

PREAMBLE AND FULL TEXT OF THE 2008 CRIMINAL JUSTICE CONSTITUTIONAL REFORM*

CHAMBER OF SENATORS AND CHAMBER OF DEPUTIES,
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TABLE OF CONTENTS

I. GENERAL CONSIDERATIONS	128
1. Article 16	131
A. The Standard of Proof for Issuing Arrest Warrants	131
B. The Definition of <i>In Flagrante Delicto</i> [“ <i>Flagrancia</i> ”]	133
C. Investigative Pre-Charge Detention [“ <i>Arraigo</i> ”]	134
D. Definition of Organized Crime	135
E. Requests for Search Warrants	136
F. Recording Private Conversations between Individuals	137
G. Preliminary Proceeding Judges [“ <i>Jueces de Control</i> ”]	138
2. Article 17	139
A. Alternative Dispute Resolution Mechanisms	139
B. Quality Public Defense Services	139
3. Article 18	140
A. Changing the Expression “Corporal Punishment”	140
B. Changing the Expression “Convict” (“ <i>reo</i> ”) for that of “Convicted Person”	140
C. Changing the Expression “Rehabilitation” for “Reinsertion”	140

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** The following is a selection by professor Carlos Natarén of the most important sections of the various different preambles written by both the Chamber of Senators and the Chamber of Deputies during the almost two years of negotiation and exchange of different versions of reform bills between the two chambers. See Natarén, Carlos, *Notes on Criminal Process and Constitutional Reform in Mexico Today*, MEXICAN LAW REVIEW, this issue, for a full description of the legislative process which led to the final version of the reform. The Constitutional text included at the end of this document is the definitive version after the reform.

D. Maximum Security Centers for Organized Crime and Other Inmates Who Require Special Security Measures	141
E. Exceptions in Cases of Organized Crime	141
4. Article 19	142
A. Change of Name: Trial Binding Order [<i>“Auto de Vinculación a Proceso”</i>].....	142
B. Standard for the Material Substance	142
C. Precautionary Measures and Pretrial Detention	142
D. Pre-trial Detention and Serious Crimes	143
E. Suspension of the Statute of Limitations for Criminal Action and Proceedings against Organized Crime.....	144
5. Article 20	144
A. The Accusatory Process.....	144
B. The Structure of Article 20	145
C. Section A. The Principles of the Process	145
D. Section B. The Rights of the Accused.....	148
E. Section C. The Rights of the Victim or the Offended Party	151
6. Article 21	151
A. Private Criminal Action.....	153
B. Plea Bargaining	153
7. Article 22	154
8. Articles 73 and 115.....	155
9. Article 123	157
10. Transitory Regime.....	159
II. EXECUTIVE BRANCH. MINISTRY OF THE INTERIOR. DECREE BY WHICH VARIOUS PROVISIONS OF THE POLITICAL CONSTITUTION OF THE UNITED MEXICAN STATES ARE REFORMED AND ADDED.....	163

I. GENERAL CONSIDERATIONS

[...] As to the proposal put forward, it proposes the establishment of an accusatory system, abiding by its fundamental principles and characteristics, and adapted at the same time to our nation’s imminent need to efficiently fight the high crime rates that afflict the citizens and go against our institutions, so that it can thus be gradually consolidated into Mexican legal culture and tradition.

It is a commonly accepted opinion that [criminal] proceedings are very lengthy and have an excessive number of formalities; the public prosecutor takes a leading role and during the preliminary investigation phase, a type of “mini-trial” is held. This “mini-trial” is given considerable weight during the

proceedings, to the extent that the evidence is reproduced almost exactly during the real trial, thus undermining the importance of a trial and the objective assessment of the arguments presented by the parties involved, with the inevitable result of the public prosecutor not being very competitive, which weakens his actual performance. In the opinion of citizens, the fact that the proceedings are usually presented in writing has been interpreted, in most cases, as opacity, since a judge is not present at most trials because judges often delegate functions to assistants. A representative survey carried out by CIDE in 2006 at prisons in Morelos, Mexico City and the State of Mexico, showed that 80 percent of those accused never spoke with the judge.¹

Regarding provisional remedies, the most drastic among them, that is, pre-trial detention, is usually the general rule. The abovementioned survey reveals an alarming figure: 82% of the accused are prosecuted for offenses against property and for amounts under 5,000 pesos [about USD 400]. In addition to the obvious effects it has on the accused, this also affects his immediate social environment and inevitably interferes with other important guarantees.

Likewise, our current system does not encourage the use of alternative justice and there are various procedural problems that stand in the way of effective restitution of damages.

In saying that the current system is mainly inquisitive, we mean that the accused is guilty until proven otherwise. The accused is considered an object under investigation rather than a subject with rights. While the Office of the Public Prosecutor indisputably has more infrastructure for acting than the defense does, the accused does have the right to an attorney. There is also the legal concept of “a person of his trust,” which, when this occurs, has given rise to unequal conditions in attempting to prove the innocence of the accused. In addition to this, public defense attorneys receive low salaries, there is no civil service career in some states of the nation, and they generally do not have the necessary infrastructure, which is why defense attorneys often use areas in investigative agencies or courthouses.

At the trial, the judge substantiates the process by himself, a situation that obstructs his performance. Moreover, it should not be overlooked that executing the sentence has an administrative character, pre-release benefits and sentence enforcement is under the responsibility of the General Office of Prevention and Social Reinsertion, and awarding benefits depends on the unanimous opinion of the Interdisciplinary Technical Council. Thus, rehabilitation has not been very effective since the convicted person is quite unlikely to be assimilated into society.

Broadly speaking, the above leads us to conclude that the current model of criminal justice has been surpassed by the reality in which we find ourselves. Therefore, a system of guarantees is proposed so that the rights of both the

¹ MARCELO BERGMAN, ELENA AZAOLA & ANA L. MAGALONI, *DELINCUENCIA, MARGINALIDAD Y DESEMPEÑO INSTITUCIONAL. RESULTADOS DE LA SEGUNDA ENCUESTA A POBLACIÓN EN RECLUSIÓN EN EL DISTRITO FEDERAL Y EN EL ESTADO DE MÉXICO* (CIDE, 2006).

victim and the offended party, as well as those of the accused are respected, starting from the presumed innocence of the accused. This system would be governed by the principles of public access, confrontation and cross-examination, concentration, continuity and immediacy, of an accusatory and oral nature. The accusatory aspects would ensure a three-part proceeding in which the public prosecutor is the prosecution, the accused has the opportunity to defend himself and that in the end, a judge determines the outcome. The oral aspects would lend weight to encouraging transparency while also guaranteeing a direct relationship between the judge and the parties, to in turn give rise to more agile and simplified criminal proceedings.

The establishment of a due process judge is contemplated to resolve immediately and by any means the requests for provisional remedies and investigation techniques employed by the authorities, if necessary, to ensure that parties' rights are respected and that prosecution acts according to law. The trial judge shall be responsible for the case from the moment the accused is subject to the proceeding until the corresponding sentence has been issued, and the sentencing implementation judge shall oversee and direct the implementation of the sentence.

As to pretrial detention, it has the intention to be applied only when other provisional remedies are insufficient to warrant the appearance of the accused at the trial, the progress of the investigation, the protection of victims, witnesses or society, or when the accused is being processed or has previously been sentenced for committing a willful crime. In cases of organized crime, intentional homicide, rape, kidnapping, violent crimes involving weapons or explosives, as well as serious crimes considered as going against national security, the free development of personality and of health, pretrial detention is recommended to be applied in all these cases.

Alternative dispute resolution mechanisms expressly established by constitutional decree is also deemed necessary in order to ensure the restitution of damages. These mechanisms would be subject to judicial legal oversight under the terms set forth in secondary legislation. This measure would result in procedural economy, in addition to the fulfillment of the essential objective of ensuring that the victim of a crime is protected and that the accused assumes responsibility for his actions, compensating, as far as possible, for the damage caused.

In terms of the defense of the accused, the intention is to eliminate the concept of "person of [the accused's] trust" and to guarantee the right to adequate defense by an attorney. To consolidate this objective and ensure equal terms, a quality public defense service will be guaranteed for the general public, and public defenders will be ensured of the conditions to pursue a professional career service, establishing that public defenders' salaries may not be lower than those of the Public Prosecutors.

As to organized crime, given the complexity of this issue due to the harm it inflicts on society, a special system is proposed. Starting with its legislation,

this task will be exclusively under the authority of the Federal Congress. At a constitutional level, organized crime will be defined as a *de facto* organization made up of three or more people for the purpose of permanently or repeatedly committing crimes under the terms of the corresponding law. For these cases, the due process judge is authorized to order the detention of a person at the request of the office of the public prosecutor, based on the time and place as stipulated by law, as long as it is deemed necessary for the success of the investigation, the protection of persons or legal interests, or when there is a real risk of the accused evading legal action. This period cannot exceed forty days, and can only be extended when the Public Prosecutor can prove that the causes that gave rise to the order still exist. Under no circumstances can this period go beyond eighty days.

The above gives us a general overview of the comprehensive reforms to the criminal justice system. Regarding the text of the proposed decree approved by the Joint Committees of Constitutional Issues and Justice, we present the following necessary arguments and grounds to be guided through and understand the accusatory criminal procedure system, currently under deliberation in Mexico.

1. *Article 16*

A. *The Standard of Proof for Issuing Arrest Warrants*

Considering that the criminal justice system to be adopted is geared toward the defense of civil liberties, fully respecting human rights and fomenting access to criminal justice by both the accused and the victims or offended parties as a sign of legal certainty, it is necessary to establish a reasonable level of evidence to issue an arrest warrant and thus prevent most complaints or accusations from being filed by the Public Prosecutor, which alleges that the information uncovered by the investigation is not enough to present the facts to the competent judge. An arrest warrant is one of the first steps toward the judicial proceedings that establishes a happy medium between the accused's legitimate right not to be subjected to ungrounded nuisance actions and his fundamental right of having the inquiry into his possible participation in an allegedly criminal act brought before a judge with all the guarantees and rights internationally accepted as part of the due process in a democratic justice system and not unilaterally by an administrative authority that in the end will accuse him before a judge with a collection of evidence obtained without the participation of the accused or without proper defense. It is also in the best interest of society to subject individuals to fair criminal procedures if there is evidence of their participation in a criminal act.

Thus, the legislative proposals to explain the current evidentiary demands for the Public Prosecutor to present the facts before a judge and request an ar-

rest warrant are considered suitable and at an internationally accepted level. Therefore, the prosecution can simply present the judge with the evidential information that establishes the material execution of the act defined by law as a crime and the probable participation of the accused in said act, whether as the person behind said crime or a participant, to issue said warrant; the sufficient elements to rationally validate the act of bringing the accused before the trial judge, being informed of the charge of an act defined as a crime punishable by criminal law with imprisonment and being able to fully exercise his right of defense in criminal proceedings that respect all the principles of an accusatory system like the one proposed.

The proposed standard of proof is accepted because within the context of an accusatory procedural system, which is internationally distinguished by its performing what we know as a preliminary investigation as an initial and basic investigation, and not an extensive administrative examination of fact as occurs in inquisitive systems, for it is during the trial when, under equal conditions for both parties, the evidence previously gathered by the parties is presented and acquires the corresponding probative value, and not during the preliminary stage of the investigation as occurs in the present system. Therefore, it will be impossible to uphold such a high standard of proof for requesting an arrest warrant under the new system since the Public Prosecutor will no longer present formalized evidence proving the act and let alone the criminal responsibility of the accused because in this case it would not fulfill the purpose of lessening the formality of a preliminary investigation and strengthening the importance of criminal proceedings and trials in particular.

There is no reason for this diminution of the standard of proof needed for an arrest warrant to give rise to its misuse in view of the counterweights in place to deter those who may be tempted to do so since the criminal proceeding will be equally balanced for both parties and will fully respect the rights of the accused. Therefore, if an arrest warrant is obtained without having to resort to unlawful means to satisfy the standard of proof needed, the accused will undoubtedly be absolved as it will be expressly included in the principles of the Constitution, along with the presumption of innocence, the burden of proof and the exclusion of unlawfully obtained evidence. In other words, it would be counterproductive for the Public Prosecutor to request an arrest warrant without the likelihood of being able to prove the crime and criminal responsibility during the trial since the prosecution would not have another opportunity to indict the accused.

In view of the above, we believe these advisory commissions are the adequate means to temper the current compilation of evidence the judge must receive from the office of the public prosecutor in order to issue an arrest warrant. Thus, the information provided must establish the existence of an act contemplated in criminal law and the accused's probable participation (in the broadest sense of the term) in said act, and not prove the *corpus delicti* or the presumed responsibility of the accused, which requires an analysis of the

evidence provided from the beginning of the proceedings and not during the trial, which where it should be carried out.

B. *The Definition of In Flagrate Delicto* [“Flagrancia”]

The concept of *in flagrante delicto* as a justification for a person’s detention without a judicial order is used worldwide, only that the scope of this concept is found to be used differently in various laws. It is internationally accepted that *in flagrante delicto* not only includes the moment of committing the crime, but also the period immediately after when the physical pursuit of the individual identified as participating in the crime is carried out. Thus, if the person is detained during his physical escape or immediate hiding, the concept of *in flagrante delicto* is considered applicable and hence detention is justified.

This concept of *in flagrante delicto* does not cause any major debates, but there is another approach to this definition known as comparative flagrancy, which consists of extending the opportunity for the authority to detain an individual for a period of forty-eight or seventy-two hours after a serious crime as defined by law was committed. After the investigation of said crime has been formally opened and when indicated by the victim, a witness or an accomplice to the crime; when an individual is identified as a participant in the criminal activity; or when material objects, other traces or the individual’s fingerprints are found in the area, secondary legislation considers it justifies the detention of the person without a warrant and holding said person for investigation for up to forty-eight hours before deciding whether to bring the person before the corresponding judge or to release the person pursuant to the law.

While it is understood that the high crime rate that afflicts our nation has created the need to give the authorities new legal instruments in order to increase their success in investigating and prosecuting crimes, it is believed that excesses have been incurred in regulating the concept of *in flagrante delicto* by allowing comparative flagrancy, given that the police authority can carry out arbitrary detentions, when the spirit of our Constitution is that flagrancy only encompasses the moment the crime is committed and immediately after that time during the pursuit of the accused.

In view of this, it is deemed fitting to explain the concept of *in flagrante delicto*, by limiting its scope to comprise the moment the crime is committed, that is, the *iter criminis*, until the period immediately after in which the person involved is being physically pursued. Consequently, the purpose is to limit flagrancy to the point known in doctrine as “quasi-flagrancy” in order to bar any possible legislative excesses that have given rise to comparative flagrancy, which is not in accordance with the internationally accepted meaning of this concept.

C. *Investigative Pre-Charge Detention* [“Arraigo”]

Without a doubt, an innovative proposal is that of including in the Constitution a provisional remedy to prevent the accused from evading the prosecutorial authority at first, and ultimately judicial authority, or else that the accused might obstruct the investigation or affect the integrity of the persons involved in the act in question.

It is clear that the growth of organized crime, even that of a transnational nature, has placed the traditional judicial and procedural institutions in peril to a certain extent, which is why legislators have extended the range of effective measures to counterbalance its impact on the perception of public insecurity. One such instrument is that of pre-charge detention.

This concept consists of depriving an individual of his personal freedom for an established period of time during the preliminary investigation or the criminal proceedings by means of a court order requested by the office of the public prosecutor so as to prevent the accused from fleeing from the place of the investigation or hiding from the authority, or affecting the persons involved in the act in question. There is detention at the place of residence of the person under investigation or detention that is served elsewhere, even other than the territory in which he resides. The first instance has been used for crimes defined by law as serious and the second, only for alleged members of organized crime groups. In both cases, judicial authorization must always be obtained beforehand.

The measure is extremely useful when applied to individuals who live clandestinely or do not reside in the place under investigation, but it is especially so when individuals belong to complex criminal organizations that can easily elude international checkpoints or there is reasonable doubt that if released they will obstruct the authority or encumber the institutions or and evidence, and go against those for whom an arrest warrant has yet to be obtained due to the complexity of the investigation or the need to wait for evidence to come through international cooperation.

All the same, the Supreme Court of Justice of the Nation issued a final judgment in Constitutional Action (“*Acción de Inconstitucionalidad*”) case number 20/2003 filed by legislators from the State of Chihuahua against the state congress and governor, in which the court declared the invalidity of article 122 bis of the former local Code of Criminal Procedures in force, arguing that it fundamentally constitutes a restriction on the right of personal freedom that is not set forth in the General Constitution of the Republic. Therefore, the case stated that it is inadmissible in view of the principle set forth in article 1 of said Constitution requiring that any exceptions to constitutional rights must be stated in the Constitution itself.

In this sense, it is proposed to include the concept of pre-charge detention in article 16 of the Constitution, exclusively for cases involved with organized crime, establishing the cases of admissibility, the authority to request the de-

tention and authorize it, the period for which it can be granted, the option of having the judge determine the place and other conditions for serving said detention, the possibility of extending the duration of detention for up to an equal amount of time, and the justification for said extension, thus addressing the extremes of any exception to a person's right of personal freedom.

Therefore, the proposal to include the concept of pre-charge detention in cases of organized crime investigations and proceedings in progress was deemed admissible. In the case of proceedings, it shall encompass circumstances in which pre-charge detention is not carried out under the terms and conditions established by the judge and based on the corresponding law, as well as the period of up to forty days with the possibility of an extension for up to another forty days, as long as the circumstances for which it was initially authorized are still in effect.

D. Definition of Organized Crime

Since the 1990s, when the concept of "organized crime" was included for the first time in the Constitution, it aimed at establishing specific rules and some exceptions to the provisions applicable to most individuals subject to criminal proceedings. This situation derived from the need to have new and more severe legal instruments that would allow the authorities in charge of the investigation, prosecution and punishment of the members of actual criminal organizations, which have been acquiring much more influence and power than the traditional criminal organizations.

Unfortunately, this crime phenomenon has continued to grow exponentially, not only in Mexico but worldwide. This fact has compelled the international community to draft a convention that would establish, recognize and enforce, and manage mechanisms to fight this kind of crime, which puts State sovereignty and viability at risk. Thus, the United Nations Convention against Transnational Organized Crime, also known as the Palermo Convention as the political signing took place in that city, was agreed upon and has entered into force. Mexico has ratified this Convention and is a member State.

This Convention provides for measures of a different nature, but specifically for rules on the investigation, prosecution and punishment of this type of crime which due to its intensity implies forms and limits on the traditional rights granted to the accused during criminal proceedings, according to procedural law. Therefore, our country opted to institute most of the specific rules for this crime in a special law enacted by the Congress of the Union and in only a few cases were the rules elevated to constitutional level.

Even when the Supreme Court of Justice of the Nation's interpretation of certain articles of the Federal Law against Organized Crime has been in the sense that the articles must accommodate individual, and therefore constitutional rights, it is true that on distinctly emphasizing the accusatory nature of

the outlined criminal proceedings, by explicitly including various principles and fundamental rights that until now had only been implicitly suggested in the Constitution, it is necessary to include some specific rules that apply to organized crime. These rules pose certain restrictions on rights in order to opportunely comply with that set forth in article 1 of the Constitution, in the sense that the exceptions to the fundamental rights acknowledged by the Constitution must be included in it and consequently, the number of references to organized crime will increase in the articles of the dogmatic section. Therefore, in the interest of the clarity the supreme law should exhibit to make it accessible to any of the nation's inhabitants and thus generate legal certainty, it is important to establish a general explanation of what is meant by organized crime.

For these reasons, a definition has been incorporated into the Constitution. This definition is essentially an abridgement of the main components of the concepts contained in the current legal framework, and serves to delimit the scope of application of the limitations on individual rights, naturally making it possible for secondary legislation to provide a broader account of the restricted rights, based on the constitutional definition since, as is known, rights are established in the Constitution, but laws of a lower hierarchy can be elaborated on, as in the case of a legal definition that may include more elements than those set forth in said constitutional clause.

E. Requests for Search Warrants

One of the concerns is the speed of ruling on the requests for provisional measures and investigation techniques presented by the Public Prosecutor to the judge so as not to lose the opportunity of implementing said measures. However, one measure that stands out is the search warrant, which had usually been filed and processed through the traditional written procedures, which sometimes overly delayed the activities of the Public Prosecutor, which as a result posed the risk that the evidence sought would disappear, be altered or be destroyed.

In order to set the standards for a special rule that allows the request for such warrants and ruling on them by any means, leaving always a record of the communications, there is a proposal to eliminate the specific obligation of fulfilling this proceeding in written form along with other changes, such as appointing certain judges to promptly and expeditiously attend requests for said provisional and other measures. This will make it possible for the Public Prosecutor, whether in person or through less direct means, to file the request and for the judge to respond immediately. If the warrant is granted, the agent of the Public Prosecutor can immediately proceed to enforce the measure, notwithstanding the fact that the documentation supporting the authorization may be sent at the same time or at a later date for the records.

Furthermore, by establishing that judicial hearings must be governed by the principles of the accusatory system, hearings must be oral and it is feasible that procedural law specify the procedure for this process.

Along this line, the eleventh paragraph of article 16 of the Constitution should be modified to eliminate the special rule stating that search warrants must be requested in writing. Taking into account the fact that with the due process judges assigned by the judicial branch to focus on ruling immediately on the above-mentioned requests, the procedure is expected to be carried out orally, contributing to the effectiveness of the corresponding authorities.

F. Recording Private Conversations between Individuals

Ongoing debates surround the existing technological possibility that one of the parties to a private conversation can record said conversation and later use it without the other speaker's consent for it to be made public. However, it is different when one of the parties records a conversation with information about a criminal incident or behavior because in this case, it is the will of one of the participants who discloses the conversation without interference from a third party, and even more so when the content is unlawful or provides information that appraises of or explains a potentially criminal incident, for which there are provisions for public order and in public interest that requires its denouncement or the collaboration of the person who participated in the conversation.

Under this premise, for crimes like false imprisonment, as in the case of kidnapping, federal courts have allowed victim's relatives to present recordings of their conversations with the probable kidnappers as evidence in the criminal proceedings, and for these recordings to be included in the corresponding rulings.

While this might be deemed sufficient for resolving the problem, it is also true that, as in the case of police searches, it is illegal to apply this measure to the general public due to the widespread conviction that private conversations are invariably confidential. Furthermore, since this is under the authority of the judges, court jurisprudence is an interpretation of a given text at a specific moment in history that may be suspended at any time and rendered null and void. Therefore, it is necessary to establish the lawfulness of these acts under explicitly defined, general and permanent circumstances.

In view of this, establishing this restriction on the constitutional right to the inviolability of private conversations is legally warranted, except when ordered by legal decree, if one of the participants has taped the conversation without the consent of the other participant, as long as it does not infringe the obligations of reserve set forth in the laws.

G. *Preliminary Proceeding Judges* [“*Jueces de Control*”]

Since it is linked to several of the modifications to be made to article 16 of the Constitution, one proposal with a wide-ranging effect is that of establishing federal and local judges, called preliminary proceeding judges, who will basically focus on ruling on the prosecutorial requests for provisionary measures and investigation techniques to be resolved immediately to minimize the risk of any delay in executing the proceedings.

Aware of the complex reality our nation is facing and the rate at which favorable circumstances for carrying out the abovementioned proceedings change in particular, there are also concerns about upholding the Rule of Law and especially fighting high impact crime. Therefore, notwithstanding the responsibility the Public Prosecutor has and now, based on this ruling, the police will have in investigating crimes, it is deemed necessary to set down the establishment of “preliminary proceedings” [“*jueces de control*”] judges to focus on ruling on temporary measures and other proceedings that require judicial oversight in a timely and responsive fashion, that rulings may be issued by any legally unquestionable means and that rulings contain the required information, without this meaning that rulings will no longer be grounded or their motives not duly explained.

Another function of “preliminary proceedings” judges [“*jueces de control*”] will be to deal with appeals against conditional rulings, the non-exercise of criminal action, desisting and suspending criminal proceedings, to control its validity and in all these cases safeguard the rights of the accused, the victims and the offended party.

This type of judge could be the one to conduct proceeding hearings, before the trial, which will patently be governed by the rules of due process set forth in article 20 as proposed in this ruling. This will depend on the organization established by laws, as well as workloads and available resources since court circuits with high crime rates will surely require one or more judges to solely deal with ruling the abovementioned remedies and techniques, some judges limited to reviewing the appeals against Public Prosecutor findings, which may number in the thousands, and other judges to be responsible for handling the proceedings until before the trial takes place, even for abbreviated proceedings.

Thus, the fundamental powers should be established only at a constitutional level and further elaboration on the rights should be referred to secondary legislation so as not to overregulate our Constitution.

For all these reasons, it is deemed relevant to establish due process judges to be responsible for quickly ruling on prosecutorial requests for searches, detentions, interventions of private communication, search warrants and other issues that require judicial oversight, as well as for ruling on appeals against Public Prosecutor findings and carrying out procedural hearings prior to the

trial based on the principles of an accusatory system, according to the rules of organization issued for that purpose by each judicial branch.

2. *Article 17*

A. *Alternative Dispute Resolution Mechanisms*

The text proposed for article 17 establishes the alternative dispute resolution mechanisms that guarantee access to prompt and expedited justice for the general public. These alternative mechanisms to jurisdictional processes for solving disputes, which include mediation, conciliation and arbitration, among others, will make it possible first of all to change the model of restorative justice, lead to the public's more active participation in finding other forms of interacting that promote personal responsibility, respect for others and the use of negotiation and communication for collective development. These mechanisms will also assist in reducing the heavy workloads of the jurisdictional agencies and for victims to obtain restitution of damages more promptly, which is a pending matter of our legal system.

For criminal matters, it will be necessary to regulate the use of these mechanisms by administrators of the law, considering the nature of the rights that are protected and those that can be waived; and in all cases, it will be manifestly necessary to cover the restitution of damages beforehand and in full for it to proceed since this, as mentioned above, is a longstanding complaint of society that must be addressed. In view of the two aspects noted above, the forms of alternative justice for criminal matters will need to be reviewed by the authority performing them in favor of the victims and offended parties. Therefore, it is deemed important to appoint a judicial supervisor to fulfill this role.

B. *Quality Public Defense Services*

The regulations needed to allow effective access to justice for all the general public, and especially those who are most vulnerable, is another contribution found in the text proposed to modify article 17. Convinced that the "criminal law of the enemy", which attempts to label those who oppose the decision of the groups in power as dangerous using predefined and contrived concepts is not the solution for the peaceful and democratic life of our society, the Public Defender was established as an institution that safeguards the individual and collective rights of the Mexican people.

The progressive evolution of human rights has led to the conclusion that the States' obligation of guaranteeing the free exercise of these rights is not only limited to a prescribed matter, but it also entails an obligation for the

State to provide all the necessary means so that the subject of said rights can make them effective. In other words, it is the State's obligation to guarantee effective access to justice, as the renowned Italian legal scholar Mauro Capelletti accurately pointed out some 30 years ago.

This is one effective way of guaranteeing the general public's access to justice, mindful of the inequalities in Mexican society, of which a high percentage is subject to extreme poverty, and with the aim that the State guarantees quality legal defense services for the most vulnerable sector of society. If the justice system is decidedly acceptable for only prosecution agencies and trial courts and not for the defense of the most vulnerable, it will result in social injustice, a costly consequence for everyone.

Therefore, this institution of defense services must ensure quality with a professional, trained, career staff earning as much as public prosecutors, with the mission of adequately defending the people who so request it and the vision of being a defender of the rights of people in disputes with other individuals or in conflict with the law.

3. *Article 18*

A. *Changing the Expression "Corporal Punishment"*

The first paragraph of article 18 of the Constitution is changed in order to adapt the expression "corporal punishment" to the laws in force in the Constitution. Before reforming various constitutional instruments to eliminate capital punishment, the expression corporal punishment, that is, the punishment that can be inflicted upon the accused's body, comprehended both imprisonment and capital punishment. Given the fact that the Constitution now only allows imprisonment, it is necessary to adjust the text so it will correspond to said conditions. Therefore, the only term to be used hereinafter will be that of imprisonment.

B. *Changing the Expression "Convict" ("reo") for that of "Convicted Person"*

In accordance to the above and for the purpose of adapting the terminology of our Constitution to that of the international treaties to which Mexico is a part, it has been proposed to eliminate this word since it considered degrading and insulting, and to replace it with convicted person.

C. *Changing the Expression "Rehabilitation" for "Reinsertion"*

On the other hand, the term "social rehabilitation" is considered inadequate in referring to the moment in which convicted persons have completed

their sentences are reinserted into their social environment. Considering the fact that the fundamental nature of prison is that of a complete and exclusionary institution, we conclude it is not possible for convicted persons to achieve social rehabilitation during their stay at said institution. An institution whose main trait is exclusion cannot incorporate or readapt anyone to society. In view of this, support is given to the motion of changing the term “social rehabilitation” to that of “social reintegration” and to establish the new objective of inducing inmates not to commit crimes again.

*D. Maximum Security Centers for Organized Crime and Other Inmates
Who Require Special Security Measures*

A prison sentence affects one of a person’s most prized possessions: his freedom. However, sometimes, a citizen who breaks the law must be punished by having this valued possession restricted. Maximum security prisons must be reserved for persons who have been processed for or convicted of organized crime, and other inmates that require special security measures. Regarding this last premise, we refer to cases in which the crime is not one of those contemplated in the system for organized crime, but such a measure can be justified given the inmate’s ability to evade the course of justice or to continue committing crimes from penitentiaries, as well as in cases in which third parties pose a clear risk to the inmate himself —as in the case of former members of police institutions— or when there is a psychological condition that can put the entire prison community at risk, among other circumstances.

E. Exceptions in Cases of Organized Crime

It is deemed fit to prohibit the accused and those convicted of organized crime from serving their prison sentences in penitentiaries closest to their homes, and on the other hand, to designate special prisons for these inmates. Likewise, it is considered proper to approve restrictions on communications between these inmates and third parties, with the exception of their defense counsel, and impose special surveillance measures given the fact that these prisoners are extremely dangerous.

These Committees believe it appropriate to change the penitentiary system, but this will not be possible if prisons remain under the exclusive control of the Executive Branch. Therefore, it is accepted that the power of the Executive will be limited exclusively to the administration of prisons and the judicial branch will be granted the power to ensure a sentence is carried out.

With this separation, each branch of power will be given its corresponding share: the Executive Branch will deal with prison administration and the Judicial Branch with that of carrying out the sentences, which implies safe-

guarding the rights of the inmates and rectifying any abuses, discrepancies and compliance with the statutes that may arise within the prison system.

4. *Article 19*

A. *Change of Name: Trial Binding Order* [“Auto de Vinculación a Proceso”]

In this reform, the traditional name of indictment is replaced by that of trial binding order. The concept of indictment specifically denotes an inducement that is usually accompanied by some kind of deprivation of rights; while a binding to process order only refers to the formal notification that the public prosecutor receives regarding the accused, for the purpose of the accused being properly informed of the reasons for which the investigation is being carried out and so the judge can intervene to control the actions that could affect fundamental rights. Even then, the material substance of the case shall still be required.

B. *Standard for the Material Substance*

As in the case of article 16 of the Constitution, the new text of article 19 aims at modifying the standard of proof for the binding to process order to be issued. The reason for this is basically the same as that rendered for article 16 above. Regarding this point, it should be added that the extreme standard of proof that has been used until now creates the effect that, within the period of time established by the Constitution, the procedure is carried out in such a way that it culminates in a writ that is practically a sentence against the defendant. This weakens the trial, the only stage in which the accused can defend himself with effective guarantees, and unduly gives more strength to the unilateral procedure of the public prosecutors gathering of evidence during the investigation, which has not been subjected to the oversight of the accused. The horizontal control exercised by the defense at the trial assures the quality of the information provided by the public prosecutor; therefore, it is not appropriate for judgements to be anticipated before the trial before a judge.

C. *Precautionary Measures and Pretrial Detention*

In order to avoid the excesses committed until now during pretrial detention, it was decided to establish the principle of subsidiarity and of exception for this institution to act. The use of precautionary measures, which are genuine acts of interference, shall proceed solely when there is the need for precaution during the process or victim protection. This means that the

use of a precautionary measure will proceed only when there is the need to guarantee the appearance of the accused at the trial; the progression of the investigation; the protection of the victim, of witnesses or the community, as well as when the accused is on trial or has been previously convicted of a willful offense. Pretrial detention shall only proceed when no other precautionary measures can ensure these ends will be achieved.

This new design follows the principle of presumption of innocence. Several classical and contemporary authorities on procedural law have rightly noted the inevitable conflict of authority that is thought to affect the rights of persons who are subjected to pretrial detention without having their presumed innocence defeated beforehand at a trial in which all the guarantees of due process are respected. Conflict of authority in itself is insuperable, but in order to mitigate it by a certain degree, the admissibility of such effects is expected to be the exception.

Another aspect that should be taken into account is that provisional remedies should be proportional to both the crime ascribed to the accused and the need for preventive measures. The above-mentioned risks allow for adjustments and are never all or nothing; modifications will depend on each specific case. Therefore, the public prosecutor must always appraise the need for preventive measures and justify said measures before the judge, allowing both the accused and his defense the possibility of exercising the right of reply at a hearing.

Lastly, the admissibility of provisional remedies must be governed by the principle of subsidiarity so that whenever it is decided to apply this provisional remedy, it should be as least intrusive to an individual's legal domain as possible. The aim in this case would be to cause the least interference possible.

D. Pre-trial Detention and Serious Crimes

In regulating precautionary measures, cases dealing with serious crimes and organized crime are handled differently. The aim is to prevent what has happened so far in terms of serious crimes and organized crime; that is, that the lawmaker has been the one to make the final decision regarding which cases should be governed by the Constitution and which ones call for special treatment since the cases deal with serious crimes or organized crime. It should be noted that special rules for provisional remedies are needed for these cases; however, the exceptions must be set forth in the text of the Constitution because if it is cross-referenced with the law, it will inevitably weaken the principle of constitutional supremacy.

When the system of serious crimes was first created to admit release on bail, it intended this remedy to be the exception. However, state and federal experience has shown that his exceptional system has taken over the rest of the body of laws. Nowadays, there is tremendous abuse of pretrial detention,

inasmuch as most crimes meet the criteria of serious crimes in ordinary law. In order to overcome this situation, it has been decreed that the Constitution itself must determine the exceptional cases for which in principle it would suffice to prove the alleged material substance for pretrial detention to proceed.

Article 19 of the Constitution itself establishes the possibility that state and federal procedural laws incorporate an exception to the design of the regulations governing provisional remedies and pretrial detention as explained above. The judge is expected to order pretrial detention in cases of organized crime, intentional homicide, rape, kidnapping, violent crimes involving weapons or explosives, as well as serious crimes against national security, the free development of personality and health, if the public prosecutor is able to satisfy the requirements called for to entail a proceeding for these crimes during the hearing.

The decision regarding precautionary measures can obviously be revised, so much so that it expressly states that it will be possible to revoke the liberty of individuals already subject to the proceedings when extreme cases as set forth in the Constitution can be proven and according to that directed by law.

E. Suspension of the Statute of Limitations for Criminal Action and Proceedings against Organized Crime

To prevent those accused of organized crime to evade the law easily, the suspension of the statute of limitations for criminal and procedural action has been provided for in case the formal binding to process order has already been ruled for said crime.

5. Article 20

A. The Accusatory Process

A key element for reaching the fulfillment of the object of this reform is to create the bases for a completely accusatory court procedural system, regulated by the principles of public access, confrontation and cross-examination, concentration, continuity, immediacy and impartiality.

One of the most important characteristics of an accusatory court process is the strict separation that should exist between the investigative agencies and jurisdictional agencies. This principle is already recognized in article 21 of the Constitution, as well as in article 18, which establishes the Comprehensive Juvenile Justice System. However, Mexican legislative tradition has established a mixed process that veers away from this important principle. Therefore, the first paragraph of article 20 of the Constitution reiterates the accusatory nature of the process.

This ruling establishes that the process will be accusatory and oral. Orality in itself is not a procedural principle; however, it is the instrument that makes it possible to renovate and give efficiency to the rest of the principles as explained below. It is not possible to conceive public proceedings if legal proceedings are carried out in writing. In this type of procedure, judges and people learn about all the proceedings at the same time. Nor would it be possible to give it the corresponding continuity as the hearings develop and to focus on the evidence presented if the proceedings do not take place orally. Without orality, there is no place for the proactive interrogations that make confrontation and cross-examination possible.

It should be noted that orality is not only a characteristic of a trial, but of all the proceedings in which the accused should take part. Orality implies abandoning the system or methodology of putting together a case file as has been done until now, to be replaced by a hearing system.

The hearing system inherent to this new process implies that judicial decisions, especially if these decisions affect rights, are to always be taken before the parties after said parties have been given the opportunity to contradict the evidence and to be heard. Thus, orality is not a characteristic of trials alone, but of all proceedings in general, including the preliminary stages of a trial. Exceptions would naturally be made in cases in which, without the knowledge of the accused or his defense attorney, the public prosecutor requests an arrest warrant, a search warrant, intervention in private communications, or an order to withhold procedures, as well as other judicial proceedings that due to their nature require stealth.

B. The Structure of Article 20

The creation of the accusatory process requires article 20 to be restructured so as to include the principles of due legal process. In order to focus to the highest degree on the rules that govern this type of processes, the article has been restructured under three headings.

Section A encompasses the design and the general rules of criminal proceedings throughout their various phases, investigations submitted to judicial control, the preparation stage for the oral trial, the hearings that require confrontation and cross-examination. Sections B and C set forth the rights of the accused and of the victim or offended party, respectively.

C. Section A. The Principles of the Process

Sub-section I establishes the object of the criminal process, which simply consists of clarifying the facts, protecting the innocent, and striving to ensure that the guilty party does not go unpunished and that the damage is redressed.

In addition to that stated above concerning the hearing system, it should be noted that the principles of the criminal process do not apply to the trial itself, but to all the hearings in which evidence is discussed in the presence of the parties. Sub-section II of this section sets forth the principles of immediacy and free assessment of the evidence.

The principle of immediacy implies that all the pieces of evidence that are presented during a process and that contribute to taking preliminary decisions during the process and to determining person's criminal responsibility, whether witnessed by a judge at a hearing without compromises or intermediaries in such a way that the judge is able to decide on the decision in question after a free assessment of the evidence provided. This method significantly enhances the quality of the information based on which the decision is made, provided that it allows for direct contact with the source of the evidence; the ruling is then issued after hearing both parties.

The principle of free assessment of evidence is applied in decision-making. This principle is employed because the other systems traditionally used for assessing evidence in modern law are notoriously ineffective for guaranteeing the rational nature of judicial activities. This approach pertains to systems in which judges are separated into those of fact and those of law; that is, in systems that have a trial by jury. In these traditions, the jury is not obligated to explain its decision. This will not be the case in Mexico since decisions of fact shall be pronounced by professional judges who will be required to ground and explain their decisions as ordered in article 16 of the Constitution.

A weighted evidence system leads to unsatisfactory results. In this system, a pre-established legislative assessment of the evidence prevails over the judicial ruling —conclusive and semi-conclusive evidence. Despite the objectivity this system strives for, the results are genuinely poor in terms of the quality of the information used for decision making. The appearance of objectivity comes from its disguisedly deductive nature, which does not admit any authentic grounding from the facts. Empirical knowledge in law is primarily inductive inferential. Therefore, systems based on free assessment and healthy criticism are ideal for making the knowledge obtained during criminal proceedings more reliable.

Sub-section III of Section A establishes the prohibition of issuing sentences if evidence is not presented at a trial. The article itself sets forth the exception of preliminary evidence which, although it is in keeping with all the formalities pertaining to a trial, is presented before a due process judge before the trial has taken place.

Preliminary evidence is admissible in cases in which the evidence runs the risk of being lost if it is not promptly collected. Once the legal proceeding regarding preliminary evidence has been carried out, the results are incorporated into the trial by reading them.

An exception to this principle is also set forth for cases in which the accused expressly waives his right to an oral trial and admits to the act he is accused of

in exchange for some legal benefit. In these cases, the accused shall be judged by the due process judge with the evidence that come to light in the investigation carried out by the public prosecutor.

Lastly, a third exception to this principle is provided for cases of organized crime in which it is not possible to replicate the evidence at a trial either because the witness died due to an act attributed to the accused or because there is a proven risk for witnesses or victims. This possibility does not prevent the accused from objecting to and challenging the evidence presented.

In order to guarantee legal impartiality and to prevent judges from being influenced by information that has not been presented at a trial, sub-section IV stipulates that evidence is to be presented before a judge or a court different from the one that had previously handled the case. This focuses on the separation of the criminal courts of law at the trial level.

Once the investigation has been closed and an accusation has been prepared, the due process judge who issues the sentencing order and determines that trial proceedings be initiated has no longer jurisdiction over the trial. The reasoning behind this precautionary measure is that the judge or the court presiding the trial will only have the summary of the case and admissible evidence prior to trial that indicates the accusation and the evidence to be presented at the trial and that the decision-making body will hear for the first time.

Sub-section V establishes a fundamental principle of the accusatory process that states that the *onus probandi* corresponds to the accusing party and to the principle of equality between parties.

Sub-section VI prohibits the judge from coming into contact with any of the parties without the presence of the other. The reasoning for this approach is once again to prevent the judge from only obtaining unilateral information and that it predispose his criteria. This provision naturally has its exceptions for the proceedings requested by the public prosecutor and deemed necessary to guarantee the effectiveness of the investigation.

Sub-section VII states that once criminal proceedings have begun, early termination can be ordered if the accused does not oppose said termination under the conditions established by the law for such cases. If the accused admits complicity in the crime and there is sufficient evidence to corroborate the accusations, the judge must schedule a sentencing hearing. The law shall establish the benefits that may be granted in these cases.

Sub-section VII sets forth the standard of proof for a conviction, which is none other than the grounded proof for a conviction. As stated above, this is not about an intimate conviction, but of one that can be justified by the factual elements of which the public prosecutor can give proof.

Sub-section IX refers to the clause for excluding illegally obtained evidence. The prohibition of illegally obtained evidence is essential for preserving procedural loyalty on behalf of the police and the public prosecutor, as well as for professionalizing the investigation.

The text was drafted to adhere to the need for properly dimensioning this procedural concept. In view of the other alternatives that were discussed, it was decided to adopt the one that says that any evidence gathered by violating fundamental rights, and not only legal rights, would be declared null and void. This is because some violations of legal provisions can be amended and corrected during the process without this meaning that rights are affected. Broadening the scope of excluding evidence of assumptions that do not imply defenselessness or the violation of other guarantees could result in a repetition of useless procedural acts or the annulment of decisions purely on the basis of formalities, which could affect the effective procurement of justice.

Lastly, sub-section X states that all the principles explained above must also be observed in the preliminary hearings of the trial.

D. Section B. The Rights of the Accused

Section B now establishes the rights of the accused. A list of these rights is given below. First of all, the right to the presumption of innocence is expressly recognized.

The principle makes it possible to establish the process as a way of obtaining proof that an individual has committed a crime, and until this requirement is fulfilled, no individual can be considered guilty or subject to punishment. Guilt and not innocence must be proven.

In the Mexican legal system, this principle is already recognized as the country has signed various international instruments that expressly grant the presumption of innocence as a guarantee. This principle has been included in several international human rights instruments, some directly binding and others indirectly binding. Among the international documents with a legal binding effect are the Universal Declaration of Human Rights (article 11, paragraph 2) and the American Declaration of the Rights and Duties of Man (article XXVI) dated December 10 and May 2, 1948, respectively; the International Covenant on Civil and Political Rights of December 19, 1966 (article 14.2); the American Convention on Human Rights of November 22, 1966 (article 8.2); as well as by the Standard Minimum Rules for the Treatment of Prisoners (article 84, paragraph 2) adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Geneva in 1955. Despite its widespread influence within the international framework of human rights, in our environment it has been very difficult to establish recognition of this principle. In fact, until 1983, the Federal Criminal Code stated exactly the opposite, that is, the presumption of guilt.

In addition to being a fundamental principle for prosecution, the presumption of innocence represents an obligation in the treatment of the accused. Thus, the regulation of provisional remedies has been designed as mentioned above.

Sub-section II establishes the right to render a statement or to remain silent. The right to a preliminary statement has traditionally been a concept used in Mexico's social setting to allow the accused to answer to the charge the accusing party has made against him. It is now deemed necessary to reform this right so as to give it a broader scope that is not subject to a statute of limitations—the traditional 48 hours when charges were filed with the accused in custody—nor with the excessive formalities that are now required. The right consists of allowing the accused to declare if he desires to do so, or to remain silent, without the latter being used as an indication of guilt against the accused. The moment this right can be claimed is precisely when the accused is detained.

Sub-section III establishes the accused's right to be informed of the charges against him from the moment of his detention or at his first appearance before the public prosecutor or judge, as well as the rights to which he is entitled. An exception is made for cases of organized crime. In these cases, it is possible to authorize that the name of the accuser not be revealed. The possibility of granting benefits to those who effectively collaborate in the prosecution of organized crime is also foreseen.

Sub-section IV establishes the already existing right to offer material evidence. One of the cornerstones of the right to defense is comprised of the right to present evidence. The way in which this right is structured consists of establishing the appropriate conditions to present evidence, as well as the assistance that might be needed to ensure the appearance of witnesses in court.

Sub-section V establishes the right to be tried in a public hearing before a single or collegiate decision-making body. An oral trial is the last stage in the entire criminal justice system. Only the presence and effectiveness of trial rights make the existence of other practices feasible and legitimate from a democratic perspective. Some of these practices include alternative procedures, the rescission of cases and the admissibility of an abbreviated trial procedure. Without an oral trial, the criticism many direct against the so-called plea-bargaining or consensual justice would be valid since it admits criminal proceedings without evidence and without truth. Even then, the possibility of a trial with guarantees such as the fundamental rights of the accused makes it possible to anticipate what will happen at the trial and to determine the best way to face criminal prosecution. Whoever knows himself innocent will always opt for an oral trial that absolves him.

Public access may however be limited. When it is necessary to limit public access to trials in order to protect the assets of a higher importance; that is, when it is indispensable for the protection of victims, witnesses or minors. Restrictions to public access should not be interpreted as affecting the right of defense.

Protecting the personal information of third parties, as in the case of industrial secrets, can also be considered for restricting public access to trials.

Lastly, it should be noted that since public access is an exception to a general rule regarding rights, this exception should in turn be enacted with cer-

tain limits; that is, to the degree to which it is strictly needed to fulfill its purpose of protecting.

Sub-section VI guarantees the right to information. As mentioned above, the right to information is an absolutely fundamental right. The general rule is that the accused should be given all the information needed, in a timely fashion, so he may exercise his right to confrontation and cross-examination, as well as to defend himself. The information from the investigation carried out should be disclosed to the accused if the accused is detained; at the moment of being summoned to appear as a likely suspect; or else when he is involved in the proceedings. As of these moments, the accused should be provided with all the information he may request for his defense and that are found in the records of the investigation.

One of the basic premises of this constitutional reform is that human rights protection and the instruments for an effective criminal prosecution are completely compatible. The fact that the accused has the right to access all the information cannot be interpreted as opening the door to the destruction of evidence and of the means of evidence needed for the successful outcome of criminal investigations. Along these lines, this Committee believes it is indispensable to include in the text of sub-section VI the possibility of ordering secrecy in the investigation, even when the accused has already been formally "binded" to the process.

This discretion shall only be admissible for the purpose of upholding the success of the investigation and when discretion is essential for this end. The due process judge would be the official in charge of authorizing the discretion of the investigation at the request of the public prosecutor. As with any other exception to a constitutional guarantee, its admissibility should be limited and proportional to the specific conditions of the case. The information, however, will have to be provided in a timely manner to the accused before the trial so that the accused may exercise his right to defend himself.

Sub-section VII refers to the required term for a trials. The rule that the accused shall be judged within four months in cases in which the maximum punishment does not exceed two years in prison and within a year if the punishment exceeds that period of time, unless an extension has been requested for the defense of the accused, shall remain in force.

Sub-section VIII establishes the rule of the right to adequate defense. It is deemed essential to adopt the proposal, object of this ruling, in order to establish the right to an adequate defense by a lawyer as an inalienable constitutional right, thus eliminating the traditional concept of person of trust. The person of trust does not actually guarantee anything and the possibility of that person actively participating in the accused's defense has only translated into corrupt practices and a lack of professionalism.

Sub-section IX sets forth the new rules to limit the term of pre-trial detention. In addition to limiting the term, which cannot exceed the maximum sentence for the crime in question, there is already a new rule for the maxi-

imum term of this provisional remedy, which states that pre-trial detention cannot last for more than two years if the delay can be attributed to the State.

E. Section C. The Rights of the Victim or the Offended Party

Section C of article 20 of the Constitution now confers new rights for crime victims. Basically, this consists of a more active participation in the process by embracing innovative concepts.

In this reform, important rights that have been recognized before are preserved. Such is the case of the victim's right to receive legal advice from the public prosecutor, to be informed of his rights and to receive information throughout the development of the criminal proceedings, if so requested.

The rights to receive medical and psychological assistance are also preserved, as well as having access to other measures for protection and assistance.

A new constitutional aspect of assistance is established in such a way that the victim can directly intervene in the trial and seek remedies under the terms established by law. Several states, such as Baja California, Chihuahua, Morelos, Oaxaca and Zacatecas, have incorporated the concept of "assisting party" in their procedural statutes. This recognizes the victim as a genuine party to the proceeding; that is, it allows the victim to join the accusation presented by the public prosecutor. In these statutes, the victim is given the possibility of naming a legal representative to directly litigate at the oral trial. This concept is now embodied as a new constitutional guarantee so that victims can have the opportunity to directly defend their interests. Naturally, this does not mean that the public prosecutor is no longer obligated to give victims effective, quality service and represent the interests of the victim.

The newly established rights for victims include the possibility of protecting their identity in cases of minors, or in cases of victims of rape, kidnapping or organized crime, whenever the judge deems it necessary for their protection.

Likewise, the public prosecutor's duty to design strategies to protect victims and offended parties, witnesses and all others involved in the proceeding is also established.

In addition to the above, the scope of the right to contest the decisions not to prosecute a criminal action for all the legal purposes comprised in all the forms in which this could occur; that is, in cases of waivers and of confidentiality. Case law had already foreseen these extremes, which are now expressly recognized in the Constitution.

6. Article 21

In the draft proposed for article 21, the creation of a new national, general code of coordinating principles for agents that form part of the National

Public Security System is deemed pertinent. The regulation expressly contemplates coordination between the Public Prosecutor and the police forces at the three levels of government in order to attain nationwide integration of public security efforts, but always within a framework of respect towards the federal system.

Thus, the law enacted on this matter, which contains the coordinating principles for the National Public Security System, should specifically establish at least certain components. The first one should regulate the recruitment, admission, training, duration in service, evaluation, knowledge and certification of the members of public security institutions. The second component should establish an essentially homogenous police career nationally as a basic part of these principles. Moreover, the certification of police forces and Public Prosecutors should be specifically regulated. This not only implies putting them into the database to prevent those who have committed crimes or are members of illegal organizations from entering police institutions, but also, and primarily, establishing a certification system to ensure that police forces have the knowledge and skills needed to perform their duties, always within an unrestricted framework of respect for human rights. Thus, for instance, for a member of the municipal, state or federal police not assigned to a state or federal investigation agency to be able to carry out the work of preliminary investigation or assist the public prosecutor, should be fully certified and have knowledge of legal issues and of the protection of human rights, as well as the abilities and skills that allow him to do his job effectively.

This means that, in the federalist spirit that inspires this reform, the general laws established by the Congress of the Union must be adapted to each of the realities and situations of each region in the country by means of laws that state legislative bodies shall enact under the terms of the system.

On the other hand, article 21 of the Constitution has been reformed to establish the relationship between the Public Prosecutor and the police during the investigation of crimes, as well as for investigations dealing with intelligence and prevention.

Just as happens in most countries in the world, police officers will be under the auspices and the direction of the Public Prosecutor when exercising the duty of criminal investigation. These police officers will be able to perform the work of analysis and investigation but with certain restrictions. At the moment in which the police officer discovers the crime, he must notify and report it to the Public Prosecutor immediately. This first paragraph of article 21 should be read as an integral part of the last paragraphs of article 21 and, as a result, police officers that perform investigative functions should be certified, and have not only the knowledge and skills to do their job technically, but also the legal regulations and unrestricted respect to human rights while investigating. The principle upheld by the permanent legislature for enacting these changes implies the absolute need for coordination between

the agents of the Public Prosecutor and police officers for reasons of public security. Coordination in performing the investigation means that both agents and police officers must perform their duties in such a way that the objective of the investigation is achieved, but always in dealing with the investigation of crimes under the auspices and direction of the Public Prosecutor in the exercise of this duty.

Carrying out the investigation under the auspices and direction of the Public Prosecutor represents an operative direction of the work of investigation and this direction is separate from the hierarchy of the police, as the police may be administratively assigned to other bodies, ministries or even municipalities; or else to the ministerial or judicial police assigned to state or federal Attorney General as in the case of crime investigation agencies. This means that state or federal legislatures will determine the nature of this relationship.

A. Private Criminal Action

Along another line, the victim will have the possibility of exercising criminal action directly, without prejudice that the Public Prosecutor may intervene in these assumptions to safeguard public interest. Two forms are established: one pertaining to the possibility that the public prosecutor's accusation is adhered to, which was already explained on discussing the issue of trial intervention, and the autonomous exercise of that right for certain cases as set forth in the law. The exercise of criminal action in these situations will clearly be the exception, only in those cases in which the interest of the affected party is not general. As in the case of assistance, this possibility should not translate into the Public Prosecutor neglecting cases, but should intervene since the authority to do so has already been given him by article 21. These possibilities will allow the procurement and administration of justice to become more transparent, provided that it gives way to citizen control over the functions involved in procuring justice.

B. Plea Bargaining

The duty of rationalizing and creating a coherent policy for criminal prosecution is already a manifest standard to efficiently manage public resources, handle economic problems and maximize the available resources to their highest level, as well as to accomplish the desired political-criminal objectives.

The unconditional use of the principle of full responsibility in criminal investigation overloads the justice system with minor crimes that have no bearing on public interest, but that criminal investigation authorities are obliged to pursue these crimes in view of a misunderstood non-discretionary nature of criminal prosecution that generates ongoing investigation costs for issues that

do not merit it. Under these circumstances, it is deemed necessary to grant to the Public Prosecutor the power to use plea bargaining so as to allow the office to manage the resources available for investigation and use said funds for crimes that offend and harm the legal interests of the greatest consequence.

It is clear that plea bargaining will not apply in cases of public interest of capital importance. Likewise, the possibility of objecting to the non-exercise of criminal action before legal authorities is also upheld.

7. *Article 22*

The current first paragraph of article 22 intends to establish the principle that all punishment must be proportional to the crime punished and the assets affected. The intention is to have legislators always looking for correspondence between the punishment and the value of the legally-protected property when determining sentences. Thus, the greater the effect, the greater the punishment, and vice versa.

[...]

The use of forfeiture seeks to create a newer and less complicated concept to apply, one that allows the State to exact assets on which there is information demonstrating that said assets are the instruments, objects or products of organized criminal activities, crimes against public health, kidnapping, auto theft and human trafficking, or activities aimed at hiding or interspersing the assets that result from such crimes.

This modification aims at confronting crime systemically, directly having an impact on criminal finances, increasing the costs and lowering the profits, as well as being a frontal attack against the factors that cause, correlate, give way to or promote criminal behavior.

It should be noted that currently the destiny of the assets instruments, objects or products of a crime depends, first of all, on the seizure of said assets. Likewise, it is essential to wait for the official statement of full criminal responsibility of one or several people. However, sometimes, the assets may not have be directly related to the accused, even when there is evidence indicating that the assets are the instruments, objects or products from criminal activities, or activities aimed at hiding or interspersing the assets that result from a crime.

In this sense, in order to find an efficient tool that helps dismantle criminal organizations and limit their negative effects, prevent these organizations from spreading, and principally seize the assets of these groups, establishing a procedure that is jurisdictional and unconnected to criminal matters is deemed necessary.

By this means, ordering the seizure of property will be allowed for assets that:

- a) Are instruments, objects or products of a crime, even when a sentence has not been issued to determine criminal responsibility, but there is sufficient proof to determine that the criminal act took place.
- b) Are not instruments, objects or products of a crime, but have been used or intended for concealing or merging property that is the product of a crime.
- c) Are being used by a third party to commit crimes if the owner of the property was aware of the fact and did not notify the authority or did something to hinder it.
- d) That are owned by third parties, but there is sufficient evidence to prove that said assets are the products of offenses against property or of organized crime and the person accused of these crimes acts as the owner of said assets.

Lastly, in order to respect every person's constitutional right to due process of law, it should be noted that remedies to prove the lawful origin of the assets in question and acting in good faith, as well as the impossibility of knowing about the unlawful use of said assets may be applied against procedures regarding the seizure of assets.

8. *Articles 73 and 115*

The first proposed reform is that of section XXI of article 73 of the Constitution. This reform aims at granting the Congress exclusive power to legislate on matters of organized crime, which means that only the Federal Government will deal with crimes of this kind. During the transition period, which will be discussed below, state laws on such matters shall continue in effect until the Congress exercises the power now granted to it.

Meanwhile, as established in the reforms set forth in articles 21, 73 section XXIII and 115 of the Constitution, the National Public Security System will allow activities regarding this matter to be coordinated envisioning federal, state and municipal levels, along with basic agents supervising on behalf of the National System. This reform will make it possible for the System created in 1995 to evolve as the system has not been able to fully guarantee the quality of the public service rendered by Public Security despite the major budgetary investments that have been made.

The current state of both the system and of federal, state and municipal police institutions was analyzed to draft the reforms to the National Public Security System. It was observed that there are different standards and attributes, which vary in regions and even in processes of deterioration, corruption and sometimes, admittedly, by drug-trafficking infiltrating the ranks. Thus, while there are states and municipalities with well-trained, prepared police forces, there are others in conditions that are not as favorable. Despite

the undeniable progress that has been made, even federal institutions have not been able to establish themselves as professional, state-of-the-art institutions. Despite having been established more than ten years ago, the Federal Preventive Police is still trying to establish an action plan to achieve efficiency.

Therefore, it is necessary to revise the entire public security system in order to make it consistent with the realities of our country, endowing the institutions with the attributes needed to fulfill their duties. Naturally, this will necessarily be balanced, an indispensable aspect to prevent any abuses or, what is worse, violations of citizens' fundamental rights.

Thus, the first paragraph of article 21 stipulates that the work of crime investigation corresponds both to the police and the Public Prosecutor. This is necessary, considering that, in the literal meaning of the text, the control of the investigation currently corresponds exclusively to the Public Prosecutor. As a result, the interpretation given to this has been that police officers, even ministerial ones, cannot participate in absolutely any of the phases of the investigation.

This interpretation is erroneous considering that, according to the most advanced models of investigation, it is the duty of the police to perform basic tasks like preserving the crime scene, gathering information or evidence that will be essential for ensuring successful criminal proceedings immediately after a crime has been committed.

It is very important to make it clear that in the exercise of their investigative duties, the police officers shall always conduct themselves under the auspices and management of the Public Prosecutor; in other words, with the reform, the latter shall not lose its role as the controller and the key player during the investigative phase.

Without a doubt, another enhancement lies in the fact that the new proposed text does not predetermine an organic structure for the investigative police. This means that both the Federal Government and the states will be in charge of deciding, by means of their own legislation, the best possible location for this police force: whether as part of the same investigative institution (the attorney general office) or in another public administration agency as done in most countries.

Regardless of the above, these Committees believe it necessary to develop a wide-ranging security system based on coordination, but one that also establishes the basic requirements for regulating police institutions nationwide. Therefore, the establishment of a National Public Security System is being proposed.

This system would be conceived, in the first place, to set forth the regulations for police career services; that is, the selection, admission, training, tenure, evaluation, recognition and certification of members of public security institutions. Of course, the operation and development of the police career will basically be carried out in municipalities, states and the Federal District, but that will be subject to these bases.

In second place, the bases are intended to cover aspects regarding criminalistics and personnel.

Prevention is especially important, in the sense that, once the system is implemented, no one shall be able to join these institutions without having been duly certified and registered.

Social participation is an essential component for success of the system. Therefore, it is deemed fit to include that the bases of the system must imperatively take community participation into account so that society can assist, among other things, in evaluating crime prevention policies, as well as the results of the institutions themselves.

Finally, a law now in force for budgetary provisions is contemplated to be included in the text of the Constitution so as to specify that the funds the Federal Government allots to states and municipalities for public security may not be used for a different purpose.

In order to make the system congruent, an additional reform to section VII of article 115 stipulating that a law in state legislatures shall govern preventive police forces for the purpose of establishing basic standardization has been proposed.

It should be pointed out that this modification does not change the fact that the law states that the preventive police are under the command of the municipal president; this means that as upheld by Supreme Court doctrine, the power to name the head of the municipal police shall still be the responsibility of this municipal official.

9. *Article 123*

The principles of legality, integrity, loyalty, impartiality and efficiency are the mainstay on which the behavior of every public servant is based. This is especially important when dealing with members of police, law enforcement and crime investigation institutions.

The interest in having efficient, honest and reliable judicial police agents and police officers, who can fight crime professionally, ethically and effectively, gave rise to the March 3, 1999, reform to article 123 of the Constitution. At that time, lawmakers strove to include more efficient mechanisms to dismiss those officers who, for whatever circumstance, act against the principles governing police careers. For this purpose, the following was established:

[...] The good officers in police and public security institutions should have systems that allow them to make a decent career as a professional and recognized by society. However, these systems should also allow the authorities to expediently dismiss members of these institutions who abuse their position and corrupt the institutions [...].

This measure strives to remove the bad elements in public security and law enforcement institutions, without allowing them to be reinstated, regardless of the outcome of the court ruling on the trial or means of defense brought before court; and if the case is ruled in favor of the plaintiff, the plaintiff is only entitled to a worker's compensation.

However, various legal criteria later allowed these officers to be reinstated in their positions. This was due to the fact that even when *amparo* sentences only deal with the legal implications, they have the effect of restoring things to the way they were and, as a result, have a bad public servant remain in the institution.

In view of this, this reform to article 123, Sub-Section B, Section XIII is intended to establish that in cases of non-compliance with laws stating the rules of continuance or of becoming liable in the performance of their duties, public prosecutors, experts and members of Federal, Federal District, state and municipal police institutions shall be removed or dismissed from their positions without the possibility, under any circumstance, of being reinstated or restored to their positions. In other words, even though the public servant may file a legal remedy against his dismissal, cessation or removal and were able to obtain a ruling in his favor, whether due to errors in the proceeding which lead to a retrial or a definitive ruling on the merits of the case, the State may not reinstate said public servant. However, under these circumstances, the State would be obligated to compensate the affected party.

It was considered important to include agents of the Public Prosecutor and experts in this constitutional statute, as they are essential parts of the process of law enforcement and investigation and their performance must be maintained under the principles of absolute professionalism, ethics and efficiency in their work environment.

The reliability of expert opinions is a vital component for the rulings issued by a court of law within its jurisdiction, and may allow the ministerial authority to better reinforce the investigation to therefore better prosecute crimes, so that the accused is granted more defense mechanisms in the face of a potentially ungrounded accusation.

In view of the above, it is proposed that the constitutional system in place for public prosecutors and police officers, in terms of systems regarding removal, cessation or dismissal, also apply to experts, who already have the incentive of career service.

As a measure to fight corruption in police and law enforcement institutions, the reform is conclusive in asserting that members who have incurred in non-compliance or serious misconduct as set forth in its disciplinary or work regulations may not be reinstated in their positions since it denotes an offense to the institutional values of honesty and high ethical standards needed in the public security and law enforcement system, a cornerstone of the spirit of this reform.

As seen, this reform gives rise to a healthy balance between the need of providing a career service, needed to motivate personnel by having the prospect of professionalization and growth, and the imperative of having efficient mechanisms to purge the system of agents who deviate from ethical principles and soil and damage the institutions.

Finally, according to the bill to reform Sub-Section B Section XIII of article 123 of the Constitution presented last November 15 before the Senate sitting *en banc*, it is again a priority to elevate the standard of quality of life for agents of the Public Prosecutor, members of police institutions and experts, as well as that of their families and dependents, by means of complementary social security systems that can be established by federal, state and municipal government authorities.

10. *Transitory Regime*

The justice reform is undoubtedly an undertaking of enormous importance and as such, one that requires great effort, as well as extreme care. Errors in its implementation may cause serious problems that have even led to the failure of similar reforms in other localities.

The federal system emphasizes the need to pay attention to the temporary nature of its implementation since, unlike States under a unitary or centralist regime, in Mexico, a change like the one proposed requires the participation of the Federal Congress, state legislatures and the legislative body of the Federal District.

Moreover, the above must be done gradually and in such a way that it allows members of the Union to advance at their own pace; obviously, with a maximum time period that will assure all Mexicans that, on reaching the deadline, Mexico will have a fairer, more efficient and more expeditious criminal procedure. Thus, Congress proposes a detailed transitory system that includes the abovementioned imperatives.

The first consideration established is that the Decree for the reform shall enter into force the day after its publication in the Federal Official Gazette. However, it then states there will be a series of exceptions, which are explained as follows:

- a) The new accusatory criminal procedure system shall enter into force when established by secondary legislation (federal or local) without, under any circumstances, exceeding a period of eight years, as of the day after the publication of this Decree to reform the Federal Constitution.
- b) As a result of the above, the second transitory article establishes the obligation of the Federal Government, states and the Federal District to issue and implement the modifications —or even new statutes— deemed necessary to be adopted in the new system in their corresponding jurisdictions.

One important consideration lies in instructing the various levels of government to adopt this system gradually, either by implementing the system regionally or that the new process be applied to certain criminal behaviors until it can be applied to all types of crime.

- c) Due to the complexity of the reforms, the different people involved in criminal procedures, that is, public prosecutors, judges, the accused and victims, among others, must be given complete legal certainty with the implementation of a criminal procedure that will effectively come to modify age-old customs and behaviors, as well as redefine or increase the guarantees established in this matter.

To do so, it has been proposed that when the legal provisions implementing the constitutional reform are published, the corresponding legislative branches should issue a statement. This is a formal act that expressly stipulates the exact moment at which the accusatory criminal procedure system enters into force and has been incorporated into the corresponding laws. This action shall also serve to explain to the citizens of each state the principles and guarantees that will govern the form and terms under which criminal procedures shall be put into effect. This statement will obviously be published through official means of communication.

- d) This Congress is well aware of the fact that some states of the nation have already initiated reforms that lead to the establishment of an accusatory system in their corresponding jurisdictions. For these cases, the Constitution should set forth a rule of procedure in a third transitory article that will allow these states to uphold their own reforms and that, furthermore, the states should be given the guarantee that any court proceedings and trials that may have been carried out are entirely valid and not affected by the entry into force of the reforms made to the Federal Constitution. Thus, any risk of contesting such processes and trials with the argument that there were no constitutional bases for said trials to take place is eliminated.

On the other hand, some of these states are waiting for the reform now being approved in order to make adjustments to their provisions and supplement or promote their own reforms. States may do so within the above-mentioned term of eight years.

- e) The starting point for implementing the new accusatory system is a vital aspect in the reform in question, since it consists of defining the moment at which the new system shall be put in practice.

In this regard, international experiences in the same field show that it is not recommended that the new system be used for criminal proceedings currently underway. In fact, the ideal solution for these kinds of measures is to begin at zero; that is, that the reform only be applied to proceedings that have been initiated after the said system has entered into force. The explanation established in the fourth transitory article is

undoubtedly also necessary to prevent, at all costs, the accused subject to proceedings from availing himself of the later rules considered more beneficial for his case that are set forth in the new system. In other words, the success of the reform implies making an exception to the principle of retroactivity, in one's favor, on criminal matters.

- f) Along another line of thought, and given the fact that the reform now approved transfers the power of legislating on organized crime to the domain of the Federal Congress, it is also necessary to clarify two important matters: First of all, it is important to uphold the validity of local legislation on this matter until the Congress exercises the powers granted to it in article 73, Section XXI of this Constitution, in order to circumvent any legal loopholes that make it impossible to prosecute organized crime. Secondly, it is essential to clarify that the criminal proceedings opened on the grounds of said legislation, as well as the sentences issued based on said legislation, shall not be affected by the entry into force of federal legislation. Therefore, these criminal proceedings should be concluded and carried out, respectively, according to the provisions in force prior to the entry into force of the latter legislation.

Regardless of the above, this elected government body believes it necessary to establish a maximum term of six months for the Federal Congress to discuss and approve the law that creates the National Public Security System. States should follow suit within a year of the entry into force of this Decree.

The above is mandatory given the importance of the matters contemplated in these laws and their impact on the future development of police institutions nationwide, in addition to the imperious need to move toward standardized processes for recruitment, selection, promotion, certification and professionalization, as well as the creation and networking of databases as indispensable tools to enhance the fight against crime nationwide.

Meanwhile, international experience has also shown that such an important reform requires a significant amount of financial resources. Without said funds, the reform would be condemned to failure since it is necessary to invest particularly in training public prosecutors, judges, magistrates and public defenders, among others, as well as in the physical infrastructure to adapt it for carrying out trials. Hence, the seventh transitory article manifests the obligation of the Federal Government and state legislatures to allocate the funds needed for the criminal justice system reforms.

It is also important to have an agency to coordinate national efforts to ensure the success of the reform at both federal and state levels. In addition to the branches of government, other agencies, like social or academic organizations that can contribute their knowledge, statistics and experience to the proceedings, should participate to enhance the implementation of the new criminal proceedings.

The eighth transitory article of the Decree declares the creation of this agency and provides for its establishment within the first two months after the

entry into force of the reform. Logically, this agency will be endowed with a technical secretariat that will act as the executive or operational department to advocate for and support the various branches, agencies or states along the course that has now been taken.

Finally, and regardless of the issues dealing with the transitory regime for the implementation of the new system a tenth transitory article has been provided to govern house arrest.

The transitory nature of this provisional remedy lies in the fact that its existence is deemed incompatible with or unnecessary in accusatory criminal systems.

Even then, it must be admitted that the abrupt elimination of this remedy will deprive federal and local law enforcement agents of a tool that is currently provided in most secondary codes and must therefore continue to exist at least until the accusatory procedure system enters into force.

To prevent the indiscriminate use of this remedy, it is deemed fitting to establish the exact premises for it to proceed, as well as its maximum term, in the transitory articles.

II. EXECUTIVE BRANCH
MINISTRY OF THE INTERIOR

DECREE BY WHICH VARIOUS PROVISIONS OF THE POLITICAL CONSTITUTION
OF THE UNITED MEXICAN STATES ARE REFORMED AND ADDED

(In the margin there is a seal depicting the National Seal that reads: United Mexican States. Presidential Office)

FELIPE DE JESÚS CALDERÓN HINOJOSA, President of the United Mexican States, makes it known to its inhabitants:

That the Permanent Commission of the Honorable Congress of the Union has brought before me the following

DECREE

“BY THE POWERS GRANTED TO IT BY ARTICLE 135 OF THE CONSTITUTION AND PREVIOUSLY APPROVED BY THE CHAMBER OF DEPUTIES AND THE CHAMBER OF SENATORS OF THE UNITED MEXICAN STATES AS WELL AS THE MAJORITY OF THE STATE LEGISLATURES, THE PERMANENT COMMISSION OF THE HONORABLE CONGRESS OF THE UNION

Decrees:

THE AMENDMENT AND ADDITION OF VARIOUS PROVISIONS OF THE POLITICAL
CONSTITUTION OF THE UNITED MEXICAN STATES

Sole Paragraph. Articles 16, 17, 18, 19, 20, 21 and 22 are amended; Sections XXI and XXIII of Article 73; Section VII of Article 115 and Section XIII of Subsection B of Article 123, all of which are from the Political Constitution of the United States of Mexico, shall be as follows:

Article 16. No one's person, family, residence, documents or possessions can be disturbed unless by virtue of a warrant from the competent authority, duly based on law and fact and which sets out the legal justification for such proceedings.

An arrest warrant can only be issued by the judicial authority, [and must be] preceded by an accusation or complaint about the commission of an act stipulated by law as a crime punishable by imprisonment and information is on file which establishes that the act was committed and that there is probable cause [*“existe la probabilidad”*] that the suspect committed or participated in the commission of said act.

The authority executing an arrest warrant must bring the suspect before the judge without delay and under his full responsibility. The contravention of this rule shall be punishable by criminal law.

Any person may detain a suspect at the moment he is committing a crime or immediately afterwards, delivering him without delay to the nearest authority, who shall in turn bring him before the Public Prosecutor without delay. The detention shall be recorded immediately.

Only in urgent cases, when dealing with serious crimes defined as such by law and in the face of a reasonable risk that the suspect might evade justice, or cannot be brought before a judicial authority due to the time, place or circumstances, the Public Prosecutor may, under his own responsibility, order his or her detention, stating the legal, factual and evidentiary justifications for [*“fundando y motivando”*] this decision.

In cases of urgency or *in flagrante delicto*, the judge assigned to the case shall immediately ratify the arrest of the suspect or order his or her release according to law.

At the request of the Public Prosecutor and when dealing with organized crime, the judicial authority can order the pre-charge detention [*“arraigo”*] of a person, with the specifics of place and time as stipulated by law, for a period not exceeding 40 days, as long as the action is deemed necessary for the success of the investigation, the protection of persons or legal interests, or when there is a credible risk of the accused evading legal action. This period can be extended provided that the Public Prosecutor can prove that the original causes for imposing said detention remains. In any case, the total period of detention may not exceed 80 days.

The term organized crime is understood as referring to an organization made up of three or more persons for the purpose of committing crimes permanently or repeatedly, according to the terms of the corresponding law.

No suspect is to be held by the Public Prosecutor for more than forty eight hours, a period during which the suspect must be ordered released or brought before the judicial authority. This period may be doubled in cases classified by the law as organized crime. Any abuse of the aforementioned provisions will be punished under criminal law.

All search [*“orden de cateo”*] warrants, which can only be issued by the judicial authority at the request of the Public Prosecutor, shall state the place to be searched, the person or persons to be apprehended and the objects to be seized, conditions to which the action shall be solely restricted. At the conclusion of said action, a detailed report shall be prepared in the presence of two witnesses named by the occupant of the place being searched or, in his absence or refusal, by the authority that carried out the search.

Private communications are inviolable. Any act that threatens the freedom and privacy of such communications shall be punishable under criminal law, except when such communications are offered voluntarily by any of the individuals participating in them. A judge shall evaluate the significance of these

communications, provided that they contain information related to the commission of a crime. In no case shall communications that violate the obligation of confidentiality established by law be admitted [by the court].

Only the federal judicial authority, at the request of the federal authority empowered by law or by the corresponding state Public Prosecutor, shall authorize the interception of any private communications. For this, the corresponding authority shall cite the grounds and legal causes for the request, disclosing also the type of intervention requested, the subjects of this action and the duration thereof. The federal judicial authority may not grant such authorizations in electoral, tax, commercial, civil, labor or administrative matters, nor in the case of communications between a detainee and his or her attorney.

The Judicial Powers will have preliminary proceedings judges [*“jueces de control”*]² who shall resolve immediately, and by any means, requests for precautionary measures, injunctions and warrants, guaranteeing the fundamental rights of the suspect and of the victims or offended parties. There should be a reliable record of all the communication between judges and the Public Prosecutor and other relevant authorities.

Authorized interceptions shall conform to the requirements and limits stipulated by law. Results of interceptions that do not comply with the aforementioned shall have no probative value.

The administrative authority may inspect private facilities only to ensure that sanitary and police regulations have been complied with; and to view books and documents indispensable to proving that tax provisions have been complied with, operating under the respective laws and the prescribed formalities for search warrants in the performance of these duties.

Sealed correspondence going through the post office shall be exempt from search and any violation shall be punished by law.

In times of peace, no member of the Armed Forces may be billeted in a private home against the will of the owner nor exact any benefit from said owner. In times of war, the armed forces can demand lodging, equipment, food and other benefits under the terms established in the relevant martial law.

Article 17. No one shall take the law into his or her own hands, nor resort to violence to claim his or her rights.

Everyone has the right to seek justice through the courts, which shall be prompt in providing it under the terms and conditions stipulated by laws, issuing rulings in an expeditious, complete and impartial manner. The services of the court shall be free, and as a result, judicial fees are prohibited.

² This “due process judge” controls the actions of the Public Prosecutor, when the fundamental rights of the suspects—or of the victim—are at stake and therefore accomplishes a similar function to the “Judge for the preliminary investigations” and “Judge of the Preliminary Hearing” in other criminal systems [Ed.].

Laws shall provide alternative mechanisms for settling disputes. For criminal matters, the laws shall regulate the application of these procedures, ensure the reparation of damages and establish those cases in which judicial supervision shall be required.

Those rulings that put an end to oral proceedings must be explained at a public hearing with the parties duly notified in advance.

Federal and local laws shall provide the necessary means to guarantee the independence of the courts and the full enforcement of their judgments.

The Federation, the states and the Federal District shall ensure the existence of quality public defender services for the general public as well as the conditions for a professional career civil service for the defenders. The salaries of the public defenders shall not be inferior to those of agents of the Public Prosecutor's Office.

No one can be imprisoned for debts of a purely civil nature.

Article 18. Pretrial detention shall only be applied in cases of crimes punishable with imprisonment. The place of detention shall be different and completely separate from that holding persons already serving prison sentences.

The prison system shall be organized on the basis of work, training for such work, education, healthcare and sports as a means of reintegrating the prisoner into society and ensuring he or she does not return to crime, taking into account the benefits stipulated by law. Women shall serve their prison terms in places different from those designated for men.

The Federation, the states and the Federal District may enter into agreements to have those convicted of crimes within their jurisdiction serve their sentences in penal institutions elsewhere.

Within their respective jurisdictions, the Federation, the states and the Federal District shall establish a comprehensive system of justice that shall apply to those accused of a prohibited conduct stipulated by criminal law and are between the ages of 12 and 18, in which the fundamental rights recognized by this Constitution for each individual, as well as those specific rights to which they are entitled as still developing persons, are guaranteed. Persons under the age of 12 who have committed a crime under the law shall only be subject to rehabilitation and offered social assistance.

The operation of the system at every level of government shall be in the charge of institutions, courts and authorities specialized in the administration of justice for adolescents. Orientation, protective and treatment measures may be applied as deemed necessary for each case and in observance of the full protection and best interests of the adolescent.

Alternative forms of justice must be observed in the application of this system [of justice for adolescents], provided that said forms are legally warranted. Throughout the procedures, due process of law shall be observed as well as the independence between the authorities involved in the indictment and those who enforce the measures. Each measure imposed shall be

proportionate to the act committed and shall be aimed at reintegrating the adolescent to his or her family and society, as well as the full development of his or her person and capabilities. Imprisonment shall only be used as an extreme measure and for the shortest possible period and can only be used for adolescents older than 14 years of age, who have committed antisocial acts deemed serious.

Mexican nationals serving time in foreign countries may be transferred to Mexico to serve their sentences in the Republic based on the social reintegration system established in this article, and sentenced individuals of foreign nationality convicted of federal or local crimes can be transferred to their country of origin or residence, subject to the International Treaties in effect for that purpose. Such transfers can only be carried out with the express consent of the inmate.

In those cases and conditions stipulated by the law, sentenced individuals may serve their sentences in the prison closest to their home, so as to facilitate their reintegration into the community as a form of social reintegration. This provision shall not apply in the case of organized crime or for inmates who require special security measures.

There shall be specialized prisons for preventive custody and for serving sentences related to organized crime. The corresponding authorities shall be able to restrict communication between the accused and those convicted of organized crime and third parties, except in the case of access to his or her defense attorney, and can impose special means of surveillance on inmates in these facilities. The foregoing shall apply to other inmates who may require special security measures under the terms of the law.

Article 19. No detention by a judicial authority may exceed a period of 72 hours, beginning from the time the accused is taken into custody, without the issuance of a trial binding order [*“auto de vinculación a proceso”*] which must specify: the crime attributed to the accused, the place, time and circumstances of its execution, as well as sufficient information in order to establish that an act described by the law as a crime has been committed and that there is probable cause that the suspect committed or participated in its commission.

The Public Prosecutor may only request from the judge pretrial detention when other precautionary measures are insufficient to guarantee the appearance of the accused at the trial, the progression of the investigation, protection for the victim, witnesses or the community, as well as when the accused is on trial or has been previously convicted of a willful offense. The judge shall order pretrial detention *ex officio* in the case of organized crime, intentional homicide, rape, kidnapping, violent crimes committed with weapons or explosives, as well as serious crimes against national security, the free development of personality and health.³

³ Mexico's Federal Criminal Code, title seven, states that "Crimes against health" are those related to the production, possession, transportation, promotion of illegal narcotics [Ed.].

The law shall establish the cases in which the judge shall be able to revoke the liberty of individuals subject to criminal proceedings.

The period for issuing a trial binding order may only be extended at the personal request of the suspect as stated by the law. Extending detention to his detriment shall be punishable by criminal law. If the authority responsible for the facilities in which the suspect is confined does not receive an authorized copy of the trial binding order that orders pre-trial detention, or the request for an extension of the constitutional term limits, within the abovementioned term, said authority shall bring the matter to the judge's attention on the conclusion of said term and, if such documents are not received within the following three hours, the suspect shall be released.

The criminal proceedings can only be carried out for the criminal act or acts set forth in the trial binding order. If during the development of the proceedings a crime other than the one object of the proceedings should appear, this crime shall be object of a separate proceeding without the prejudgment that a joinder may be ordered if so deemed.

If after a trial binding order has been issued on the grounds of organized crime and the defendant escapes from custody or is presented before another judge who brings charges against the accused in another country, the proceedings and the prescribed terms of the statute of limitations shall be suspended.

Any mistreatment during the arrest or while in prison, any disturbance incurred for no legal reason, any excise tax or contribution made in prison constitute abuses that shall be rectified by laws and curtailed by the authorities.

Article 20. Criminal proceedings shall be accusatory and oral. They shall be governed by the principles of public access, confrontation and cross-examination, concentration, continuity and immediacy.

A. Regarding general principles:

- I. Criminal procedure shall have as its objective the clarification of the facts, the protection of the innocent, preventing the guilty from acting with impunity, and the reparation of the damages caused by crime;
- II. All hearings shall be conducted in the presence of a judge who may not delegate to any other person the filing or evaluation of evidence, which shall be evaluated freely and logically;
- III. For the purposes of the sentence only the evidence presented at public hearings shall be taken into consideration. The law shall establish the exceptions and requirements for admitting evidence presented beforehand, which by its nature requires previous presentation, at the time of the trial;
- IV. The trial shall take place before a judge with no previous knowledge of the case. The presentation of arguments and evidence shall be public and oral and may be confronted;

- V. The burden of proof to demonstrate guilt is to be borne by the accusing party according to that established in criminal law. The parties shall have procedural equality to argue the accusation or defense, respectively;
- VI. No judge may take up matters of the proceedings with any of the parties without the presence of the other, respecting at all times the principle of contradiction, except for the exceptions established in this Constitution;
- VII. Once criminal proceedings have begun, the early termination of said proceedings may be ordered under the causes and in the manner set forth by the law, provided that there is no opposition from the accused. If the accused voluntarily and in full understanding of the consequences admits participation in the crime before a judicial authority,⁴ and there is sufficient evidence to support the accusations, then the judge shall schedule a sentencing hearing. The law shall establish the benefits that may be granted to the accused when he or she accepts their responsibility;
- VIII. The judge shall only convict when there is conviction of the defendant's guilt;
- IX. Any evidence obtained in violation of fundamental rights shall be null and void, and
- X. The principles set forth in this article shall also be observed in the preliminary hearings of the trial.

B. Regarding the rights of the accused:

- I. To be presumed innocent until the trial judge issues a ruling declaring the guilt of the accused;
- II. To render a statement or to remain silent. From the moment of his or her detention the accused shall be informed of the reasons for their detention and their right to remain silent, which shall not be used against them. Holding the accused in isolation and the use of intimidation or torture are forbidden and shall be punishable under the law. Testimony of the suspect without the presence of a defense attorney shall have no evidentiary value;
- III. To be informed upon arrest and on his or her appearance before the Public Prosecutor or the judge, of the charges against them and of their rights. With regard to organized crime, the judicial authority may authorize the withholding of accuser's name and personal information.

The law shall set out the benefits in favor of the accused, the indicted or the convicted person, who provides valid assistance in the

⁴ Equivalent to "pleading guilty" in U.S. criminal proceedings [Ed.].

investigation and prosecution of crimes associated with organized criminal groups;

- IV. To have the witnesses and evidence accepted when presented within the time specified by the law and to be assisted in securing the presence of persons whose testimonies the accused may require, under the terms stated in the law;
- V. To be tried in a public hearing before a judge or a court. Public access shall be restricted only in cases declared as exceptions under the law, for reasons of national security, public safety, the protection of victims, witnesses and minors, when legally protected information may be disclosed or when the court deems that there are sound reasons for doing so.

With regard to organized crime, the proceedings carried out during the investigative phase may have probative value even when said proceedings cannot be reproduced during the trial or it poses a risk to witnesses or victims. The foregoing shall not cancel the accused's right to object to or challenge said proceedings or to present evidence against them;

- VI. All the information the accused may request for his or her defense and that is on record in the proceedings shall be made available.

The accused and his or her attorney shall have access to investigation records upon detention and when called upon to render a statement or to be interviewed. Likewise, as of his or her first appearance before a judge the accused may consult said records, in due time in order to prepare for their defense. From this moment on investigative proceedings may not be withheld, except for in the exceptional cases expressly stipulated by the law when it is crucial to safeguard the success of the investigation and as long as it is eventually revealed so as not to affect the right of defense;

- VII. The accused shall be tried within four months, if his or her alleged crime is punishable by a maximum sentence of no more than two years in prison, and within one year if the penalty exceeds this sentence term, except in the case of a petition for more time to prepare his or her defense;
- VIII. The accused shall have the right to an adequate defense by an attorney, who shall be freely chosen even at the moment of his or her detention. If the accused does not want to or cannot appoint an attorney, after being required to do so, the judge shall assign a public defender to the accused. The accused shall also have the right to have his attorney present at all the procedural actions and said attorney is obligated to appear as many times as he or she is required, and
- IX. Under no circumstances may the imprisonment or detention of the accused be extended for failure to pay the fees of his defense attor-

neys or any other claims for money, caused by civil liability or any similar grounds.

Pre-trial detention shall not exceed the maximum sentence prescribed by law for the crime charged and in no case shall it exceed a period of two years, except if the extension is due to the accused's exercise of his or her right to defense. If a ruling has not been issued upon the completion of this term, the accused shall be released immediately for the remainder of the proceedings, an act that shall not hinder the imposition of other precautionary measures.

Any prison term imposed as a sentence shall factor in the detention time.

C. Regarding the rights of the victim or offended person:

- I. To receive legal advice; to be informed of their rights established in the Constitution and when requested, to be informed of the development of the criminal proceedings;
- II. To cooperate with the Public Prosecutor; to receive all the information and evidence available during both the investigation and the proceedings, so that the corresponding proceedings may take place and to take part in the proceedings and to submit the remedies under the terms established by the law.

When the Public Prosecutor considers that presenting evidence at the proceedings is no longer necessary, the reasons for this shall be ground in law and explained;

- III. To receive, from the moment the crime has been committed, medical attention and psychological assistance;
- IV. To be compensated for damages. In appropriate cases, the Public Prosecutor shall be obligated to request redress for damages, without undermining any similar request the victim or the offended party may make directly, and the judge may not acquit the accused from such restitution if the judge has issued a sentence against the defendant.

The law shall establish expeditious procedures to carry into effect rulings regarding the restitution of damages;

- V. To have his or her identity and other personal information protected in the following cases: when they are minors; when it involves the crimes of rape, kidnapping or organized crime; and when the trial judge deems it necessary for the protection of the victim, safeguarding in every instance the rights of the defense.

The Public Prosecutor shall guarantee the protection of victims, the offended parties, witnesses and in general all those involved in the proceedings. Judges shall monitor the due fulfillment of this obligation;

- VI. To insist on the precautionary measures necessary to ensure protection and the restitution of his or her rights, and
- VII. To call into question before the judicial authority the omissions of the Public prosecutor during the investigation of the crimes, as well as the decisions to withhold information, not to exercise, waive criminal action or suspend procedures when the reparation of the damage has not been fulfilled.

Article 21. The investigation of crimes is the sole responsibility of the Public Prosecutor and the police forces that shall act under its auspices and direction in the exercise of this duty.

The exercise of criminal action before the courts is the Public Prosecutor's preserve. The law shall set forth the instances under which individuals may bring criminal action before a judicial authority.

The imposition of sentences, their amendment and duration are fully and exclusively the domain of the judicial authority.

It is the duty of the administrative authority to apply sanctions for the violations of government and police regulations. Such sanctions shall consist of fines, arrest of up to thirty-six hours or community service; but if the transgressor does not pay the fine imposed, this will be exchanged for a period of arrest that under no circumstances shall exceed a period of thirty-six hours.

If the transgressor of the government and police regulations is a day laborer, an unskilled worker or employee, he or she may not be punished with a fine greater than one day's wages.

In the case of non-salaried workers, the fine for violating government and police regulations shall not exceed the equivalent of one day's income.

The Public Prosecutor may consider the principle of opportunity to cancel the prosecution of a crime, in the cases and under the conditions set forth in the law.⁵

The Federal Executive may, with the approval of the Senate in each case, recognize the jurisdiction of the International Criminal Court.

Public security is one of the responsibilities of the Federation, the Federal District, the states and municipalities and this responsibility includes crime prevention, investigation and prosecution to make such prevention effective, as well as sanctions for administrative violations under the terms of the law, in the respective jurisdictions set forth in this Constitution. The performance of the public security institutions shall be governed by principles of legality, objectivity, efficiency, professionalism, honesty and respect for the human rights recognized in this Constitution.

The public security institutions shall be non-military [*"civil"*] in nature, disciplined and professional. The Office of the Public Prosecutor and the

⁵ This refers to the possibility of "plea bargaining" and the exercise of "prosecutorial discretion", as per U.S. criminal justice proceedings [Ed.].

police institutions at the three levels of government shall coordinate among themselves to fulfill the objectives of public security and shall form part of the National Public Security System, which shall be subject to the following minimum rules:

- a) The regulation of the selection, admission, training, permanence, evaluation, recognition and certification of members of public security institutions. The operation and development of these acts shall be under the responsibility of the Federation, the Federal District, the states and the municipalities within the area of their corresponding powers.
- b) The establishment of criminal and personnel databases for public security institutions. No person shall be admitted into the public security institutions without having been duly certified and registered in the system.
- c) The drafting of public policies aimed at preventing crimes from being committed.
- d) Community participation to assist in the process of evaluation of crime prevention policies, among others, as well as public security institutions shall be established.
- e) Nationwide public security funds shall be distributed to states and municipalities, which shall use said funds exclusively for the above purposes.

Article 22. Capital punishment, mutilation, cruel punishment, branding, lashes, beatings, torture of any kind, excessive fines, the confiscation of property and any other unusual or transcendental punishments are prohibited. Every sanction must be proportional to the crime and to the affected legal interest.

It is not considered confiscation when an individual's property is ordered to be seized for the payment of fines or taxes, nor when it is ordered by a judicial authority for the payment of civil liabilities incurred in committing a crime. Nor is it considered confiscation when the judicial authority orders the impoundment of property in cases of illicit enrichment under the terms of Article 109, the State use of the goods seized as a result of abandonment under the terms set forth in the corresponding provisions, nor asset forfeiture. In the case of the asset forfeiture, a procedure shall be established and governed by the following rules:

- I. It shall be before court and separate from criminal proceedings.
- II. It will proceed only in cases of organized crime, crimes against public health, kidnapping, auto theft and trafficking in persons, regarding the following types of property:
 - a) Those which are instruments, object or products of the crime, even when a sentence has not been issued to determine criminal respon-

sibility, but there is sufficient proof to determine that the criminal act took place.

- b) Those which are not instruments, objects or products of the crime, but have been used or intended for concealing or merging property that is the product of the crime, as long as the extreme cases of the above clause is met.
- c) Those which are being used by a third party to commit crimes, if the owner of the property was aware of the fact and did not notify the authority or do something to hinder it.
- d) Those which third parties have title, but there is sufficient evidence to prove that said property is the product of offenses against property or organized crime and the person accused of these crimes acts as the owner.

III. Any person considered an affected party may present the corresponding redress to show that the lawful origin of the property and his or her good faith, as well as the fact that he or she could not have known the unlawful use of his or her property.

Article 73. The Congress has the power:

I. to XX. ...

XXI. To establish the crimes and offenses against the Federation and to determine the punishment that for said offenses should be imposed, as well as to legislate on matters of organized crime.

...

...

XXII. ...

XXIII. To enact laws that establish the bases for cooperation between the Federation, the Federal District, the states and municipalities, as well as to create and organize the public security institutions for federal matters, according to that established in Article 21 of this Constitution.

XXIV. to XXX. ...

Article 115. ...

I. to VI. ...

VII. The preventive police shall be under the command of the mayor under the terms set forth in the State Law on Public Security. This police force shall obey the orders the state governor may issue in the cases the governor considers of *force majeure* or a serious public disturbance.

...

...

IX. and X. ...

Article 123. Every person has the right to decent and socially useful employment; to this effect, the creation of jobs and the social organization of work shall be advocated, according to the law.

Without violating the following rules, the Congress of the Union shall issue laws on labor-related matters, which shall be governed:

Section A. ...

Section B. ...

I. to XII. ...

XIII. Military personnel, naval personnel, foreign service personnel, Public Prosecutors, experts and members of the police institutions shall be governed by their own laws.

Public Prosecutors, experts and members of the police institutions of the Federation, Federal District, states and municipalities, may be removed from their positions if they do not comply with the requirements the laws in force at the time of the act stipulate for remaining in said institutions or be removed for incurring liabilities in the performance of their duties. If the jurisdictional authority rules that the firing, removal, dismissal, suspension or any other type of termination of employment was unjustified, the State shall only be obligated to pay redundancy payment and the other benefits to which the individual is entitled, without it being admissible under any circumstances for said individual to be reinstated, regardless of the result of the trial or means of defense filed.

Federal State, Federal District and municipal authorities shall put into effect supplementary social security systems aimed at strengthening the social security system for the personnel of the Office of the Public Prosecutor, police forces and expert services, their families and dependents.

The State shall grant active members in the Army, Air Force and Navy the benefits referred to in paragraph f), Section XI of this clause, under similar conditions and by means of the body in charge of social security for the members of said institutions.

XIII bis and XIV. ...

TRANSITORY ARTICLES

FIRST. This Decree shall enter into force the day after its publication in the Federal Official Gazette, with the exception of that set forth in the following transitory articles.

SECOND. The accusatory criminal procedure system set forth in Articles 16, paragraphs second and thirteenth; 17, paragraphs third, fourth and sixth; 19; 20 and 21, paragraph seventh, of the Constitution, shall enter into force at the time stipulated by the corresponding secondary legislation, without exceeding a term of eight years, as of the day after the publication of this Decree.

As a result, the Federation, the states and the Federal District, within the scope of their corresponding powers, must issue and put into effect the modifications or pieces of legislation needed to consolidate the accusatory criminal procedure system. The Federation, the states and the Federal Dis-

trict shall adopt the accusatory criminal system in the manner they deem suitable, albeit regional or by the type of crime.

At the moment the pieces of legislation referred to in the above paragraph are published, the competent branches of government or legislative bodies must likewise issue a statement that shall be published in the official channels of information, and it shall expressly state that the accusatory criminal procedure system has been included in said laws and, therefore, that the guarantees embodied in this Constitution shall begin to govern the manner and terms in which criminal procedures are pursued.

THIRD. Notwithstanding that set forth in the second transitory article, the accusatory criminal procedure system established in articles 16, paragraphs second and thirteenth; 17, paragraphs third, fourth and sixth; 19; 20 and 21, paragraph seventh, of the Constitution, shall enter into force the day after the publication of this Decree in the Federal Official Gazette, in the states that have already incorporated said decree in their laws in force, making any court actions performed founded on said laws valid, regardless of the date in which said laws entered into force. To this end, the statement set forth in the second transitory article must be issued.

FOURTH. The criminal proceedings initiated prior to the entry into force of the new accusatory criminal procedure system set forth in Articles 16, paragraphs second and thirteenth; 17, paragraphs third, fourth and sixth; 19; 20 and 21, paragraph seventh, of the Constitution, shall be concluded according to the provisions in effect prior to this Decree.

FIFTH. The new reinsertion system set forth in the second paragraph of Article 18, as well as the rules for the modification and duration of the sentences established in the third paragraph of Article 21, shall enter into force at the time established by the corresponding secondary legislation, without exceeding a term of three years, as of the day after the publication of this Decree.

SIXTH. State laws for matters of organized crime shall continue to be in effect until the Congress of the Union exercises the powers conferred to it in Article 73, Section XXI, of this Constitution. The criminal proceedings initiated founded on said laws, as well as the sentences issued based on said laws, shall not be affected by the entry into force of this federal legislation. Therefore, said proceedings should be concluded and executed, respectively, according to the provisions in force prior to the entry into force of this legislation.

SEVENTH. Within a maximum term of six months after the publication of this Decree, the Congress of the Union shall enact the law that creates the National Public Security System. The states shall enact the laws for this matter within a maximum term of one year as of the entry into force of this Decree.

EIGHTH. The Congress of the Union, state legislatures and the legislative body of the Federal District must allot the funds needed to reform the

criminal justice system. Budgetary allocations must be specified in the budget next following the entry into force of this decree and in the subsequent budgets. This budget shall be allocated for the design of the legislative reforms, organizational changes, the building and running of the infrastructure and the necessary training for judges, agents of the Office of the Public Prosecutor, police officers, public defenders, experts and attorneys.

NINTH. Within two months after the entry into force of this Decree, a coordinating body composed of representatives of the Executive, Legislative and Judicial branches, including the academic sector and civil society, as well as Public Security Conferences, Administration of Justice and Chief Justices shall be created. Said body shall have an executive secretary, which will aid and assist local and federal authorities, as requested.

TENTH. The Federation shall create a special fund to finance the activities of the technical secretary referred to in the eighth transitory article. The funds shall be granted on the basis of compliance with the obligations and the aims established in the law.

ELEVENTH. In the interim for the accusatory procedural system to enter into force, Public Prosecutors may request from a judge the pre-charge detention of the accused in dealing with serious crimes and for up to a maximum term of forty days.

This measure shall be legally warranted when deemed necessary for the success of the investigation, the protection of persons or legal interests, or when there is a risk based on the fact that the accused may evade legal action.

Mexico City, Federal District, May 28, 2008.- Sen. Santiago Creel Miranda, President.- Dep. Susana Monreal Ávila, Secretary.- Signatures”

In compliance with that set forth in Section I or Article 89 of the Political Constitution of the United Mexican States, and for its due publication and observance, I issue this Decree at the Residence of the Federal Executive Branch, in Mexico City, Federal District, on the sixteenth of June of the year two thousand eight.- Felipe de Jesús Calderón Hinojosa.- Signature.- Minister of the Interior, Juan Camilo Mouriño Terrazo.- Signature.