

The Role of the United States in the Promotion of Criminal Reform in Mexico: the Case of Law Schools

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Introduction

Since the transitions to democracy in Latin America several international or government agencies have promoted judicial reforms in the region. Improving the rule of law was crucial for the stability of democracy and the certainty of a market-oriented economy. International organizations such as the Friedrich Ebert Foundation, the World Bank or government agencies such as USAID or the European Commission invested several resources to reform the justice system. International aid was directed toward changing the legal system (from mixed-inquisitorial to accusatorial), granting independence to Supreme Courts, creating constitutional courts, public defender offices, professionalizing judges, prosecutors, the police, as well as other members of the justice-sector complex. The United States' (US) role in promoting these reforms in Latin American countries was very active.

For the case of Mexico, the aid provided by the US to the justice-sector only increased in 2008 with the implementation of the Mérida Initiative, a regional security strategy of cooperation. Previously, aid for a judicial reform was rather inexistent and the assistance was mostly concentrated on counternarcotic activities. With the Mérida Initiative in 2008 the US Congress started to appropriate funds to Mexico. To date circa 2.3 billion dollars had been canalized to Mexico². Initially, the Mérida Initiative focused on financing equipment, technology and military and police training to foster the fight against organized crime and drug-trafficking. Since 2010, however, the Mérida Initiative expanded its scope in Mexico and now focuses in four areas: “1) disrupting organized criminal groups; 2) institutionalizing the rule of law; 3) building a 21st century border; and 4) building strong and resilient communities”³. In this work, we focus on the second one: institutionalizing the rule of law.

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² US Embassy, “Fact Sheet The Merida Initiative - An Overview”, 2014, online document: <http://mexico.usembassy.gov/eng/ataglance/merida-initiative.html> [Access: January 23, 2015]

³ Ribando Seelke, “Supporting Criminal Justice System Reform in Mexico: The U.S. Role”, *Congressional Research Service*, 2013, p. 12.

In 2008 Mexico passed a landmark reform to the criminal justice system. This reform aimed to change the mixed-inquisitorial legal system into an adversarial one, and was designed to be implemented nationwide by 2016. Under the area “Institutionalizing the rule of law” of the Mérida Initiative, the US government has directed funds to implement the justice sector reform. How is the implementation of this reform working? What are the main obstacles for the implementation? To answer this question one needs to focus in two types of actors. On the one hand, justice-sector actors, that is, judges, prosecutors, police officers and defense attorneys; and, on the other hand, societal actors, especially, law faculty members and users (victims and defendants) of the criminal justice system.

In this paper, we explore the role played by societal actors, in particular, law faculty members in facilitating the implementation of the 2008 criminal justice reform at the state level through the change of law schools' curricula, the training of professors and the development of infrastructure for the adversarial criminal system. We argue that law faculty members' commitment contributes to set a steady base for the success of the new accusatorial system. We use the cases of different law schools in the states of Chihuahua, State of Mexico and Jalisco to provide evidence regarding the commitment of these societal actors with the reform and how collaboration with United States might be conducted in the future. We selected these states based on when they introduced *de jure* the new adversarial system and how they have progressed in their status implementation. Chihuahua and the State of Mexico adopted the adversarial system in 2006 and 2009 respectively⁴. While Chihuahua is currently the leading state in reform implementation advancement, the State of Mexico remained behind at the introduction phase: state representatives changed the law but the system still does not work in all judicial districts and there are considerable differences in the degree of progress shown by the various institutions of the justice-sector (police, prosecutor's office, public defender's office and the judiciary), as well as insufficient training or budget to implement the reform⁵. Jalisco changed its laws to allow the introduction of the criminal reform only two years before the 2016 constitutional deadline established by the federal authorities. To date,

⁴ Zepeda Lecuona, Guillermo, “Informe General Seguimiento del Proceso de Implementación de la Reforma Procesal Penal en México. Estados de Chihuahua, Estado de México, Morelos, Oaxaca y Zacatecas, 2007 – 2011” USAID-Ceja Americas, 2012.

⁵ CIDAC, “Hallazgos sobre los avances en la implementación del Nuevo sistema de justicia penal en México”, CIDAC/USAID, 2013.

its status implementation is precarious: the reform operates in only one judicial district, the training is not extended to all justice-sector operators and the budget assigned to further advance the reform implementation is insufficient and the information systems do not perform well⁶.

This chapter is organized as follows. In the next section, we present a brief context of the promotion of justice-sector reform in Mexico with emphasis on the Mérida Initiative. The third part reviews the literature that help us to frame our cases. Borrowing from John Searle's (1997) proposal about the creation of "institutional facts", we argue that the *commitment* of actors is crucial for the reform to be implemented successfully. In the fourth section, we present evidence regarding the commitment of law faculty members in nine universities across three Mexican states and argue how it might affect the implementation of the criminal justice reform. Finally, we close with a conclusion about how future cooperation between Mexico and the US, by supporting the transformation of law schools, might bolster the implementation of the adversarial criminal reform in Mexico.

Promoting Justice Reform: The Mérida Initiative

The bilateral relationship between Mexico and the United States has traditionally encompassed a broad set of subjects such as economy, migration, education and security. Both countries' government authorities agree on the great importance that represent—for their foreign political agendas—the bilateral relation: for Mexico the United States is deemed to be the most important relation, while for the United States, Mexico is “one of the most important partners”⁷. Mexico and the United States have a long-standing relation in the security area, in particular, regarding the drug-trafficking field (operations to reduce the production of drugs in Mexican soil, or to detect illegal drugs in vehicles crossing the border). The parameters of this relation have been always set by the United States—whose interest in controlling drugs date back to 1930, with an interlude in World War II. Proposals of cooperation, however, arrived in Mexico more as political pressures. For instance drug certifications were the primary tool to induce change, while other efforts such as funding for law

⁶ *Ibid*

⁷ US Senate, “Judicial and Police Reforms in Mexico: Essential Building Blocks for a Lawful Society”, 2012, online document: <http://www.foreign.senate.gov/imo/media/doc/74912.pdf> [Access: January 20, 2015]

enforcement activities or training to strengthen justice-sector institutions was lacking.⁸ Several times the US government seemed too intrusive to the Mexican authorities, especially because drug production, violence, police and political corruption was considered a national sovereignty issue to be solved by national politics. This holds a part of truth. An uncontested fact, however, was that politicians in Mexico (especially under the PRI —Institutional Revolutionary Party) never took seriously drug-related problems⁹, as well as a justice apparatus incapable of delivering justice. As a matter of fact, government authorities, and also many analysts, were of the idea that the bilateral relationship should concentrate on other —softer— trade issues¹⁰, so to turn less problematic the relationship between the two countries.

Since 2001, however, security —in particular national security— turned into a top priority for the United States. This had several implications for Mexico, because it shares a 2,000 miles border with the United States. Since then, illegal migration, organized crime and drug-trafficking have been stressed by US government authorities to pose severe threats to their national security¹¹. This perception increased due to an internal strife in Mexico that had had dramatically escalated between criminal organizations under Vicente Fox (2000-2006) and between the government and criminal organizations under Felipe Calderón administration (2006-2012). Especially in this last period, security collapsed into criminal violence.

Within this context, in 2007 the then presidents of Mexico and the United States, Calderón and George W. Bush (2000-2008), launched the Mérida Initiative, a partnership aimed to enhance the cooperation on anticrime assistance, military and police training. The initiative was approved and US Congress appropriated funds in fiscal year 2008. In the beginning, the Merida Initiative was “designed to develop a

⁸ According to a Report of the United States Government Accountability Office (GAO) funds provided by US Government for law enforcement activities were about \$9 million per year (around \$57 million from 2000 to 2006), while after Mérida Initiative agreement this amount increased to \$400 millions only for fiscal year 2008, GAO, 2010, p. 2.

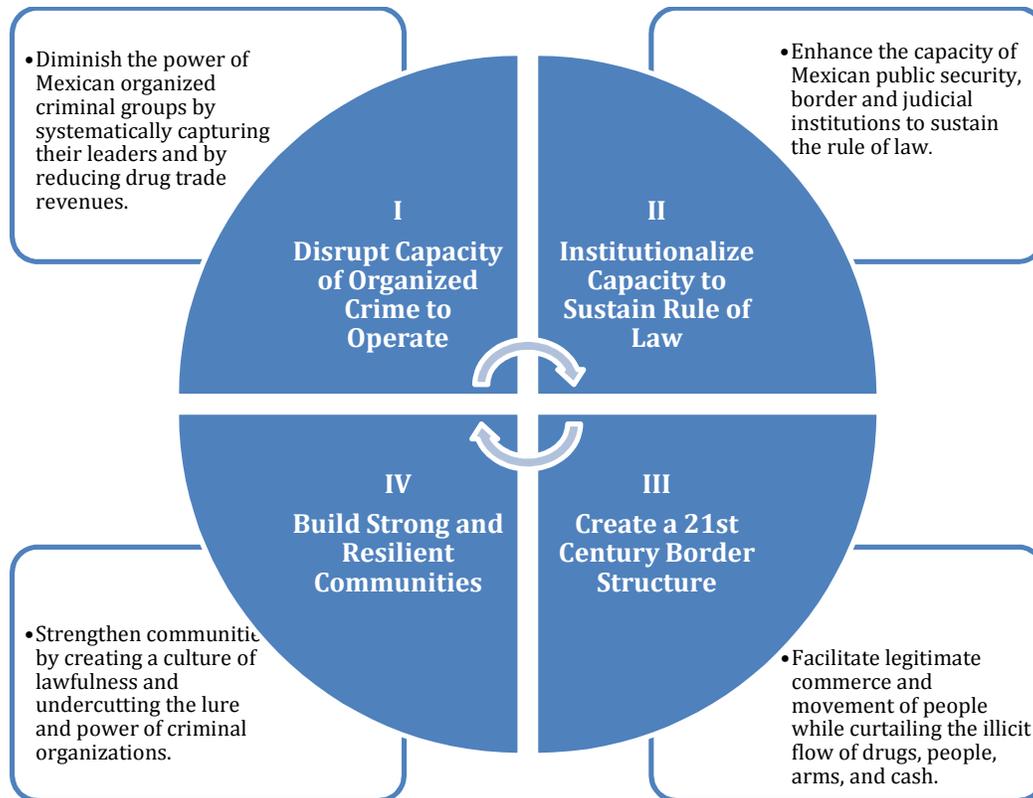
⁹ See the several cases of government authorities, both at the federal and state level, infiltrated by organized crime: General José de Jesús Gutiérrez Rebollo, ex-governor Jorge Carrillo Olea, or ex-governor Mario Villanueva Madrid are remarkable examples.

¹⁰ Chabat, Jorge, “Drug Trafficking and US-Mexico Relation”, in Kenny, Paul and Mónica Serrano, Mexico’s Security Failure. Collapse into Criminal Violence, Routledge, 2012.

¹¹ GAO, “Mérida Initiative. The United States Has Provided Counternarcotics and Anticrime Support but Needs Better Performance Measures. Report to Congressional Requesters”, United States Government Accountability Office, 2010.

heightened military response to Mexico's drug war”¹² and aid concentrated mainly on technical assistance, counternarcotic equipment such as helicopters, planes and x-Ray inspections devices. Once Barak Obama took office (2008), however, the agreement extended to include four pillars:

Figure I. The four pillars of Mérida Initiative



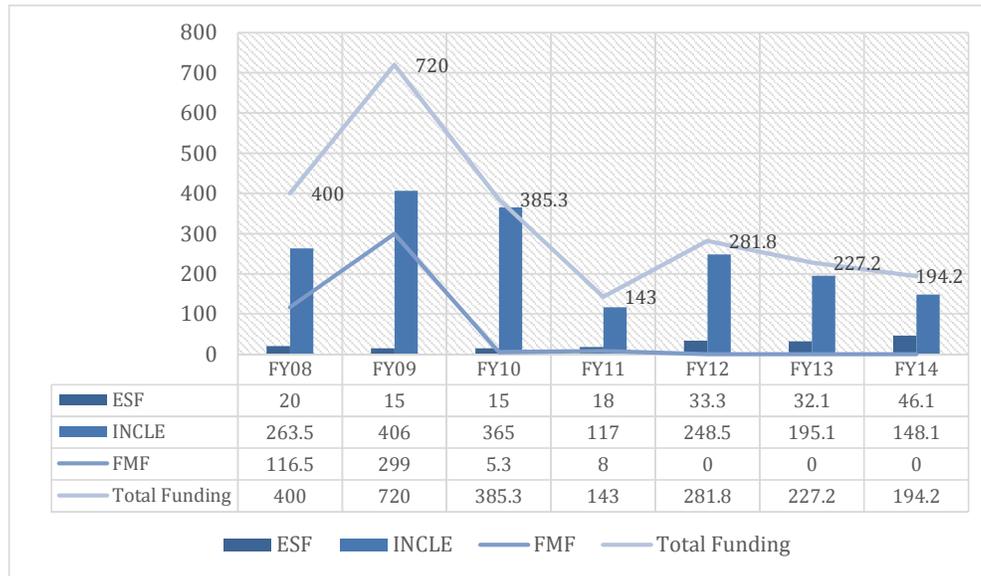
Source: US Embassy, 2014a.

The four pillars have sought to face the problem from a more comprehensive perspective, considering to further advance the cooperation and work not only on a visible outcome —to battle drug-related violence— but also on those problems that cause it, such as dependent and un-professional justice-sector institutions, law schools with old curricula, or a poor culture of lawfulness. This transformation implied more resources appropriated by US Congress for the Mérida Initiative than those initially

¹² Weismann, Deborah, “Remaking Mexico: Law Reform as a Foreign Policy, *Cardoso Law Review*, Vol. 35, 2014, p. 1482.

allocated (\$1.4 billion). Up to 2014, \$2.3 billion have been assigned for financing several programs.

Graph I. Resources appropriated by US-Congress to Mérida Initiative, 2008-2015 (million of dollars)



Source: Ribando Seelke and Finklea, 2014.

Graph I shows the evolution of the total founding for the Mérida Initiative through three different appropriation accounts managed by US Department of State: the Economic Support Fund (ESF), Foreign Military Financing (FMF), and International Narcotics Control and Law Enforcement (INCLE). As we can observe from the Graph, the account that has received more founding is INCLE, representing 75% of all allotted budget for Mérida Initiative. The resources allocated to ESF and INCLE have been directed to air mobility for counter-narcotics operations, scanners, professionalization of federal police, equipment, training canines, but also to accomplish justice-sector reform, institution building, training and rule of law activities¹³.

Mérida Initiative is managed by the Department of State with the US Agency for international Development (USAID) playing a major role in the operation of

¹³ Department of State, “Mexico”, 2014, online document: <http://www.state.gov/j/inl/regions/westernhemisphere/219174.htm>; US Senate, “Making Emergency Supplemental Appropriations for Disaster Relief and Summer Jobs for the Fiscal Year Ending September 30, 2010, and for other Purposes”, 2010, online document <http://www.gpo.gov/fdsys/pkg/CRPT-111srpt188/pdf/CRPT-111srpt188.pdf> [Access: February 20, 2015]

pillars II and IV of Merida Initiative, in particular, the implementation of criminal justice constitutional reform and the development of community-based initiatives to prevent and control crime. Regarding the criminal reform, USAID has financed several programs to a) strength the capacity and professionalize judges, prosecutors, public defense attorneys, and police on the new accusatorial legal system; b) monitor the implementation of criminal reform at the state level; c) develop the academic programs of law schools; and d) socialize among citizens the criminal justice constitutional reform¹⁴. Additionally, USAID in cooperation with the US Embassy in Mexico and the Mexico's Technical Secretary of the Coordination Council for the Implementation of the Criminal Justice System (SETEC) launched in 2014 the program "Promoting Justice" (PROJUST) deemed the "most ambitious USAID project so far to promote justice-sector reform"¹⁵. PROJUST seeks to advance the implementation of criminal reform at the state and federal level by providing "training and technical assistance to professionals who work within the criminal justice system, including judges, prosecutors and defense attorneys"¹⁶.

How are all these efforts working? According to a report of the United States Government Accountability Office (GAO), the State Department faces several challenges in the implementation of the Mérida Initiative programs among which the following can be outlined: 1) insufficient number of staff to administer the programs; 2) changes in the government; and 3) funding availability¹⁷. Additionally, we find evidence that the commitment of actors involved in the activities promoted by the Mérida Initiative —particularly, the implementation of criminal reform— play an important role in transforming the system. In the following section, we present the literature on the role of actors' commitment in the implementation of reforms that help us to frame the cases selected for this study.

Actors and its Commitments in Institutionalizing Criminal Reform

¹⁴ USAID, "USAID Mexico. Results 2013", 2013, [Access: Feb, 18 2015], online document: <http://www.usaid.gov/sites/default/files/documents/1862/USAID%20results%202013.pdf> [Access: January 23, 2015]

¹⁵ US Embassy, "U.S. Government Provides \$68 Million to Mexico in Support of Criminal Justice Reform" online document: <http://mexico.usembassy.gov/news-events/press/us-government-provides-68-million-to-mexico-in-support-of-criminal-justice-reform.html> [Access: February 18, 2015], 2014a, p. 1.

¹⁶ *Ibidem*.

¹⁷ GAO, 2010, p.15, *Op. Cit.*, p.4

How to advance successfully in the implementation of pillar II of Mérida Initiative? Regarding to the criminal justice system reform in Mexico, this paper advance the assertion that the actors' *commitment* to the principles of an adversarial criminal justice system is a factor closely related to the success or failure of the reform implementation at the local level. If this premise is accepted, then the process of training, socialization and appropriation of new values becomes relevant. That process occurs firstly at universities, which are responsible for training future juridical operators, those that will drive the adversarial model and build the new institutional reality. Thus, redesigning curricula, investing on educational infrastructure (oral trials rooms, mediation centers for professional practice) and training professors in the new adversarial criminal justice system are priorities for a successful reform implementation. A set of relevant data obtained from some federal states (see case analysis section) show the meager results of the role of universities; situation that is significantly worsened if one takes into account the persistence of malpractice, as well as some constitutional incongruences such as the existence of maximum criminal law aimed at combating organized crime.¹⁸ This section presents some theories that explain reform implementation and seek to understand the role of different actors in this process, so to create the "institutional facts" necessary to give effect to a reform, that is, to implement it successfully.

The literature in policy implementation offers several approaches to explain when and why a reform is implemented successfully. There are two main approaches: top-down and bottom-up.¹⁹ On the one hand, top-down approaches explain implementation through policy designer actors, in particular, the extent to which these actors clearly emphasize in statutes the objectives, processes, budget and supportive groups or institutions for the reform to be implemented²⁰. On the other hand, bottom-up theories propose that target local actors' commitments, will or motivations are

¹⁸ In the constitutional reform published in the Official Journal of the Federation on June 18, 2008, Articles 17, 18, 19, 20, 21 and 22 fostered a protective model based on the principles of publicity, contradiction, concentration, continuity and immediacy. However, Articles 16, 73, paragraphs XXI and XXIII, 115 paragraph VII and 123, section VII, section B, paragraph XIII strengthened a hierarchical, punitive criminal law focused on the protection of the state through the figures of preventive detention, exceptions to due process when accused of organized crime, and militarization of law enforcement offices.

¹⁹ Cerna, Lucie, "The Nature of Policy Change and Implementation: A Review of Different Theoretical Approaches Analyst", OECD, 2013, online document: <http://www.oecd.org/edu/cei/The%20Nature%20of%20Policy%20Change%20and%20Implementation.pdf> [Access: January 10, 2015].

²⁰ *Ibid*, p. 18.

significant for the implementation of a reform (McLaughlin, 1987). In this work, we concentrate on the latter. According to Milbrey McLaughlin, bottom-up “perspective shifts the focus of analysis away from institutions and institutional goals to individuals and individual incentives, beliefs, and capacity. Organizations don't innovate or implement change, individuals do”.²¹ Thus, we expect to observe advancements in the implementation of the criminal reform in law schools (design of new curricula, infrastructure, and human resources) if their faculty members are committed or motivated with criminal justice change.

Close to bottom-up theories of policy implementation is the proposal of John Searle when he explains the conditions that favor the creation of institutional facts. The notion of "institutional fact" is original from Searle and serves to explain how social reality is constructed; the set of institutional facts constitute and form a determined —institutional— social reality²². His approach is relevant to study the implementation of the criminal reform at the local level in Mexico, since it focuses its analysis on the influence that the point of view of individuals has in the creation and maintenance of social reality; according to this author what constitutes institutional facts is precisely some degree of collective acceptance of its objectives. The core of his proposal consists in distinguishing between facts that exist independently of us and who he calls "brute (physical) facts" (e.g., the presence of snow on the summit of Mount Everest), and those events that depend on the agreement or human acceptance, these are "institutional (mental) facts", and Searle qualifies them as a subclass of social facts. For example, institutions like money, marriage, borders or criminal justice systems exist because they were created and their recognition is shared by the collectivity. The acceptance of the formula "X counts as Y in context C" is what allows the continued and persistent existence of institutional facts²³.

The *commitment* assumed by system's operators with the principles of the new scheme of criminal justice is the initial element from which they create, maintain and represent "institutional facts" needed to win recognition and deploy the socializing function of the new organization, in this case of the adversarial criminal justice system. The serious risk involved when there is no such commitment is the simulation

²¹ McLaughlin, Milbrey Wallin, “Learning from Experience: Lessons from Policy Implementation”, *Journal of Educational Evaluation and Policy Analysis*, Vol.9. No. 2, 1987, p. 174.

²² Searle, John, *La construcción de la realidad social*. Barcelona: Paidós, 1997.

²³ *Ibid*, p. 128

and the absence of substantive changes for jump-starting the new regulatory framework; simply no institutional facts would manifest.

An institutional fact related to criminal proceedings could be the duty of the judge to appoint a public defender to represent the person accused of a crime if no one has previously appointed a lawyer; also the convention whereby an apprehension—if not flagrancy occurs—requires a warrant issued by a judge with competency. In case that the accused was judged without a defender or had been arrested without a warrant, the consequences of the final judicial decision should be favorable to him according to the *presumption of innocence* principle. Now, the question that comes first to mind with these examples is under what conditions occur institutional facts? Searle replies that there are three components which determine the existence of institutional facts: 1) the collective intentionality; 2) the assignment of function; and 3) the establishment of constitutive rules. The first element, the collective intentionality, has to do with certain degree of *acceptance* or *collective belief* needed to generate cooperative behaviors between individuals who participate in the actions of that institutional fact. Once this condition occurs, the cooperation between people allows *assigning functions* (the second element) to some facts or processes carried out, which means achieving a consensus about which function—finality—must be accomplished. Finally, the third component refers to the formalization of this scheme; the rule indicates the conditions of possibility of the institutional fact, its form is «X counts as Y in the context of C»:

The key to understanding institutional reality is to see it as a class of functions imposed on entities where the functions cannot be performed solely in virtue of the physical constitution of the entities, but require the collective acceptance of the imposed status and function. These collective impositions of what I call "status functions," are of the form "X counts as Y in context C".²⁴

As it can be observed, according to Searle, the assignation of status functions and the establishment of constitutive rules are the successful result of having materialized the collective intentionality. An illustrative example that uses the author to present this explanation is money: the piece of printed-paper is a brute fact, but the fact that that piece of paper is "money" (and then can be used as medium of exchange) is an institutional fact. Whether this is the case implies: 1) The existence of a collective intentionality on the meaning of that piece of paper (it would not exist as

²⁴ *Ibid*, p. 426.

money without the shared belief that is such); 2) The assignment of function (to assign quality as a means of exchange); from a 3) constitutive rule that indicates that «the pieces of paper with certain characteristics (X) count as money (Y) in the context of an economy (C)». Thus, the physical properties of the piece of paper (X) would be insufficient in causal terms to fulfill the function Y (be money) if there is no such assignment status.

The example of money allows us also to observe the importance of education as a vehicle for symbolic space creations, beliefs, prejudices and moral and cognitive resources that give meaning to the three constituent elements of institutional facts. Regarding collective intentionality, the commitment of law students to an “internal statement”²⁵ of the values and principles of the legal system (in this case the adversarial criminal justice system) allows them to participate in a community that shares the same socially validated criteria or behavior.

When sharing the same axiological perspective, the legal community is able to assign roles, goals or objectives into practice. For our discussion, the training of lawyers involved in establishing goals and valuable results must meet the procedural instruments that make up the adversarial model of criminal justice. For example, the commitment to the protection of human rights means avoiding obtaining evidence through torture. This feature of the criminal proceedings must be socialized in classrooms and certainly in the areas of action of authorities. To fulfill this purpose, the 2008 reform established a constitutive rule (art. 20.IX Constitution) to exclude illegally obtained evidence, the exclusionary rule says: "Any evidence obtained in violation of human rights is void"²⁶. This constitutional provision supports the function of preventing torture and their inclusion in the reform is due to the rejection (to a collective intentionality) that the academic community has made from universities and research centers.

Criminal Reform Implementation in Law Faculties in Chihuahua, State of Mexico and Jalisco. A Target for Judicial Promotion.

²⁵ About the concept of “internal statement” to foster the enforcement of rules see Hart, H. L. A., *The Concept of Law*, Oxford, Clarendon Press, 1961.

²⁶ Mexican Constitution, 1917 –last amendment 2014.

As stated above, the commitment of actors is crucial for the implementation of the criminal reform. We identified two types of actors. On the one hand, justice-sector actors as judges, prosecutors, forensic scientists, defense lawyers or police officers, that is, those in charge of making the system work. On the other hand, societal actors such as law faculty members and users (victims and defendants) of the criminal system. In this work, we concentrate on law faculty members, that is, those actors that are in charge of reforming law degree programs to prepare the next generations of lawyers that will seek a place in the job market. In this section, we explore and discuss the extent to which law faculty members show commitment to the implementation of the criminal justice reform in Mexico, by advancing changes in their law school curricula, educational infrastructure and training professors in the new system. We consider that to implement a criminal reform that drastically changes the legal system, it is necessary to reform also legal education. Indeed, the introduction of an accusatory legal system implies, as Mauricio Duce points out, a radical change from training law students in building and managing a dossier (*Expediente*) to train them in litigation strategies for oral trials²⁷.

In Mexico, only a handful of law schools have adapted their programs to prepare students to work under the new accusatory system, while the vast majority still train students under the old curricula with a strong emphasis on learning abstract doctrines and memorizing norms. In fact, according to the 2011 Legal Education Reform Index for Mexico—a study led by the American Bar Association (ABA)—, the predominant teaching method in Mexican law schools is based on lectures:

Law courses in Mexican law schools are taught primarily through lectures. Law professors received their legal educations in the form of lectures and are not themselves familiar with alternative teaching techniques. Most are successful lawyers, very good speakers in the classroom, and have the ability to synthesize and convey information well. However, they are simply not trained to teach courses focused on developing practical skills in students, such as research, analysis of real cases, drafting of legal documents (and) oral arguments (...) According to some law schools deans (...) the schools do not offer their professors training opportunities to develop interactive teaching methodologies because the professors are not interested in attending such courses. One explanation for this is the belief that being a successful lawyer is a sufficient qualification to give a good class.²⁸

²⁷ Duce, Mauricio, “Enseñando destrezas de litigación en procesos orales en la Universidad Diego Portales: Experiencias y aprendizajes”, *Cuadernos Unimetanos 15*, Universidad Metropolitana, Caracas, 2008, p. 94.

²⁸ ABA, “Legal Education Reform Index for Mexico”. *American Bar Association&USAID*, 2011, p. 29, online document:

This evidence poses serious problems for faculty members' commitment to reform law curricula and, consequently, contribute to the implementation of the accusatorial criminal reform. Both Searle (1997) and McLaughin (1987) argued that to institutionalize or implement a reform, the existence of a collective intentionality or societal actors beliefs is necessary and we will not find it among professors that value little, for instance, their training in new teaching methods or new ways to understand criminal law and its practice.

Additionally, the assessment of ABA also found that "most schools place little emphasis on instruction in professional skills of the profession".²⁹ Specifically, law students do not acquire during their careers abilities that help them to analyze facts and solve problems, because "there are no courses that strive to develop students' critical thinking, advocacy, or client relations skills".³⁰

When we analyzed private and public universities in the states of Chihuahua, State of Mexico and Jalisco to observe their efforts to reform law curricula and to develop professional skills that contribute training future lawyers to work in an adversarial system, we found that most of them show few advances. Even if the criminal justice reform finds at different phases in each state, faculty law members in mostly all universities must still work hard to have the bases for preparing students for the new system.

To observe law faculty members' commitment we consider law school curricula, in particular, the list of courses related to the acquisition of knowledge and skills needed for an accusatory system, among which are: introduction to criminal accusatory system; case theory and analysis; accusatory criminal procedure; oral litigation techniques; criminal defense clinic; oral trials; alternative mechanism for dispute resolution (AMDR); or legal argumentation. Additionally, we contemplate the existence of infrastructure and skilled human resources: oral trials room, AMDR room, legal clinic and the number of certified professors³¹ for the accusatory system. Table I shows this information for three universities for each of the selected states in this work:

http://www.americanbar.org/content/dam/aba/directories/roli/mexico/mexico_legal_education_reform_index_2011_en.authcheckdam.pdf [Access: March 17, 2015].

²⁹ *Ibid*, p. 13

³⁰ *Ibid*, p. 27

³¹ The SETEC offers an exam that certifies law professors as trainers for oral trials, criminal investigation, forensic expertise, or the use AMDR in an accusatory system.

Table 1. Law Schools in Chihuahua, State of Mexico and Jalisco

State	University	Last Curricula Modification	List of courses related to an adversarial legal system	Oral Trial Room	AMDR ³² Room	Legal Clinic
Chihuahua	Autonomous University of Chihuahua (UACH)	2013	Legal Argumentation AMDR Oral Litigation	Yes	Yes	No
	ITESM, Campus Chihuahua	2011	Oral Trials AMDR	Yes	No	No
	Autonomous University of Ciudad Juárez (UACJ)	2005	Legal Argumentation Criminal Procedural Law Clinic (Adversarial System)	Yes	No	No
State of Mexico	Autonomous University of State of Mexico (UAEM)	2004	Legal Argumentation	Yes	No	No
	National Autonomous University of Mexico (UNAM), Campus Acatlán	2013	Legal Argumentation	No	No	No
	University of Toluca Valley (UVT)		Legal Argumentation AMDR	No	No	No
Jalisco	University of Guadalajara (UdeG)	2013	Legal Argumentation Theory AMDR on Civil and Family Area Arbitration and AMDR	Yes	No	No
	ITESM, Campus Guadalajara	2011	Oral Trials AMDR	Yes	No	No
	ITESO	2012	AMDR	Yes	No	No

Source: Faculty web page, program coordinator and SETEC

³² Alternative Methods for Dispute Resolution.

Chihuahua is the leading state in the ranking that reports criminal justice reform's implementation advancement³³. As a matter of fact, in this state the introduction of an adversarial system started well before the 2008 constitutional reform on criminal justice. The three universities reviewed for the case of Chihuahua have taken important steps to introduce courses related to the adversarial system. The UACH, UACJ and ITESM (the first two public and the last private) have installed oral trial rooms. However, only the UACH accounts AMDR room to develop the professional skills of students. None of the universities revised has established legal clinics to foster litigation abilities of future lawyers.

The State of Mexico adopted quite early the constitutional mandate on criminal reform and transformed (*de jure*) its inquisitorial system into one with predominant adversarial features. The system operates in some municipalities. According to CIDAC³⁴ (2013), however, its ranking of criminal justice reform's implementation advancement is very low. This is consistent also with the evidence of progress we found in law schools. We selected two public universities and one private. The public universities' (UAEM and UNAM-Campus Acatlán), so far do not include obligatory courses to train students in the adversarial system. The only subject related to this system is legal argumentation. The private university, University of Toluca Valley, besides legal argumentation, includes in its obligatory curricula the subject of AMDR. Regarding educational infrastructure for the development of practical skills on adversarial system, only the UAEM accounts with oral trails room, while none of them has AMDR room or a professional practice center such as a legal clinic.

Recently, Jalisco passed legislation at the state level to introduce the adversarial system mandated by 2008 constitutional reform. As 2014, however, the system was not yet operating and thus its raking of implementation advancement is very low³⁵. In this state we selected UdeG, ITESO and ITESM, the first a public university and the two other private. All of them had included in their curricula few courses related to the development of professional skills for an adversarial system, such as oral trials, arbitration and AMDR. They also installed oral trials rooms for students to practice their skills for the new system. More efforts need to be made,

³³ CIDAC, 2013, *Op. Cit.*, p. 2.

³⁴ *Ibid.*

³⁵ *Ibid.*

however, to introduce also an AMDR room as well as to establish a legal clinic that shows evidence of their commitment to train students for the adversarial model.

Regarding the capacities and training of professors under the new system, we can consider the relation between the average students number by certified professor by the SETEC.³⁶

Table 2. Student Number by Certified Professor

State	Law students enrollment	Certified professors by SETEC	Students number by certified professor
Chihuahua	4241	120	35.3
State of Mexico	34449	303	113.6
Jalisco	16726	103	162.3

Source: ANUIES, 2012; SETEC, 2015.

Here a substantial difference emerges. Chihuahua, with the higher ranking in implementing the criminal reform, accounts with 35 students by each certified professor. The State of Mexico, a low ranking state in implementing the reform but an early comer in the *de jure* introduction of the adversarial system, has 113 students by each certified professor. And, finally, Jalisco, very low in its criminal reform implementation and late comer in the *de jure* introduction of the adversarial system has the greater number of students by certified professor: 162 for each professor, that is, few professors are certified to teach the adversarial system to students that soon will be outside universities looking for a job.

If we take the scheme proposed by Searle to the constitutional reform of the criminal system in 2008, we will find the problems of the reform's institutionalization; the main one has to do with the lack of training in moral and cognitive resources by law faculties, needed to address conceptual contradictions and practices inherited from an authoritarian criminal law based on reasons of State. We discuss these contradictions below:

The existence of a collective intentionality. This point is the most serious in implementing the penal reform in Mexico. If this first element to build institutional facts requires a type of intentional mental state that is obtained only if shared with

³⁶ A SETEC certified professor implies that he passed an exam containing several subjects concerning the accusatorial system. He knows the new rules. Malpractice (“the system works otherwise”) and traditional believes, however, might persist.

other individuals —reason why is the primal input of social facts—, the criminal reform does not contemplate it; to date we do not have a widespread commitment or shared intentionality to detonate an effective change towards a *minimum criminal law* that guarantees human rights.³⁷

One of the main obstacles is the formalist model of legal education, which tends to perpetrate the *status quo*. In the case of criminal law, the state of affairs is maintained mainly because teaching methods are still based on strong components of inquisitorial criminal law, components that are then reproduced and legitimized in the everyday practice of criminal authorities. Faced with this reality, students uncritically assume the written law that they are presented to in codes and judicial precedents, devoid not only of a solid evaluative criteria — that allows them to contrast the judicial reality with the adversarial criminal law's principles—, but also limited by epistemological abilities to prove facts, activity that besides being predominant in criminal law is a defining property of the adversarial criminal law: the verification of the legal truth as correspondence with the facts. Is illustrative of this problem the opinion of several "employers" who were interviewed in a study conducted by Ana Laura Magaloni in 2006: "(...) Law schools not only do not train well lawyers but deform the legal talent that many students have at the beginning of their career".³⁸

The quality of professors is another obstacle for promoting the reform to the criminal justice system. The selection processes that favor merit and abilities, professor's evaluations by students and coordinators, as well as courses to improve teaching skills are all difficult instruments to implement in law faculties in which most professors are, at the same time, successful attorneys. This makes complex the control over the quality of their teaching, since they are not always willing to take time away from their core business.

Law faculties are overwhelmingly comprised of practicing lawyers who spend only a few hours a week at the school teaching one or two courses. While this has the advantage of bringing the professors' professional experience and networking opportunities into the classroom, it also means that faculty generally lack the time to adequately prepare to teach, grade assignments, support

³⁷ On the theory of *minimal criminal law*, mainly focused on minimizing violence on crimes and verdicts, as an ethical-political justification of criminal law in a democratic regime see the work of Luigi Ferrajoli *Law and Reason. Theory of Penal Guarantees*, Ferrajoli, 1995, pp. 321-349.

³⁸ Magaloni, A., "Cuellos de botella y ventanas de oportunidad de la reforma a la educación jurídica de élite en México", en Fix Fierro, Hector, *Del gobierno de los abogados al imperio de la ley*, Universidad Nacional Autónoma de México, 2006, pp. 73-74.

students outside the classroom, or conduct scholarly research.³⁹

A final point has to do with the elitist and conservative nature of the legal *status quo* of professor in law. According to Duncan Kennedy "(...) professors are overwhelmingly white, male with typical middle-class manners and heterosexuals"⁴⁰, and they reproduce a complex set of institutional practices that lead students to voluntarily participate in the specialized hierarchical role of lawyers. In his analysis there are few professors that are critic of the system and, of course, do not represent the model installed in students' imaginary of a "successful lawyer".

To conclude, the existence of a collective intentionality means to internalize a change and create new habits, when this does not happen, simulation appears. To avoid it, is essential to leave behind legal formalism teaching, specifically, the formalistic interpretation of law.⁴¹ The problem of simulation has been documented by Alejandro Hope. Regarding the implementation of adversarial criminal reform in the states, Hope mentions five strategies to obstruct change,⁴² the second one is telling and is related to a formal adherence to the new legislation while contradicting the spirit of the reform. In his opinion the State of Mexico is representative of this situation, wherein:

The reform to the criminal justice system, mandated by the constitutional changes of 2008, meant only to put a patina of orality to the old ways. In Mexicans' land, an oral and adversarial system means to read outloud a preliminary investigation, built in the old style, and not to argue before a judge a theory of the case. That is, the methods are new, but the bottom line remains intact.

The assignment of function. Universities, in particular law schools play an important function in the implementation process of an institutional fact, in this case, the criminal reform. Their function is clear and shared: when educating students, they must provide the knowledge, skills and values to act in the new adversarial system.

³⁹ ABA, 2011, *Op. Cit.*, p. 39.

⁴⁰ Kennedy, Duncan, "La educación legal como preparación para la jerarquía", *Academia. Revista sobre enseñanza del Derecho*, n° 3, 2010, p. 119.

⁴¹ We understand by a formalistic interpretation of the law "the decision which preferably takes into account the logical-linguistic questions, which might be called 'formal', and not the most attentive decision on fact (stakes or social purpose intended), or that is substantial". The quote is from Norberto Bobbio who also explains the various meanings that the term legal formalism has, especially with reference to four problems: that of justice, law, the science of law and legal interpretation. See Bobbio, Norberto, *El problema del positivismo jurídico*, México, Fontamara, 1994. About the divergent uses of the concept and the advantages that represent taking formalistic decisions see Schauer, Frederick, "Formalism", *Yale Law Journal*, 97, (4), 1988.

⁴² Hope, Alejandro, "El freno y el acelerador: Cómo los gobiernos estatales pueden obstaculizar o facilitar reformas estructurales", en *Índice de competitividad 2014. Las reformas y los Estados. La responsabilidad de las entidades en el éxito de los cambios estructurales*, México, IMCO, 2014.

Mainly aims to create a common knowledge, where everyone knows and share the sense of procedures and results. With the data presented in Table II, we can argue that law faculty members, in particular professors need to perform better its function of educating the next generation of lawyers and justice system operators. For this, they need to learn and adopt the new rules of the system. A way to observe the extent to which they are advancing in this issue is by looking to the number of certified professors, which as discussed above is still quite low.

Also crucial in professors' performing their function of educating for the new system is a much needed change in their teaching methods (currently, lecturing and with strong focus on black letter law) since they are incompatible with the skills required for the new criminal system. In this vein, the work of Magaloni is telling. She evaluates law students' training in main universities in Mexico and concludes that:

Legal education in Mexico has focused on the theoretical and conceptual study of the rules in the abstract, and the teaching methods have emphasized the ability to memorize over any other ability students might possess. This causes a situation of separation or divorce between what students learn and the reality of practice.⁴³

This widespread university legal pedagogy limits the development of the necessary skills for the student to solve practical problems of the profession, especially those related to the adversarial model of criminal justice. The most significant absences are related to oral and written skills in argumentation, research, decision-making, negotiation and measurement, among others. In this regard, Magaloni suggests focusing the change in the methodological innovation in teaching: simulations, case studies, legal clinics or negotiation exercises; in short, focus education in legal practice and not only in the mere transmission of knowledge. This innovation in the educational model would break the divorce between the classroom and the exercise of professional practice and, thereby, achieve in a better way the allocation of functions to the different actions and processes that requires the institutionalization of the new model of criminal justice.

The establishment of constitutive rules. The constitutive rules (rules of the game) indicate the conditions for materializing or implementing institutional facts. Its logical

⁴³ Magaloni, 2006, *Op. Cit.*, p. 18.

structure is expressed in the formula «X counts as Y in context C». For our discussion, these rules are mainly the reform to the criminal system that changed various constitutional articles; but also other complementary reforms such as the creation of the National Code of Criminal Procedure, or the National Law of Alternative Dispute Resolution Mechanisms in Criminal Matters.

It is worth noting, however, that a project or a procedure which contributes to transform legal education in Mexico has not been designed by national authorities. Universities are changing their law curricula, creating new infrastructure for oral trials or training professors in the new criminal system depending on the will of their faculty members or budget availability. Notwithstanding, universities (both public and private) need government or international support to advance this transformation. If an institutional project was designed to help the implementation of the criminal reform in the various justice-sector institutions (polices, public prosecutor offices, courts), authorities need also to design a strategy to advance the reform of legal education in Mexico, since at universities we find the tomorrow's generation of justice-sector operators. There are a few examples of cooperation between the governments of Mexico and the United States that might be replicated. Both USAID and the North American Consortium on Legal Education (NACLE) had facilitated small-scale exchange programs and cross-border university partnerships among law schools in the United States, Canada and Mexico. University partnerships, as well as student and professor exchange programs contribute to prepare for the adoption of an adversarial system and to reduce the costs of training in Mexico. According to Zachary J. Lee "close cooperation between Mexican law schools and US law schools would significantly enhance the effort to implement the constitutional reforms".⁴⁴ The progress of the criminal reform will be difficult if we do not consider law schools in the process of this much-needed transformation, if we do not consider how and where future justice-sector operators are trained.

Final remarks

The promotion of justice in Mexico faces several challenges. Beyond the administrative and budgeting challenges to train judges, prosecutors, defense

⁴⁴ Zachary, J. Lee, "Wrestling with Mexican Criminal Procedure: How Law Schools in the United States and Mexico can team up to rebuild Mexico's Criminal Trial", *Houston Journal of International Law*, Vol. 33, No. 1, 2010, p. 74.

attorneys and police officers, cooperation between Mexico and United States should address the current problems faced by law faculties. So far they have been left alone: to the entire will of faculty members to adopt the changes needed to make easier the implementation of the adversarial system. This is problematic. Faculty members' commitment to a criminal reform that changes all their epistemological paradigms, all what they had learn and been, ask for more than constitutional (letter) changes. The Mérida Initiative might be a promising framework to foster the cooperation among universities' law faculties in Mexico and the US, especially under Pillar II. If one accepts that legal education directly affects the possibilities of creating institutional facts, then the law schools would have to be the central factor of change and implementation of criminal reform. In this sense, economic and institutional support will ensure the construction of a collective intentionality favorable to the adversarial criminal justice model.

The success of the reform involves a broad consensus about the social role of the new model of criminal law. In the end, what will make the distinctions in different implementation's scenarios is not only to do the right thing, but to do what it takes to make things happen and give the expected results; that means achieve systemic adequacy of the rules with their environment. To institutionalize the rule of law and to implement the criminal reform, a higher budget should be canalized to academic exchange programs for students and professors: experience personally an adversarial justice system to know their advantages might potentially stimulate the creation of actors' commitment to develop, adopt and promote a new law curricula and teaching methods to favor the implementation of the adversarial criminal reform.

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