

## TRANSPARENCY AND THE PUBLIC PROSECUTOR'S OFFICE

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Transparency in the Public Prosecutor's Office is still a pending task that involves two contradictory dynamics. On the one hand, the Public Prosecutor's Office is one of the least transparent institutions of the Mexican State, in spite of the advances made since the Federal Law for Transparency and Access to Information (LFTAIPG in Spanish). On the other hand, it is an institution that can change a great deal in a brief period of time, as demonstrated by the cases of states where reforms in the criminal justice system have established oral trials.

The fundamental problem is that the Public Prosecutor's Office operates with a specific kind of criminal justice system. In Mexico, both at the federal level and in most states, the administration of justice is based on a (written) inquisitive/mixed system in which the Public Prosecutor's Office not only has extended powers during the process, but where its activities are also carried out behind the backs of the citizenry.

In contrast, the states of Nuevo León and Chihuahua have recently established justice systems of accusatorial/oral type, similar to the one found in most democracies in the world. In these systems, the activities of the Public Prosecutor's Office are more transparent and are subject to accountability mechanisms by the victims, the accused or citizens who are not directly involved in a penal process.

Currently, ten states in Mexico are discussing their own constitutional reforms in order to create oral trials. In fact, both houses of Congress have received, from the National Network in Favor of Oral Trials, a draft of a proposed constitutional amendment that would extend this penal system to the whole country.<sup>1</sup>

<sup>1</sup> For further information about the proposal for constitutional reform, advances in the states and mechanisms to participate, please refer to [www.juiciosorales.com](http://www.juiciosorales.com). For an explanation about the constitutional reform proposal, see: Miguel Carbonell and Enrique Ochoa, "Juicios orales: ¿por dónde empezar?," in *Enfoque (Reforma supplement)*, No. 664 December 8, 2006, pp. 4-7.

## What is the Degree of Transparency in the Public Prosecutor's Office under the Current Criminal Justice System?

Until recently, only citizens involved in a court case would have the right to know, through the case file, about the investigations or conclusions of the Public Prosecutor's Office. The rest of the citizens remained, by law, without any right to information regarding the way in which this government agency carried out investigations to protect us from potential aggression against our property and integrity.

This changed on June 11, 2002, with the implementation of the LFTAIPG and, above all, on April 2, 2004, with the publication of the Supreme Court and Federal Judiciary Council's Regulations for implementing the law.

Based on these legal provisions, we citizens now have access, with some restrictions, to documents found in the Federal Judicial System. This achievement is significant, because it allows us to know, through case files, how the Public Prosecutor's Office investigates and makes its case.<sup>2</sup> Unfortunately, this change has been insufficient to effectively reveal the Public Prosecutor's Office's work, due to three related reasons.

First, the Federal Transparency Law and its Regulations only open federal court files. However, 95% of crimes are the responsibility of state authorities and federal courts do not handle them directly. Therefore, whether or not citizens can have access to texts that the Public Prosecutor's Office has included in a file would depend on their state's transparency legislation.

In spite of advances made by various states, the effectiveness of transparency laws and state institutes created to implement them varies significantly.<sup>3</sup> As a result, the possibility for citizens' to monitor the Public Prosecutor's Office's performance through files is uneven throughout the Republic.

Second, throughout the legal process, under the (written) inquisitive/mixed justice system, citizens face the Public Prosecutor's Office in a disadvantageous situation. Regrettably, it is a common practice for neither the victim nor the accused to be able to directly challenge the Public Prosecutor's Office's version in front of a judge. Any confrontation of different versions is done in writing, through the case file, where evidence that the Public

<sup>2</sup> For analysis of the Regulations, please refer to Miguel Carbonell's article, "El derecho de acceso a la información y el Poder Judicial de la Federación," in: *Derecho Comparado de la Información*, No. 3, Mexico, (January-June, 2004) pp. 189-199.

<sup>3</sup> Please refer to Miguel B. Treviño de Hoyos' article "The Missing Local Model" in this book.

Prosecutor's Office presents, carries greater weight than that which is presented by either party or any citizen. The system does not oblige the Public Prosecutor's Office to present their evidence through a formal session in front of citizens or the media.

The most delicate moment for a citizen is during the compilation of their pre-trial investigation file. At this stage, the Public Prosecutor's Office is in the position of authority and knows that evidence included in the file will have a virtually decisive value during the process. This is why, normally, they will contribute very little after this prior investigation.<sup>4</sup> Consequently, there is a credible threat of corruption. Evidence that is presented by the Public Prosecutor's Office can favor the victim, if the crime committed against him/her is considered more serious; or it can benefit the accused, if what happened is distorted in order to reduce the possibility for him/her to be found guilty or in order for the conviction to be lighter, as the case may be.

Third, in the current system, the Public Prosecutor's Office has a monopoly over penal action. This means that the victim depends on the ability of the Public Prosecutor's Office to put together evidence and present it before a judge, to pursue a criminal case. If the Public Prosecutor's Office carries out a faulty investigation or becomes corrupted and decides that there is no crime to pursue, the victim has little recourse.<sup>5</sup> Consequently, the citizens' ability to present and defend their case in court is limited by the efficiency and honesty of an investigative authority that cannot be held accountable.

In sum, the Public Prosecutor's Office (written) inquisitive/mixed system does not act with full transparency; it holds a monopolistic power, which allows it to "negotiate" with the victim or the accused over the existence or seriousness of the crime. This can tip the scales of "justice", since the judicial system gives greater weight to their evidence during the process. Therefore, in spite of the advances made with the LFTAIPG, the Public Prosecutor's Office carries out its job within a system that creates powerful incentives for corruption.<sup>6</sup>

What changes can be made in order for the Public Prosecutor's Office's tasks to be more transparent, honest, and open to evaluation by citizens?

<sup>4</sup> Miguel Sarre describes the disadvantageous condition of citizen processes in the chapter "Control del Ministerio Público," in *Los Controles Constitucionales* (Anuario de Derecho Público, McGraw Hill/ITAM, 1997), pp. 131-149.

<sup>5</sup> The victim can present before a District Judge, an appeal in administrative matters against the Public Prosecutor's Office for "non-exercise of penal action". If he or she loses, the Public Prosecutor's Office must perform a new investigation, but at the end can conclude that there is no reason to initiate due process and close the case.

<sup>6</sup> For a diagnosis of problems in the Mexican Penal System, please refer to Guillermo Zepeda Lecuona's excellent book, *Crimen sin Castigo: Procuración de Justicia Penal y Ministerio Público en México* (Mexico: FCE-CIDAC, 2004).

## Oral Trials: a Proposed Solution

A successful mechanism in countries with legal cultures similar to Mexico's has been to change to the accusatorial/oral system of criminal justice.<sup>7</sup> This would help resolve the three problems described above.

In the first place, the constitutional reform—under consideration in Congress—proposes to establish an oral trial system at the federal level and in every state of the Republic, within less than five years. Similarly, it proposes the creation of a Legal Due Process Law where general procedures for accusatorial/oral systems will also be set up for all states. This kind of homogenous institutional framework will benefit all citizens, regardless of the region where they live. At the same time, the states could continue to improve their own justice systems, but they would do so starting from a shared higher institutional ground.

Secondly, the accusatorial/oral system is made up of two essential parts that favor transparency and complement each other. The first would establish alternative conflict resolution mechanisms, whereby the government offers a professional mediator who meets with the victim, the accused, their lawyers and the Public Prosecutor's Office, in order to attempt to resolve the case through an agreement that makes amends to the victim.

At this stage, the victim and the accused listen in person to the evidence that the Public Prosecutor's Office has, and they can present their own version of the facts. If the parties come to an agreement, it will be authorized definitively by a Guarantees Judge, in charge of verifying that there are no flaws in the agreement. Thus, the one responsible for the crime can make amends directly to the victim and the money does not end up in the channels for corruption that are within the reach of the Public Prosecutor's Office, which occasionally happens under the current system. Most of the cases in the criminal justice system could be resolved through this process.

The second part of the new system is the oral trial, where during a public hearing, in the presence of the judge, the Public Prosecutor's Office, the victim, the accused and their lawyers will present all the evidence in the case, in a transparent and oral manner. Citizens and media can be present during the hearing, which is videotaped.

<sup>7</sup> To gain knowledge about oral trials in Chile, please refer to Andrés Baytelman and Mauricio Duce's book, *Litigación Penal: Juicio Oral y Prueba* (Mexico: FCE, 2005).

During this stage, all evidence can have the same weight. The probative value of the Public Prosecutor's Office is not pre-determined, as in the (written) inquisitive/mixed system, and it would have to rely on its capacity to gather and present scientific evidence that sustains its interpretation of the facts. The accused can contradict the evidence that the Public Prosecutor's Office presents, and find support from specialists and witnesses. The oral trial judge evaluates the particular strength of each piece of evidence and, using all the information available, makes their ruling.

Third, with this reform, the Public Prosecutor's Office loses its monopoly over the decision to pursue criminal cases. The victim can present evidence directly to the Guarantees Judge, for him/her to initiate the criminal process. The Public Prosecutor's Office will still have the obligation to investigate, but the accusatory/oral reform suggests that the victim not depend on it for the justice system to take action.

In sum, a constitutional reform in favor of an oral trial system will change the incentives under which the Public Prosecutor's Office operates today. Oral hearings, alternative approaches to conflict resolution, and procedural equity between the parties, will allow the citizen to have access to a transparent and accountable justice system, which is necessary for full democracy and which is today absent in Mexico, in spite of the Federal Transparency Law.