IN CENTRAL AMERICA 381 (2001).

86. Victor Fuentes, *Viven en Poder Judicial con Bonanza Económica: Crece Gasto Corriente Casi 31% en 2003*, REFORMA, Aug. 8, 2003, at 2A (noting that the average monthly salary received by a PJF employee in 2002 was 43,273 pesos, up from a 1998

resulted in the situation that, assuming a 10:1 peso to dollar exchange rate, Mexico's federal judges and magistrates made, respectively, \$19,726 U.S. and \$18,271 U.S. more than their U.S. federal counterparts in 2003.<sup>87</sup> Though it is not possible to attribute the entirety of this phenomenon to the aforementioned salary hikes, it is now possible to see Mexico City judges moving about town in high-end luxury automobiles.

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monthly average PJF salary of 18,550 pesos). The average monthly salaries of state level judicial functionaries are, by way of contrast, less. Michoacán judges and magistrates received, respectively, 18,782 and 32,584 pesos per month in 2001. Adam Garcia, *Recompensan a Jueces de Michoacán*, REFORMA, Apr. 21, 2002. Stated in annual terms, Michoacán judges and magistrates earned, respectively, 225,384 (or, assuming a 10:1 peso to dollar exchange rate, \$22,538 U.S.) and 393,008 (or, assuming a 10:1 peso to dollar exchange rate, \$39,300 U.S.) pesos. These amounts are significantly lower than the average salaries received by U.S. state trial court and appellate judges in 2002 (respectively, \$111,220 U.S. and \$121,086 U.S.). NAT'L CTR. FOR ST. CTS., SURV. OF JUD. SALARIES 2 (2003), [http://www.ncsconline.org/WC/Publications/KIS\\_JudComJudSal1002Pub.pdf](http://www.ncsconline.org/WC/Publications/KIS_JudComJudSal1002Pub.pdf) (last visited Nov. 8, 2004).

87. U.S. federal district and circuit judges made, respectively, \$154,700 U.S. and \$164,000 U.S. in 2003. U.S. Supreme Court Associate Justices and the U.S. Supreme Court's Chief Justice made, respectively, \$190,000 U.S. and \$198,600 U.S. in 2003. THE FED. B. ASS'N & THE AM. B. ASS'N, FEDERAL JUDICIAL PAY: AN UPDATE ON THE URGENT NEED FOR ACTION (2003), at <http://www.fedbar.org/Federal%20Judicial%20Pay.pdf> (last visited Dec. 3, 2003).

**Table 7****Federal Judicial Salaries**

Year	Judge	Magistrate	Minister
2004	145,355.51 p/mo 1,744,266.10 p/yr	151,893.63 p/mo 1,822,723.50 p/yr	151,893.63 p/mo 1,822,723.50 p/yr
2003	145,355.51 p/mo 1,744,266.10 p/yr	151,893.63 p/mo 1,822,723.50 p/yr	151,893.63 p/mo 1,822,723.50 p/yr
2002	145,355.51 p/mo 1,744,266.10 p/yr	149,327.27 p/mo 1,791,927.20 p/yr	149,327.27 p/mo 1,791,927.20 p/yr
2000	78,147.08 p/mo 937,764 p/yr	132,016.13 p/mo 1,584,193.50 p/yr	143,231.72 p/mo 1,718,780.60 p/yr
1999	33,915.00 p/mo 406,980 p/yr	37,107.00 p/mo 445,284 p/yr	39,103.00 p/mo 469,236 p/yr
1998	48,235.00 p/mo 578,820 p/yr	52,232.00 p/mo 626,784 p/yr	40,718.00 p/mo 488,616 p/yr

Note: These peso denominated values correspond to the maximum rate of monthly judicial compensation

Source: Diario Oficial

Increasing salaries appear to have provoked an elevated level of interest on the part of lawyers in pursuing a judicial career (as manifested in the increased number of male and, increasingly, female attorneys that submit themselves to the competitive selection process which leads to a position on the bench).<sup>88</sup> It is not clear, however, that the strategy has actually succeeded in changing the profile of the typical judicial candidate, as measured by the perceived prestige of his or her law school. This observation is supported by the fact that the percentage of federal judges and magistrates who obtained their legal education at less prestigious public universities dropped only .65% – i.e., from 93.15% to 92.50% – between the time of the 1985/1993 surveys and 2002-2003.<sup>89</sup>

88. Women, according to a 1982 survey of 246 judicial profiles, accounted for 7.3% of Mexico's federal judges and magistrates. MEXICO SOCIAL 1992-1993, *supra* note 81, at 428. Women accounted for 18.7% of all Mexican federal judges and magistrates in 2003. CJF, *supra* note 83.

89. While the total percentage of publicly-educated federal judges and magistrates has not changed since the mid-1980s, it is interesting to note that the percentage of judicial officials which are graduates of the UNAM's law program dropped from an average of 41.4% during the time of the 1985/1993 surveys to 31.5% in 2002-2003. *Id.* This downward trend with respect to the UNAM was accompanied by a corresponding rise in the percentage of federal judicial officials which obtained their law degrees from state



The second principal strategy that has been pursued in connection with the drive to bolster the competence of the federal judiciary involves the overhauling of the concept of the judicial career (*carrera judicial*) pursuant to the introduction of a more demanding, systematized, and competitive set of initial selection and subsequent advancement standards.<sup>90</sup> One important development in this regard is the requirement that those individuals who aspire to the federal judiciary have served, in their capacity as fully licensed attorneys,<sup>91</sup> for a certain number of years<sup>92</sup> prior to seeking a position as either a judge or magistrate. It is no longer possible for an otherwise unqualified individual to become a federal judge or magistrate by virtue of the operation of a system of political patronage (pursuant to the receipt of what is known in Mexican political parlance as a *hueso*).<sup>93</sup> The other fundamental requirement which has been implemented is that would-be judges and magistrates demonstrate substantive and procedural proficiency by means of a competitive, multiple-phase qualification and selection process. Acting in accordance with the mandate that it form and train the members of the PJJF,<sup>94</sup> the Federal Judicature Institute (the *Instituto de la Judicatura Federal*, or “IJF”), an auxiliary organ of the Federal Judicial Council (the *Consejo de la Judicatura Federal*, or “CJF”), has taken primary responsibility for administering the competitive aptitude exam,<sup>95</sup> specialized preparatory training,<sup>96</sup> *concursos de oposición libre e internos*,<sup>97</sup> and other practice-oriented

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universities (this figure rose from an average of 51.75% during the 1985/1993 period to 61% in 2002-2003). *Id.* These statistics provide an additional indication of the UNAM’s declining prestige at the same time they suggest that the perceived value associated with the former practice of coming from the provinces to study law in the capital is declining.

90. “Ley Orgánica del Poder Judicial de la Federación,” D.O., 26 de Mayo de 1995, arts. 63-75 [hereinafter LOPJF].

91. *Id.* arts. 106, 108.

92. A lawyer must have served at least three years as a *secretario de acuerdo* before seeking to become a judge. Similarly, a district judge must have served in that position for five years prior to becoming eligible to compete for a magistrate position. *Id.*

93. See Yamin & Garcia, *supra* note 5, at 500; Herget & Camil, *supra* note 51, at 66 (noting the way in which judicial appointments are typically made as political rewards for the faithful); Hughes, *supra* note 10, at 10 (noting that the SCJN has traditionally served as a haven for politicians “on the outs”); Sam Dillon, *Crime is Unleashed, but the DA is Undaunted*, N.Y. TIMES, Aug. 6, 1998, at A4 (describing the Mexican Supreme Court as a “holding pen for presidential cronies”).

94. LOPJF, *supra* note 90, arts. 81, 92. The forerunner to the IJF was, as previously noted, the IEJ. The IEJ provided specialized judicial training between 1978 and 1995. IJF, *supra* note 84.

95. LOPJF, *supra* note 90, art. 112. A mandatory aptitude exam is required of all lawyers that elect to pursue the *carrera judicial*.

96. The IJF conducts specialized preparation courses for (i) *secretarios de acuerdo* who aspire to become judges (consisting of 1,080 hours of classes and study spread out over six months) and (ii) judges who aspire to become magistrates (consisting of between

written and oral tests<sup>98</sup> which, together with the consideration of candidates' academic, professional maintenance, and workplace performance evaluations,<sup>99</sup> form the basis for the CJF's subsequent selection of judges and magistrates. The operation of these filtering mechanisms can, assuming the existence of the requisite political and administrative will on the part of the CJF, be expected to (i) assure the selection of the best qualified (as opposed to the best connected) candidates and (ii) contribute to the elimination of the problem which uninformed judges pose to the efficient and confidence-inspiring administration of justice.

### c. Continuing Judicial Education

An effective means of ensuring a high level of quality in the justice imparted by the federal judiciary involves requiring judges and magistrates to engage in orientation training at the time they assume office, and continuing judicial education ("CJE") on an annual basis thereafter.<sup>100</sup> This is especially true in the context of a legal system which, for reasons stemming from the transformative process it, along with the society it serves, is going through, finds itself rethinking the traditional notion that the task of judging entails nothing more than the mechanical application of norms. The subject matter encompassed by such a requirement would, ideally, include substantive, procedural, ethical, and administrative aspects of the justice system. As a result of such training, Mexico's judges and magistrates would refine and/or acquire not only specific skills, but also a sense of ethos with respect to the social expectations and responsibilities vested in their positions.<sup>101</sup>

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60-180 hours of classes and study spread out over six months). *Id.* arts. 92, 94, 96; SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, INFORME DE LABORES 412-13 (2001) [hereinafter INFORME-2001]. As for the effectiveness of these courses, 140 of the 170 *secretarios de acuerdo* who participated in the first three cycles of judge training conducted during 2001 were ultimately designated judges. *Id.*; SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, INFORME DE LABORES 540 (2002) [hereinafter INFORME-2002].

97. LOPJF, *supra* note 90, arts. 112 and 114. Judge and magistrate candidates are required to "participate" in a competitive *concurso* consisting of a substantive examination.

98. *Id.* The judge and magistrate candidates that receive the highest scores in the *concurso* will advance to a subsequent round of oral and practical (case study-based) evaluation.

99. *Id.* art. 111.

100. Rogelio Perez-Perdomo, *Training Programs for Judges*, in JUDICIAL REFORM, *supra* note 16, at 108 (noting that training can be an important part of improving judicial systems).

101. *Id.* at 109.

While there is no formal CJE requirement (either for orientation or maintenance purposes) similar to that imposed on U.S. judges, Mexico reaches the same result – at least in part – insofar as the advancement of *secretarios de acuerdos* (i.e., to judge positions) and judges (i.e., to magistrate positions) are directly linked to their successful preparation for, participation in, and completion of a competitive selection process. The “in part” qualification stems from the fact that several years can elapse between the time that *secretarios de acuerdos* and judges go through these processes. Absent the existence of an express CJE requirement, aspiring judges and magistrates may or may not stay abreast of cutting edge legal developments during the years which fall in between the different stages of their careers. Those who do not avail themselves of this opportunity to the fullest extent possible are unlikely to develop the “conceptual and analytical skills which are needed to resolve the increasingly complex problems of society.”<sup>102</sup>

The negative consequences of this situation have come to be partially offset by the increasing availability of CJE type programming offered through the IJF’s expanding network of learning centers (consisting, in turn, of its principal seat in Mexico City, 30 regional offices, and 31 PJF affiliated *Casas de Cultura Jurídica*) and the contemplated introduction of a system of performance-based advancement incentives.<sup>103</sup> Pursuant to the foregoing, judges and magistrates have an expanded opportunity to take practical courses geared towards strengthening their command of procedure, jurisprudence, doctrine, and legal reasoning<sup>104</sup> either in person or, in the event that a judicial official resides far from a course location, via the Internet (using the recently launched *Sistema de Educación a Distancia*-based “*Campus Virtual*”)<sup>105</sup> or videoconference (this option is available through

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102. FIX-FIERRO, *supra* note 39, at 251-52. It is, not surprisingly, this same group which “continues to comport itself in accordance with a very traditional and formalistic mentality,” thereby permitting judges and magistrates to “avoid taking responsibility for their own decisions.” *Id.*

103. *Id.* The National Center for State Courts has, pursuant to a USAID grant, been working to promote CJE at the state level in Mexico. NAT’L CTR. FOR ST. CTS., MEXICO-U.S. JUDICIAL PARTNERSHIP FOR JUSTICE (2003), at [http://www.ncsconline.org/D\\_Intl/Intl\\_projects.html#Mex](http://www.ncsconline.org/D_Intl/Intl_projects.html#Mex) (last visited Jan. 6, 2004).

104. Examples of some of the CJE courses offered in 2001-2002 include: “Industrial Property” (79 participants), “Jurisprudence” (78 participants), “Environmental Law” (80 participants), “Fiscal Reform” (40 participants), and “Indigenous Law.” INFORME-2002, *supra* note 96, at 550-52. These offerings will be supplemented by the Masters in Judicial Law which the UNAM is establishing pursuant to a sub-grant from USAID. Sarles, *supra* note 36, at 75. Notwithstanding the availability of these opportunities and offerings, legal commentators in Mexico continue to assert that Mexican judges must learn to prepare and present opinions with stronger and more persuasive reasoning. *Critican Crecimiento del Poder Judicial*, EL NORTE, Dec. 13, 2003 [hereinafter *Critican Crecimiento*].

105. CONSEJO DE LA JUDICATURA FEDERAL, INSTITUTO DE LA JUSTICIA FEDERAL CAMPUS VIRTUAL, at <http://www.campus.cjf.gob.mx/index.jsp> (last visited Dec. 23, 2003).

the regionally distributed *Casas de Cultura Jurídica*). The CJE opportunity engendered by the Internet has, finally, been compounded by the recent interlinking of Latin America's "judge schools" into a single network, the Iberoamerican Network of Judicial Schools (*Red Iberoamericana de Escuelas Judiciales*).<sup>106</sup> The creation of this network, to the extent it eliminates distance as a barrier to intra-hemispheric judicial communication and collaboration, presents Mexico with a valuable opportunity to leverage the legal reform experience of other Latin American nations for the purpose of more effectively carrying out its own rule of law-oriented initiatives.

## **B. Judicial Independence**

"In my judgment, the reform of 1994 was correct not only because it strengthened the PJF, but also because it gave rise to indisputable signs of independence."<sup>107</sup>

"Our resolutions tend to consolidate a democratic state grounded in the rule of law because their roots are nurtured by a fundamental respect for . . . the separation of powers . . . and . . . independent decision making."<sup>108</sup>

### **1. In the Shadows of Mexico's Modern History**

The independence of Mexico's judiciary was not assured – indeed, it was not even deemed necessary – during the PRI's seven decade reign in power.<sup>109</sup> Pre-1994 manifestations of this reality include the frequency with which the SCJN has been sacked en masse,<sup>110</sup> the existence of executive dominated judicial

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106. Consejo de la Judicatura Federal, Red Iberoamericana de Escuelas Judiciales, at <http://www.riaj.org> (last visited Dec. 23, 2003).

107. INFORME-1999, *supra* note 41, at 14.

108. SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, INFORME DE LABORES 11 (1997) (translation by author).

109. Berruecos, *supra* note 35, at 4; Szekely, *supra* note 2, at 389 (noting Mexico's "notorious" lack of judicial independence); Owen M. Fiss, *The Right Degree of Independence*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY 55-56 (Irwin P. Stotzky ed., 1993) (noting the way that the combination of a hegemonic political party and an authoritarian executive worked to prevent Mexico's judiciary from operating independently of party and/or government institutions and pressures); CARPIZO, *supra* note 3, at 551-52 (noting traditional weakness of framework of guarantees in support of judicial independence).

110. Mexico's Supreme Court was sacked en masse on at least three occasions during the twentieth century (1928, 1934, and 1994). Taylor, *supra* note 78, at 147-49.

appointment procedures, the government's long-standing unwillingness to permit the Court to make rulings with *erga omnes* effects, and the near total absence of SCJN rulings adverse to the interests of the executive (see Table 8, *infra*).<sup>111</sup>

As a result of the executive's fear and mistrust of the judicial branch, the SCJN spent the better part of the twentieth century passively watching the nation's economic, social, and political trajectory, intervening only for the purpose of protecting individual petitioners on an inefficient, case by case basis against the abusive acts of government.<sup>112</sup> The perceived subordination of the SCJN relative to the executive branch, coupled with widespread skepticism regarding the politicized nature of court appointments and intra-branch corruption, further eroded judicial prestige and citizen confidence in Mexico's legal institutions.

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111. The predominance of the executive over the judicial branch in post-independence Mexico was established pursuant to (i) the passage of the *Ley Juárez* and the *Ley de Desamparo* (1855) and (ii) the socio-political upheaval associated with the War of the Reform (1855-1861). MIROW, *supra* note 31, at 112; COSSIO, *supra* note 78, at 63 (noting the almost "inexistent" capacity of the SCJN to uphold the supremacy of the Constitution); Taylor, *supra* note 78, at 147 (noting that the SCJN did not challenge the President on any significant case between 1928 and 1995); Andrew Reding, *No Rule of Law, No Free Trade*, WALL ST. J., Mar. 18, 1993, at A13 (noting that "[o]ne will search in vain . . . for a decision by the Supreme Court limiting the power of the chief executive."). *But see* PABLO GONZALEZ CASSANOVA, *DEMOCRACY IN MEXICO* 21-24 (1970) (asserting that the SCJN ruled against the executive branch in 34% of the *amparos* filed between 1917 and 1960). The value of the Cassanova study has been cast into question, however, due to its failure to distinguish between those cases in which the executive was made a party to an action as a matter of mere procedural formality, on the one hand, and those in which the executive had a real interest, on the other.

112. The SCJN rarely intervened in matters which had the potential to profoundly impact society during the period 1917-1994. LUCIO CABRERA ACEVEDO, *EL CONSTITUYENTE DE 1917 Y EL PODER JUDICIAL DE LA FEDERACIÓN: UNA VISIÓN DEL SIGLO XX* at 247-254 (2002) (noting that the only two major issues with which the SCJN became involved were the consolidation of the system of executive tribunals and the federal government's assertion of domain over the nation's subterranean resources). Examples of matters of transcendent social importance which were not, alternatively, taken up during this time include the Tlatelolco massacre of 1968, the disappearance of anti-government activists in the 1970s and 1980s (in connection with Mexico's *guerra sucia*), the nationalization of the banking system in 1982, and the electoral fraud associated with the Salinas election of 1988.

**Table 8****The Independence of Mexico's Supreme Court, 1857-2003**

Variable	1857	1917	1928	1934	1994
Administration	Liberal	Carranza	Calles	Cardenas	Zedillo
Number Ministers	11	11	16	21	11
Appointment Dynamics	Indirect election	Nominated by state legislatures, elected by absolute majority of federal Congress	Nominated by executive, approved by Senate	Nominated by executive, approved by Senate	Nominated by executive, approved pursuant to two-thirds vote of Senate
Salary	Not addressed	Not addressed	Can not be reduced during term	Can not be reduced during term	Can not be reduced during term
Length of Term	6 years	Two and four year terms between 1917 and 1923, qualified life thereafter	Qualified life	6 years (concurrent with executive) between 1934 and 1944, qualified life thereafter	15 years
Removal	Offenses and omissions committed in fulfillment of charge	Bad conduct, juicio de responsabilidad	Bad conduct, juicio de responsabilidad	Bad conduct, juicio de responsabilidad	Bad conduct, juicio político
Salient Feature/ Development of Political Environment	Post-independence political instability	Mexican revolution	Consolidation of executive power	Consolidation of executive power	Political competition, economic liberalization, federalism

Source: Derechos del Pueblo Mexicano<sup>113</sup>

113. Cámara de Diputados, DERECHOS DEL PUEBLO MEXICANO: MÉXICO A TRAVÉS DE SUS CONSTITUCIONES, Tomo IX, Artículos 82-94, at 803 (2000).

## 2. The Scope and Initial Impact of the Constitutional Reforms of 1994

Responding to (i) the elevated level of domestic and international pressure spawned by the emergence of an increasingly competitive political and commercial environment<sup>114</sup> and (ii) the realization that the success of the stabilization and structural adjustment policies carried out in the 1980s was contingent upon the implementation of a second generation of reforms targeted at public institutions, Ernesto Zedillo, within the first days of his administration, pushed through a sweeping package of constitutional reforms aimed at strengthening the SCJN's capacity to uphold the constitutionally prescribed division of government powers and protect the rights of individual citizens.<sup>115</sup> This action underscored the strength of the government's resolve to endow the SCJN with the authority needed to serve as the principal guardian of the constitution;<sup>116</sup> at the same time it indirectly revealed the way in which Mexico's intra-governmental power dynamics were shifting away from the model of an authoritarian executive and towards a functional version of the tri-partite division of powers originally contemplated by Montesquieu.

One of the principal objectives of the Zedillo reform package focused on the necessity of strengthening the independence of the judiciary in Mexico. To this end, the level of consensus required for Senate approval of an executive nomination for the position of Supreme Court Minister was raised from a simple (i.e., one-half) to a super (i.e., two-thirds) majority of all senators present.<sup>117</sup> This simple reform had the effect of making it more difficult for any one party and/or

114. See Szekely, *supra* note 2, at 403 (noting that the "accumulated social exasperation with the situation of law and order in the country" forced Zedillo and the PRI to address the issues bearing on the administration of justice and the rule of law).

115. "Decreto Mediante el cual se Declaran Reformados los Artículos 21, 55, 73, 76, 79, 89, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 110, 111, 116, 122, y 123," CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, D.O., 31 de Diciembre de 1994.

116. Mexico, unlike other Latin American nations, has not created a separate "constitutional court."

117. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS art. 96, D.O., 5 de Febrero de 1917 [hereinafter MEX. CONST.]. Notwithstanding this positive development, the level of scrutiny received by Mexican Supreme Court nominees is nominal. This situation contrasts sharply with the confirmation practices of other Latin nations. In Argentina, for example, the positions of Supreme Court nominees with respect to a broad range of key issues are recorded by NGOs (for example, the *Asociación por los Derechos Civiles*), publicly disseminated, and extensively debated. *Asociación por los Derechos Civiles, Designación de Jueces*, at <http://www.adc.org.ar/home.php?iACCION=28&iCAMPOACCION=&iCLASIFICACION=37> (last visited Aug. 1, 2004).

political actor to dominate the appointment process and, subsequently, to exert improper influence over an SCJN minister.<sup>118</sup> The responsibility for appointing magistrates and district court judges was, alternatively, transferred from the Supreme Court to the *Consejo de la Judicatura Federal*.<sup>119</sup> This aspect of the reform package had a similar effect inasmuch as it helped to insulate the remainder of Mexico's federal judges from potentially independence-compromising political influences.

Though originally criticized for the rushed and non-transparent nature of its enactment as well as its substantive and procedural deficiencies,<sup>120</sup> it is now, in hindsight, evident that the Zedillo reforms of 1994, situated within the context of a divided and competitive government, have given rise to an unprecedented level of judicial independence in Mexico.

For the first time in Mexico's modern history, the SCJN has the effective power and freedom to rule against the interests of the executive. Starting in August 2000 with Constitutional Controversy 26/1999, the SCJN ruled, in an 11-0 decision, that the federal executive could not withhold from Congress financial information pertaining to the operation of the *Fondo Bancario de Protección al Ahorro* ("FOBAPROA").<sup>121</sup> This executive-adverse ruling was followed by the Constitutional Controversy 5/2001 involving the regulation of daylight savings time.<sup>122</sup> In a 10-0 decision (one Minister was absent), the SCJN again ruled against the executive branch, holding that the authority to regulate on this issue pertained exclusively to the Congress. Shortly thereafter, the Court took up Constitutional Controversy 22/2001 regarding the politically and economically sensitive issue of

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118. The independence of the SCJN is otherwise bolstered by (i) the operation of mandatory waiting periods with respect to an individual's eligibility for pre- and post-service appointments, (ii) the staggering of terms (so as to not coincide with *sexenio* transitions), and (iii) the existence of a system of guaranteed pensions. MEX. CONST., *supra* note 117 arts. 94-95; Note, *Liberalismo Contra Democracia: Recent Judicial Reform in Mexico*, 108 HARV. L. REV. 1919, 1929-31 (1995) [hereinafter *Liberalismo Contra Democracia*].

119. LOPJF, *supra* note 90, art. 81.

120. Yamin & Garcia, *supra* note 5, at 519 (characterizing the Zedillo reforms as "cosmetic"); Taylor, *supra* note 78, at 151 (describing the Zedillo reform package as "impractical"); FIX-FIERRO, *supra* note 39, at 252 (noting that no public consultations were held with respect to the substantive content of the reform package); Szekely, *supra* note 2, at 404 (noting that the Congress was only given ten days to consider the Zedillo judicial reform package).

121. "Controversia Constitucional 26/1999," 12 S.J.F. 575 (9a época 2000). The FOBAPROA is a fund that was set up to bail out Mexico's non-performing asset-ridden banking industry.

122. "Controversia Constitucional 5/2001," 14 S.J.F. 882 (9a época 2001).



the executive's recently proposed energy bill.<sup>123</sup> Notwithstanding the sensitivity of the matter, the Court, in an 8-3 decision, concluded that the executive's proposal violated the Constitution. Most recently, the SCJN was required to pass on the legality of the federal government's expropriation of approximately 5,300 hectares of land in the vicinity of Texcoco for the construction of a new airport. Although the Constitutional Controversies presented by the Federal District and the municipal governments of Atenco, Acolman, and Texcoco<sup>124</sup> did not advance to the point of a final decision, the string of preliminary rulings issued by the SCJN against the executive led to withdrawal of the plan.<sup>125</sup>

Finally, expressions of the SCJN's increasingly independent nature are not restricted to its decisional record of the last few years. It is, for example, plainly evident that Mexico's current Ministers have far surpassed their predecessors in terms of contributing to policy dialogues, informing legislative debates,<sup>126</sup> interacting with other domestic and foreign judicial entities,<sup>127</sup> communicating with the press,<sup>128</sup> and increasing both the presence and the visibility of the SCJN.<sup>129</sup> The willingness of today's Minister to assume, in

123. "Controversia Constitucional 22/2001," 15 S.J.F. 607 (9a época 2002).

124. "Controversia Constitucional 1/2002," 16 S.J.F. 857 (9a época 2002) (Constitutional Controversies 2/2002 and 3/2002 were presented in connection with the aforementioned matter).

125. U.S.-MEXICO BRIEFS, at <http://www.hispanicvista.com/html/092302mex.htm> (last visited Aug. 1, 2004).

126. An example in this connection involves, as shall be discussed in greater detail, *infra*, the way in which the SCJN spearheaded the establishment of a *Comisión de Análisis de Propuestas para una Nueva Ley de Amparo*. SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, INFORME DE LABORES 23 (2000) [hereinafter INFORME-2000]. The PJF has, in a similar vein, submitted the largest number of proposals in connection with the nationwide consultation program conducted by the government for the purpose of improving the justice system. SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, CONSULTA NACIONAL SOBRE UNA REFORMA INTEGRAL Y COHERENTE DEL SISTEMA DE IMPARTACIÓN DE JUSTICIA EN EL ESTADO MEXICANO, at <http://www.scjn.gob.mx/reforma> (last visited Aug. 15, 2004).

127. In 2002, the SCJN (i) attended the XII Reunión de Presidentes de Cortes Supremas de Justicia del Istmo Centroamericano y del Caribe and the VII Cumbre de Presidentes de Cortes Supremas y Tribunales Supremos de Justicia, (ii) participated in the preparation of the Universal Declaration of Judicial Standards at the Hague, (iii) established "International Cooperation Agreements" with the Supreme Courts of Guatemala, Honduras, Nicaragua, Costa Rica, and Panama, and (iv) received visiting judicial officials from Spain, Slovakia, Canada, and the United States. INFORME-2002, *supra* note 96, at 40-42.

128. The SCJN proactively conceived of and implemented, for the benefit of the media, a "*Curso de Inducción Judicial Dirigido a Medios de Información*" in 2002. *Id.* at 27.

129. Examples of outreach programs recently launched by the SCJN include (i) "*La Justicia Va a la Escuela*" (focusing on civic and ethical education at the grade school level, 5,062 sessions were realized between 2001-2002), (ii) "*La Universidad Visita a la Corte*" (over 2,000 students from 57 different universities visited the SCJN in 2002), (iii)

addition to his or her standard controversy resolving duties, the non-traditional role of high profile emissary of justice is helping to make the PJF as a whole more efficient, transparent, and publicly accessible. This outcome is positive insofar as it presents a supplemental means of changing negative perceptions of the legal system and, by extension, strengthening of the rule of law in Mexico.<sup>130</sup>

### 3. The SCJN's Unfinished Agenda: Budgetary Reform and Self-Regulation

The SCJN has, over the course of the past five years, demonstrated its capacity for independent decision and action. This said, however, it has not become as insulated as it could and should be, if it is to fully function as the “fulcrum point of equilibrium between the different powers of government.”<sup>131</sup> In a development that complements the spirit of independence manifest in its recent decisions, the Court has become an outspoken advocate for the further expansion of its autonomy. Pointing to the actions of other Latin nations (see Table 9, *infra*),<sup>132</sup> the SCJN has argued that the reform of constitutional article 100 (fraction X) so as to guarantee the PJF's receipt, at a minimum, of 2.6% of the overall federal budget would bolster its independence and, consequently, improve the overall functioning of Mexico's system of justice.<sup>133</sup>

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“*Conociendo al Poder Judicial de la Federación*” (geared towards strengthening popular awareness of civic and juridical values, this program reached over 2,400 students at 39 preparatory schools throughout the Republic in 2002), and (iv) “*La Justicia Sale a Escena*” (imparting basic instruction regarding the operation of the justice system by means of theatrical production). *Id.*

130. *Critican Crecimiento*, *supra* note 104 (noting the activism and energy of former Supreme Court President Genaro David Gongora).

131. “Iniciativa de Decreto que Reforma el Párrafo Décimo y Agrega un Párrafo Undécimo al Artículo 100 de la Constitución Política de Los Estados Unidos Mexicanos, Para Establecer una Previsión Constitucional Presupuestaria Destinada al Poder Judicial,” *Gaceta Parlamentaria*, 15 de Junio de 2001, at <http://gaceta.diputados.gob.mx/Gaceta/58/2001/jun/20010615.html#Ini20010615Art100> (last visited Dec. 15, 2003) [hereinafter *Gaceta* 15 June 2001].

132. Jorge Correa Sutil, *Reformas Judiciales en América Latina: Buenas Noticias para los Desfavorecidos*, in LA (IN)EFECTIVIDAD DE LA LEY Y LA EXCLUSIÓN EN AMÉRICA LATINA 258 (Juan E. Mendez et al. eds., 2002) [hereinafter *Mendez*].

133. INFORME-2000, *supra* note 126, at 21; Maribel Gonzalez, *Pide la Corte Aumentar su Presupuesto*, *REFORMA*, Aug. 13, 2002, at 21A; Abel Barajas & Sergio Caballero, *Exigen Cortes Fondos Propios*, *REFORMA*, Nov. 29, 2002, at 1A. The idea of increasing the PJF's budget had previously been raised during the de la Madrid administration. MIGUEL DE LA MADRID, *EL EJERCICIO DE LAS FACULTADES PRESIDENCIALES* 24-25 (1998).

**Table 9**

**Latin Nations which Have Reformed their Constitutions  
so as to Guarantee the Judicial Branch's Receipt  
of a Minimum Share of the Total Budget**

Nation	Minimum Percentage
Bolivia	3%
Ecuador	2.5%
El Salvador	6% (min.)
Costa Rica	6%
Honduras	3.0% (min.)
Guatemala	2.0% (min)
Panama	2.0%
Paraguay	3.0% (min)

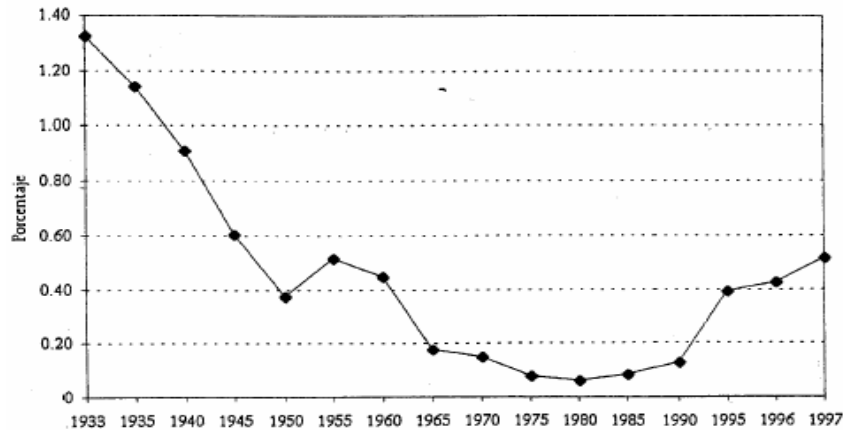
Sources: constitutions of specified nations

Under the current system, the SCJN and the CJF jointly elaborate the budget of the PJF for subsequent inclusion in the *Proyecto del Presupuesto*, subject to the subsequent revision of same by either the Secretary of the Treasury and Public Credit (the *Secretaria de Hacienda y Crédito Público*, or “SHCP”) or the Congress.<sup>134</sup> The PJF’s share of the federal budget has, over the span of the last seventy years, ranged between .05% and 1.33% (see Graph 1, *infra*).<sup>135</sup>

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134. MEX. CONST., *supra* note 117, arts. 74, 100; IGNACIO BURGOA, DERECHO CONSTITUCIONAL MEXICANO 833 (2001).

135. This level of funding is similar to that noted with respect to Mexico’s state judiciaries. According to a 2002 survey conducted by Moody’s and the ITAM, the judicial branches corresponding to Mexico’s 31 states and the Federal District received, on average, 1.45% of overall state or entity budgets. LAURA BARRIENTOS, MOODY’S CONTRACT ENFORCEABILITY INDICATORS 21 (MOODY’S INVESTORS SERVICE REPORT No. 74716, 2002).

**Graph 1****The PJF's Share of the Total Federal Budget, 1933-1997**

Source: México Social<sup>136</sup>

These outlays – described by the SCJN as belonging to the “third world”<sup>137</sup> – are smaller than those regularly received by judiciaries in the developed world.<sup>138</sup> Leaving aside the fact that a positive relationship between the receipt of a guaranteed percentage of the total budget and judicial independence has yet to be demonstrated with respect to those nations identified in Table 9, it is important to note that the growth of constitutionalism, occurring as it has within the policy context of second-generation reforms geared towards the strengthening of public sector institutions, has, over the past five years, given rise to an unprecedented 220% (+) increase in the SCJN, CJF, and Electoral Tribunal’s (*Tribunal Electoral*) combined share of the overall federal budget. As Table 10, *infra*,

136. DIVISION DE ESTUDIOS ECONOMICOS Y SOCIALES, BANCO NACIONAL DE MÉXICO, MÉXICO SOCIAL 1996-1998: ESTADÍSTICAS SELECCIONADAS 500 (1998) [hereinafter MÉXICO SOCIAL, 1996-1998].

137. INFORME-2000, *supra* note 126, at 21; BURGOA, *supra* note 134, at 832-33 (characterizing the financial condition of the PJF as “deplorable”).

138. The judicial branches of European nations typically receive funding on the order of 4-5% of the total budget. Martinez, *supra* note 9, at 8. The percentage of the total budget received by the U.S. federal justice system has, alternatively, been closer to that received by the PJF.

shows, this increase has almost doubled that part of the federal budget earmarked for the PJF and more than tripled PJF outlays on a per capita basis.

**Table 10**

**Amount and Percentage of Budget Assigned to PJF (Pesos)**

Year	Total Federal Budget	PJF Budget	CJF's Part of PJF Budget	PJF's Budget as % of Total Federal Budget	Percent Change in PJF Budget	PJF Budget on Per Capita Basis
2004	1,650,505,100,000	19,400,049,098	16,281,202,004	1.17%	N/A	N/A
2003	1,524,845,700,000	15,481,656,650	14,858,663,531	1.02%	.83%	N/A
2002	1,484,256,100,000	15,353,610,906	12,844,634,514	1.03%	11.23%	148.48
2001	1,327,188,100,000	13,803,000,000	11,620,400,000	1.04%	70.92%	136.25
2000	1,243,126,600,000	8,075,766,038	5,526,633,368	.65%	72.04%	81.65
1998	830,486,900,000	4,694,000,000	1,385,915,000	.57%	N/A	48.99
1990	N/A	257,000,000,000*	N/A	N/A	N/A	N/A
1980	N/A	1,000,017,000	N/A	N/A	N/A	14.3
1970	N/A	109,736,000	N/A	N/A	N/A	2.1

\* Stated in old pesos

Sources: SCJN and CJF Information Requests

The independence gains engendered by the establishment of a situation of budgetary certainty for the PJF would, the SCJN has additionally argued, be enhanced by the reform of Constitutional article 71 (fraction IV) so as to allow the Court to propose legislation applicable exclusively to the PJF. The rationale underlying this reform – beyond the obvious fact that the very essence of the SCJN's public function provides it with a perspective on legal norms that is unique within the government – draws additional support from the way in which the majority of Mexican state governments as well as a growing number of Latin American and European governments (including, for example, Norway, Spain, Colombia, Cuba, Ecuador, Honduras, Nicaragua, Peru, Venezuela, Panama, Brazil, the Dominican Republic, El Salvador, and Guatemala) have bestowed this faculty on their own judiciaries.<sup>139</sup> Although this is not the first time the issue of the judicial branch's faculty to propose laws has surfaced in Mexico,<sup>140</sup> former

139. "Iniciativa de Reformas a Diversas Disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en Materia de Fortalecimiento del Poder Judicial," *Gaceta Parlamentaria*, 22 de Marzo de 2002 at <http://gaceta.diputados.gob.mx/Gaceta/58/2002/mar/20020322.html#Ini20020322Yadira> (last visited Dec. 15, 2003) [hereinafter *Gaceta* 22 March 2002].

140. The concept of authorizing the SCJN to propose laws was incorporated into the *Ley Tercera* of the *Siete Leyes Constitucionales* (1836), the *Proyecto de la Mayoría* (1842), the *Proyecto de la Comisión de la Constitución* (1842), and the *Bases Orgánicas* (1853). BURGOA, *supra* note 134, at 846.

SCJN President Genaro David Gongora, in an attempt to preemptively allay fears that such a reform would undermine the division of powers principle, recently clarified the Court's intention by stating "the Supreme Court does not seek to usurp the functions of the legislator; rather, it seeks to collaborate with the legislative branch in preparing proposals which can be subsequently presented via the formal route."<sup>141</sup> Legislative initiatives directed at the budgetary autonomy and legislative faculty issues have been advanced by Mexico's major political parties and are currently pending in Congress.<sup>142</sup>

#### 4. Persistent Threats to Judicial Independence

While the advances noted in the preceding section are consistent with the Fox administration's stated commitment to the goal of improving the balance of power between the branches of the federal government,<sup>143</sup> the PJF's ability to attain a greater level of independence is impeded by the continued operation of so-called "executive" or "administrative" tribunals and the dangerous expansion of narco-violence.

##### a. Administrative Tribunals

The persistence of extra-PJF administrative tribunals<sup>144</sup> undermines the concept of judicial independence – and, more generally, the rule of law – insofar as they represent a parallel system of justice which is inadequately insulated from political pressure and whose rulings are, accordingly, tainted by the specter of partiality.<sup>145</sup> Mexico's administrative courts can, as Michael Taylor writes, be

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141. INFORME-2000, *supra* note 126, at 23.

142. Gaceta 15 June 2001, *supra* note 131 (proposing that PJF receive a guaranteed minimum of 2.5% of Mexico's annual federal budget); Gaceta 22 March 2002, *supra* note 139 (proposing that SCJN be granted the authority to propose PJF-specific legislation).

143. Presidencia, *Plan Nacional de Desarrollo*, at <http://pnd.presidencia.gob.mx> (last visited Mar. 9, 2003) [hereinafter Presidencia].

144. Mexico's principal administrative tribunals are the *Tribunal Federal de Justicia Fiscal y Administrativa* ("TFJFA"), *Tribunal Superior Agrario* ("TSA"), and *Tribunal de Conciliación y Arbitraje* ("TCA"). MEX. CONST., *supra* note 117, arts. 27, 73, 123.

145. Keith Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1, 24-27 (1987); CARPIZO, *supra* note 3, at 180 (noting way in which TFJFA's origins can be traced back to the *Ley Lares*). Szekely, *supra* note 2, at 402-03 (noting that Mexico's administrative tribunals are "primarily under the Executive's control"). The use of specialized tribunals is a remnant of the system of *fueros* which

seen as a “political and demagogic attempt at control by the executive branch.”<sup>146</sup> It is, in this regard, impossible not to note that the subject matter jurisdiction of Mexico’s administrative tribunals corresponds to issues that have, historically, been of immediate strategic interest to the ruling party – namely, land, labor, and taxes. The *Partido Acción Nacional* (“PAN”) further develops Taylor’s point when it asserts that the existence of courts which do not pertain to the PJF undermines the fullness of the judiciary’s constitutionally prescribed “*potestad jurisdiccional*”<sup>147</sup> by making a mockery of the idea of a division of powers, constituting an institutional design that is incompatible with the alteration of political power which occurred on July 2, 2000 (i.e., the date on which Fox was elected president), engendering an inefficient and dysfunctional duplicity of functions, and diluting the neutrality of the administration of justice.<sup>148</sup>

The executive-initiated procedure for appointing the “magistrates” which preside over administrative tribunals are, for example, much less clear than those applicable to the PJF. Unlike the constitutional requirement that all SCJN Minister candidates be approved by a two-thirds vote of the Senate, administrative magistrate candidates proposed by the executive are approved with the vote of an unspecified percentage of Senators.<sup>149</sup> The absence of a clearly specified percentage for the purpose of Senate approval leaves the administrative magistrate nomination and approval process open to the exertion of a potentially greater range of executive and/or other political pressure than that encountered in connection with the SCJN nomination and approval process.

The removal of administrative magistrates is similarly problematic. Notwithstanding their classification as autonomous organs (*órganos autónomos*), disciplinary actions involving administrative magistrates do not pertain, as is the case with PJF judicial officials, to the CJF but, rather, to the administrative tribunals themselves.<sup>150</sup> This situation, to the extent that the decision to pursue a disciplinary action remains with entities which are, in effect, part of the executive branch and therefore subject to political pressures not felt by their PJF counterparts, can adversely impact the independence of administrative tribunal magistrates.

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existed in Spain and Portugal prior to the discovery, conquest, and colonization of the Americas.

146. Taylor, *supra* note 78, at 164.

147. The term *potestad jurisdiccional* refers to the authority of a court to assert jurisdiction over a matter. GERARDO SOLIS & RAUL GASTEAZORO, JR., WEST’S SPANISH-ENGLISH LAW DICTIONARY 273 (1992).

148. Gaceta 22 March 2002, *supra* note 139.

149. “Ley Orgánica del Tribunal Federal de Justicia Fiscal y Administrativa,” D.O., 15 de Diciembre de 1995, art. 3 [hereinafter LOTFJFA]; “Ley Orgánica de los Tribunales Agrarios,” D.O., 26 de Febrero de 1992, art. 15 [hereinafter LOTA].

150. LOTFJFA, *supra* note 149, arts. 16, 26; LOTA, *supra* note 149, arts. 8, 30.

The final issue which has the potential to jeopardize the independence (and, thus, impartiality) of Mexico's administrative tribunals is budgetary in nature. As is the case with the PJF, the budgets for Mexico's administrative tribunals must ultimately be submitted to the discretionary review of the SHCP – an executive branch entity - prior to being incorporated into the overall federal budget.<sup>151</sup> This element of “in house” oversight and discretion weakens the autonomy of Mexico's administrative tribunals by leaving administrative magistrates exposed to the possibility of indirect executive pressure in the form of threatened funding reductions.

Though the impediment posed by executive branch tribunals to the impartial and independent administration of justice is mitigated by the prohibition against the reduction of the salaries of sitting administrative magistrates,<sup>152</sup> a party's right of appellate recourse to the PJF system,<sup>153</sup> and the applicability of PJF-generated *jurisprudencia*,<sup>154</sup> the operational attributes noted, *supra*, are directly at odds with the government's attempt to portray administrative tribunals as “fully autonomous” federal entities.<sup>155</sup>

Despite the existence of a long-running debate regarding the necessity, nature, and constitutional validity of Mexico's administrative courts,<sup>156</sup> it is important to note that there are growing indications that their days may be limited. As is the case with the issues of budgetary autonomy and self-regulation, an initiative is currently pending in Congress which, if passed, will bring Mexico into conformity with the consolidation experience of other nations (including, by way of example, Spain, Guatemala, Peru, and Panama) by reforming Constitutional articles 27 and 94 so as to provide for the elimination of all administrative tribunals.<sup>157</sup> While such an outcome would likely enhance the impartiality with which justice is administered in Mexico, it must be additionally recognized that the process of integrating administrative tribunals into the PJF could have the effect of exacerbating docket congestion.

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151. LOTFJFA, *supra* note 149, art. 26; LOTA, *supra* note 149, arts. 8, 11; CARPIZO, *supra* note 3, at 189.

152. LOTFJFA, *supra* note 149, art. 7; LOTA, *supra* note 149, art. 14.

153. CARPIZO, *supra* note 3, at 191.

154. Vargas, *supra* note 38, at 37-67. Mexico's administrative tribunals are also empowered to create their own jurisprudence. LOTFJFA, *supra* note 149, art. 14; LOTA, *supra* note 149, art. 9.

155. LOTFJFA, *supra* note 149, art. 1; LOTA, *supra* note 149, art. 1.

156. Szekely, *supra* note 2, at 402-403 (noting that Mexico's administrative tribunals have a “more than questionable constitutional foundation”); CARPIZO, *supra* note 3, at 189 (stating that there is no legal basis for thinking that the TFJFA is part of the executive branch).

157. Gaceta 22 March 2002, *supra* note 139.



**Table 11****Attributes of Administrative Tribunal Independence**

Independence Indicator	Status
Administrative tribunals subject to the Ley Orgánica del Poder Judicial de la Federación?	No
Appointment procedures for administrative magistrates as rigorous as those used in conjunction with appointment of SCJN Ministers?	No
Administrative magistrates under the disciplinary jurisdiction of the CJF?	No
Administrative tribunals vested with decisional autonomy?	Yes
Administrative tribunals bound by PJF jurisprudencia?	Yes
Rulings of administrative tribunals appealable in PJF?	Yes
Salaries of sitting administrative magistrates irreducible?	Yes
Budget proposals of administrative tribunals free of executive discretion?	No
Administrative tribunals under the APF-wide IFAI/SISI transparency system	No

## b. Narco-Violence

Judicial independence in Mexico is additionally impeded by the fact that federal judges and magistrates (particularly those attached to penal courts) can, pursuant to threats made against their own physical safety or that of their families, be intimidated into making decisions which are favorable to the country's powerful *narco-traficantes*. The seriousness of the threat posed by this situation has been brought home by the growing number of narco-related assassinations registered within Mexico's legal community between 1987 and the present.<sup>158</sup>

158. Kevin Sullivan, *Mexican Judges' Climate of Fear*, WASH. POST, Nov. 19, 2001, at A16 (noting the 2001 assassination of two federal magistrates in Sinaloa); José Reveles, *Larga Lista de Ejecuciones de Abogados y Jueces*, EL FINANCIERO, Nov. 19, 2001, at 74 (noting assassination of a judge in 1987, a magistrate in 1996, and 77 other legal

Mexico briefly looked into the possibility of enhancing judicial security through the use of Colombian or Peruvian style “*jueces sin rostro*,” but the idea was ultimately rejected.<sup>159</sup> The government is currently investigating alternative means of assuring the physical safety of magistrates and judges, leading examples of which include the introduction of tougher penalties for those who commit or threaten to commit crimes against judicial officials and the provision of personal security detachments for judges and the members of their families.

### **C. Judicial Activism**

“The court is prepared to take a more proactive role in defining public policies.”<sup>160</sup>

#### **1. Perfect Code Creation, Presidentialism, and the Otero Formula: Limiting the Federal Judiciary’s Capacity to Say What the Law Is**

The civil law has, as a general proposition, been wary of the practice of judicial activism. Consistent with the certainty-oriented nature of the civil law tradition of codification (one whose antecedents can, with reference to Latin America, be traced broadly from Justinian’s *Corpus Iurus Civilis* to Alfonso X’s *Siete Partidas* to the French Civil Code of 1804), lawmakers attempt to scientifically construct codes which are so comprehensive that judges rarely, if ever, have to “interpret” or fill in lacunae.<sup>161</sup> According to this view of perfect

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professionals over the past ten years); Tim Golden, *Mexican Judge is Shot Dead*, N.Y. TIMES, June 21, 1995, at A8 (noting the killing of a Mexico City judge in 1995).

159. “*Jueces sin rostro*” (literally, “faceless judges”) are judges who, for reasons related to personal security, hear and decide cases in such a way as to physically conceal their identity (and thereby reduce the likelihood of retaliation for an unfavorable ruling). Luis Alegre et al., *Relacionan con narco crimen de magistrados*, REFORMA, Nov. 20, 2001, at 2A; Francisco Rejendiz & Jose Navarro, *Analiza Gobernación como proteger a jueces*, EL HERALDO DE MÉXICO, Nov. 14, 2001, at 1 (identifying connection between the assassination of magistrates and *narco-traficantes*); Ignacio Aczaga, *Seguridad para magistrados, Exigen a Fox*, EL SOL DE MÉXICO, Nov. 20, 2001, at 2A (noting the Mexican Supreme Court’s rejection of Colombian-style “*jueces sin rostro*”).

160. FIX-FIERRO, *supra* note 39, at 254.

161. MERRYMAN, *supra* note 78, at 48-55 (noting that the civil law’s emphasis on certainty reflects a “desire to make the law judge proof”); HELEN L. CLAGETT, THE ADMINISTRATION OF JUSTICE IN LATIN AMERICA 123 (1952). This said, however, Mexico’s civil and commercial codes do grant judges the faculty to interpret an issue in accordance with, respectively, the “general principles of law” and the “common customs of merchants” where the law is either silent or unclear. “Código Civil Federal,” D.O., 26 de Mayo de

code creation, the impartation of justice entails, essentially, judges finding and mechanically applying the correct code provision.<sup>162</sup> The value of legal certainty is not, as is the case with the common law, balanced against that of flexibility (this point is illustrated by the way in which U.S. courts have the opportunity to enhance the understanding of bare legislative statements of rules through the faculty of interpretation and the doctrine of *stare decisis*). Viewed in this light, Mexican judges, like their brethren elsewhere in Latin America, have been more like “career civil servants” than independent “political forces.”<sup>163</sup> To be or to do otherwise would run afoul of the civil law’s strict commitment to the dogma of “separation of powers” and, as noted Latin American legal scholar Keith Rosenn points out, exposes courageous judges to the risk of personally discovering the way in which a strong executive can render constitutional provisions designed to safeguard judicial tenure “meaningless.”<sup>164</sup>

This basic orientation lies at the heart of the Mexican legal system. Mexico’s attainment of independence during the socially, economically, and politically transformative period of the industrial revolution – coupled with the concomitant discovery that colonial rule had not prepared it for self-government at the national level – created a situation wherein the constitutions and judicial institutions of the nineteenth century functioned less as instruments of government or legal protection and more as means of delimiting territory and distributing power between kinship-based interest groups.<sup>165</sup> The subsequent consolidation of territory and emergence of an executive dominated government did little to change either public perceptions or expectations regarding the natural and proper role of the judiciary.<sup>166</sup> Between the judicial branch’s continued state of isolated passivity, the limiting effect of the Otero formula,<sup>167</sup> and the non-existence of the

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1928, arts. 18, 19 [hereinafter C.C.F.]; “Código de Comercio,” D.O., 17 de Octubre de 1889, art. 2.

162. Vargas, *supra* note 2, at 6.

163. Keith Rosenn, *The Success of Constitutionalism in the United States and Its Failure in Latin America: An Explanation*, in *THE U.S. CONSTITUTION AND THE CONSTITUTIONS OF LATIN AMERICA* 73 (Kenneth W. Thompson ed., 1991).

164. *Id.*; CARPIZO, *supra* note 3 at 545 (noting that Mexico’s traditional lack of judicial activism reflects less a fear of making law and more the lack of interpretational necessity engendered by the PJF’s long subservience to an authoritarian and hegemonic executive).

165. HENRY P. DE VRIES, *CASES AND MATERIALS ON THE LAW OF THE AMERICAS* 212 (1972).

166. The executive branch sought, throughout the twentieth century, to usurp the function of the PJF by making itself the arbiter of society’s claims for justice and equality. *Gaceta* 15 June 2001, *supra* note 131.

167. The Otero formula stands for the proposition that the outcome of an *amparo* suit affects only parties to the suit (this concept is known in Spanish as “*relatividad de sentencias*”). This concept first appeared in Manuel Crescencio Rejon’s 1840 draft constitution for the state of Yucatan. Mariano Otero subsequently proposed its

*acción de inconstitucionalidad*, Mexico's increasingly hegemonic executive branch could be relatively certain that neither the SCJN nor the Constitution would stand in the way of presidential plans and practices. As Michael Taylor notes in this regard, the weakness of the courts and the *amparo* suit "interacted to form a vicious cycle of powerlessness."<sup>168</sup> This reality is manifest in the fact that only fifty-five constitutional controversies were registered with the SCJN between 1917 and 1994.<sup>169</sup>

2. Amplifying the Federal Judiciary's Potential to Shape Mexico's Future: The Expansion of the *Controversia Constitucional* and the Introduction of the *Acción de Inconstitucionalidad*

The constitutional reform package of 1994, coupled with the advent of real political competition, administrative decentralization, and the general trend towards strengthening the judicial review powers of Latin American courts,<sup>170</sup> signaled the end of the Mexican judiciary's obscurity and the inception of the SCJN's new role as the ultimate arbiter of disputes between the coordinate branches of the federal government, on the one hand, and government, business, and society, on the other. The prospective success with which Mexico meets in terms of consolidating its democracy, settling long-simmering and socially divisive controversies, achieving economic growth, and ensuring security and stability will, in large part, be a function of the way in which the SCJN rises to the challenge of this new role.

Whereas standing to bring a constitutional controversy had been previously restricted to the federation and state governments, the Zedillo administration, as part of its strategy for strengthening federalism in Mexico, opened up the issue of standing to include the Federal District and local

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incorporation into the federal Constitution of 1857 as a means of reducing the friction caused by the *Poder Supremo Conservador's* authority to declare the nullity of unconstitutional acts committed by the executive, legislative, and judicial powers. "Iniciativa de Ley que Reforma Diversos Artículos de la Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos, y la Ley Orgánica del Poder Judicial de la Federación, en Materia de Relatividad de las Sentencias," Gaceta Parlamentaria, 4 de Abril de 2003, <http://gaceta.diputados.gob.mx/Gaceta/58/2003/abr/20030404.html#Ini20030404Sentencias> (last visited Dec. 15, 2003) [hereinafter Gaceta 4 April 2003]; Vargas, *supra* note 38, at 61.

168. Taylor, *supra* note 78, at 157 (noting that the *amparo* has "lasted so long because it has done so little").

169. Berruecos, *supra* note 35, at 16.

170. CARPIZO, *supra* note 3, at 542.

municipalities.<sup>171</sup> While the right of municipalities to bring such an action had been recognized as early as 1991, the expanded range of standing for the purpose of bringing a constitutional controversy established by the 1994 reforms augmented the vertical dimension of the SCJN's capacity to ensure the separation of powers.<sup>172</sup> More importantly, the 1994 reforms empowered the SCJN to make constitutional controversy rulings with "general" (i.e., *erga omnes*) effects, provided that the resolution in question meets with the approval of at least eight Ministers.<sup>173</sup> This outcome is significant in that it marks a historic break from the government's traditional mistrust of the judiciary, as expressed in the concept of "*relatividad de sentencias*." The making of rulings with *erga omnes* effects can be expected to improve Mexico's legal system by facilitating judicial economy in the administration of the courts and reinforcing the principle of equality before the law. The Zedillo administration's efforts to consolidate the constitutional authority of the SCJN were capped off by the introduction of an entirely new cause of action, the *acción de inconstitucionalidad*.<sup>174</sup> This landmark reform gave the SCJN, for the first time in Mexico's modern history, the faculty to invalidate legislation determined to be contradictory to the Constitution given, as was the case with constitutional controversies, the supporting vote of at least eight Ministers.<sup>175</sup> Though, as previously noted, the Zedillo package of constitutional reforms has been roundly criticized,<sup>176</sup> the undeniable fact is that improvements in judicial independence, party standing, and the scope of the impact associated with rulings have resulted in a 1,080% increase in the number of constitutional controversies brought between 1917-1994, on the one hand, and 1994-2002, on the other, and a 2,633% increase in the number of *acciones de inconstitucionalidad* brought between 1996 and 2002 (see Table 12, *infra*).

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171. MEX. CONST., *supra* note 117, art. 105, fraction I (a) and (b).

172. Berruecos, *supra* note 35, at 12-14.

173. MEX. CONST., *supra* note 117, art. 105, fraction I (k).

174. *Id.* art. 105, fraction II.

175. *Id.* art. 105, fraction II (f).

176. Szekeley, *supra* note 2, at 407 (noting that the *acción de inconstitucionalidad* procedure is "riddled with impractical requirements"); Taylor, *supra* note 78, at 162 (claiming that the procedural dynamics associated with the *acción de inconstitucionalidad* make it "nearly impossible" to raise).

**Table 12****Constitutional Controversy &  
Acción de Inconstitucionalidad Filings, 1917-2002**

Year	Number of Constitutional Controversies Filed	Number of Acciones de Inconstitucionalidad Filed
2002	67 (1995-2002=649)	35 (1995-2002=164)
2001	370	40
2000	37	41
1999	38	21
1998	29	8
1997	30	13
1996	59	5
1995	19	1
1994	5	0
1917-1994	55	N/A

Source: SCJN Informes, SCJN Information Request

This quantitative upswing has been accompanied by the newfound willingness of the SCJN to proactively provide – in the interest of safeguarding the well-being of the people (*el “bienestar de la persona humana”*)<sup>177</sup> – meaningful guidance with respect to a seemingly unlimited range of contemporary political, commercial, and social issues. Mexico’s evolution on this point is evident in Mauricio del Toro Huerta’s observation regarding the way that jurisprudential criteria are displacing legal texts (such as codes or laws) as the driving force behind judicial action.<sup>178</sup> Though it has yet to decide any matter with the preemptive assertiveness of *Marbury v. Madison*, the cases presented in the following section plainly illustrate the way in which the SCJN is increasingly using its power of interpretation for the purpose of displacing the executive as the

177. COSSIO, *supra* note 78, at 149-53 (citing *Controversia Constitucional* 31/1997); Carlos Rios Espinosa, *El bienestar de la persona humana: comentarios a la tesis de jurisprudencia P/J. 101/99*, 1 JUEZ: CUADERNOS DE INVESTIGACIÓN DEL INSTITUTO DE LA JUDICATURA FEDERAL 127 (Spring 2003), at <http://www.ijf.cjf.gob.mx/docs/2003/JUEZ2.pdf> (last visited Jan. 2, 2004).

178. Mauricio del Toro Huerta, *La judicialización de la política, la politización de la justicia y los nuevos avatares del Poder Judicial*, 1 CAUCES 31, 32 (2002).

ultimate referee with respect to the interests of government, business, and society and, in so doing, attaining a new prominence in the public life of the nation.<sup>179</sup>

### 3. Judicial Activism . . . To a Limit

Manifestations of the resolve with which the Court has begun to insert itself into the life of the country abound. In February of 2002, the First Chamber of the SCJN rejected the federal prosecutor's (*Procuraduría General de la República*, or "PGR") argument that the investigation of the politically explosive events surrounding the 1968 massacre at Tlatelolco were time barred and, in a unanimous 5-0 decision, ordered the case to proceed (noting that to decide otherwise would deprive complainants of their constitutionally guaranteed right of judicial security).<sup>180</sup> The Court's willingness to hear and rule on issues which directly impact the lives of citizens was further confirmed by its 7-4 decision establishing the legality, in certain circumstances, of abortion (the "*Ley Robles*" case).<sup>181</sup> A final example of this tendency entails the SCJN's 11-0 decision to uphold an extradition request premised on an assertion of universal jurisdiction.<sup>182</sup> This ruling is, in addition to underscoring the disposition of the SCJN to take up socially and/or politically delicate matters, significant insofar as it marks the first time that a Latin American court has upheld an extradition request where the underlying charge encompasses a grave violation of human rights (genocide). The one exception to the trend embodied in the preceding examples involves Constitutional Controversy 82/2001 (the "*Ley Indígena*" case).<sup>183</sup> In an 8-3 decision, the SCJN determined that it did not have the authority to exert judicial control over constitutional reforms realized by the "*Órgano Reformador*."<sup>184</sup> This decision clearly defined the point beyond which the SCJN would not pass in deference to culturally and legally determined notions regarding the role of the judiciary with respect to the issue of law making. As SCJN Minister Juan Diaz Romero stated in support of the majority position, "*todo tiene un limite*"

179. FIX-FIERRO, *supra* note 39, at 255.

180. "Ministerio Público. La Resolución en la que Declara Encontrarse Imposibilitado Jurídicamente para Conocer de los Hechos Denunciados en Virtud de que Opero la Prescripción de la Acción Penal y, Acordó No Iniciar Ni Integrar la Averiguación Previa Respectiva, Transgrede las Garantías de Legalidad y Seguridad Jurídica," 15 S.J.F. 29 (9a época 2002).

181. "Acción de Inconstitucionalidad 10/2000," 15 S.J.F. 793 (9a época 2002).

182. SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, Amparo en revisión 140/2002, at <http://www.scjn.gob.mx> (last visited Oct. 17, 2003).

183. "Controversia Constitucional 82/2001," 16 S.J.F. 683 (9a época 2002).

184. Press Release, Poder Judicial de la Federación, Resuelve el SCJN controversias constitucionales en materia indígena, at [http://www.laneta.apc.org/ceacatl/Archivo/020906\\_SCJN\\_comunicado.htm](http://www.laneta.apc.org/ceacatl/Archivo/020906_SCJN_comunicado.htm) (last visited July 24, 2004).

(“everything has a limit”).<sup>185</sup> The SCJN’s recognition of the importance of maintaining an adaptable yet ultimately conservative approach to the location of this limit suggests that Mexico is unlikely to contribute to the spread of the speculative thought that expanded powers of judicial review and increased levels of independence will give rise to a “government of judges”<sup>186</sup> (i.e., a so called “juristocracy”).

#### 4. The Benefits of an Increasingly Active Federal Judiciary

The trend towards a relatively increased level of judicial activism impacts the rule of law in Mexico in several important ways. The increased freedom of the SCJN to prioritize, accept, and resolve socially, economically, and/or politically complex cases strengthens constitutionalism at the same time it facilitates the expansion and/or clarification of Mexico’s growing body of *jurisprudencia*<sup>187</sup> (see Table 13, *infra*).

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185. *Desechan reclamo indígena: resuelve Suprema Corte que carece de facultades para decidir sobre reformas a la Constitución*, EL NORTE, Sept. 7, 2002, (reporting comment made by SCJN Minister Diaz Romero).

186. Hammergren, *supra* note 43 (noting the concern that the concentration of excessive power in the judicial branch could stifle “the executive’s ability to promote new programs”); del Toro Huerta, *supra* note 178, at 32 (expressing concern that the emergence of the PJF as a true public power will result in both the judicialization of the political process and the politicization of justice).

187. *Jurisprudencia* is the term used to refer to a judge made rule of law or procedure. A single *jurisprudencia* is formed after five consecutive and consistent decisions with respect to an issue are rendered by, *inter alia*, the SCJN (with the approval of at least eight Ministers and the *tribunales colegiados* (with the unanimous approval of *magistrados*)). The Upper Chamber of the Federal Tax Tribunal (*Sala Superior del Tribunal Fiscal de la Federación*) can, alternatively, create *jurisprudencia* with the passage of three consecutive and consistent decisions. *Jurisprudencia* created by the SCJN is binding on all lower federal, state, military, and administrative courts (including those of the *Distrito Federal*). UNITEC, INTRODUCCIÓN AL ESTUDIO DEL DERECHO 92-93 (2000).



**Table 13****The Growth of Jurisprudence in Mexico, 1970-2002**

Year	Tesis de Jurisprudencia				Tesis Aisladas <sup>188</sup>			
	Pleno	Salas	TC	Total	Pleno	Salas	TC	Total
2002	N/A	N/A	N/A	502	N/A	N/A	N/A	2,202
2000	161	152	18	498	187	244	1,096	1,527
1996	76	31	357	514	166	22	2786	3,096
1990	20	74	213	307	59	246	2,098	2,403
1980	6	58	11	75	78	724	505	1,307
1970	22	46	11	79	208	881	226	1,315

Sources: SCJN Information Request, SCJN Informes, SJF, and IUS

These outcomes, to the extent they provide judges with the discretion and flexibility they need to interpret unclear and/or outdated codes and laws, have the potential to strengthen both citizen and investor confidence in the justice system's ability to assure certainty and the phenomenon of common law-civil law convergence.<sup>189</sup> Elevated levels of confidence in the legal system can, in turn, give rise to the second principal impact associated with an increasingly active judiciary – namely, the emergence of the institutional and normative circumstances necessary for the consolidation of Mexico's democratic transition and the attainment of sustained and equitable development.

188. *Tesis Aisladas* (or “*ejecutorias*”) are the individual decisions rendered, *inter alia*, by the SCJN and the *tribunales colegiados* which, in aggregate, comprise a single *jurisprudencia*.

189. JOHN H. MERRYMAN, *THE LONELINESS OF THE COMPARATIVE LAWYER* 19 (1999) (noting that the Roman civil law and the English common law are converging more than they are diverging); Hector Fix Zamudio, *The Confluence of Common Law and Continental European Law in the Mexican Writ of Amparo*, *THE MEXICAN FORUM*, Oct. 1983, at 4-9; 3 JORGE VARGAS, *A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS*, <http://www.mexlaw.com/v3introduction.html> (last visited Jan. 5, 2004) (predicting that “in the years to come, Mexican law will be subject to an even more direct, constant, and pervasive process of Americanization”).

#### **D. The Administration of Justice**

“The resolutions of the courts are not rendered in a timely way”<sup>190</sup>

“We no longer have any life – we are working full time, weekends included.”<sup>191</sup>

##### **1. Traditional Obstacles to Administrative Efficiency within the PJF**

Infrastructure deficiencies,<sup>192</sup> delay-inducing rules of procedure, lax standards of professional responsibility, dated administrative practices, and the retention of exclusive jurisdiction over certain types of matters have, traditionally, impeded access to the justice system, clogged up court dockets (see Table 14, *infra*), and produced cases and controversies of legendary duration.<sup>193</sup>

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190. INFORME-2001, *supra* note 96, at 15.

191. Victor Fuentes, *Crece Poder Judicial pero persiste rezago*, REFORMA, Apr. 14, 2002, at 1A.

192. Former SCJN President Genaro David Gongora Pimentel speaks to the way in which the combination of excessive distance and inadequate infrastructure can result in a denial of due process when he notes “many people – especially the poor in rural areas – decline to bring otherwise valid claims because courts are too far. They might have to travel by boat to reach the court. In deciding to forego the filing of a claim, the lack of judicial infrastructure is effectively depriving citizens of a basic right.” (Translation by author.) Victor Fuentes, *Entrevista / Genaro Gongora Pimental: Debe Poder Judicial seguir su expansión*, REFORMA, Dec. 12, 2002, at 12A.

193. A high profile example in this connection involves the PEMEX pipeline which exploded in Guadalajara in 1992. More than ten years after this tragedy, the court has yet to reach any conclusion. Denis Rodriguez, *Sigue sin culpable explosión en Jalisco*, EL NORTE, Apr. 22, 2002. Rural agrarian disputes under the jurisdiction of the *Tribunal Superior Agrario* have, in an even more extreme example, been known to go on for upwards of fifty years. Ivan Rendon, *Termina conflicto de 50 años por tierras en Oaxaca*, EL NORTE, Dec. 16, 2003.

**Table 14****Total and Per Capita Cargas de Trabajo,\*  
Mexican Federal District and Appellate Courts**

Year	Carga de Trabajo, Federal District Courts	Carga de Trabajo per Federal District Judge	Carga de Trabajo, Federal Appellate Courts**	Carga de Trabajo per Federal Appellate Magistrate**	Carga de Trabajo per Federal Judicial Official, Federal District and Appellate Courts Combined
2003	371,159	1,170	320,200	577	792
2002	331,626	1,256	298,999	557	787
2001	291,471	1,143	309,016	634	809
2000	247,321	1,139	290,009	638	801
1999	258,980	1,314	279,203	754	904
1998	244,157	1,298	232,339	677	897
1997	309,369	1,672	189,815	595	990
1996	297,457	1,671	152,855	559	998
1995	283,199	1,618	142,813	482	904
1994	281,942	1,668	129,474	N/A	N/A
1993	305,158	1,883	120,909	N/A	N/A
1992	302,538	1,939	119,110	N/A	N/A
1991	308,500	2,003	117,763	N/A	N/A
1990	328,897	2,237	104,658	N/A	N/A

\* Number of previously existing matters plus all new filings

Sources: SCJN and CJF Information Requests, SCJN Informes

Accepting the conventional wisdom that justice delayed or otherwise obstructed is, in fact, justice denied, such outcomes accentuate the sense that Mexico's legal system does not adequately respond to the needs of society.<sup>194</sup> As a result of the persistence of this adverse confluence of reason and circumstance, Mexico's citizens and merchants have grown accustomed to carrying out the

194. Rafael Estrada Samano, *The Administration of Justice in Mexico: What does the Future Hold?*, 3 U.S.-MEX. L.J. 35 (1995), <http://www.natlaw.com/pubs/usmxmlaw/usmjnm4.htm> (last visited Dec. 19, 2002).

social, economic, and political dimensions of their lives in an environment of physical insecurity and juridical uncertainty.

## 2. Initial Strategies Geared Towards Improving Administrative Efficiency within the PJF

Mexico's initial solution for remedying this situation entailed increasing the total number of federal courts, judges, and support staff.<sup>195</sup> Table 15, *infra*, documents the dramatic and controversial expansion the PJF has undergone over the course of the last three decades, generally, and the past eight years, in particular. Noteworthy highlights for the 1995-2003 period include (i) an 80% increase in the total number of PJF courts and (ii) an 85% increase in the total number of PJF judges and magistrates.<sup>196</sup> The SCJN maintains that additional increases in infrastructure are, to the detriment of the budgets of the coordinate branches of Mexico's federal government,<sup>197</sup> necessary if the PJF is to adequately respond to society's growing demand for judicial services.<sup>198</sup>

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195. SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, INFORME DE LABORES LXVIII (1995) (noting PJF's creation of new courts so as to be able to respond, in a way that is consistent with its obligation to render justice in a prompt and expeditious manner, to the growing number of lawsuits).

196. The total number of PJF support staff increased by 93.7% (i.e., from 13,470 to 26,094 employees) between 1994 and 2002. Fuentes, *supra* note 192. The federal executive branch, by way of contrast, shed approximately 265,000 positions between 1996 and 2002. Fuentes, *supra* note 191.

197. The PJF has, over the past few years, been the beneficiary of budget increases which are significantly higher than those made available to the coordinate branches of Mexico's federal government. See Fuentes, *supra* note 86.

198. Fuentes, *supra* note 192 (reporting former SCJN President Genaro David Gongora's statement that the PJF needs an additional 32 *Juzgados de Distrito*, 7 *Tribunales Colegiados*, 1 *Tribunal Unitario*, and 3,447 new employees to be able to adequately respond to the needs of society).

**Table 15****PJF Infrastructure**

Year	PJF Courts		PJF Courts, Per Capita	PJF Courts, Per Square KM	PJF Judges and Magistrates		PJF Judges and Magistrates, Per Capita	PJF Judges and Magistrates, Per Square KM
	Dist	App.			Judges	Mags.		
2003	317	233 (65/168)	-	1 court per every 3,496 Sq. KM	317	555 (64/490)	-	1 judge or magistrate per every 2,205 Sq. KM
2002	264	228 (63/165)	1 court per every 210,162 citizens	1 court per every 3,908 Sq. KM	264	537 (63/484)	1 judge or magistrate per every 129,088 citizens	1 judge or magistrate per every 2,400 Sq. KM
2001	255	214 (60/154)	-	-	255	487 (59/428)	-	-
2000	217	193 (56/138)	1 court per every 241,219 citizens	1 court per every 4,690 Sq. KM	217	454 (56/398)	1 judge or magistrate per every 147,391 citizens	1 judge or magistrate per every 2,866 Sq. KM
1999	197	168 (52/116)	-	-	197	370 (52/318)	-	-
1998	188	147 (49/98)	-	-	188	343 (49/294)	-	-
1997	185	139 (49/90)	-	-	185	319 (49/270)	-	-
1996	178	131 (47/84)	-	-	178	273 (47/226)	-	-
1995	175	130 (47/83)	-	-	175	296 (47/249)	1 judge or magistrate per every 193,205 citizens	1 judge or magistrate per every 4,082 Sq. KM
1990	147	105	1 court per every 351,587 citizens	1 court per every 7,631 Sq. KM	-	-	-	-
1985	107	53	-	-	-	-	-	-
1980	89	35 (12/23)	-	-	-	-	-	-
1970	55	22 (9/13)	1 court per every 655,844 citizens	1 court per every 24,974 Sq. KM	-	-	-	-

Note: Numbers in parentheses correspond to data for Tribunales Colegiados and Tribunales Unitarios

Sources: SCJN Informes, CJF Information Requests

The foregoing strategy has, absent the innovation of case resolution and disposal methods grounded in substantive aspects of the law, been accompanied by the development and implementation of procedurally-driven filtering mechanisms. Various studies document the way in which PJF courts apply hyper-technical standards of review with an eye to identifying those matters which can be rejected on the basis of a procedural deficiency. It is, in this connection, noted that the proportion of *amparos* dismissed by federal district courts – typically on the grounds of *improcedencia* or *sobreseimiento* – increased from 54% in 1940 to 73% in 1993.<sup>199</sup> By adhering to this formalistic approach to review, PJF courts are able to maintain a degree of control over their *cargas de trabajo*.<sup>200</sup>

PJF judges and magistrates who, in spite of the aforementioned measures, are still unable to stay abreast of their dockets may, as a last resort, delegate certain judicial responsibilities and functions to staffers. The U.S. State Department indirectly picks up on this practice when it notes, for example, that “judges are often not present at hearings when defendants give testimony.”<sup>201</sup> While these strategies and practices have simultaneously reduced the per capita *carga de trabajo* of PJF judges and magistrates (combined)<sup>202</sup> and increased the density of PJF courts and judicial officials on both a per capita and a per square kilometer basis<sup>203</sup> (thus helping to eliminate distance as an access to justice

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199. Faraway, *supra* note 7, at 307.

200. ANA LAURA MAGALONI & LAYDA NEGRETE, EL PODER JUDICIAL Y SU POLÍTICA DE DECIDIR SIN RESOLVER 7 (CIDE, Documento de Trabajo STEJ1, Dec. 2001) (on file with author) (noting that approximately two-thirds of all *amparos* end up being thrown out on the basis of a formal defect). This work largely reiterates the basic finding of the CIDAC’s earlier work on the issue. *La Problemática del Poder Judicial en México*, in A LA PUERTA DE LA LEY: EL ESTADO DE DERECHO EN MÉXICO 41, 64-65 (Héctor Fix Fierro, ed., 1994) (noting that 77% of all *amparos* were denied, frequently on the basis of a technicality, so as to lighten court case loads).

201. DOS-2002, *supra* note 69, at 24.

202. The *carga de trabajo* of federal district and appellate courts on a combined, per judicial official basis declined from 904 matters in 1995 to 792 matters in 2003. A de-aggregated view shows, alternatively, that the *carga de trabajo* per district court judge was reduced almost in half (from 2,237 matters in 1990 to 1,170 matters in 2003) while the *carga de trabajo* per appellate magistrate demonstrated an upwards trend (from 482 matters in 1995 to 577 matters in 2003). The latter tendency lends support to the SCJN’s claim that it needs even more resources if it is to adequately respond to the growing demand for its services.

203. While the data underlying this observation derive exclusively from federal component of the Mexican justice system, it is relevant to note how distant Mexico’s “judge to population” ratio (1:129,088 as of 2002) is from the United Nation’s recommendation of 1:4,000. UNGAR, *supra* note 9, at 188.

barrier), they have succeeded neither in containing the courts' *carga de trabajo* in absolute terms nor in improving the speed with which the PJF imparts justice.<sup>204</sup>

As regards the first strategy, the fact that the U.S. federal justice system serves approximately 186 million more citizens (plus an ever growing volume of foreign claimants) than the PJF with a smaller infrastructure of courts and judges suggests that much more than a simple expansion of physical and human resources is required for the establishment of an efficient and confidence-inspiring system of justice.<sup>205</sup> Of course, a certain degree of resource expansion is to be expected over time (and particularly so in the context of a population characterized by dynamic growth). Mexico should not, however, permit this approach to improving the administration of justice to become so heavily relied upon that it detracts, as shall be discussed, *infra*, from the search for alternative methods of overcoming its delay-inducing matrix of laws, procedures, and socio-political traditions.

The second practice noted – i.e., the management of PJF dockets via the application of a highly formalistic standard of review – has similarly been criticized for the way that technicality-driven adjudications can result in the rejection of cases that would otherwise have been heard and, consequently, de facto denials of due process. Finally, the same basic outcome is reached by the expedience-oriented practice of delegating judicial responsibilities, inasmuch as individuals other than judges or magistrates end up taking actions and making decisions that can bear on the final outcome of a controversy.

### 3. Subsequent Reforms

Recognizing the overall ineffectiveness of the aforementioned set of strategies and practices in terms of assuring the expeditious and reliable administration of justice, the Mexican government has, over the course of the past decade, introduced a number of operational, procedural, and technological reforms.

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204. The actual extent of docket congestion is difficult to determine from the foregoing statistics due to the fact that it is impossible to identify how many of Mexico's presently pending matters pertain to effectively inactive, abandoned, or otherwise dead files ("*archivos muertos*"). Studies carried out in diverse geographical and jurisdictional contexts indicate that the number of *archivos muertos* contained within standard estimations of docket size can be quite high. Hammergren, *supra* note 43.

205. According to 2003 data, the United States has 833 federal district and appellate judges as compared to Mexico's 872 federal district judges and appellate magistrates. U.S. COURTS, THE FEDERAL JUDICIARY, at <http://www.uscourts.gov> (last visited Nov. 24, 2003); U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, at <http://www.census.gov> (last visited Nov. 24, 2003).

One important example in this regard is the 1994 creation of the CJF.<sup>206</sup> Inspired by the example of other Latin nations, this reform effectively relieved the SCJN of all PJF-related administrative duties. While the functioning of the CJF has, to date, positively impacted the administration of justice in Mexico by enabling the SCJN to focus on its primary task (i.e., the expedient and just resolution of controversies), analysis of the judicial council experience of other countries indicates that it should not be automatically viewed as a panacea for the entirety of the legal system's administrative ills.<sup>207</sup>

An equally significant development involves the establishment of the SCJN's authority to exercise a *certiorari*-like discretion over the direct *amparos* it will hear in accordance with the decree reforming Constitutional articles 94, 97, 100, and 107<sup>208</sup> and *Acuerdos Plenarios* 5/1999<sup>209</sup> and 6/1999.<sup>210</sup> These *acuerdos*, in permitting the SCJN to selectively address those *amparo* matters which are deemed to be of the utmost importance,<sup>211</sup> give the Court an elevated degree of control over its caseload and strengthen its capacity to function as the ultimate arbiter of the nation's legal disputes.

The third action that has been taken for the purpose of containing the growth of the PJF caseload and improving the administration of justice consists of the Plan for the Prevention of Docket Backlogs (*Plan para la Prevención del Rezago*).<sup>212</sup> Launched in 2000-2001, this plan identifies and subsequently provides special attention to those matters which have already been the object of extraordinary delay. According to SCJN statistics for the year 2001-2002, the

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206. MEX. CONST., *supra* note 117, art. 100; LOPJF, *supra* note 90, art. 68. Unlike the U.S. Judicial Council system, most members of Mexico's CJF are not sitting judges. *See also* Robert W. Page, *Governance and Administration of the Courts in Latin America*, in JUDICIAL REFORM, *supra* note 16, at 56.

207. LINN HAMMERGREN, DO JUDICIAL COUNCILS FURTHER REFORM? LESSONS FROM LATIN AMERICA 1 (Carnegie Endowment for Int'l Peace, Working Paper No. 28, 2002). Other Latin nations that have established judicial councils include Argentina (1994), Bolivia (1994), Brazil (1977), Colombia (1981), Costa Rica (1989), the Dominican Republic (1994), Ecuador (1992), El Salvador (1983), Panama (1987), Paraguay (1992), Peru (1969), Uruguay (1981), and Venezuela (1961). UNGAR, *supra* note 9, at 170.

208. "Decreto por el que se Reforman los Artículos 94, 97, 100, y 107 de la Constitución Política de los Estados Unidos Mexicanos," D.O., 11 de junio de 1999.

209. "Acuerdo Numero 5/1999 del Pleno de la Suprema Corte de Justicia de la Nación que Establece las Bases Generales para la Procedencia y Tramitación de los Recursos de Revisión en Amparo Directo," D.O., 22 de junio de 1999.

210. "Acuerdo Numero 6/1999 del Pleno de la Suprema Corte de Justicia de la Nación en el que se Determina en Envió de Asuntos a los Tribunales Colegiados de Circuito," D.O., 23 de junio de 1999.

211. INFORME-1999, *supra* note 41, at 15.

212. INFORME-2002, *supra* note 96, at 36.



operation of the plan resulted in the resolution of 434 of 846 previously delayed cases.<sup>213</sup>

The final efficiency-oriented reform which has been brought to bear on the administration of the PJJ involves information and communications technology (ICT). Consistent with former SCJN President Genaro David Gongora's observation regarding the "vital necessity" of bringing information media to bear on the administration of justice, this reform has been carried out along two distinct yet ultimately inter-related axes of activity – namely, the modernization and harmonization of the PJJ's internal ICT infrastructure and the creation of electronic interfaces for the benefit of the public at large.<sup>214</sup>

Turning, first, to the internal ICT infrastructure of the federal judiciary, it is significant to note that the PJJ has developed or outlinked to a number of juridical networks (for example, the *Red Jurídica Nacional* and the *Red de Información y Comunicaciones*), systems (for example, the *Sistema Electrónico de Administración de Documentación Jurídica*, *Sistema Integral de Seguimiento de Expedientes*, *Sistema Único de Estadística*, and *Sistema Integral Administrativo*), and databases (for example, IUS and the CLESAN NET).<sup>215</sup> In the course of establishing this ICT infrastructure, the PJJ has inter-connected over 18,000 computers since 1999 and digitalized all files dating back to 1825 (5,254 linear meters of archived materials were captured pursuant to the *Programa de Administración y Conservación de Archivos* in 2002 alone).<sup>216</sup> These advances have made it possible for the PJJ to disintermediate and reduce the total number of administrative processes, capture and retain more accurate data, engage in the real-time tracking of matters, and preserve scarce temporal and financial resources.<sup>217</sup> Armed, accordingly, with enhanced levels of time, money, and information, the PJJ should, in theory, be in a better position to identify acts of corruption, assure accountability, and administer justice.

Similar progress has been made with respect to the second axis – i.e., the creation of electronic interfaces between the PJJ and the public at large. The SCJN has, for example, established publicly accessible links on its website<sup>218</sup>

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213. *Id.*

214. INFORME-1999, *supra* note 41, at 26.

215. INFORME-2002, *supra* note 96, at 299-306.

216. *Id.* at 305. "Acuerdo General Conjunto Numero 1/2001, del Pleno de la Suprema Corte de Justicia de la Nación y del Pleno del Consejo de la Judicatura Federal, que Establece Lineamientos para el Flujo Documental, Depuración, y Digitalización del Acervo Archivístico de los Juzgados de Distrito, Tribunales Unitarios de Circuito, y Tribunales Colegiados de Circuito," D.O., 11 de septiembre de 2001. PJJ archives are digitalized and stored according to the following time spans: 0-5 years, 5-50 years, and 50+ years.

217. Informe-2002, *supra* note 96, at 299.

218. See SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, SERVICIOS, at <http://www.scjn.gob.mx> (last visited Aug. 1, 2004). Legal content is also available on

containing summaries of SCJN plenary sessions, *acuerdos* issued by federal district courts and tribunals (both unitary and collegiate), select decisions (typically involving matters of elevated public interest), jurisprudence,<sup>219</sup> and all current federal legislation. Complete sentences are, on the other hand, published both in the hard copy and the online version of the *Diario Oficial*.<sup>220</sup>

The foregoing services have added real value in terms of overcoming inefficiency and distortion producing information asymmetries, deepening the penetration of up-to-date codes, laws, and *jurisprudencia*, and enhancing Mexico's capacity for interstitial development (i.e., by facilitating the "continuous flow of legal interpretations extending and modifying legal rules").<sup>221</sup> This said, however, Mexico's PJF has yet to make available the following discretion-reducing and efficiency, transparency, and confidence-enhancing online services: (i) access to pleadings, motions, and other relevant legal content<sup>222</sup> (similar, by way of contrasting example, to the U.S. government's PACER system); (ii) case management; (iii) filing (similar, again by way of contrasting example, to the U.S. government's ECF system<sup>223</sup>); and (iv) notifications.<sup>224</sup> It is, in a related vein,

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Mexico's e-government portal. See Sistema Nacional e-México, *Del Judicial*, at [http://www.e-mexico.gob.mx/wb2/eMex/eMex\\_Del\\_Judicial](http://www.e-mexico.gob.mx/wb2/eMex/eMex_Del_Judicial) (last visited Dec. 25, 2003).

219. *Jurisprudencia* made available online present an abstract statement of the rule of procedure or law at issue. Unlike U.S. cases, Mexican *jurisprudencia* does not contain information regarding the parties, the facts, the supporting and conflicting law, the policy ramifications, etc. The *sentencias* (and, if available, the *expedientes*) associated with each of the *ejecutorias* which, together, form the basis of the *jurisprudencia* contain a greater level of detail in this regard.

220. See *Diario Oficial*, at <http://www.segob.gob.mx/dof/pop.php> (last visited Aug. 1, 2004).

221. ROBERT MEANS, UNDERDEVELOPMENT AND THE DEVELOPMENT OF LAW XVII (1980).

222. Fredric I. Lederer, *The Foundation for the Virtual Courtroom: Today's Developing Technologies*, at [http://www.ncsconline.org/D\\_Tech/CTC/CTC6/CTC6302Sec2.htm](http://www.ncsconline.org/D_Tech/CTC/CTC6/CTC6302Sec2.htm) (last visited Oct. 30, 2004) (noting, by way of comparative example, how the online file access systems make it possible for lawyers and members of the public to track the status of cases currently pending in the United States).

223. See e.g. Northern District of New York, *Electronic Case Filing*, at <http://www.nynd.uscourts.gov/cmecf/> (last visited July 24, 2003).

224. Various Mexican states have launched online "virtual tribunals" including, for example, Nuevo Leon (<http://www.nl.gob.mx/poderjudicial> and <http://148.245.166.58/>) and Tabasco (<http://www.tsj-tabsaco.gob.mx>). Services commonly encountered at these virtual tribunals include case management, the *Boletín Judicial*, local and sometimes federal laws, and legal forms (*tramites*). Ximena Alexandra Gutierrez, *E-Justicia en Tabasco, Mexico*, at <http://www.centerdigitalgov.com/international/story.php?docid=55186> (last visited Nov. 7, 2004). In what constitutes a clear example of the value to be derived from the operation of online tribunals, the state of Nuevo Leon estimates that the launch of its virtual tribunal

noted that the PJF has yet to establish true “courtrooms of the future.” Unlike the U.S. federal district courts, many of which have Internet enabled computers on counsel tables (for quick Lexis or Westlaw access) and real-time transcript and image capture and transmission capabilities,<sup>225</sup> PJF “court” facilities (with the exception of the SCJN) consist, typically, of the technologically unsophisticated chambers of judges. The rectification of these shortcomings would improve both the efficiency and the transparency of the administration of justice in Mexico.

#### 4. Pending Developments

While the preceding reforms collectively constitute an important step in the direction of more efficient administration of justice, there is a strong consensus both in and outside of government that more can and should be done. This sentiment is manifest in the sizeable number of initiatives which are either currently pending or otherwise being discussed within legal circles.

##### a. Reform of the *Amparo*

Perhaps the best known (and most controversial) pending reform involves Mexico’s *amparo* law. Having reached the conclusion that this legendary protective mechanism is neither used in conformity with its originally intended purpose<sup>226</sup> nor, as currently structured, responsive to contemporary political and legislative circumstances,<sup>227</sup> the SCJN, in a clear expression of its willingness to take a more active role in the affairs of the nation, prepared and presented to Congress an initiative to reform the *amparo*.<sup>228</sup> The most divisive

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has reduced court visits (and consequently enhanced employee productivity) by 25%. Veronica Sanchez, *Agiliza Tribunal Virtual tarea de abogados*, REFORMA, Apr. 7, 2003, at 2A. Nuevo Leon has, moreover, recently introduced an initiative which expressly assures that online filings and notifications will produce “legal effects.” *Id.* In spite of these state level developments, Mexican legal commentators contend that the judicial system is not doing all that it could to deliver online legal services to the public. Luis Manuel C. Méjian, *Justicia por medios electrónicos*, POLÍTICA DIGITAL, Feb. 2002, at 18.

225. Southern District of Texas, *E-Court FAQ Page*, at <http://www.txs.uscourts.gov/atyadm/ecourfaq.htm> (last visited Oct. 25, 2003) (setting forth the attributes of a typical federal “e-court”).

226. See UNSR, *supra* note 3, at 33 (noting that the present system of *amparo* “unnecessarily delays” legal processes, especially in civil matters).

227. Ruben Ruiz Soriano, *Urge una nueva ley de amparo*, ABOGADO, Mar. 2003, at 30 (noting the unsuitability of the present *amparo* law for confronting the needs of modern society).

228. SCJN, Proyecto de Ley de Amparo Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos, at <http://www.scjn.gob.mx> (last

aspect of this initiative centers on the elimination of the Otero formula and the establishment of *erga omnes* effect with respect to *amparo* actions.<sup>229</sup> The adoption and implementation of this reform would promote judicial economy by enabling the SCJN to use the time it currently spends receiving, considering, and ruling on controversies which have been the subject of prior adjudication for more constructive purposes. The *exposición de motivos* pertaining to one of the initiatives currently pending in connection with the elimination of the Otero formula speaks to the efficiency gains which would flow from such a reform when it notes that “the issuance of resolutions with general effects would foreclose the constant filing of *amparos* with respect to issues that have been repeatedly ruled on.”<sup>230</sup> The adoption and implementation of this reform would, additionally, reinforce the concept of equality under law by making the resolutions of the PJF applicable to all citizens.<sup>231</sup> The idea of eliminating the Otero formula is currently stalled due to the stiff opposition it has met from the SHCP, the secretariat which

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visited Jan. 2, 2004) (presenting comprehensive overview of SCJN’s attempts to spearhead the reform of the *amparo* law). Other *amparo* reform initiatives have been presented by the PRI and the PVEM. *Gaceta* 4 April 2003, *supra* note 167; “Iniciativa que Adiciona Dos Fracciones al Artículo 10 y Reforma el Artículo 208 de la Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos,” *Gaceta Parlamentaria*, 31 de Marzo de 2004, at <http://gaceta.cddhcu.gob.mx/> (last visited Mar. 31, 2004).

229. Pursuant to article 107 of the Mexican Constitution, *amparo* sentences pertain exclusively to individuals and are incapable of making any type of general declaration with respect to a law. MEX. CONST., *supra* note 117, art. 107.

230. *Gaceta* 4 April 2003, *supra* note 167. A good example of the inefficiency engendered by the fact that an *amparo* can not have general effects involves transitory art. 3 of the ISR for 2003. Being unable to avail themselves, as a whole, of the security that comes from knowing that the legality of a specific provision of the law had, following the final decision of the highest court in the land, been conclusively resolved, Mexican corporations, universities, and institutions were forced to protect their fiscal rights pursuant to the filing of approximately 1,100 *amparos*. While the SCJN did ultimately establish a string of decisions that were sufficiently similar for the purpose of emitting a *tesis de jurisprudencia*, this did not occur until after the aforementioned entities had undertaken the expense and effort of filing – and the PJF had expended resources receiving – the *amparos*. INDETEC, *Anulo la Corte el Impuesto Sustitutivo al Crédito al Salario*, at [http://www.indetec.gob.mx/e-Financiero/Docs/Boletin19/ISCAS\\_05.pdf](http://www.indetec.gob.mx/e-Financiero/Docs/Boletin19/ISCAS_05.pdf) (last visited Jan. 3, 2004).

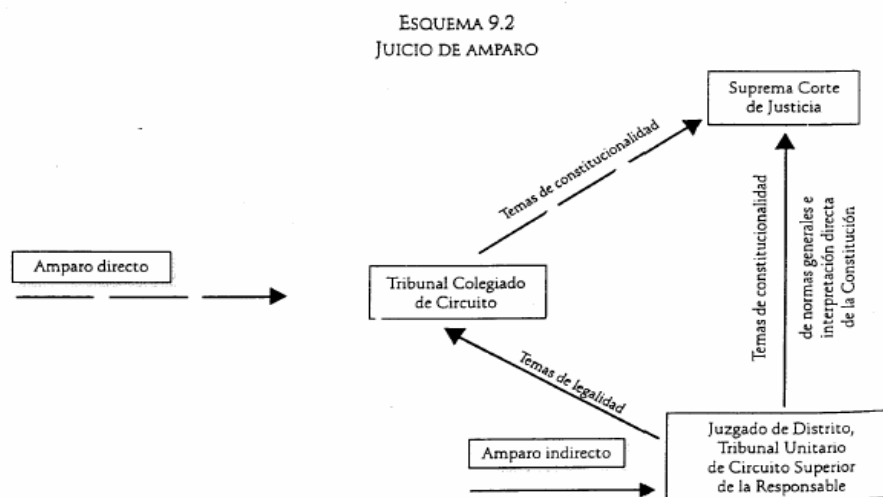
231. This would be a positive development for those citizens whose financial inability to bring an *amparo* leaves them, in a de facto way, unable to secure the same protection against unclear and/or unconstitutional laws that is available to the wealthier and better connected segments of society. Alicia Diaz, *Consideran confiables amparos*, REFORMA, Mar. 31, 2003, at 11A (noting that the only option available to taxpayers for challenging the constitutionality of ambiguous tax laws consists of the filing of a costly *amparo*).

has, to date, been the principal beneficiary of the long-established practice of having *amparo* resolutions apply exclusively on an *inter-partes* basis, as well as those members of the legal community which specialize in *amparo* matters (the “*amparistas*”).<sup>232</sup>

More recently, the SCJN has, together with the state tribunals which issued the Merida Declaration, voiced its support for the concept of making the *Tribunales Estatales Superiores* (“TES”)<sup>233</sup> the final authority with respect to most matters which originate in state courts. As Graph 2, *infra*, shows, litigants currently have the right to challenge the rulings of the TES through the filing of an *amparo directo* before the *Tribunales Colegiados* of the PJF.

**Graph 2**

**The Flow of Amparo Proceedings**



Source: México Social<sup>234</sup>

The existence of this right of recourse is the principal causative factor behind the disproportionately large number of federal appellate magistrates which Mexico has in relation to federal trial court judges. The scope of this disparity is illustrated by a comparison of the overall “shapes” of the U.S. and Mexican

232. Victor Fuentes, *Mejora la actuación del Poder Judicial: desconfían abogados de tribunales locales*, REFORMA, Apr. 21, 2002, at A12.

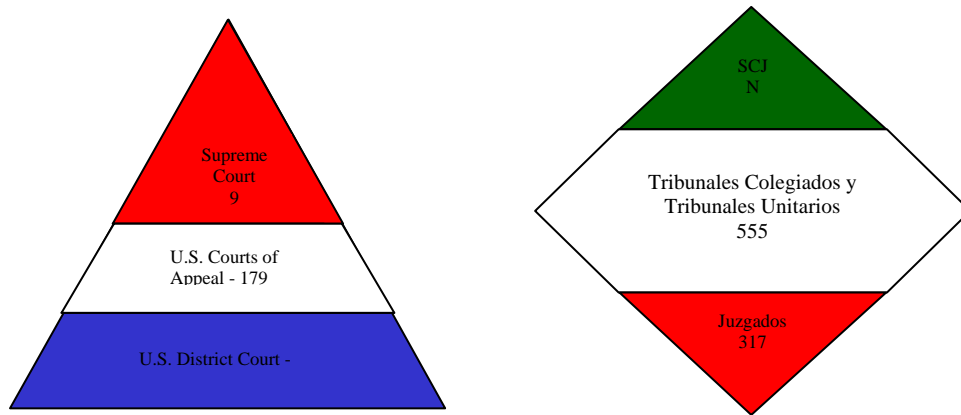
233. *Tribunales Estatales Superiores* are the highest state level court in Mexico.

234. MÉXICO SOCIAL 1996-1998, *supra* note 136, at 500.

federal legal systems as determined by the number of trial court and appellate judges within the two countries (see Graph 3, *infra*).

**Graph 3**

**Structural Characteristics of U.S. and Mexican Federal Justice Systems (as of 2003)**



It has been estimated that the elimination of the direct *amparo* would do away with up to 59% of the PJF's current case backlog.<sup>235</sup> The elimination of this action would likely have the additional effect of helping to bring the annual number of cases decided by the SCJN (over 6,000 per year as of 2000) into closer alignment with the annual number of rulings issued by the U.S. Supreme Court (approximately 75 per year).<sup>236</sup> Notwithstanding the significant potential of this proposal in terms of streamlining and expediting the administration of justice in Mexico, the Merida Declaration is presently opposed by private sector law firms and local bar associations on the ground that the high levels of incompetence and corruption encountered in state level legal systems mitigate against doing away

235. Other arguments advanced by local judges in support of the Merida Declaration center on (i) the necessity of devolving state court autonomy and (ii) the fact that the conditions which gave rise to the *amparo directo* during the last century no longer exist. Faraway, *supra* note 7, at 309; Fuentes, *supra* note 232.

236. Sam Dillon, *Mexico's Chief Justice Strives to Oil a Creaking System*, N.Y. TIMES, Mar. 10, 2000, at A3.

with the right to challenge the resolutions of the *Tribunales Estatales Superiores* before the stereotypically better prepared and less corrupt courts of the PJF.<sup>237</sup>

#### b. Introduction of Oral Proceedings in Criminal Matters

A second pending reform seeks to improve the administration of justice by overhauling the procedural aspects of federal criminal actions. Consistent with the hemisphere-wide trend,<sup>238</sup> federal and state initiatives have recently been introduced for the purpose of establishing oral proceedings (wherein attorneys verbally present arguments before a judge who subsequently issues a ruling on an expedited basis) and reinstating the use of juries which are empowered to decide questions of fact (Mexico used juries between 1856 and 1929).<sup>239</sup> The adoption and implementation of these reforms could, to the extent they succeed in

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237. Fuentes, *supra* note 232. No less than 83% of respondents in a recent survey spanning forty-two bar associations and law firms in twenty-three states opposed the idea of eliminating the direct *amparo*. This response is driven, in large part, by the low level of confidence which bar associations and law firms have in state courts.

238. Oral proceedings have been introduced in civil and/or penal proceedings in Guatemala, Costa Rica, El Salvador, Chile, Argentina, Uruguay, Peru, and Spain. FIELD & FISHER, *supra* note 85, at 35-47. The process of forming local codes and laws was guided, with frequency, by the Model Ibero-American Code of Procedure. *Id.* The adoption of these common law inspired proceedings by civil law countries constitutes another example of common law-civil law convergence.

239. “Iniciativa de Decreto por el que Se Expide el Código Federal de Procedimientos Penales, la Ley Federal de Ejecución de Sanciones Penales, la Ley General de Justicia Penal para Adolescentes, la Ley de la Fiscalía General de la Federación, la Ley Orgánica la Policía Federal, y la Ley de Seguridad Pública, Reglamentaria de los Párrafos Séptimo y Octavo del Artículo 21 de la Constitución Política de los Estados Unidos Mexicanos, y Se Reforman, Adicionan, y Derogan Diversos Artículos de la Ley Federal Contra la Delincuencia Organizada, de la Ley Orgánica de la Administración Pública Federal, de la Ley Orgánica del Poder Judicial de la Federación, de la Ley Federal de la Defensoría Pública, de la Ley Reglamentaria del Artículo 5o, Constitucional, Relativo al Ejercicio de las Profesiones en el Distrito Federal, del Código Penal Federal, y de la Ley de Amparo Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos, y de la Ley Reglamentaria de las Fracciones I y II de Artículo 105 de la Constitución Política de los Estados Unidos Mexicanos.” submitted to the Senate of the Republic by Vicente Fox Quesada, the President of the United Mexican States, Mar. 29, 2004 (on file with author) (proposing the use of oral proceedings); Gaceta 21 November 2001, *supra* note 11. Reflecting Mexico’s deep seeded wariness of juries, the latter initiative requires that all jurors have a law degree. The historical basis for this wariness stems from concerns regarding the academic and intellectual preparedness of the average Mexican citizen for jury duty. As the *exposición de motivos* for the initiative notes, legislators in 1856 (including Dip. Vallarta) were of the opinion that Mexico did not have the degree of culture (“*grado de cultura*”) that was necessary for the use of juries. *Id.*

simultaneously making the process of articulating arguments and presenting evidence more transparent and reducing the time required for reaching a judgment or resolution, do much to improve the overall efficiency of the administration of justice, reduce the number of individuals being held in correctional facilities (thereby freeing up public funds for other socially beneficial projects and programs), and bolster the level of confidence which citizens and investors have in Mexico's legal system.<sup>240</sup>

### c. Expanded Use of ADR

The final pending reform addressed here focuses on alternative dispute resolution ("ADR"). Seizing on the way in which both Latin and non-Latin nations have been able to use extra-judicial dispute resolution techniques for the purpose of enhancing access to justice amongst the marginalized segment of society, avoiding the financial loss and relational destruction associated with litigation, expediting the resolution of disputes, and keeping caseloads under control,<sup>241</sup> Mexico has, over the past five years, moved away from the ineffective practice of judge coordinated "conciliation" and towards a system of structured,

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240. FIELD & FISHER, *supra* note 85, at 40.

241. UNGAR, *supra* note 9, at 199-208 (noting the way mediation has benefited the marginalized sectors of Argentine, Brazilian, and Guatemalan society); WILLIAM DAVIS, RESOLUCIÓN ALTERNATIVA DE CONTROVERSIAS 17-30 (1998) (noting successful use of mediation in Argentina, Bolivia, Brazil, Chile, Columbia, Costa Rica, Ecuador, El Salvador, Peru, Uruguay); Walter A. Wright, *Mediation of Private United States-Mexico Commercial Disputes: Will It Work?* 26 N.M. L. REV. 57, 66-71 (1996) (noting that while Anglo-Latino cultural differences could impede the successful use of mediation in Mexico, mediation has been positively received in Latin communities in Texas and Puerto Rico); Luis Miguel Díaz & Nancy A. Oretskin, *Mediation Furthers the Principles of Transparency and Cooperation to Solve Disputes in the NAFTA Free Trade Area*, 30 DENV. J. INT'L L. & POL'Y 73 (2001); Chief Justice Thomas J. Moyer, *Mediation as a Catalyst for Judicial Reform in Latin America*, 18 OHIO ST. J. ON DISP. RESOL. 619, 621 (2003) (noting that the establishment of efficient and effective mediation programs in Latin America can help parties circumvent corrupt officials, aid in the reduction of judicial system inefficiency, address violence and unlawfulness in society, and foster a more participatory and democratic society). *But see* Hammergren, *supra* note 43 (noting that compulsory pre-trial conciliation may have unintended adverse effects on the poor inasmuch as it can constitute yet another obstacle on the path to justice); Gary La Free & Christine Rack, *The Effects of Participant's' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 L. & SOC'Y REV. 767, 789 (1996) (reporting limited support for the hypothesis that less formal dispute resolution processes are more susceptible than judicial decision making to bias against the less powerful).



out of court, and neutrally facilitated mediation.<sup>242</sup> To this end, Mexico has, with the input of the CJF, the IJF, the *Barra Mexicana*, the *Instituto Mexicano de la Mediación*, the *Centro de Mediación Notarial*, the ABA, USAID, the World Bank, the Commercial Arbitration and Mediation Centre for Americas, the *Centro de Atención para Víctimas del Delito*, and the U.S.-Mexico Conflict Resolution Center, prioritized the training of mediators and the inauguration of ADR/mediation centers.<sup>243</sup> Although these centers are becoming increasingly integrated into the dispute resolution process, attorney acceptance, public awareness, and usage levels with respect to mediation remain relatively low. Mexico could partially overcome this situation by revising its laws so as to make neutrally facilitated and professionally managed mediation a mandatory first step in a broader range of circumstances. The updating of the federal rules of law and procedure with respect to session confidentiality and the enforceability of mediated agreements, at a minimum, would augment Mexico's ability to maximize the social, economic, and administrative benefits made possible by mediation.<sup>244</sup>

### 5. Recommended Reforms

This section closes by making a series of recommendations regarding additional reforms which could be taken for the purpose of strengthening the administration of justice in Mexico.

The first recommended reform involves the necessity of improving the efficiency with which the PJF receives and disposes of cases. This is especially critical with respect to those cases which are, by virtue of the operation of the Otero formula, repetitive in nature. One potential solution would be for Mexico to

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242. Clara Ramirez, *Respalda la PGR Mediación Judicial*, REFORMA, May 6, 2002, at 4A; Abel Barajas, *Proponen conciliación para delitos no graves*, REFORMA, Aug. 23, 2002, at 2A; *Proponen Alternativa en Justicia*, REFORMA, May 4, 2002, at 7A (noting way in which the presidents of the *Tribunales Superiores de Justicia* of 24 different states advocated the increased use of mediation at the "Coloquio Nacional sobre Justicia Alternativa"). On the other side of the ADR continuum, Mexico has a well developed, albeit underutilized, legal framework for arbitration.

243. ABA Latin American Law Initiative Council, *Mediation in Mexico: Project Overview*, 2003, at 2 (on file with author). Mediation centers have been set up in Aguascalientes, Baja California Sur, the Distrito Federal, Guanajuato, Jalisco, Nuevo Leon, Oaxaca, Puebla, Queretaro, Quintana Roo, Tabasco, and Sonora. See Sarles, *supra* note 36, at 75.

244. Mexico currently has no federal law addressing the confidentiality of mediation sessions. While Mexico does, on the other hand, technically have a federal law which generically addresses settlement agreements, it could be made stronger by simplifying its exceptions and expressly linking its applicability to conciliation and mediation. C.C.F., *supra* note 161, art. 2944.

establish a means of pooling cases with common questions of law and fact, in the name of judicial economy. In introducing such a measure, Mexico could look to either the U.S. class action or the Argentine *acción colectiva* as models.

The second recommended reform consists of the creation of courts which specialize in commercial material. Notwithstanding the fact that federal and state courts have concurrent jurisdiction over issues of commerce, the *amparo*-oriented focus of the former leaves the primary responsibility for resolving commercial controversies (including, for example, debt collection, contract enforcement, etc.) with the latter.<sup>245</sup> While this outcome is acceptable in theory, it is problematic in practice. State courts frequently have deficient human and physical resources, a situation which facilitates corruption and diminishes independence.<sup>246</sup> The lack of attention paid by federal courts to practical issues of commerce, on the other hand, precludes the development of a detailed and harmonized body of jurisprudence which can be used for the resolution of commercial disputes.<sup>247</sup> The lack of certainty generated by the combination of these issues can have the effect of placing a drag on economic activity.<sup>248</sup> Against this backdrop, it is proposed that the PJF establish an appropriate number of federal district courts whose subject matter jurisdiction pertains exclusively to commerce.<sup>249</sup> The implementation of

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245. It is estimated that 90% of the cases which enter the federal justice system pertain to *amparos*. Berruecos, *supra* note 35, at 10. It is, alternatively, estimated that state courts exercise jurisdiction over 80% of all non-*amparo* controversies in Mexico. Hammergren, *supra* note 8, at 735.

246. Barrientos, *supra* note 135, at 1 (noting that 14/32 of Mexico's federative entities were found to have "below average" levels of contract enforceability).

247. Alejandro Ascencio, *Requiere México Juzgados de Distrito Especializados*, REFORMA, Apr. 15, 2003.

248. *Id.*

249. This measure has been opposed by some legal reform advocates on two different grounds. The first is that the asserted need for specialized commercial tribunals is actually nothing but a smokescreen intended to divert attention away from the small amount of credit provided by Mexico's financial sector during the past decade. The second is that the taking of such a measure would be fundamentally misplaced. That is, empirical research indicates that the principal source of legal difficulty encountered by credit granting and/or commercial entities pertains not to the processing of cases but, rather, enforcement of judgments. According to the reasoning associated with the second point of opposition, the creation of specialized commercial fora is inadvisable because it would invariably fail to address the real problem in issue. Hammergren, *supra* note 43. Without detracting from the valuable insights provided by the aforementioned empirical research, the present work takes issue with the second point of opposition advanced, largely on the strength of the thought that *actuarios* attached to fora with commerce specific subject matter jurisdiction would be better able to develop enforcement tactics and skills that are, by virtue of their narrowly defined professional focus, more effective than those available to *actuarios* who

such a reform would not be difficult, conceptually. The PJF already has specialized courts with respect to administrative law, organized crime, etc. This measure should be followed up with additional efforts to enhance the training, resources, independence, and oversight of state level judges and magistrates.

The final recommended reform focuses on the need to improve the enforcement of judgment process. Under the current system, the enforcement of PJF rulings requires the collaboration of court-based *actuarios* and executive branch functionaries. Besides the collaborative tension which can arise in conjunction with the enforcement of socially and/or politically unpopular decisions, the present system is plagued by difficulties with respect to the identification, attachment, valuation, and public auctioning of debtors' property. Manifestations of the dysfunctional nature of Mexico's judgment enforcement procedures include the large number of judicial resolutions which continue to go ignored<sup>250</sup> and the fact that 52.8% of the judges, lawyers, and *actuarios* who participated in a recent study regarding the obstacles to the enforcement of local judgments were not of the opinion that Mexico's "legal system usually provides an effective means of recovering judicially recognized debts."<sup>251</sup> Mexico could overcome these impediments to the effective enforcement of judgments by revising its legislation so as to make it more difficult for debtors to avoid creditors pursuant to fraudulent transfers, providing creditors with a more reliable means of confirming the existence, location, and lien status of debtors' assets,<sup>252</sup> streamlining the *remate* process, and introducing – in a way that does not jeopardize the maintenance of public order – a limited range of extra-judicial self-help remedies.

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are regularly exposed to a broader range of enforcement contexts. The preceding statement assumes that the debtor is not insolvent, engaged in the fraudulent concealment of assets, or otherwise "judgment proof."

250. INFORME-2001, *supra* note 96, at 16 (noting that the many of the cases resolved by the Supreme Court involve unenforced judgments).

251. Kossick & Bergman, *supra* note 9, at 442.

252. An important step in this direction entails the recent publication of the *Reglamentos* applicable to the *Sistema Integral de Gestión Registral* ("SIGER"), Mexico's newly launched online public commercial registry. "Reglamento del Registro Publico de Comercio, D.O., 24 de Octubre de 2003; Secretaria de Economía, *SIGER*, at <http://www.siger.gob.mx> (last visited Jan. 10, 2004).

### E. Access to Justice

“The Constitutional guarantee of access to justice is indispensable to fulfilling the purpose of law.”<sup>253</sup>

“Ultimately, institutions are not truly reformed unless they are accessible to citizens.”<sup>254</sup>

“Courts and legal services are, in theory, accessible to the public in the same way as the Sheraton Hotel: anybody can enter, provided they can pay.”<sup>255</sup>

#### 1. The Ideal and the Reality of Access to Justice

Article 14 of the Mexican Constitution guarantees individual citizens the right to defend their life, liberty, property, and possessions by means of trial in an established tribunal. In the event that a citizen facing criminal charges declines or is otherwise unable to secure counsel after having been instructed to do so, the courts of the PJF will, in the interest of assuring the defendant’s adequate defense, designate a public defender.<sup>256</sup> These basic protections are, in the context of a country where an estimated 40% of the population lives below the poverty line,<sup>257</sup> there is no constitutional level presumption of innocence,<sup>258</sup> and the guarantee of due process is loosely correlated with skin tone and/or social class,<sup>259</sup> critical components of Mexico’s overall formula for assuring access to justice. More fundamentally, their availability plays a fundamental role in countering the

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253. INFORME-2001, *supra* note 96, at 15.

254. UNGAR, *supra* note 9, at 187.

255. Alejandro M. Garro, *El Acceso de los Pobres a la Justicia en América Latina*, in Mendez, *supra* note 132, at 280.

256. MEX. CONST., *supra* note 117, art. 20.

257. CEPAL, *Panorama Social de America Latina 2002-2003*, at <http://www.eclac.cl/prensa/noticias/comunicados/4/12984/presentacionPS2002-2003jao.pdf> (last visited Jan. 3, 2004).

258. CMDPDH, *supra* note 9, at 7-8.

259. REDING, *supra* note 4, at 41 (noting that indigenous persons are “disproportionately likely to be killed or tortured by security forces under the most varied of pretexts, and far less likely to get a prompt and fair trial”). The likelihood of this outcome is, furthermore, elevated by the Mexican justice system’s tendency to “thunder down” hard on easier to resolve (and less politically sensitive) matters involving petty criminals as opposed to the more serious crimes of high profile businessmen or public officials. Sullivan, *supra* note 28.

structurally determined perception that Mexico's system of justice is, effectively, an instrument of the elite for subjugating the poor and the uneducated.

Despite the apparent solidity of this framework, it is generally considered that Mexico's federal legal system has failed to protect the rights of the accused in an expeditious and gratuitous way. PJF defenders have, traditionally, been perceived as being overloaded, underpaid, incompetent, and corrupt.<sup>260</sup> At times, court-appointed defenders have even been unlicensed.<sup>261</sup> The U.S. Department of State's 2002 Country Report on Human Rights Practices for Mexico fleshes out some of the shortcomings associated with the work of Mexico's federal public defenders when it notes:

While there is a constitutional right to an attorney at all stages of criminal proceedings, in practice, the authorities often do not assure adequate representation for poor defendants. Attorneys are not always available during the questioning of defendants; in some instances a defense attorney will attempt to represent several clients simultaneously by entering different rooms to certify that he was present although he did not actually attend the full proceedings. In the case of indigenous defendants, many of which do not speak Spanish, the situation is often worse. The courts do not routinely furnish translators for them at all stages of criminal proceedings, and thus defendants may be unaware of the status of their case.<sup>262</sup>

Andrew Reding provides further insight into the deficient nature of the services provided by Mexico's public defenders when, referring to the findings of an National Indigenous Institute (*Instituto Nacional Indigenista*, or "INI") study, he notes that "courts had not yet sentenced 70% of indigenous prisoners, half of whom the authorities held in pretrial detention for longer than allowed by law."<sup>263</sup>

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260. Yamin & Garcia, *supra* note 5, at 511; AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL'S CONCERNS REGARDING TORTURE AND ILL-TREATMENT IN MEXICO (Apr. 30, 1997), at [http://web.amnesty.org/library/pdf/amr410171997English/\\$file/amr4101797.pdf](http://web.amnesty.org/library/pdf/amr410171997English/$file/amr4101797.pdf) (last visited Nov. 9, 2004) (noting that lawyers working for the state have inadequate resources at their disposal and are inadequately prepared and severely overworked).

261. UNSR, *supra* note 3, at 25 (reporting that the majority of public defenders in the Federal District were not, at the time of his investigation, in possession of a proper license to work as a lawyer).

262. DOS-2002, *supra* note 69, at 25. The failure of Mexico's federal justice system to provide translators is, in the context of a country which has over 56 different ethnic groups, a breach of its obligations under art. 8.2 of the American Convention of Human Rights. CMDPDH, *supra* note 9, at 13.

263. REDING, *supra* note 4, at 41.

A National Institute of Statistics, Geography, and Information (*Instituto Nacional de Estadística, Geografía, e Informática*, or “INEGI”) study involving the administrative capacity of Mexico’s system of criminal justice reached the even more alarming conclusion that only one in ten of the country’s criminal defendants is processed in accordance with the requirements of the law.<sup>264</sup>

The low quality of representation provided by federal public defenders has been perpetuated by the fact that Mexican law prohibits the filing of an *amparo* on the basis of deficient counsel. The federal government’s failure to establish an effective mechanism for assuring a minimum level of professional competence on the part of defenders has, in turn, been compounded by the frequency with which the intended beneficiaries of this supposedly gratuitous public service – the great majority of whom hail from the poorest segments of society – have been required to make irregular payments in connection with the receipt of legal assistance. Faced, accordingly, with the prospect of a prohibitively expensive private sector lawyer or a government furnished representative of doubtful effectiveness, many citizens have, in the past, elected to retain the services of unlicensed intermediaries popularly known as “*coyotes*,” “*tinterillos*,” or “*gestores*.”<sup>265</sup> This outcome increases the number of actors in the Mexican legal system who are both untrained and wholly outside of any type of professional oversight, thereby complicating Mexico’s already challenged system of judicial administration and devaluing the constitutional ideal of universal access to justice.

## 2. The Scope and Impact of Measures Recently Introduced for the Purpose of Strengthening Access to Justice

Recognizing the failure of the system to guarantee, in practice, the public’s access to justice, Mexico has, over the space of the last ten years, undertaken a number of important remedial actions. Between 1994 and 2001, for example, Mexico overhauled the legal framework and institutional foundation associated with government-supplied counsel by introducing updated laws, establishing the Institute of the Federal Public Defender (*Instituto Federal de Defensoría Pública*, or “IFDP”) as an organ of the PJF vested with technical and operational autonomy,<sup>266</sup> making the process of selecting public defenders and

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264. Victor Fuentes, *Rebasan denuncias al sistema judicial*, REFORMA, June 24, 2002, at 1A.

265. See Yamin & Garcia, *supra* note 5, at 511; Raúl Monge, *La Justicia Mexicana: Corrupción*, PROCESO, July 7, 2002, at 35-38.

266. “Decreto de ley Federal de Defensoría Pública y de Reforma a la Orgánica del Poder Judicial de la Federación,” D.O., 28 de Mayo de 1998, art. 4 [hereinafter LFDP].

counselors more competitive,<sup>267</sup> expanding the mandate of the public defender's office so as to encompass both penal and civil matters,<sup>268</sup> loosening service eligibility requirements in the interest of enabling more citizens to qualify for legal assistance,<sup>269</sup> improving public defender pay,<sup>270</sup> and establishing an intra-governmental program geared towards securing the early release of indigenous prisoners from federal detention facilities.<sup>271</sup>

These actions have been accompanied by a concerted effort to augment both the human resources and physical infrastructure of the IFDP. As Table 16, *infra*, shows, the combined number of defenders (penal) and counselors (civil) increased from one IFDP lawyer for every 178,715 citizens to one IFDP lawyer for every 155,255 citizens between 1999 and 2002.<sup>272</sup> This rise in the number of criminal and civil representatives has permitted the IFDP to take on a growing number of new matters. As Table 16, *infra*, indicates in this latter connection, the combined number of penal and civil matters accepted by the IFDP increased by 27% between 2000 and 2003.

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267. "Bases Generales de Organización y Funcionamiento del Instituto Federal de Defensoria Publica," D.O., 26 de Noviembre de 1998, arts. 63-72 [hereinafter Bases].

268. LFDP, *supra* note 266, art. 4.

269. *Id.* art. 15; Bases, *supra* note 267, art. 36.

270. The monthly salary for which a federal public defender is eligible ranges from a low of 25,787.06 pesos to a high of 85,858.60 pesos. "Acuerdo por el que se Autoriza la Publicación de los Sueldos, Prestaciones y Demás Beneficios de los Servidores Públicos del Poder Judicial de la Federación," D.O., 26 de Febrero de 2003, at 25.

271. The early release program was established in 1999 pursuant to an agreement made between the CNDH, the INI, the PGR, *Gobernación*, and the IFDP. Its operation has resulted in the expedited processing of over 3,000 prisoners between 1999 and 2003. DOS-2002, *supra* note 69, at 22.

272. These criminal and civil representatives serve 164 cities and towns distributed across a nation-wide network of 24 delegations. INFORME-2002, *supra* note 96, at 532-533; INSTITUTO FEDERAL DE DEFENSORÍA PÚBLICA, DELEGACIONES, at <http://www.ifdp.cjf.gob.mx/Delegaciones/default.asp> (last visited Oct. 30, 2003).

**Table 16****Human Resources and Intake at the Instituto Federal de Defensoria Publica  
(and its antecedent, the Unidad de Defensoria del Fuero Federal)**

Year	Number of Staff Lawyers		New Matters Accepted	
	Defensores Públicos	Asesores Jurídicos	Defensores Públicos	Asesores Jurídicos
2003*	545	121	138,150	22,206
2002	509	114	133,143	17,739
2001	488	105	122,372	10,610
2000	447	88	118,020	8,432
1999	472	73	108,909	991
1997	N/A	N/A	46,369	N/A
1996	N/A	N/A	57,083	N/A
1995	N/A	N/A	49,274	N/A

\* Through May 2003

Sources: SCJN Informes, CJF Information Requests

The final – and, perhaps the most important – remedial measure that has been taken with an eye to improving the service delivered by Mexico’s federal public defenders focuses on the nature and quality of the training received by IFDP representatives. The centerpiece of this initiative is the Annual Training and Incentive Plan (*Plan Anual de Capacitación y Estímulos*).<sup>273</sup> Under this program, IFDP lawyers are able to receive ongoing training with respect to subject matter that is closely related to the needs and reality of the citizens they serve including, for example, federal criminal law, indigenous law, administrative law, and *amparo*.<sup>274</sup> While voluntary, program participation is an important factor in the overall process of determining which defenders and counselors advance.<sup>275</sup>

### 3. Pending Developments and Recommended Reforms

The foregoing measures have done much to strengthen the quality and availability of government-supplied legal services in Mexico. This outcome is

273. LFDP, *supra* note 266, art. 36; INFORME-2002, *supra* note 96, at 502.

274. Information regarding programming is available on the IFDP’s recently launched microsite. INSTITUTO FEDERAL DE DEFENSORIA PÚBLICA, CAPACITACIÓN Y ESTÍMULOS, at <http://www.ifdp.cjf.gob.mx/Capacit/plananual.asp> (last visited Jan. 2, 2004).

275. Bases, *supra* note 267, arts. 73-75.



positive in that it is helping to transform the concept of universal access to justice from fiction into reality. Without meaning to minimize the significance of these developments, however, it is important to note that there are four additional measures which could be taken for the purpose of extending the benefits of professional legal representation to an even larger number of citizens. The first of these involves the prohibition of unlicensed – and, hence, unaccountable – legal representatives (i.e., the so called “*coyotes*”). An initiative requiring that representation in federal criminal matters be provided exclusively by licensed attorneys is, to this end, currently pending before the Congress.<sup>276</sup> The second measure entails expanding the provision of subsidized and/or free legal counsel. Actions which Mexico could take in this regard include strengthening the scope and effectiveness of *pro bono publico* services offered by attorneys and/or bar associations,<sup>277</sup> increasing support for the growing network of NGOs which are dedicated to public interest litigation,<sup>278</sup> modifying the social service regime so as to allow for the meaningful involvement of law students in IFDP cases (under the responsible supervision of licensed public defenders),<sup>279</sup> and creating “social justice” clinics within the country’s law schools.<sup>280</sup> The latter two measures

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276. Gaceta 21 November 2001, *supra* note 11. The scope of this initiative is good insofar as it does not preclude the participation of those non-attorney professionals which, on a regulated basis, furnish legal services of a clerical or administrative nature at prices which are accessible to the poor.

277. The legal aid service provided by the BMA is too under-staffed and under-funded to effectively meet the needs of Mexico’s poor. BARRA MEXICANA, COLEGIO DE ABOGADOS, ASOCIACIÓN DE SERVICIOS LEGALES, at <http://www.bma.org.mx/asl/home.htm> (last visited Aug. 1, 2004). The legal aid services available through state and local bar associations tend to be even less effective.

278. Private sector providers and subsidized legal services should, ideally, be spatially distributed in such a way as to be accessible to those areas with the heaviest concentrations of poverty. Mexico has yet to see the establishment of a private sector provider of subsidized legal services on the operational and organizational scale of Chile’s *Fundación Pro Bono*. See Comm. on Inter-Am. Affairs, *Report on the Buenos Aires Conference on Pro Bono and Access to Justice*, 57 REC. ASS’N B. CITY N.Y. 480, 482-83 (2002).

279. Students who elect to conduct their mandatory period of social service with the office of the federal public defender are accorded an auxiliary status and prohibited from intervening in substantive functions. Bases, *supra* note 267, arts. 76-78. This approach contrasts sharply with that taken by Chile, the nation widely considered to be the Latin American leader on the issue of access to justice. In Chile, all new law school graduates are required to give six months of service to a state run *Corporación de Asistencia Judicial*. Working under the supervision of staff attorneys, recent law school graduates handle between 80-110 cases. Michael A. Samway, *Access to Justice: A Study of Legal Assistance Programs for the Poor in Santiago, Chile*, 6 DUKE J. COMP. & INT’L L. 347, 358 (1996).

280. Mexico could, to this end, formally create a status similar to that of the U.S. “student attorney.” These individuals would work under the direct supervision and professional responsibility of attorney-clinical professors. *E.g.* Louisiana Sup. Ct. Rule

would present Mexico with pure upside insofar as they would provide law students with valuable practical experience, benefit the indigent segment of society, and facilitate the development of a culture of “*civismo*.” The third measure consists of simplifying the language and the procedure associated with the matters which most commonly involve Mexico’s poor. Poor, uneducated people can, after all, hardly be expected to embrace much less use a formal system of justice characterized linguistically by diglossic pronouncements, Byzantine procedures, and unfamiliar legitimizing rituals. The final measure which could be taken in the name of enhancing access to justice is to improve the legal literacy of citizens. Success on this point would do much to help avoid the situation where a poor and uneducated citizen fails to assert a right or pursue a valid claim for the simple reason that he or she is unaware of the formal existence and/or actionability of same.

#### **F. Regulatory and Disciplinary Oversight of Judges and Lawyers**

“The legal profession in Mexico might be one of the worst in the world insofar as disciplinary procedures are concerned.”<sup>281</sup>

##### 1. Mexico’s System of Oversight with Respect to the Legal Profession

Historically, scant attention has been paid to the professional conduct of Mexican judges and lawyers. The reasons for this situation are several and include the absence of a competition-based culture of accountability engendered by the executive branch’s long period of domination over the judiciary and the legislature, the persistence of an inadequate regulatory framework, and the non-existence of effective oversight mechanisms. The legacy of this hands off approach to the regulation and oversight of judges and lawyers is manifest in (i) the fact that no federal judge or magistrate has ever been sanctioned for corruption,<sup>282</sup> in spite of the United Nations Special Rapporteur’s recent finding

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XX: Limited Participation of Students in Trial Work, <http://www.lasc.org/rules/html/xx499.htm> (last visited Jan. 5, 2004).

281. UNSR, *supra* note 3, at 25 (relating the observation of the President of the Bar Association of Mexico City).

282. Interview with Lic. Luz del Carmen Herrera Calderon, Executive Secretary for Discipline of the CJF, in Mexico City, Mex. (June 16, 2003); telephone interview with Lic. Adrian de la Rosa Cuevas, Director of the Complaints and Denouncements Unit, Office of the *Contraloría Interna* of the *Tribunal Federal de Justicia Fiscal y Administrativa* (June 6, 2003) (stating that no TFJFA magistrate had been disciplined for corruption between 1970

that an estimated 50%-70% of the federal judiciary is corrupt;<sup>283</sup> (ii) the near absolute lack of demand on the part of Mexican attorneys for legal malpractice insurance coverage, and (iii) the paucity of publicly disseminated information regarding clients' rights (i.e., in their capacity as consumers of legal services) and the disciplinary histories of lawyers and judges (notwithstanding the SEP's obligation to publish information pertaining to developments which bear on the status of an attorney's license).<sup>284</sup>

## 2. Realigning the Regulatory and Disciplinary Framework so as to Be More Responsive to Mexico's Evolving Political, Economic, and Social Reality

There has, over the course of the past ten years, been a growing recognition of the symbiotic relationship between the inculcation of a strong sense of professional responsibility and ethics within the legal community and the attainment of efficiency and certainty in the administration of justice. The measures which Mexico has, consistent with this recognition, introduced for the purpose of better aligning the regulation and oversight of judges and lawyers with the needs of its rapidly evolving social, economic, and political reality are set out in the following sections.

### a. Background Screening

One step that has been taken in furtherance of this realignment involves screening the backgrounds of federal judicial candidates with an eye to identifying (and eliminating from further consideration) those individuals with criminal records.<sup>285</sup> This development is significant given the ease with which individuals were, in the past, nominated for and appointed to judicial posts with little, if any,

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and 2002). *But see* DOS-2002, *supra* note 69, at 24 (reporting that a federal judge had recently been dismissed for corruption).

283. UNSR, *supra* note 3, at 18. Included within this estimate is the case of Ernesto Diaz Infante, the SCJN Minister who in 1988 fled the country after being charged with accepting a half million dollar bribe to pressure a lower court magistrate to release a wealthy Mexico City businessman convicted of raping and murdering a child. Hughes, *supra* note 10, at 10.

284. LRA5C, *supra* note 75, art. 22, fraction VI.

285. LOPJF, *supra* note 90, arts. 106 and 108. An individual cannot become a federal judge or magistrate if he or she has been convicted of an intentional crime for which more than one year in prison was served. The introduction of this provision brings the requirements for federal judges and magistrates into closer alignment with those applicable to SCJN Ministers. MEX. CONST., *supra* note 117, art. 95.

meaningful review of their personal and professional records. This type of screening does not, on the other hand, extend to prospective lawyers. That is, unlike the moral character and fitness evaluation and criminal background check which their counterparts in the U.S. must pass prior to obtaining a law license, no official inquiries are made into the backgrounds of Mexican law students prior to their entry into the profession.

#### b. Asset Monitoring and the Management of Client Funds

The patrimonial declaration process applicable to all public servants - including judges and magistrates - has, in a related vein, been strengthened. Prior to 2000, the patrimonial declarations required of judicial officials were manually prepared, filed, and archived. This system did not rise to the level of its potential given the way it (i) conduced to data modification, error, and/or loss and (ii) complicated the efficient realization of asset monitoring and corruption detection activities. The 2001 launch of the now obligatory *Declaranet* eliminates many of these problems by automating, disintermediating, and centralizing the patrimonial declaration process within the Secretary of the Public Function (*Secretaria de la Función Pública*, or “SFP”).<sup>286</sup> More importantly, in creating an accurate and searchable database, the *Declaranet* system provides government auditors and the public at large with an effective oversight resource. Mexican attorneys in private practice are not, alternatively, required to maintain a separate account (similar to the IOLTA account of a U.S. attorney) for the purpose of preventing the commingling of client and counselor funds. The lack of clear and mandatory requirements in this regard works against the best interests of clients by making it difficult – if not impossible – to detect and/or remedy the misappropriation of funds entrusted to lawyers.

#### c. Transparency

The final measure which bears on the regulation and oversight of judges and lawyers involves the issue of transparency. The rigidly closed information policy maintained by Mexico throughout the better part of its modern history, together with the absence of basic verification and accountability mechanisms, produced a condition of information asymmetry characterized by the distortion of political and economic decision making processes, de minimis levels of citizen participation, and widespread corruption. This situation also effectively provided

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286. See DECLARANET, at <http://www.declaranet.gob.mx> (last visited Aug. 1, 2004).

the government with a crude means of maintaining a paternalistic control over the political life of the country. Alejandro Junco de la Vega, the President and General Director of one of the largest media groups in Mexico, captures the essence of the traditional state of transparency when he notes that Mexican citizens know more about the intimate details of Bill Clinton's sex life than the assassination of Donaldo Colosio.<sup>287</sup>

Things began to change in 2001 when Mexico, as part of its ongoing drive to strengthen public institutions, embraced a principal-agent paradigm<sup>288</sup> for conceptualizing the government-constituent relationship. A key outgrowth of this re-orientation consisted of the promulgation of landmark legislation (the *Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental*, or "LFTAIPG") establishing the federal government's obligation to disclose and the citizenry's right to request public sector information of a non-reserved character.<sup>289</sup> Viewed from the perspective of the PJF, an increased quantity of better quality information can strengthen oversight capabilities, serve as a check against the high index of judicial corruption occasioned by the "absolute secrecy" shrouding the resolution of cases,<sup>290</sup> and breed an understanding of the rule of law that is based, as former U.S. Supreme Court Justice William O. Douglas would say, less on "awe" and more on "confidence."<sup>291</sup> The SCJN directly acknowledges the importance of transparency in strengthening the administration of justice and the protection of individual rights when it states "the duty of providing timely,

287. *Es estado de derecho base para pacto nacional*, INFOSEL FINANCIERO, July 4, 2002, at <http://mx.plus.invertia.com> (last visited Dec. 16, 2003).

288. Joseph E. Stiglitz, *Principal and Agent* (ii), in 4 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 966-72 (John Eatwell et al. eds., 1987).

289. "Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental," D.O., 11 de junio de 2002 [hereinafter LFTAIPG]. This law builds on and gives meaning to the amendment which was made to article 6 of the Mexican Constitution on December 6, 1977. The right of citizens to ask for and obtain information that is not manipulated, incomplete or false was, furthermore, elevated to the level of an individual guarantee by two *jurisprudencia* of the Supreme Court. "Garantías Individuales (Derecho a la Información). Violación Grave Prevista en el Segundo Párrafo del Artículo 97 Constitucional. La Configura el Intento de Lograr la Impunidad de las Autoridades que Actúan dentro de una Cultura del Engaño, de la Maquinación y del Ocultamiento, por Infringir el Artículo 6o También Constitucional," 3 S.J.F. 513 (9a época 1996); "Derecho a la Información. La Suprema Corte Interpreto Originalmente el Artículo 6o. Constitucional como Garantía de Partidos Políticos, Ampliando Posteriormente ese Concepto a Garantía Individual y a Obligación del Estado a Informar Verazmente," 11 S.J.F. 72 (9a época 2000).

290. Ernesto Nuñez, *Piden Apertura Judicial Total*, REFORMA, June 23, 2002, at IA.

291. William O. Douglas, *Stare Decisis*, Eighth Annual Benjamin N. Cardozo Lecture delivered before the Ass'n of the Bar of the City of New York (Apr. 12, 1949), in 4 REC. ASS'N B. CITY N.Y. 31 (1949), reprinted in 49 COLUM. L. REV. 735, 754 (1949).

truthful, and objective information constitutes the most adequate means of ratifying the PJF's commitment to society."<sup>292</sup>

Notwithstanding the positive objectives and aspirations of the LFTAIPG, the combination of a deeply entrenched culture of non-transparency, weak administrative will, deficient solicitation and delivery mechanisms, and opaque physical infrastructure<sup>293</sup> make its implementation within the PJF problematic. PJF information disclosed pursuant to the requirements of Article 7 of the LFTAIPG has, for the most part, been of low quality. Typical information shortcomings include the lack of temporal depth (thus precluding any understanding of how the PJF's performance is changing through time), the over-aggregation of categories or classification concepts (thus impeding a detailed understanding of the PJF's performance with respect to a particular issue), and/or the presentation of information in an unclear format (see Table 17, *infra*, for a summary of obstacles encountered). Consider, in this last connection, the salary and compensation information published on the SCJN's web page in supposed satisfaction of its obligations under article 7 of the LFTAIPG (see Annex 1 for a reproduction of this data in its original form). The coded information contained in this example, considered in conjunction with the way in which the PJF's failure to provide an interpretive key prevents citizens from understanding which figure corresponds to the salary and compensation of a SCJN Minister, tribunal magistrate, or district judge, fails to satisfy the LFTAIPG standard that disclosed information facilitate public "use and comprehension."<sup>294</sup>

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292. INFORME-2001, *supra* note 96, at 13.

293. Judicial transparency is physically compromised by the fact that "hearings take place in busy judicial offices where the public generally must stand at a distance and often cannot hear the proceedings. In some courtrooms, glass or plastic panels have been placed between the tables where the proceedings take place and the public." DOS-2002, *supra* note 69, at 25.

294. LFTAIPG, *supra* note 289, art. 7.

**Table 17****Summary of Access to Information Obstacles**

Obstacle
Information disclosed lacks temporal depth
Information disclosed pursuant to over-aggregated categories and concepts
Information disclosed in coded form
Unidad de Enlace staff unprepared and/or uninformed
Unidad de Enlace staff willing to disregard established procedures in favor of informal solutions
Manual, non-automated solicitation and delivery mechanisms
Absence of obligation to dedicate human resources to task of extracting and furnishing an answer can be used as pretext for effectively withholding information, even if same exists, where (i) form of data sought does not conform to official registration and archiving practices and (ii) requesting party resides far from <i>Unidad de Enlace</i>
Nature and scope of successor agency obligations unclear
Answers delivered in untimely manner
Answers incomplete or otherwise non-responsive

Initial experience with regard to the filing of citizen information requests has not been much more promising. In contrast to the online information solicitation and delivery mechanism used by the dependencies and entities of the Federal Public Administration (*Administración Pública Federal*, or “APF”) and in violation of the LFTAIPG requirement that information be put at the “public’s disposition pursuant to either local or remote means of electronic communication,”<sup>295</sup> information requests pertaining to the PJF (as well as the “autonomous” organs of the Mexican government such as the TFJFA) must be made and retrieved in person at the *Unidad de Enlace* of the appropriate organ or entity.<sup>296</sup> This type of manual approach can, in spite of the fact that the LFTAIPG has now been in effect for several months, be highly disorganized. Officials at the *Tribunal Federal de Justicia Fiscal y Administrativa* did not, for example, even realize that the entity had a *Unidad de Enlace* the first time this author attempted to make an information request. More disturbingly, the use of manual, in-person information solicitation and delivery mechanisms elevates the probability that

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295. *Id.* art. 9.

296. By way of contrast, 13,474 of the 14,578 information requests submitted to the dependencies and entities of the APF between June and September of 2003 arrived via an ICT-based mechanism (i.e., the IFAI’s SISI). INSTITUTO FEDERAL DE ACCESO A LA INFORMACIÓN PÚBLICA, ESTADÍSTICAS DE SOLICITUDES DE INFORMACIÓN: RESUMEN AL 4 DE SEPTIEMBRE DE 2003, at <http://www.ifai.org.mx> (last visited Oct. 23, 2003).

public servants will attempt to dispose of information requests via “informal” or “extra-official” methods – an outcome which is fundamentally inconsistent with both the spirit and terms of the LFTAIPG – or otherwise erect bureaucratic obstacles to the surrender of solicited information. As Table 18, *infra*, indicates with respect to this latter issue, the only proposals received by this author to participate in an “informal” discussion regarding the contents of an information request correspond to those solicitations submitted via non-automated methods. The final problem encountered in connection with the solicitation and/or delivery of information involves the fact that the LFTAIPG and its accompanying *Reglamento* do not obligate the *Unidades de Enlace* of governmental organs or entities to assign human resources to the task of sifting through and extracting information which is technically available, but not exactly in the form requested by an investigator. This shortcoming in the law is problematic insofar as it can, in certain cases (for example, where distance makes it impossible for a requesting party to go, physically, to the administrative headquarters of the government organ or entity in question for the purpose of reviewing files), be used as a pretext to effectively withhold information that could and should otherwise be disclosed.

**Table 18**

**Summary of Information Request Outcomes**

Entity	Folio No.	On-line Sol. Mech.	Date of Request (dd/mm/yyyy)	On-line Del. Mech	Timely Answer	Informal Discussion Suggested	Responsive Answer
SCJN	14	No	01/07/03	Yes	No	No	Partially
SCJN	25	No	03/07/03	Yes	Yes	No	Yes
SCJN	49	No	11/07/03	Yes	Yes	No	Yes
CJF	6	No	07/01/03	No	No	Yes	Partially
CJF	14	No	08/01/03	No	No	Yes	Partially
SEP	65803	Yes	11/08/03	Yes	Yes	No	No*
SEP	65903	Yes	11/08/03	Yes	Yes	No	No*
SEP	66003	Yes	11/08/03	Yes	No	No	No
TFJFA	None	Yes	24/07/03	Yes	No	No	Yes

\* These decisions were overturned on administrative appeal

Solicitation and delivery mechanism issues aside, other information request-related problems which have, to date, been experienced involve the timeliness, accuracy, consistency, and utility of the government’s substantive responses. As Table 17, *supra*, additionally indicates, initial responses were, in five out of nine cases, delivered after the prescribed period. Upon being in receipt of final answers, it subsequently became clear that information provided was, with inappropriate frequency, inconsistent with data published in SCJN annual reports or PJF databases, incomplete, and/or unclear (see Annex 2 for an example of an



official SCJN response containing anomalous, unexplained data). While the fact that most initial responses were not challenged precludes a more definitive statement, it is worth noting that incomplete disclosure motivated by the desire to prevent the PJF from being cast in a less than positive light would have violated the interpretive presumption of openness established by article 6 of the LFTAIPG. Transparency is a relatively novel concept in Mexico and, as the preceding observations suggest, the country, generally, and the government, specifically, are going through an adjustment process characterized by resistance and uncertainty.<sup>297</sup> Former SCJN Minister Juventino V. Castro y Castro put this point into historical perspective by noting that the novelty of the guarantee of information is so new that “it is not possible to find clear and precise antecedents in our history” by which to better understand the issue.<sup>298</sup>

Going forward, there are several steps which the federal government can take to overcome its reluctance to disclose information. The first focuses on transparency at the level of the legal system and involves the PJF’s development and implementation of automated information solicitation mechanisms, as required by the LFTAIPG.<sup>299</sup> The second step centers on transparency at the level of the legal controversy and entails the amplification of the public’s right of access to information regarding *pending* legal matters (save those which have been placed under a gag order or are otherwise reserved).<sup>300</sup> This latter action would, in breaking with Mexico’s contradictory policy of making legal

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297. Ramon Sevilla, *Reconoce IFAI Incertidumbre en Dependencias*, REFORMA, Aug. 13, 2003, at 8A; Hector Guerrero, *Detectan Temor en Apertura*, REFORMA, July 4, 2003, at 24A (quoting SFP Secretary Eduardo Ramos Romero as saying that much of the public sector’s resistance to becoming more transparent is driven by a “fear of the unknown”); Benito Jimenez, *Rechazan Magistrados Abrir el Poder Judicial*, REFORMA, Aug. 28, 2002, at 1A (reporting sentiment of Mexico’s magistrates that judicial resolutions should be made available to the public only after the issuance of a definitive sentence).

298. INFORME-2002, *supra* note 96, at 859.

299. Despite the statements made by representatives of PJF *Unidades de Enlace* to this author regarding their plans to move information solicitation and delivery mechanisms online by the end of 2003, such ICT-based mechanisms are, at the time of this work’s preparation, still unavailable.

300. Article 8 of the LFTAIPG requires that only final PJF decisions be made available to the public. Contrary to the fact that this provision extends to all PJF courts, the only final PJF sentences which are, at present, available to the public pertain to those of the SCJN. In the U.S., by way of contrast, any person is able to request and review the file on any matter (assuming that it has not been sealed, expunged, or otherwise placed under a gag order) – pending or resolved – either in person, at the court clerk’s office, or, in some cases, via the Internet. Chile offers its citizens a degree of access to information regarding pending and/or resolved legal matters similar to that found in the U.S. PODER JUDICIAL, INFORMACIÓN DE CAUSAS, at [http://www.poderjudicial.cl/0.8/info\\_causas/esta4000.php](http://www.poderjudicial.cl/0.8/info_causas/esta4000.php) (last visited Nov. 18, 2004).

proceedings open to the public (in theory),<sup>301</sup> on the one hand, and restricting court room and case file access to parties with an accredited interest, on the other, bring PJF transparency practices into line with those followed by the world's most efficient and rule of law-oriented legal systems. Mexican transparency expert Jorge Islas reinforces this idea when he remarks "if there is a true volition on the part of the PJF, then they will open not only the final sentences but, also, all the writs and other resolutions generated by judges in the course of their work."<sup>302</sup> Such an outcome would strengthen oversight capabilities with respect to the PJF (as well as those lawyers which practice in federal courts) and deepen public understanding of the procedural and substantive dynamics associated with the most controversial issues of the day.<sup>303</sup> Armed with this information, Mexico's citizens and merchants would, finally, be in a better position to (i) assure accountability within the legal sector and (ii) participate in the administrative and legislative debates which bear on their interests as stakeholders in the nation's future. The final step that can be taken consists of the creation of transparency related jurisprudence. An important first step in this direction involves the *tesis relevante* recently emitted by the PJF in support of a citizen's right to request information of a political-electoral nature.<sup>304</sup>

#### d. Accountability

While the foregoing measures have, on balance, positively impacted the regulation and oversight of judges and lawyers, they do not go as far as they could and should in terms of driving meaningful change with respect to the values and practices of the Mexican legal system. Nowhere is this more evident than in the disciplinary framework applicable to members of the legal profession in Mexico.

The current patchwork of laws and regulations which collectively govern the conduct and performance of Mexican judges and lawyers is overly general, impractical, and lacunae-ridden. Mexico's approximately 40,000 attorneys and 801 federal judges and magistrates are, under the present system, criminally or administratively liable for the acts and omissions set forth in Table 19, *infra*.

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301. "Código de Procedimientos Civiles para el Distrito Federal," D.O., 1 de Septiembre de 1932, art. 59.

302. Nuñez, *supra* note 290.

303. See Lederer, *supra* note 222.

304. "Juicio para la Protección de los Derechos Políticos-Electorales del Ciudadano SUP-JCD-041/2004," TRIBUNAL ELECTORAL DEL PODER JUDICIAL DE LA FEDERACIÓN, at <http://www.trife.gob.mx/index.html> (last visited July 25, 2004).

**Table 19****Principal Disciplinary Regulations Applicable to the Federal Judiciary and Lawyers**

Subject	Conduct	Law
Judge	Compromising independence or impartiality of judiciary	Art. 131, LOPJF
Judge	Providing counsel to parties with pending matters	Art. 225, CPF
Judge	Abuse of authority	Art. 8 (I), LFRASP
Judge	Overt acts of corruption	Art. 8 (XII), LFRASP
Judge	Conflict of interest	Arts. 39-42, CFPC; Art. 47 (XIII), LFRSP
Judge	Failure to recuse	Arts. 47-53, CFPC
Judge	Admission of malicious or improper filings	Art. 57, CFPC
Public Defender	Negligent representation	Art. 233, CPF
Law Student/Lawyer	Untitled practice of law	Arts. 29, 30, 62, Ley Reglamentaria 5; <sup>305</sup> Art. 250, CPF
Lawyer	Failure to apply all professional knowledge for benefit of client	Arts. 33, 64, Ley Reglamentaria 5
Lawyer	Failure to guard secret or privileged communications	Art. 36, Ley Reglamentaria 5, Art. 210, CPF
Lawyer	Professional negligence, incompetence	Art. 2615, Código Civil
Lawyer	Conflict of interest	Art. 232, CPF
Lawyer	Making false statement, engaging in dilatory tactics	Art 231, CPF

Consistent with the long-standing tradition of focusing disciplinary efforts on less serious and more easily resolved violations (i.e., in lieu of investigating and prosecuting larger scale and more serious conduct) – and in spite of the substantial

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305. It should be noted that the legal profession does not have an absolute monopoly on the right to practice law in Mexico. In certain cases non-lawyer “gestores” or “personas de confianza” can represent the interests of another. LRA5C, *supra* note 75, arts. 26 and 28.

rhetoric currently heard in Mexico about “reforming the state,” establishing “good government,” reducing corruption, and introducing accountability – little tangible progress has been made over the course of the past eight years in terms of suspending or removing the 50%-70% of the federal judicial population which the United Nations Special Rapporteur identified, on the basis of information supplied by the Mexican legal community, as being corrupt. As Tables 20 and 21, *infra*, show in this regard, the number of judges, magistrates, and other judicial servants which have been suspended or removed for having incurred some type of administrative responsibility has remained relatively static.

**Table 20**

**Disciplinary Actions Involving Federal “Servidores Judiciales,” 1995-2002**

Year	Suspensions	Destitutions	Inhabilitations	Annual Average of Suspensions, Destitutions, and Inhabilitations, Combined
2003	5	5	1	3.6
2002	5	5	2	4
2001	11	2	2	5
2000	5	4	1	3.3
1999	4	2	2	2.6
1998	4	1	2	2.3
1997	6	5	N/A	N/A
1996	8	6	5	6.3
1995	N/A	1	N/A	N/A
Total	48	31	15	N/A

Source: SCJN Informes

**Table 21****Disciplinary Actions Involving Federal Judges and Magistrates for Violations of Article 131 (XI), LOPJF or Article 47, LFRSP, 1995-2002**

Suspensions		Destitutions		Inhabilitations	
Judges	Magistrates	Judges	Magistrates	Judges	Magistrates
18	9	2	5	5	6
Total Suspensions, 1995-2002	25	Total Destitutions, 1995-2002	7	Total Inhabilitations, 1995-2002	11

Source: CJF Information Requests

In a similar vein, Mexican attorneys rarely, if ever, become the object of administrative complaints or legal malpractice actions.<sup>306</sup> While the SEP's effective refusal to deliver information regarding the number of Mexican attorneys that have had their *cedulas profesionales* either suspended or terminated for disciplinary reasons in the years 1970, 1980, 1990, and 2000 precludes the making of a statement of absolute certainty, anecdotal evidence suggesting the accuracy of the preceding assertion abounds. Considering the United Nations Special Rapporteur's observation that the discipline-driven revocation of attorney licenses involves a "complicated procedure" that is "never implemented,"<sup>307</sup> the SEP's unwillingness to deliver *cedula* revocation information likely reflects the simple fact that no attorney licenses were revoked during the targeted years. This inference is borne out by practical experience. After several years of practice as a foreign legal consultant in Mexico, this author has yet to meet or learn of any Mexican attorney who has had his or her license suspended or terminated for disciplinary reasons. By way of sharp contrast – and, using information which could be freely obtained within a matter of minutes over the Internet – 4,269 (out of an active total of 1,231,888) U.S. lawyers were reprimanded, suspended, or disbarred in 2002.<sup>308</sup>

The reasons underlying this situation of weak lawyer accountability are threefold. First, the absence of an obligatory, specific, and publicly-disseminated

306. Rona Mears, *Texas-Mexico Bar Ass'n Code of Ethics for International Lawyers* (Oct. 14, 1999), at [http://www.haynesboone.com/FILES/tbl\\_s12PublicationsHotTopics/PublicationPDF60/298/10\\_14\\_1999\\_Mears.pdf](http://www.haynesboone.com/FILES/tbl_s12PublicationsHotTopics/PublicationPDF60/298/10_14_1999_Mears.pdf) (last visited Nov. 10, 2004) (noting that relatively few malpractice cases have been brought against lawyers for violations of the civil and penal code provisions dealing with the delivery of professional services).

307. UNSR, *supra* note 3, at 26; *Crime in Mexico: Wakey, Wakey! Mexico Reforms its Criminal-Justice System*, *ECONOMIST*, June 28, 2003, at 3 (noting that once a Mexican law student completes the five year program of study, "he is, in effect, beyond scrutiny for the rest of his career").

308. ABA, *SURVEY ON LAWYER DISCIPLINE SYSTEMS* (2002), at <http://www.abanet.org/cpr/discipline/sold/sold-home.html> (last visited Jan. 4, 2004).

set of professional standards and responsibilities makes clients less likely to seek redress for the delivery of poor quality legal services. This fact is, in turn, compounded by the criminal nature of the regulations most relevant to matters of attorney discipline. Faced with the prospect of having to meet the higher burden of persuasion associated with a criminal, as opposed to a civil, action, many clients determine that the benefits to be derived from a malpractice suit are outweighed by considerations of time, cost, and inconvenience. The final reason stems from the non-existence of mandatory bar associations with disciplinary committees empowered to hear and rule on matters of professional misconduct. Unlike the situation in the United States where disciplinary complaints can be quickly and cheaply brought at the administrative level, the only grievance action available in Mexico entails the initiation of a resource-consuming legal proceeding. The latter two factors – really but two sides of the same coin – are, to the extent they leave Mexican citizens inclined to forego valid malpractice claims, contrary to the objectives of strengthening the administration of justice and improving public confidence in the legal system. The unjust nature of this situation is captured by Héctor Fix-Fierro when he states:

The relationship between lawyers and their clients is also quite complex. The most significant problem in the relationship between them is that clients are almost completely at the mercy of their attorneys. There is virtually no control over their professional behavior. They are not accountable to any one and there is practically no defense against a disloyal, negligent, or dishonest lawyer.<sup>309</sup>

### 3. Recommended Reforms

Several measures can be taken, prospectively, to strengthen Mexico's system of judicial and attorney oversight. The first entails decentralizing the regulation of lawyers by transferring the responsibility of administrative and disciplinary oversight from the SEP to an inter-related network of national and state level bar associations (similar in concept to the way that bar associations function as administrative agencies for the judicial branch at the state level in the U.S.).<sup>310</sup> This proposed measure, consistent as it is with both the spirit of

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309. Fix-Fierro, *supra* note 52, at 14.

310. This is not a new concept in Mexico, the same basic idea having been presented at the First Annual Congress of Federal District Judges held in Mexico City on 1999. Though no progress has been made in this regard, the federal judges attending the conference proposed the creation of a decentralized organ with the authority to uphold

“*federalismo*” which currently prevails in Mexico and pan-Latin trends, would transform Mexico’s extant bar associations from voluntary and essentially ceremonious organizations into entities with mandatory memberships and real disciplinary authority.<sup>311</sup> The implementation of this measure could, furthermore, give local consumers of legal services a greater stake in assuring the effective administration of justice at the same time it reduced the spatial scope of the nation-wide license to practice presently conferred upon Mexican lawyers. The latter potential outcome would, inasmuch as it could prevent a Chiapas attorney, for instance, from practicing in Nuevo Leon (without having been first admitted to the state bar or otherwise authorized to appear in a *pro hac vice* type capacity), mitigate against the risk of malpractice or negligence occasioned by attorney ignorance of the way in which the process of political and legislative decentralization is making federal and state laws increasingly dissimilar.

The second measure which can be taken to strengthen the regulatory framework applicable to the conduct and performance of lawyers involves the introduction of a comprehensive and mandatory code of professional responsibility.<sup>312</sup> Such a code could provide clear and pragmatic guidance with respect to conduct which is inadequately addressed at present including, for example, *ex parte* communications, advertising, specialization, client fund management, referrals, fee-splitting, etc. This measure should, importantly, be accompanied by the speedy implementation of the federal judiciary’s recently approved Code of Ethics.<sup>313</sup> Timely action with respect to the latter part of this

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attorney ethics and intervene in the face of abusive litigation tactics. Victor Fuentes, *Inicia segundo Congreso de jueces, REFORMA*, June 3, 2002, at 2A.

311. Pedro J. Mantellini González, *The Role of Bar Associations in Judicial Reform*, in *JUDICIAL REFORM*, *supra* note 16, at 107 (noting Latin American trend towards mandatory bar membership).

312. The Mexican Bar Association does have a comprehensive *Código de Ética Profesional*. Barra Mexicana, Colegio de Abogados, *Código de Ética Profesional*, available at <http://www.bma.org.mx> (last visited Nov. 10, 2004). The value of this code of ethics is, as was the case with the issue of mandatory CLE, diminished by the voluntary nature of membership in the BMA.

313. “Proyecto Definitivo del Código de Ética del Poder Judicial de la Federación,” TRIBUNAL ELECTORAL DEL PODER JUDICIAL DE LA FEDERACIÓN, at [http://www.trife.gob.mx/eventos/etica\\_d.pdf](http://www.trife.gob.mx/eventos/etica_d.pdf) (last visited July 25, 2004). The National Center for State Courts (NCSC) has been working actively with the *Instituto de Estudios Judiciales del Tribunal Superior de Justicia del Distrito Federal* to introduce a code of ethics for federal district judges and magistrates. NCSC, CÓDIGO DE ÉTICA JUDICIAL MODELO PARA LOS TRIBUNALES SUPERIORES DE JUSTICIA ESTATALES, at [http://www.ncsc.com.mx/etica\\_judicial.htm](http://www.ncsc.com.mx/etica_judicial.htm) (last visited Jan. 4, 2004). Mexico’s states have, pursuant to the objectives established at the *Segunda Reunión Nacional de Tribunales de Justicia de los Estados*, also committed to develop and implement a code of ethics. Carlos Mari, *Planean tribunales un código de ética*, *REFORMA*, Apr. 13, 2002, at 1A.

measure is, considered in light of the public's evolving perceptions regarding the role and relevance of Mexico's judges and magistrates, more important than ever.

The final corrective measure which can be taken consists of improving the quantity and quality of information disseminated regarding (i) the professional disciplinary record of judges and lawyers and (ii) the rights of and grievance procedures available to citizen consumers of legal services. Taking U.S. experience again as a point of comparison, this measure could be realized by distributing information concerning judicial discipline,<sup>314</sup> professional license suspensions and terminations (together with a brief yet illustrative account of the facts which gave rise to the disciplinary action),<sup>315</sup> the duties and obligations of attorneys and judges, and grievance-filing procedures via a combination of traditional and virtual public and private sector channels.

The implementation of the foregoing measures could, to the extent they resulted in increased levels of accountability, lead judges and attorneys to conduct their professional affairs with an enhanced degree of caution and care. This outcome could, in turn, improve the administration of justice and strengthen citizen confidence in Mexico's legal system.

### III. CONCLUSION

#### **A. Judicial Reform and Performance Indicators**

Looking back over the twenty-year trajectory of neoliberalism in Mexico, can it be said that second-generation, institutionally-oriented reforms have, on balance, enhanced the country's socio-political and economic development? More narrowly considered, has this reform process brought Mexico closer to realizing Benito Juarez's dream of "re-establishing the rule of law and the prestige of authority?"<sup>316</sup> Along the same line, can it be said that Mexico has succeeded in passing, consistent with the 1928 rhetoric of Plutarco Calles, from its "historic condition of a country of men to that of a nation of men and laws?"<sup>317</sup> Or, is the

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314. Developments in judicial discipline are, for example, tracked in the American Judicature Society's *Judicial Conduct Reporter*, available in print and on line at American Judicature Society, [http://www.ajs.org/ethics/eth\\_reporter\\_home.asp](http://www.ajs.org/ethics/eth_reporter_home.asp).

315. This type of information is regularly presented in state bar association publications. See e.g. State Bar of Texas, *Texas Bar Journal*, available at [http://www.texasbar.com/0Template.cfm?Section=Current\\_Issue&Template=/ContentManagement/ContentDisplay.cfm&ContentID=8033](http://www.texasbar.com/0Template.cfm?Section=Current_Issue&Template=/ContentManagement/ContentDisplay.cfm&ContentID=8033) (last visited July 26, 2004).

316. LESLEY BYRD SIMPSON, *MANY MEXICOS* 270 (4<sup>th</sup> ed., rev. 1966).

317. PRESTON & DILLON, *supra* note 34, at 49.



current round of neoliberal reform destined to go the way of prior efforts at liberalization, the victim of popular dissatisfaction and the intuitive pull of a past which refuses to die?<sup>318</sup> While the multitude of extra-judicial factors which bear on the nation's juridical, political, and economic performance preclude the drawing of direct lines of causality, the answers to these questions are fleshed out – in a general, albeit fact-based, way – in the following analysis of the inter-relationship between Mexico's program of judicial reform and a combination of objective and subjective legal system, socio-political, and economic performance indicators.

### 1. The Legal System

Mexico's program of judicial reform has generated substantial returns with respect to a broad range of substantive, procedural, and administrative issues. PJF budgets are larger than in times past; the administration of justice is more efficient and transparent; judicial selection and training procedures are more rigorous; federal judges and magistrates enjoy a greater degree of professional independence; constitutional standing has been amplified; public access has increased; and ADR is taking root. The apparent success of Mexico's program of judicial reform is highlighted by the SCJN's receipt of the ABA's Rule of Law award.<sup>319</sup>

Notwithstanding the aforementioned advances, however, recently collected legal system performance indicators paint a different, less flattering picture of the way in which Mexico's program of judicial reform has impacted the development-inducing concept of the rule of law. As Tables 22 and 23, *infra*, show, the performance of Mexico's legal system has, considered on both a temporally and spatially comparative basis, either remained stagnant or deteriorated with respect to, *inter alia*, the quality of judicial institutions, public confidence in judicial institutions, the delivery of judicial services, the protection of tangible and intellectual property rights, the amount of time required to enforce a contract and evict a tenant, judicial opacity, perceived law and order risk, and the overall strength of the rule of law. The enduring weakness of Mexico's legal sector – at least as expressed in performance indicators – has, of late, been underscored by the way in which the investigation into former President Luis Echeverría's involvement in past human rights abuses is playing out.<sup>320</sup> The

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318. *Liberalismo Contra Democracia*, *supra* note 118, at 1922-25 (noting prior waves of liberalism in Mexico). DE SOTO, *supra* note 13, at 208 (noting that on at least four occasions since independence in the early 1800s, Latin American nations have "tried to become part of global capitalism and failed").

319. INFORME-2002, *supra* note 96, at 42.

320. Ginger Thompson & Tim Weiner, *When Promises to Bring Justice in Mexico Come to Naught*, N.Y. TIMES, July 26, 2004,

recent (and questionable) refusal of a federal judge to issue a warrant for Echeverría provides, in this connection, a poignant reminder of just how much work remains to be done in terms of creating a legal environment where judges, lawyers, and other interested parties have the freedom to seek redress with respect to complex and/or sensitive issues in an unqualified, apolitical, and impartial manner.

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<http://www.genocidewatch.org/MexicoWhenPromisestoBringJusticeCometoNaught26July2004.htm> (last visited Nov. 10, 2004); Kevin Sullivan, *Mexican Ex-Ruler Avoids Charges*, WASH. POST, July 25, 2004, <http://www.washingtonpost.com> (last visited July 26, 2004) (noting that Mexican judge declined to make public the specific legal reasoning associated with his decision to deny the special prosecutor's warrant request, contrary to customary practice).

**Table 22****Legal Sector Performance Indicators, 1995-2003**

Indicator	1995	1996	2000	2001	2002	2003	Observations
Protection of property rights <sup>321</sup>	2	3	3	3	3	3	Scale ranges from 1 (strong) to 5 (weak)
Judicial Independence <sup>322</sup>	NA	NA	3.62	NA	3.5	NA	Scale ranges from 1 (disagree) to 7 (agree)
Quality courts, law & contracts sub-index <sup>323</sup>	NA	NA	NA	55	62	63	Ranking out of field of 75-102 nations
Rule of law <sup>324</sup>	NA	55.4	45.9	NA	52.1	NA	Scale ranges from 0 (weakest) to 100 (strongest)
Law & order risk <sup>325</sup>	NA	3	NA	NA	2	NA	Scale ranges from 0 (high risk) to 6 (de minimis risk)
Confidence in judicial branch <sup>326</sup>	NA	NA	72.0	NA	81.0	NA	Percentage of respondents with little or no confidence

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321. THE HERITAGE FOUNDATION, INDEX OF ECONOMIC FREEDOM, *at* <http://www.heritage.org/research/features/index/> (last visited Mar. 15, 2004).

322. WORLD ECONOMIC FORUM, GLOBAL COMPETITIVENESS REPORT, *at* <http://www.weforum.org> (last visited Mar. 1, 2004).

323. *Id.*

324. WORLD BANK, GOVERNANCE RESEARCH INDICATORS COUNTRY SNAPSHOT, *at* <http://www.worldbank.org/wbi/governance/bycountry.html> (last visited Mar. 15, 2004).

325. THE PRS GROUP, MEXICO COUNTRY REPORT, *at* <http://www.prsgroup.com> (last visited May 24, 2004).

326. Latinobarómetro, *Informe de Prensa*, *at* <http://www.latinobarometro.org> (last visited Feb. 21, 2004) [hereinafter Latinobarómetro].

**Table 23****Legal Sector Performance Indicators: Mexico, Argentina, Brazil, and Chile**

Indicator	Mx.	Ar.	Br.	CL	Spain	Observations
Number days to enforce contract <sup>327</sup>	283	300	180	200	147	Days
Number days to evict tenant <sup>328</sup>	180	440	120	240	183	Days
Procedural formalism, enforcement of contract <sup>329</sup>	4.71	5.40	3.06	4.57	5.25	Scale ranges from 0 (less procedural formalism) to 7 (greatest procedural formalism)
Procedural formalism, eviction of tenant <sup>330</sup>	4.82	5.49	3.83	4.79	4.81	Scale ranges from 0 (less procedural formalism) to 7 (greatest procedural formalism)
Court system fair & impartial <sup>331</sup>	21.4	21.7	37.1	64.6	28.2	Percentage of respondents that answered always, mostly, or frequently
Court system honest & uncorrupt <sup>332</sup>	13.4	29.8	35.7	69.6	44.1	Percentage of respondents that answered always, mostly, or frequently
Court system able to enforce decisions <sup>333</sup>	21.5	37.9	47.6	69	57.2	Percentage of respondents that answered always, mostly, or frequently
Legal opacity <sup>334</sup>	58	63	59	32	37	Scale ranges from 0 (transparent) to 100 (opaque)
Quality of justice <sup>335</sup>	61	NA	53	52	NA	Percentage of respondents evaluating system as bad or very bad
Strength of rule of law <sup>336</sup>	-.41	.22	-.26	1.19	1.12	Scale -2.5 (weak) to 2.5 (strong)
Confidence in justice system <sup>337</sup>	6	6	1	3	2	Scale ranges from 1 (strong) to 6 (weak)
Confidence in SCJN <sup>338</sup>	61.74	NA	NA	NA	NA	Percentage of respondents with little or no confidence in SCJN

327. SIMEON DJANKOV ET AL., COURTS: THE LEX MUNDI PROJECT 56, 57 (Nat'l Bureau of Econ. Research, Working Paper No. 8890, 2002), [http://www.lexmundi.com/images/lexmundi/PDF/courts\\_nber1.pdf?SnID=549379862](http://www.lexmundi.com/images/lexmundi/PDF/courts_nber1.pdf?SnID=549379862) (last visited Nov. 10, 2004).

328. *Id.*

329. *Id.*

330. *Id.*

331. WORLD BANK, THE WORLD BUSINESS ENVIRONMENT SURVEY (WBES) INTERACTIVE DATASET, at <http://info.worldbank.org/governance/wbes/> (last visited Mar. 15, 2004) [hereinafter WBES].

332. *Id.*

333. *Id.*

334. KURTZMAN GROUP, THE OPACITY INDEX (2004) (legal opacity scores for selected countries), at [http://www.opacity-index.com/ind\\_legal.html](http://www.opacity-index.com/ind_legal.html) (last visited Mar. 15, 2004).

335. CIMA, *Barómetro Iberoamericano de Gobernabilidad 2003*, cited in Pedro Galindo, Subjective Indicators, at <http://www.ceja.cl> (last visited Feb. 14, 2004).

336. UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORTS 38-39 (2002), <http://hdr.undp.org/reports/global/2002/en/pdf/chapterone.pdf> (last visited Mar. 15, 2004) [hereinafter UNDP].

337. WORLD BANK, INVESTMENT CLIMATE ASSESSMENT REPORTS, at <http://http://www.ifc.org/ifcext/economics.nsf/Content/IC-InvestmentClimateAssessments> (last visited Nov. 10, 2004).

These indicators and experiences, in addition to directly contradicting the Fox Administration's assertion that the PJF has, through the "absolute pulchritude" of its operations, regained the confidence of citizens,<sup>339</sup> point to the continued applicability of Ernesto Zedillo's statement that "We do not have the rule of law that is required for Mexico to develop."<sup>340</sup> This perspective has received additional support in the form of the United Nations Special Rapporteur's observation that: "The transformation process . . . has been slow. Impunity and corruption appear to have continued unabated. Whatever the changes and reforms, they are not seen in reality. Public suspicion, distrust, and want of confidence in the institutions of the administration in general and the administration of justice in particular are still apparent."<sup>341</sup>

The principal explanation which has been advanced with regard to the unflattering message conveyed by the preceding legal performance indicators is that it takes time for judicial reforms – particularly those which touch upon concepts and/or practices which are deeply embedded in Mexico's social, historical, and psychological experience – to become reconciled with established customs and, consequently, to produce the desired results. Addressing the importance of patience, Linn Hamnergren observes that judicial reform "does not just happen with the enactment of a law or . . . [the] creation of a new organization."<sup>342</sup> Rather, Hamnergren continues, judicial reforms "take time to perfect and still more time to register in the public view."<sup>343</sup> While this is not an unreasonable thought, the absence of a more apparent rate of progress will, over time, likely lead to increased levels of skepticism with regard to the idea that the rule of law is central to the attainment of Mexico's long term developmental objectives.

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338. ENCUESTA, *supra* note 17, at 14-14.

339. Abel Barajas, *Niega Ejecutivo Politizar Justicia*, EL NORTE, Nov. 28, 2002.

340. Ernesto Zedillo Ponce de Leon, Address at 60<sup>th</sup> Mexican National Banking Convention, Mar. 7, 1997, *cited in* Yamin & Garcia, *supra* note 5, at 467.

341. UNSR, *supra* note 3, at 38.

342. Hamnergren, *supra* note 43.

343. *Id.*

## 2. The Socio-Political Record

“When men demand much of law, when they seek to devolve upon it the whole burden of social control, . . . enforcement of law comes to involve many difficulties.”<sup>344</sup>

Mexico has, as noted throughout this work, moved away from an authoritarian, repressive, hegemonic, non-competitive, elite dominated, and opaque political system (i.e., what Leonardo Arvitzter refers to as “democratic populism”) and towards liberal democratic values and practices. The power of this progression is evident in the way that Mexico’s opposition parties, building on piecemeal gubernatorial and municipality victories in the late-1980s and early to mid-1990s, finally succeeded in gaining, for the first time in over seven decades, control of the Congress (1997) and *Los Pinos* (2000). Other important manifestations of this transformative process include the advances that are now being made in terms of prioritizing democratic principles (Mexico recently, for example, adopted the Inter-American Democratic Charter),<sup>345</sup> maintaining a condition of political plurality, assuring electoral fairness (the Federal Electoral Institute, or “IFE,” for example, did not hesitate to assess a one billion peso fine against the PRI in the wake of the “Pemexgate” scandal),<sup>346</sup> upholding (in a way that is meaningful) the constitutional guarantee of a free press, investigating and rectifying past human rights abuses, establishing more participatory procedures and mechanisms (the IFE and the Federal Institute for Access to Information, or “IFAI,” are, for example, presided over by non-partisan citizen commissioners), and making the federal government more transparent.

Although these positive developments can not, of course, be fully attributed to Mexico’s program of judicial reform, the PJF has been able to use its enhanced level of independence and new resources (including, for example, the *Tribunal Electoral*) for the purpose of illuminating Mexico’s journey through unknown political terrain and bestowing legitimacy on electoral outcomes.<sup>347</sup> As

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344. AUERBACH, *supra* note 13, at 96 (quoting one of the leaders of the legal realist movement, Roscoe Pound).

345. “Inter-American Democratic Charter (*Resolucion de San Jose, Costa Rica*),” Sept. 11, 2001, at [http://www.oas.org/charter/resolucion1\\_en\\_p4.htm](http://www.oas.org/charter/resolucion1_en_p4.htm) (last visited Nov. 18, 2003).

346. JESÚS CERVANTES, RATIFICA EL TEPJF MULTA POR MIL MDP AL PRI, at <http://www.proceso.com.mx> (last visited Mar. 10, 2004).

347. Consider, in this connection, the way in which the electoral tribunal has played a key role in breaking up the time-honored yet anti-democratic practices of the old system.

former SCJN President Genaro David Gongora accurately observes in this regard, “the democratic principles which Mexico has developed over the past decades depend on justice.”<sup>348</sup>

Mexico’s general lack of consensus building experience, considered in conjunction with the diminished nature of the executive branch’s de facto dispute resolution capabilities, has had the effect of transforming the PJF, by default, into *the* primary arbiter of the increasingly complex controversies generated by the government and society.<sup>349</sup> Working with an expanded range of constitutional actions and potential actors, the PJF’s power of judicial review has, in theory, acquired a new level of significance in terms of providing interpretive guidance with respect to issues at the heart of divisive policy debates and maintaining an equilibrrious balance of power at both the local and federal levels of government.<sup>350</sup>

On the basis of the foregoing observations, it would seem that Mexico’s program of judicial reform has made a constructive contribution to the emergence and consolidation of liberal democratic values and practices. This said, however, consideration of the following points suggests, counter-intuitively (as well as against the basic tenets of the so-called “third wave” of democratization), that the move towards democratic values and practices has not necessarily enhanced Mexico’s capacity for development.

The first point which adversely implicates the inter-relationship between judicial reform, democracy, and development involves Mexico’s actual state of political paralysis.<sup>351</sup> While the substitution of the PJF for the executive as the nation’s ultimate dispute resolution provider is desirable, in principle, the relative slowness of the process for creating binding interpretations has prevented the courts from doing a more effective job of breaking up partisan policy impasses in a way that is more commensurate with the immediate needs of society. The negative consequences which flow from this practical reality confound, in turn, the efforts of Mexico’s principal parties to reach either a formal or informal “*pacto*” with respect to the identification, prioritization, and realization of the

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del Toro Huerta, *supra* note 178, at 32 (noting the positive impact of the Electoral Tribunal’s decisions in the “Yucatan” and “Tabasco” cases).

348. INFORME-2001, *supra* note 96, at 15.

349. Examples of controversies that would, in the past, have been quietly resolved through political channels and which are now pending in the federal justice system include the Chiapas rebellion, the UNAM student strike, and the *El Barzon* debtor movement. FIX-FIERRO, *supra* note 39, at 277-78.

350. Presidencia, *supra* note 143 (noting that the PJF’s control of the constitution has reached new levels given its emerging role as the “guardian of equilibrium between the powers of government”).

351. Andres Oppenheimer, *México Tiene un Grave Caso de Parálisis Política*, REFORMA, July 23, 2002, at 22A.

nation's economic, social, and political objectives.<sup>352</sup> Former Fox Administration Chancellor Jorge Castañeda alludes to the political delicacy of this situation when he notes "'We were wrong' to think that the arrival of transparent and democratic government would engender political and social change in the country . . . there are very 'powerful and well-organized forces' that impede the transition and transformation of Mexico."<sup>353</sup> The less than efficient nature of the role which the PJF presently plays in terms of establishing clear parameters for the policy discourse process hinders development insofar as it leaves the fate of socially and commercially beneficial programs and projects to the vagaries of Mexico's ever shifting political landscape. Reflecting on the historic experience of Latin America, the process of economic and political transition (and, hence, development progress) will remain unrealized absent the prior establishment of a formal consensus amongst dominant interest groups.<sup>354</sup>

The second point which raises concerns regarding the goodness of fit between judicial reform, democracy, and development focuses on Mexico's declining voter turn-out rate (see Table 24, *infra*).

**Table 24**

**Voter Turn-Out in Recent Federal Elections, 1994-2003**

% of Population Participating, 1994	% of Population Participating, 2000	% of Population Participating, 2003
77%	64%	42%

Source: IFE;<sup>355</sup> Alejandro Moreno<sup>356</sup>

352. Joel Estudillo Rendon, *Back to the Future: Will the Dark Forces of Mexico's Past Hijack Mexico's Democratic Transition?*, BUS. MEX., Jan. 2002, at 23 (noting that it is "worrisome" that those responsible for Mexico's "political change have not been capable of establishing the basic agreements that would carry through a real transformation of the political regime"); Maribel González, *Evitan dar por hecho democracia en México*, REFORMA, Apr. 17, 2002, at 8A (noting Delal Baer's preoccupation with Mexican government's inability to "generate consensus").

353. Martin Morita, *Ve Castañeda lejos el cambio político*, REFORMA, Mar. 28, 2003, at 24A (reporting comments made in interview by Jorge Castañeda); Guillermo Cantu, *Los grupos de poder se resisten el cambio*, LA CRÓNICA DE HOY, Jan. 7, 2002, at 11.

354. CANSINO, *supra* note 35, at 126.

355. IFE, *Resultados Electorales*, at <http://www.ife.org.mx> (last visited Feb. 12, 2004).

356. ALEJANDRO MORENO, *EL VOTANTE MEXICANO: DEMOCRACIA, ACTITUDES POLÍTICAS, Y CONDUCTA ELECTORAL* 136-55 (2003).



While this trend might be interpreted as a sign of stability and satisfaction with respect to the status quo in other political systems, its persistence in the context of Mexico indicates a weakening of citizen participation, an increased willingness to engage in protest votes, and the onset of the condition of “democracy fatigue”<sup>357</sup> (see Table 25, *infra*). Michael Mazaar gives voice to this sentiment when he writes “The great expectations which accompanied political and economic reform . . . in Mexico . . . have given way to widespread dissatisfaction.”<sup>358</sup>

**Table 25****Satisfaction with Democracy in Mexico**

Survey Year	Percent that Responded “Very” or “Somewhat” Satisfied
2003	18%
2002	18%
2001	26%
2000	37%
1997	45%

Source: Latinobarómetro<sup>359</sup>

These practices and phenomena are – as the recent experiences of Argentina, Bolivia, Ecuador, Paraguay, Venezuela, and Haiti demonstrate<sup>360</sup> – troublesome

357. Andres Oppenheimer, *Latin America Suffering Democratic Fatigue*, MIAMI HERALD, Oct. 18, 2001, at 6A; Andres Oppenheimer, *Is Latin America Ready for Tough Democracy Rules?* MIAMI HERALD, May 13, 2001, at 5A; Jorge Buendia Laredo, *Elecciones A Nadie Le Importan*, PROCESO, June 8, 2003, at 22. Notwithstanding the rising level of voter apathy observed up through the mid-term elections of 2003, the PRI’s high profile bid to wrest control of the state of Yucatan from the Pan in May 2004 resulted in a voter turn-out of approximately 65%. Similarly large voter turn-out levels have been predicted for the other key state level elections that will be held between 2004 and 2006.

358. MICHAEL MAZAAR, *GLOBAL TRENDS 2005*, at 188 (1999). This perspective is reiterated in the findings of a recent UN survey that 53% of Latin Americans would prefer an “autocratic” government if it improved economic conditions. Scott Johnson, *Latin America Lags Behind*, NEWSWEEK LATIN AM. ED., July 5, 2004, at 38.

359. Latinobarómetro, *supra* note 326.

360. Clifford Krauss, *Argentine Leader, His Nation Frayed, Abruptly Resigns*, N. Y. TIMES, Dec. 21, 2001, at 1; Alfredo Riquelme, *Voting for Nobody in Chile’s New Democracy*, NACLA REP. ON AM., May-June 1999, at 31; *Chavez Administers the Last Rites for the Rule of Law*, ECONOMIST, May 15, 2004, at 33 (noting that Chavez’s increased control over the judiciary places him “on the brink of winning absolute power in his country”); Felipe Calderon Hinojosa, *Democracia en América Latina*, REFORMA, Apr. 18, 2002, at 12A (noting disregard of democratic processes in Peru, Ecuador, and Venezuela); *Masivas Protestas Sacuden a Paraguay*, at

insofar as they ultimately (i) work against the attainment of liberally-oriented development goals and (ii) increase the likelihood of civil strife (and, in extreme cases, the partial or complete breakdown of political systems). The specter of democracy fatigue-fueled strife in Mexico reached an alarming level of concern when, at the end of 2002, a group of horseback riding *campesinos* invaded and briefly occupied the federal Congress building at San Lázaro.<sup>361</sup>

The final point noted in this connection deals with the wave of intra-governmental violence which has plagued the Fox Administration. Too often, public servants opt to take matters into their own hands rather than submitting political controversies to Mexico's administrative or legal dispute resolution bodies. Although intra-governmental violence has been a problem in the past (four hundred and eleven politically motivated assassinations were, for example, carried out during the administration of Carlos Salinas de Gortari), the number of politically motivated assassinations recorded to date for the current administration – i.e., that which most clearly symbolizes Mexico's transition to democracy – exceeds the level of intra-system killing observed in prior administrations.<sup>362</sup> This situation, in addition to indicating that Mexico's political institutions and actors may not yet possess the maturity required for the orderly brokering of power and influence which characterizes the daily functioning of more fully developed representative democracies, further impedes the attainment of the country's liberally inspired economic, political, and social goals by fomenting a climate of political fear and instability.<sup>363</sup>

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[http://mexico.indymedia.org/front.php3?article\\_id=2911](http://mexico.indymedia.org/front.php3?article_id=2911) (last visited Aug. 8, 2002) (noting efforts of opposition leader to force resignation of president via initiation of destabilizing protests); Margaret Warner, *Crisis in Haiti* (PBS NewsHour broadcast, Feb. 25, 2004), [http://www.pbs.org/newshour/bb/latin\\_america/jan-june04/haiti\\_2-25.html](http://www.pbs.org/newshour/bb/latin_america/jan-june04/haiti_2-25.html) (last visited Mar. 15, 2004) (noting non-democratic transition of power in Haiti).

361. Daniel Lizarraga, *Atropellan al Congreso*, REFORMA, Dec. 11, 2002, at 1A.

362. Alvaro Delgado, *El Deterioro de las Instituciones*, Mar. 22, 2004, at <http://www.proceso.com.mx/archivomres.html?nid=22664> (last visited Mar. 23, 2004) (noting assassination attempt against Oaxaca governor and high ranking PRI party official Jose Murat); *Servidores Públicos, Bajo la Sombra de la Muerte*, EL NORTE, Mar. 17, 2002 (noting that as of March 2002, twenty-one high level functionaries – on average, one every three weeks – were killed in acts of extreme violence).

363. Andres Oppenheimer, *La Erosión de la Democracia*, EL NORTE, Mar. 1, 2004; Ricardo Pascoe Pierce, *La Crisis de Democracia*, REFORMA, Nov. 27, 2003; Daniel Pensamiento, *Consideran en Riesgo "Madurez Democrática"*, REFORMA, Aug. 11, 2002, at 9A; Maribel González, *Evita Dar por Hecho Democracia en México*, REFORMA, Apr. 17, 2002, at 8A; Fernando Pedrero, *Llaman a Aceptar Juego Democrático*, REFORMA, Apr. 16, 2002, at 5A; Fernando Rivera Calderón, *Dictadura Perfecta v. Democracia Imperfecta*, MILENIO, Aug. 13, 2001, at 24.

It is clear from the foregoing that Mexico's early experience with endogenously-driven democracy has been characterized by political paralysis, voter apathy, and instability. The expansion of the PJJ's capacity for judicial review has not, moreover, had a significantly positive impact on the formation of Mexico's fledgling liberal democratic values and practices. The latter observation provides indirect support for Linn Hammergren's statement that "judicial review, as commonly practiced (in Latin America), may not be an appropriate way to resolve inherently political conflicts."<sup>364</sup> Possibly these outcomes would have been different had, on balance, Mexico's program of judicial reform been more successful in terms of improving the levels of inter-personal trust which are fundamental to building the "deep confidence" in the "benevolent qualities of man" that can, in combination with other factors, enable a nation to push beyond the minimum benchmark of restrictive electoral democracy and towards a more genuine and accountable form of participatory democracy (see Table 26, *infra*).<sup>365</sup>

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364. Hammergren, *supra* note 43.

365. Harold Lasswell, *Democratic Character*, in THE POLITICAL WRITINGS OF HAROLD D. LASSWELL 463, 502 (1951); LEONARDO ARVITZER, DEMOCRACY AND THE PUBLIC SPACE IN LATIN AMERICA 43 (2002).

**Table 26****Inter-Personal Trust in Mexico**

Survey Year	Percent that Responded that It Is Possible to Trust Others
2003	19%
2002	22%
2000	34%
1998	40%
1997	43%

Source: Latinobarómetro<sup>366</sup>

Failing this, however, it is hard to not conclude – at least under the present circumstances - that Mexico’s short- and intermediate-term development interests would have been more effectively served by the continued existence of a top-down political system characterized by less competition and more certainty.<sup>367</sup>

### 3. Economic Performance

The last inter-relationship considered involves that between Mexico’s program of judicial reform and economic performance. Without intending to detract from the varying degrees of success that Mexico has encountered in terms of securing macroeconomic and microeconomic stability,<sup>368</sup> the majority of the indicators set forth in Table 27, *infra*, do not tell the story of an economy that is, as a result of improvements in its legal system, making progress towards (i)

366. Latinobarómetro, *supra* note 326.

367. Luis Rubio, *¿Menos Democracia?*, REFORMA, July 25, 2004, at 17 (noting the growing number of complaints within Mexico regarding the way that the democratic process exacerbates tensions between governmental powers and impedes the taking of urgent decisions).

368. Mexico, in aggregate terms, experienced low inflation, strengthened foreign currency reserves, a shrinking government deficit, and more competitive interest rates (measured as a percentage of GDP) during the period 1994-2003. The government’s solid performance in this regard has been parlayed into an investment grade rating. BANCO DE MÉXICO, INFORMACIÓN FINANCIERA Y ECONÓMICA, at <http://www.banxico.org.mx/eInfoFinanciera/FSinfoFinanciera.html> (last visited Mar. 15, 2004).

assuring an equitable distribution of income;<sup>369</sup> (ii) supplying the capital needed for the expansion of existing or the realization of new projects;<sup>370</sup> (iii) creating enough new jobs to keep pace with the rising number of new entrants into the workforce (and thereby keeping people out of the informal economy); (iv) attracting trade and investment; (v) rising to the challenge of global competition; and (vi) contributing to the health, safety, and welfare of the population.<sup>371</sup>

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369. Enrique Iglesias, *Advantages and Risks of Globalization: The Case of Latin America*, at <http://www.globalpress.org/ingles/Washington/iglesias.html> (last visited July 29, 2002) (pointing out that the phenomenon of globalization has not had “parallel consequences in the distribution of income and in the narrowing of the gap between those at the top and those at the bottom”); Carrie A. Meyer, *Globalization and Inequality in Latin America* (2000), at <http://mason.gmu.edu/~cmeyer/inequality.htm> (last visited July 29, 2002) (noting that all Latin Gini coefficients exceed the global average of .4); Miguel Szekely, *Desigualdad*, NEXOS, Jan. 2002, at 18 (noting that Mexico’s exaggerated levels of income inequality have remained relatively constant since 1992); JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 86 (2002) (noting that the top thirty percent of Mexico’s population has benefited from the liberal economic policies of the Washington consensus at the expense of those at the bottom). The developed world’s failure to make globalization more inclusive, according to Klaus Schwab of the World Economic Forum, could raise the “prospect of a resurgence of the acute social confrontations of the past, magnified at the international level.” Klaus Schwab & Claude Smadja, *Globalization Needs a Human Face*, INT’L HERALD TRIB., Jan. 28, 1999.

370. Johnson, *supra* note 358, at 39 (noting that the deficient state of the region’s economic and regulatory environment has resulted in Latin America’s IPO to population ratio being ten times smaller than the world mean); *An Overlooked Revolution*, ECONOMIST, Aug. 28, 2004, at 33 (noting that the number of new mortgages issued each year by Mexico’s commercial banks decreased from approximately 100,000 in 1994 to 12,000 in 2003).

371. Pablo Hiriart, *Secuestro: Negocio con Mayor Garantía de Éxito en México*, LA CRÓNICA DEL HOY, Jan. 7, 2002, at 4 (noting that between 1980 and 1994 the number of “prolonged” kidnappings in Mexico increased from 140 to 300 per year; in contrast, the number of “express” kidnappings committed each year in Mexico has risen to approximately 10,000); Daniel Millan & Jose Luis Tapia, *Inhiben Secuestros La Inversión, Advierten Embajadores a Creel*, REFORMA, Jan. 8, 2002, at 6A (noting that concern over physical security is adversely impacting foreign investment in Mexico); Francisco Gomez, *Ciudad Juárez, Asesinatos de Mujeres: Mas Crímenes e Impunidad*, EL UNIVERSAL, Dec. 3, 2001 (reporting that over 360 female *maquila* laborers have been either killed or disappeared along the border over the last decade).

**Table 27****Economic Performance Indicators**

Indicator	1994	1998	2000	2001	2002	2003	Observations
GDP per Capita (PPP, US\$) <sup>372</sup>	5,913	7,704	9,023	8,430	9,000 (est.)	NA	None
Gini Index <sup>373</sup>	47.7	51.9	NA	NA	53.1	NA	None
FDI <sup>374</sup>	15,062.7	12,284.8	16,448.7	14,122.2 <sup>375</sup>	14,435.3	10,731.4	Millions of dollars
Portfolio Investment <sup>376</sup>	12,103	3,658	881	-1,500	NA	NA	Millions of dollars
Bank and Non-Bank Lending to Private Sector <sup>377</sup>	62.1	44.2	34.4	31.4	31.8	NA	Percentage of GDP
Total Export of Goods/Services <sup>378</sup>	16.8	31.2	31.0	28.0	27.2	NA	Percentage of GDP
Trade & Investment Readiness <sup>379</sup>	3.94	NA	3.52	NA	3.88	NA	Scale ranges from 0 (not ready) to 5 (ready)
Gross Domestic Savings <sup>380</sup>	17	22	21	18	NA	NA	Percentage of GDP
Open Unemployment <sup>381</sup>	3.7	3.2	2.2	2.4	2.7	3.29	Percentage of economically active population
Maquila Employment <sup>382</sup>	1.39	1.44	1.47	1.41	1.34	1.28	Millions of workers
Informal Economy <sup>383</sup>	NA	57	61.5	61.37	63.02	63.21	Percentage of economically active population
Competitiveness, IMD <sup>384</sup>	NA	NA	14	15	19	24	Ranking out of field of 30 nations
Competitiveness, WEF <sup>385</sup>	NA	32	42	51	45	47	Ranking out of field of 75-102 nations
Presuntos Delincuentes <sup>386</sup>	165,927	181,698	183,977	192,614	NA	NA	Federal/state combined
HDI Rank <sup>387</sup>	NA	49	55	51	54	55	Ranking out of field of 175 nations

372. UNDP, *supra* note 336.

373. *Id.* (values range from 0, representing perfect equality, to 100, representing perfect inequality).

374. SECRETARÍA DE ECONOMÍA, CUADRO NO. 1: INVERSIÓN EXTRANJERA DIRECTA EN MÉXICO, at <http://www.economia.gob.mx/pics/p/p1175/04-JUN.xls> (last visited Nov. 2, 2004).

375. This figure excludes the value of Citibank's purchase of Banamex.

376. WDI, *supra* note 9, at 331.

377. WORLD BANK, Report No. 25858 ME, MEXICO – RURAL FINANCE DEVELOPMENT STRUCTURAL ADJUSTMENT LOAN PROJECT (2003), at <http://www-wds.worldbank.org/> (last visited Nov. 8, 2004).

378. WDI, *supra* note 9, at 219.

379. Jeffrey J. Schott & Shanna Rose, Readiness Indicators for Latin America 1-6 (July 1998) (preliminary draft, on file with author). TIIR values for 2002 were calculated by the author pursuant to the IIE's methodology.

380. WDI, *supra* note 9, at 219.

381. SECRETARÍA DEL TRABAJO Y PREVISION SOCIAL, CUADRO 1.13: PRINCIPIOS INDICADORES DE LA DESOCUPACION ABIERTA, at <http://www.stps.gob.mx> (last visited Mar. 1, 2004). These figures are kept deceptively low by the vibrancy of the informal economy.

382. *Id.*

383. *Id.*

384. INT'L INST. FOR MGMT. DEV., WORLD COMPETITIVENESS YEARBOOK (2004), at <http://www02.imd.ch/wcy> (last visited Mar. 1, 2004).

385. WORLD ECONOMIC FORUM, *supra* note 322.

386. INSTITUTO NACIONAL DE ESTADÍSTICA GEOGRAFÍA E INFORMÁTICA, ESTADÍSTICAS JUDICIALES EN MATERIAL PENAL: CUADERNO NUM. at 10-19 (2002).

387. UNDP, *supra* note 336.

Notwithstanding the fact that these indicators can be influenced by a complex set of extra-judicial factors (including, for example, the poor quality of public education and health care, the red tape-ridden nature of the regulatory environment, the entry of an export-oriented China into the WTO, the building pressure within the U.S. to remedy its trade deficit, the weakening U.S. dollar, the strong peso, and the slowdown of the global economy),<sup>388</sup> Mexico's basic economic performance data do not appear to lend much support to the conventional wisdom that strengthened judicial institutions are an indispensable part of spurring economic growth, stability, and development. If anything, the elevated levels of popular discontent associated with the country's lackluster record of economic performance have intensified internal doubts regarding the continued viability – and, more fundamentally, the desirability – of free market policies in Mexico.<sup>389</sup>

### **B. At the Crossroads of the Past and the Future**

“Every national history has its own script, but few have turned so consistently towards the past as has Mexico. Scenes have been reactivated over and over again.”<sup>390</sup>

Mexico, more so than at any other time in its recent history, finds itself being pulled apart by ideologically opposed political and economic forces. On one end of the ideological continuum are the proponents of Mexico's current liberal economic and political policies. Believing that the short-term deprivation and dislocation caused by Mexico's version of “socially responsible free market capitalism”<sup>391</sup> will eventually give way to long-term gain, this group advocates additional reform, increased integration with the world economy, and a forward-looking “stay the course” approach. On the other end of the continuum are the diverse groups (including, for example, environmentalists, farmers, labor, small business owners, cultural preservationists, intellectuals, etc.) which are united by their opposition to liberalism. Pointing to the rising popularity of left-of-center politicians in other parts of Latin America (consider, for example, Brazil's Lula,

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388. LESTER THUROW, *FORTUNE FAVORS THE BOLD* 238-44 (2003).

389. This outcome is consistent with Peruvian economist Hernando De Soto's observation that “[a]dvocates of capitalism are intellectually on the retreat. Ascendant just a decade ago, they are increasingly viewed as apologists for the miseries and injustices that still impact the majority of the people.” DE SOTO, *supra* note 13, at 209.

390. ENRIQUE KRAUZE, *MEXICO: BIOGRAPHY OF POWER* 792 (1997).

391. *Continuara Modelo de Libre Mercado con Responsabilidad Social*, NOTIMEX, Aug. 2, 2004, at <http://www.notimex.com.mx/> (last visited Aug. 12, 2004).

Argentina's Kirschner, Chile's Lagos, Ecuador's Lucio Gutierrez, Peru's Toledo, and Venezuela's Chavez) and the eroding condition of Mexico's political sovereignty, commercial and financial autonomy (particularly in connection with what is perceived to be the "de-nationalization" of business and finance in Mexico),<sup>392</sup> cultural identity, and social stability,<sup>393</sup> these groups have rallied around leaders whose style and political rhetoric harkens back, like so many other aspects of life in Mexico, to its "developmental state" past.<sup>394</sup> The stakes in this struggle between the forces of right and left, open and closed, change and inertia, and past and present are nothing less than the freedom and the power to shape Mexico's future both in terms of internal development and external integration.

Institutional reform, generally, and judicial reform, specifically, can still play a decisive role in shifting the balance of ideological consensus in one direction or the other. As Stephen Johnson, a senior analyst at the Heritage Foundation notes, initial efforts at cleaning up electoral processes, replacing import substitution practices with open markets and freer trade, privatizing inefficient state industries, and introducing solid macroeconomic fundamentals will reach a point of diminishing returns absent the further development of

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392. Joseph Stiglitz, *The Broken Promise of NAFTA*, N.Y. TIMES, Jan. 6, 2004, at 22.  
393. The deterioration of Mexico's social fabric is evident in the large number of resistance groups which operate throughout the country. *Alertan Sobre Riesgo de Ingobernabilidad*, REFORMA, Oct. 4, 2002, at 4A (noting challenge posed to government by the *Frente Popular Revolucionario* and the *ejidatarios* at Atenco); Jorge Fernandez Mendez, *La Guerrilla Mala*, MILENIO, Aug. 13, 2001, at 8; Jorge Torres Jimenez, *La Vida en la Clandestinidad*, CAMBIO, Nov. 25, 2001, at 40; Enrique Moran Monroy, *Guerrilla en el DF*, IMPACTO, Aug. 12, 2001, at 20; Zeferino Garcia Sainz, *El México Bronco: 81 Grupos Armados*, LA EXTRA, Aug. 19-25, 2001, at 1; *Reaparece el EPR en Guerrero*, EL FINANCIERO, Nov. 12, 2001, at 83; Joshua Paulson, *Rural Rebellion in Southern Mexico*, NACLA REP. ON AM., Mar.-Apr. 2000, at 26; Linda Robinson & Lucy Conger, *Mexico's New Revolution*, U.S. NEWS & WORLD REP., Aug. 15, 1994, at 40 (noting that the Mexican Attorney general is monitoring guerilla bands in ten states including Guerrero, Hidalgo, Morelos, Michoacan, and Chiapas).

394. PRESTON & DILLON, *supra* note 34, at 3-6 (noting Mexico's fear that the absence of authoritarian leadership will lead to the destruction of the nation at the hands of an unruly populace); Andres Oppenheimer, *¿Se viene la ola "Neopopulista"?*, REFORMA, Jan. 8, 2002, at 22 [hereinafter *Neopopulista*]; John Ward Anderson, *Mexico's Dinosaurs Resurgent*, WASH. POST FOREIGN SERVICE, May 23, 2000, at A23; Elliot Abrams, *How To Avoid the Return of Latin Populism*, WALL ST. J., May 21, 1993, at 16 (stating that as long as large portions of Latin America's population continue to live in poverty, the pull of populist rhetoric is far from dead); *Dinosaurs on the Prowl Again*, ECONOMIST, Aug. 17, 2004, at 29 (noting that the PRI's old patronage system could displace Mexico's still uncertain democracy).



confidence-inspiring public institutions and the rule of law.<sup>395</sup> The World Bank recently reached the same conclusion. As William Maloney and Luis Serven write, “free trade alone is not enough.” The benefits of free trade will continue to be sub-optimal “without significant policy and institutional reforms.”<sup>396</sup>

If, in this regard, Mexico is to successfully ensure the continuity of policies geared towards the operation of free markets and participatory democracy, it is imperative that more be done to:

- Modernize its framework of substantive laws (particularly with respect to commerce, energy, intellectual property, taxes, and criminal activity) in a way that more effectively responds to Mexico’s contemporary reality<sup>397</sup>
- Streamline legal and administrative procedures so as to make the administration of justice and the enforcement of judgments less formalistic and more efficient
- Enhance the functioning of the public registries of commerce and property with an eye to making it easier to leverage and/or foreclose on property
- Raise the level of confidence which citizens and investors have in the country’s legal institutions and actors by closing the gap between the law as it is written and practiced
- Ensure that externally generated or otherwise “borrowed” judicial reform proposals are evaluated in light of and compatible with Mexico’s unique historical, social, and political context.<sup>398</sup> Being attentive to this point will help avoid the parochialism and mismatching of ambition and ability which resulted in the ultimately unsuccessful experience of the current

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395. Stephen Johnson, *Is Neoliberalism Dead in Latin America?*, HERITAGE FOUND., Sept. 4, 2003, at <http://www.heritage.org/Research/LatinAmerica/wm332.cfm> (last visited Feb. 24, 2004).

396. William F. Maloney & Luis Serven, *Lessons from NAFTA for Latin America & the Caribbean: A Summary of Research Findings*, at <http://www.worldbank.org> (last visited Mar. 1, 2004).

397. Presidencia, *supra* note 143 (noting need for the “profound revision and modernization of the legal framework so as to be able to respond in an opportune manner to new economic dynamics and international standards in commerce and technology”).

398. Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History, and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 844 (2003).

rule of law promotion field's predecessor, the law and development movement of the 1960s and 1970s.<sup>399</sup>

- Expand the infrastructure and resources of the PJF, thereby fortifying access to justice and judicial independence
- Strengthen state courts by improving the training and independence of justices of the peace, judges, and magistrates and, more delicately, providing for the creation of state level jurisprudence
- Promote the use of mediation and arbitration amongst both legal professionals and citizen-consumers of legal services in a way that does not translate into additional expense or lost time for those with limited resources
- Expand the availability of (or innovate, if necessary) simplified dispute resolution mechanisms and/or services which meet the temporal and financial needs of those citizens and small-to-medium-sized merchants whose reality revolves around the informal economy
- Accomplish further decentralization of the justice system by shifting attorney licensing and oversight functions to the states
- Augment legal sector transparency and accountability
- Address the problem of non-compliance with legal rules by adopting a strategy of leadership through example
- Reform the "old" mentalities pertaining to judges, lawyers, and citizen-consumers so that they align with the justice system's updated mission and structure<sup>400</sup>
- Harness the public education system for the purpose of inculcating *civismo* and legal literacy<sup>401</sup>
- Seek out, take into consideration, and act upon the concerns, perceptions, and needs of citizen-consumers of legal services. The implementation of this measure would enable citizens to

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399. YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES 4 (2002).

400. Faraway, *supra* note 7, at 317.

401. The SFP, SEP, and ANUIES have collaborated on the creation and impartation of *civismo*-oriented educational content. Hanako Taniguchi, *Definen línea de educación cívica*, REFORMA, Apr. 15, 2002, at 8A. Similar programs are being set up and directed towards Mexico's primary education system. Ramón Sevilla, *Impulsan valores en educación básica*, REFORMA, May 21, 2003, at 20A (noting launch of "Programa Integral de Formación Cívica y Ética para la Educación Primaria").

take a more direct stake in shaping and monitoring the justice system.<sup>402</sup>

- Learn from the judicial reform experience of similarly situated nations
- Systematically record observations with respect to specific judicial reform issues so as to be able to critically evaluate the impact of past measures<sup>403</sup> and, going forward, formulate legal sector policy on the strength of both conventional wisdom and empirical data<sup>404</sup>
- Build consensus for reform amongst key members of all three branches of government, bar associations, chambers of commerce, and civil society. Success on this point would facilitate the formulation and implementation of specific initiatives.<sup>405</sup>

These reforms should, it is additionally submitted, endeavor to refocus the fundamental scope of Mexico's program of judicial reform so as to include not just judges, court administrators, ADR providers, and public defenders (that is, the primary representatives of the traditional reform axes of "judicial independence," "access to justice," and "administrative efficiency"), but also practitioners, law school faculty, law students, bar associations, NGOs, and citizen-consumers of legal services. The logic underlying this much needed change in orientation is simple: because the problems which undermine the rule of law and the administration of justice in Mexico cannot be attributed to any single sub-group within the overall legal community (say, for example, judges), future reform initiatives should be comprehensive in terms of both perspective and impact. A chain is, after all, only as strong as its weakest link. Sergio López-Ayllón and Héctor Fix-Fierro reinforce this point when they write "[J]udicial reform cannot

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402. DAKOLIAS, *supra* note 21, at 65 (recommending adoption of a consensus-based approach to judicial reform).

403. Christina Biebesheimer, *Justice Reform in Latin America and the Caribbean: The IDB Perspective*, in Domingo & Sieder, *supra* note 36, at 109 (noting the way in which the evaluation of judicial reform measures contributes to the attainment of long term development objectives).

404. THOMAS CAROTHERS, PROMOTING THE RULE OF LAW ABROAD: THE PROBLEM OF KNOWLEDGE 5, (Carnegie Endowment for Int'l Peace, Working Paper No. 34, Jan. 2003) (noting that current rule of law promotion activities suffer from an "apparent lack of knowledge at many levels of conception, preparation, and evaluation").

405. Harry Blair & Garry Hansen, *Weighing in on the Scales of Justice: Strategic Approaches for Donor Supported Rule of Law Programs*, USAID PROGRAM AND OPERATION ASSESSMENT REPORT, Feb. 1994, at 7 (on file with author).

be accomplished without comparable transformations in legal education, the legal profession, and legal culture.”<sup>406</sup>

Should, alternatively, Mexico’s efforts at institutional and judicial reform fall short of the heightened expectations they have, to date, generated, the present round of liberalism will, like those which took place in the mid-1800s and early-1900s, likely collapse under the weight of the popular discontent associated with the economic and political status quo, the resurgent appeal of populist, left-of-center leaders such as Manuel Lopez Obrador and Cuahatemoc Cardenas, and the country’s inherent aversion to the instability which historically accompanies periods of transition.<sup>407</sup> As one commentator recently observed in this regard, the failure of the current effort at reform could – in keeping with Carlos Fuente’s thoughts regarding the simultaneity of past and present in Mexico<sup>408</sup> – unleash a counter-reaction to the country’s recent policies of political and economic modernization wherein the “opposition’s message from the past will become a roadmap to the future.”<sup>409</sup> While a reversion to more traditional practices, policies, and perspectives may ultimately succeed in preserving national sovereignty, bringing about the re-nationalization of commerce and finance, safeguarding Mexico’s rich cultural identity, restoring fallen standards of living, and – by extension – encouraging those developing nations which have not already done so to make a definitive break with the hegemonic policy prescriptions of the Washington consensus,<sup>410</sup> the vacuum engendered by such an

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406. Faraway, *supra* note 7, at 317.

407. *Encuesta/Alcanza Aprobación Record*, REFORMA, May 6, 2003, at 1A (noting that the record breaking level of popularity enjoyed by Mexico City’s left-of-center mayor Andres Manuel Lopez Obrador could help him take the presidency in 2006); Douglas W. Payne, *Between Chile and Chiapas: Democracy and Economic Reform May be Short Lived If They Do Little Beyond Perpetuating the Perks of the Ruling Class in Latin Societies*, U.S./LATIN TRADE, Dec. 1994, at 96.

408. The simultaneity of past and present is, according to Fuentes, a reflection of the way in which so many of Mexico’s historical periods and projects have been left unfinished. “Among us,” Fuentes writes, “there is no single time: all of our times are alive.” PRESTON & DILLON, *supra* note 34, at 32.

409. *Mexico Adrift*, N.Y. TIMES, Dec. 28, 2003, at 8.

410. An increasing number of Latin American nations have either challenged or rejected neoliberalism and the Washington consensus. Andres Oppenheimer, *House Vote Creates ‘New Momentum’ for U.S.-Latin Ties*, MIAMI HERALD, Dec. 9, 2001, at 12A (noting “increasingly anti-free trade atmosphere” in Brazil); *Neopopulista*, *supra* note 394 (noting, in the wake of Argentina’s economic collapse, a growing rejection of the neoliberal model throughout the Americas); Juan Forero, *Still Poor, Latin Americans Protest Push for Open Markets*, <http://www.nytimes.com/2002/01/19/international/Americas/19PERU.html> (last visited Nov. 5, 2004) (noting that 63% of respondents in a 17 country Inter-American Development Bank survey stated that privatization had not been beneficial); Stephen

ideological dislocation could give rise to a short- to intermediate-term period of re-orientation characterized by rapid disinvestment, political and economic instability, spiraling violence and opportunism, and diminished interest in regional integration under the FTAA.

The making of predictions as to the way in which this ideological tension will be resolved is, understandably, beyond the scope of the present work. This said, however, it is reasonable to think that whatever the decision that Mexico makes, it will have far-reaching repercussions both for its own future peace and prosperity, as well as that of the developing world.

#### IV. ANNEXES

##### Annex 1

##### Example of PJF Information Disclosure Shortcoming

The following content is posted on the web page of the SCJN pursuant to its obligation under article 7 of the LFTAIPG to disclose the annual salary levels of judicial officials. The information is of limited usefulness, however, insofar as it is presented in accordance with a coded “rango” (i.e., a position range) for which no interpretive key is provided.

#### PODER JUDICIAL

#### SUPREMA CORTE DE JUSTICIA DE LA NACION

#### **ACUERDO por el que se autoriza la publicación de los sueldos, prestaciones y demás beneficios de los servidores públicos del Poder Judicial de la Federación.**

Al margen un sello con el Escudo Nacional, que dice: Estados Unidos Mexicanos.- Poder Judicial de la Federación.

ACUERDO POR EL QUE SE AUTORIZA LA PUBLICACION EN EL DIARIO OFICIAL DE LA FEDERACION DE LOS SUELDOS, PRESTACIONES Y DEMAS BENEFICIOS DE LOS SERVIDORES PUBLICOS DEL PODER JUDICIAL DE LA FEDERACION.

#### **BASES**

**PRIMERA.-** Que la Suprema Corte de Justicia de la Nación, el Consejo de la Judicatura Federal y el Tribunal Electoral, integrantes del Poder Judicial de la Federación, en cumplimiento a lo dispuesto por el artículo 45 del Decreto del Presupuesto de Egresos de la Federación para el Ejercicio Fiscal del 2003, publicado en el **Diario Oficial de la Federación** el día 30 de diciembre de 2002, publica el total de percepciones netas de los servidores públicos de mandos medios y superiores, dentro de los tabuladores y normatividad establecida por los Organos de Gobierno competentes.

**SEGUNDA.-** Para los efectos del punto de acuerdo anterior, el total de percepciones netas mensuales se sujetará al tabulador siguiente:

NIVEL SALARIAL	REMUNERACION NETA MENSUAL (SUELDO BASE Y COMP. GARANTIZADA)	
	MINIMO	MAXIMO
28 Y RANGOS HOMOLOGOS	12,984.72	25,989.40
29 Y RANGOS HOMOLOGOS	18,769.19	43,541.30
30, 31, 32 Y RANGOS HOMOLOGOS	25,787.06	85,858.60
33A, 33B, 33C Y RANGOS HOMOLOGOS	43,364.20	112,864.70
33E, 33F, 33J, 33H, 34 Y RANGOS HOMOLOGOS	53,054.23	139,834.50
35 Y RANGOS HOMOLOGOS	85,638.05	145,355.51
36 Y RANGOS HOMOLOGOS	97,060.11	151,893.63
. 37 Y RANGOS HOMOLOGOS	NO APLICABLE	151,893.63

Source: Diario Oficial, 26 de Febrero de 2003

### Example of Unclear PJF Response to LFTAIPG Information Request

This SCJN response to a request for information regarding the PJF's budget contained no accompanying explanation for the disproportionately large size of the 1990 figure.

SUPREMA CORTE DE LA NACION  
OFICIALIA MAYOR  
SECRETARIA TECNICO JURIDICO  
DIRECCION GENERAL DE DIFUSION  
UNIDAD DE ENLACE

OFICIO NO. DGD/UE-A0052003  
México, D.F., a 16 de Julio de 2003  
C. ROBERT KOSSICK M.

P R E S E N T E:

En términos de lo dispuesto en el artículo 28 del Acuerdo General Plenario 9/2003 y en relación con su solicitud presentada ante este Módulo de Acceso el 17 de junio de 2003 le comunico que conforme a la clasificación realizada por la Unidad Departamental competente, la Dirección General de Presupuesto y Contabilidad, la información relativa al presupuesto de la Suprema Corte de Justicia de la Nación por los años de 1970, 1980, 1990 y 2000, es pública.

En ese tenor, atendiendo a lo dispuesto en los artículos 24 y 25 del mencionado Acuerdo General y a lo manifestado en su escrito antes referido, en el que señaló como modalidad de entrega, entre otras, la prevista en la fracción segunda del último numeral citado, por medio de esta comunicación electrónica le informo el contenido de la respuesta emitida por la Unidad Departamental correspondiente:

AÑO	PRESUPUESTO
1970	\$ 109,736,000
1980	\$ 1,000,017,000
1990	\$ 257,000,000,000
2000	\$ 8,075,766,038

Sin más por el momento, esperamos que la información otorgada sea de su utilidad.

A t e n t a m e n t e  
Ing. Víctor Colín Gudiño  
Titular de la Unidad

