

Introduction to *Prisión sin Condena* (Prison without Conviction)

By Denise Tomasini-Joshi, Open Society Justice Initiative

Freedom. So much has been said about this word, so many battles—ancient and current alike—fought over this concept. Yet the most basic form of freedom, the freedom from undue physical restraint—arrest, detention, incarceration—absent a finding of guilt remains the most elusive. In spite of laws and traditions that forbid “arbitrary arrest and detention,”¹ debate over the word “arbitrary” has allowed governments all over the globe to maintain systems where people are routinely detained without having been convicted of the accused offense.

In Mexico the term to describe this type of detention is “preventive detention.” Unfortunately this title is a misnomer as it assumes that this type of detention is designed to prevent crime and that it does in fact result in such prevention. As we will see shortly, in Mexico the “preventive” nature of preventive detention has been eliminated, decisions are made on the basis of lists, and as the result of failure to implement logical alternatives. The more accurate term, and the one used in this piece, is “prison without sentence.”

The real human costs and consequences of “prison without sentence” (also known as “pretrial detention,” or PTD) as quantified below are given a voice through the victims of Mexico’s over- and mis-used PTD regime. What follows then is a summary of the legal framework and an explanation of the institutional and societal costs of this regime.

Intent and Legality

The Inter-American Convention, Article 8(2) provides that “every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law.”² In Mexico, the Constitution specifies that only for a “crime for which imprisonment is a punishment can pretrial detention be allowed”³ and that pretrial release will be allowed under restraint “as long as the crime in question is not one, which due to its gravity, is denied that benefit under the law.”⁴ Ironically, these provisions, meant to limit the applicability of pretrial detention, allow for even greater use of the measure. The concept of “gravity”—just as the concept of “arbitrary”—lends itself to wide interpretation and often re-definition.⁵ In Mexico, approximately 95% of

¹ Universal Declaration on Human Rights. On the Web at: <http://www.un.org/Overview/rights.html>

² These additional provisions guide the treatment of a person in pretrial detention: “any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial,” Article 7(5); “[a]nyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest of detention is unlawful,” Article 7(6); and “every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal,” Article 8(1). On the Web at: <http://www.oas.org/juridico/spanish/Tratados/b-32.html>

³ Artículo 18 Constitución Mexicana

⁴ Article 20, Frac. A, I

⁵ Tragically, the Mexican Constitution is on the verge of becoming even more restrictive on PTD.

all crimes allow for imprisonment. Add to this that legislators have opted to classify as “grave” an inordinate amount of crimes and you find that the “limitations” of the Mexican Constitution only serve to provide a loophole that validates the use of pretrial detention as a general rule; precisely what the International Covenant on Civil and Political Rights has established **should not** be done.⁶

Unfortunately Mexico is not alone, and the result of this legal subversion by multiple states of the original intent of constitutions and treaties is direct and fatal: approximately three million people can be found in pretrial detention around the world on any given day. In Mexico, on an average day, approximately 90,000 people may be found held in pretrial detention—a number that has doubled in the last ten years.⁷ Given that these numbers are approximations and that the system has an incentive to undercount people in PTD, it is safe to assume that the real figures are in fact higher. This overuse of pretrial detention debases the presumption on innocence and violates international human rights norms and the spirit of the Mexican Constitution.

Why Everyday Citizens Should Be Concerned

It is acknowledged that when properly used, pretrial detention serves a legitimate purpose. Often it is the only measure available to manage risks that a person will: 1) flee; 2) interfere with the penal process, including intimidating the victim or other witnesses; and/or 3) commit serious crimes. Overuse and misuse of this measure however creates patent unfairness and inefficiencies in the criminal justice system, which affect all. For example, many people are accused and held who are eventually found innocent of any crime.⁸ These occurrences result in the violation of the rights of those individuals and in pain and suffering from their families. Less direct but more widespread are the ill-effects that unnecessary pretrial detention has on society as a whole: enabling the cycle of poverty, increasing criminal behavior, spreading communicable diseases, permitting ineffective use of public monies, and promoting inefficient and harmful policing practices. These ill-effects touch every person whether they realize it or not, and have an enormous impact on society.

Enabling the Cycle of Poverty

Mexican prisons have a high concentration of the poorest people in the country.⁹ Still, a recent study in Nuevo Leon found that 61% of people arrested stated that they had gainful employment at the time of their arrest¹⁰ and these people often have a number of dependents. When ties to that employment are severed the result is an immediate loss of income. In addition, the detainee loses other related benefits of employment such as

⁶ “It shall not be the general rule that persons awaiting trial shall be detained in custody”. CCPR Article 9.3. Signed by Mexico on 23 March 1981

⁷ Guillermo Zepeda Lecuona’s upcoming publication, *Economic Costs of Pretrial Detention in Mexico*.

⁸ In Mexico every year over 40,000 people are acquitted by the courts and released. *Myths of Pretrial Detention in Mexico*, Guillermo Zepeda Lecuona. Open Society Justice Initiative, 2005.

⁹ See, Guillermo Zepeda Lecuona’s upcoming publication, *Los Costos de la Prision Preventiva en Mexico*.

¹⁰ Upcoming Open Society Justice Initiative and Renace, a.b.p. publication on a survey of judicial decisions on bail in the state of Nuevo Leon.

seniority and continued labor experience. Re-entering the job market is difficult for anyone who has taken a hiatus (for, say, health reasons) but for a person with a history of detention, even when they are eventually found innocent this barrier is more pronounced.

A person who has been pursuing an education also bears this opportunity cost. People arrested in the middle of a course of study can lose out on completing classes and even forgo their degree even when they are near completion. Re-starting after a hiatus is further complicated by economic complications that arise upon arrest.

Research on the costs of pretrial detention finds that when a primary bread winner is incarcerated the family not only loses their primary source of income but also incur in significant expenditures to assist the incarcerated family member. Costs related to the jailed family member and hiring an attorney can increase the burden on poor families almost to the breaking point.¹¹ Most importantly, bail—often the only means for obtaining provisional release—forces families to go into debt to secure the family member’s release. For the accused, even after release they usually spend considerable amounts of time getting back on their feet and repaying debts to families and friends accrued on their behalf during the period of detention.¹²

Increasing Criminal Behavior

While pretrial detention is an important and legitimate means to manage the risks described earlier, when it is applied to people who either don’t pose these risks or who can be safely supervised in the community, it has the strong counter effect of pushing people far down the path of crime.¹³ A number of reasons can be assumed for this result. One reason is that people accused of minor crimes often lose ties to their families and communities; another is that people in pretrial detention lose other means of lawfully supporting themselves.

Pretrial detainees are not always segregated from convicted and/or violent criminals. This means that even first time offenders, or worse the wrongly accused, often spend long periods of time interacting with hardened criminals. While this is happening their contacts with the outside world are weakened. Research in other countries shows that many marriages end in divorce after a spouse experiences a period of incarceration.¹⁴ It is not surprising then to find that arrestees also lose contact with other members of their

¹¹ Creasie Finney Hairston, “Prisoners and Their Families: Parenting Issues during Incarceration,” in Travis and Waul, *Prisoners Once Removed* (Urban Institute Press, 2003), 264.

¹² For a more thorough discussion and detailed numbers on the costs to families of pretrial detention see, Guillermo Zepeda Lecuona’s upcoming publication, *Los Costos de la Prision Preventiva en Mexico*.

¹³ Some researchers argue that the environment in prison is inherently “criminogenic” that is, that it creates and causes crime. See, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974–2002*, Vieraitis, Kovandic, and Marvel. <http://www.blackwell-synergy.com/doi/abs/10.1111/j.1745-9133.2007.00456.x?cookieSet=1&journalCode=cpp>

¹⁴ De acuerdo a un reporte de las Naciones Unidas una quinta parte de las mujeres encarceladas en Gran Bretaña terminan divorciándose. En otro reporte 48% de todas las personas en prisión sin condena alegan haber perdido contacto con sus familias. “Key Facts and Figures,” <http://www.innocentuntilproven guilty.com/keyfacts.html>

extended families during the same periods. As a result, persons in detention begin making new friendships and relationships with other inmates. This leads to a situation where prisons have been called “universities of crime.”¹⁵ Even where a detainee may try to stay away from such friendships risks abound for those who do not “join.” Gangs ensure that they recruit people at their most vulnerable and those who try to stay away from them often are victims of, or witnesses to, violence. It is estimated that 66.7 % of inmates have been the victims or robbery inside the prison.¹⁶ The psychological and physical effects of this can be devastating.¹⁷

Compounding the problem we find that, as detailed above, people in detention often lose income from employment as well as the opportunity of future employability. When that person is released, he has been both trained and incentivized for crime, without many alternatives for lawful employment.

The increase in the number of pretrial detainees contributes to the chaotic situations in overcrowded jails, where the state loses control and the survival of every prisoner then depends on brute force. The result invariably is an increase in the danger that these individuals pose when returned to society; precisely the inverse of an important objective of detention as a measure.

Spreading Communicable Diseases

With their unsanitary conditions and overcrowding, prisons have long been known to be natural breeding grounds for certain types of diseases.¹⁸ In modern times epidemics among inmates of Hepatitis C¹⁹, and tuberculosis²⁰ are commonplace. Less discussed are the outbreaks of meningitis²¹, chickenpox²², and staphylococcus (more commonly known as “Staph”).²³ Recent attention in fact has been focused almost exclusively on the spread of HIV/AIDS in prison. In many cities and countries the rate of HIV infection in prison is many times that of the general population.²⁴ Due to the rate of intravenous drug use, risky sexual practices, and sexual assault, many of these infections occur within the prison itself.

¹⁵ Vease artículos de Mexico: <http://www.tuobra.unam.mx/publicadas/031015213446.html>, de Brasil: http://news.bbc.co.uk/hi/spanish/specials/2005/carceles/newsid_4375000/4375110.stm, y de Argentina: <http://www.offnews.info/verArticulo.php?contenidoID=5136>.

¹⁶ Carlos Zardain E., *Las cárceles: ¿Readaptación social o universidad del crimen?*. Fundación de Estudios Urbanos y Metropolitanos. En el Web en: <http://www.fundacion-christlieb.org.mx/pdf/las-carceles.pdf>

¹⁷ http://www.motherjones.com/news/special_reports/prisons/violence.html

¹⁸ http://www.motherjones.com/news/special_reports/prisons/disease.html

¹⁹ <http://www.msnbc.msn.com/id/17615346/>

²⁰ <http://www.cdc.gov/MMWR/preview/MMWRhtml/00056381.htm>

²¹ <http://content.nejm.org/cgi/content/full/335/12/833>

²²

http://www.elpais.com/articulo/madrid/Aislados/presos/prision/Valdemoro/brote/varicela/elpepuespmad/20070207elpmad_3/Tes and, <http://www.hindu.com/2006/01/22/stories/2006012209430100.htm>

²³ <http://www.sacbee.com/101/story/465447.html> and,

<http://wcco.com/topstories/staph.infections.Duluth.2.361094.html>

²⁴ http://www.ideal.es/granada/prensa/20061130/local_granada/tasa-enfermos-carcel-diez_20061130.html

Little attention however has been paid to the consequences of these infections. Not only do the sufferers often die, or become disabled and unable to contribute to society, but often times they spread these diseases beyond the correctional facilities where they reside. For example, in Los Angeles, California in the early 1990's, a rare epidemiological study showed that an outbreak of meningitis in a neighborhood was directly tied to an outbreak of the disease inside the local jail.²⁵ Given that people in detention receive visitors, that they are watched over by correctional staff who leave the institution every day and go back to their families, and that they are often eventually released, it stands to reason that they would transmit diseases easily between the jail and the outside world. The danger of putting healthy people in such an environment cannot be overstated. The tragedy of subjecting an innocent person or even a low-level offender to these risks cannot be denied.

Permitting Ineffective Use of Public Monies

Incarceration is expensive. A study undertaken in 2007 found that in Mexico the cost of detaining people without a conviction ranges between 4,890 and 6,580 billion pesos.²⁶ As the author of that study notes:

It is seen, for example, that the total cost of preventive detention is equal to the annual income of almost 91,000 average Mexican families.²⁷ Even more surprising is the fact that the preventive detention's cost to the State is equal to 62% of the federal expenses devoted to public safety for the year 2006.²⁸

If we could say that society is safer, that the accused do not commit offenses and that citizens experience the benefits of this focusing of state funds, perhaps these expenditures would be worth it. However, victimization surveys show that people are no safer today than they were years ago when the detention rate was lower. We also know—as detailed above—that people are re-trained for committing crime, that prisons create public costs by helping spread disease and preventing employment, and that rehabilitation is minimal.²⁹ This is enough to state clearly that we are not getting our monies worth; but there is more. For every peso spent on incarceration there is an opportunity cost—the cost of not doing something better with those funds. What could we do with those funds? According to the Organization for Economic Co-operation and Development (OECD) in

²⁵ Ibid. at footnote 9.

²⁶ Guillermo Zepeda, upcoming publication, *Economic Costs of Pretrial Detention in Mexico*.

²⁷ According to the INEGI, the average monetary income of Mexican families for the year 2006 is 106,000 pesos. Therefore, the social cost of preventive detention may reach 130,000 times that amount. See the National Survey of Incomes and Expenses for 2006. Available at http://www.inegi.gob.mx/est/contenidos/espanol/sistemas/enigh/enigh_2006/datos/2006/3tema.xls (last visited in September 2007).

²⁸ According to the federal expenditure budget decree for the 2006 fiscal year, the net budget spent on public safety is 9,274 billion of pesos. See decree at the Web site of the Secretaría de Seguridad pública (Office of Public Safety) <http://www.ssp.gob.mx/portalWebApp/ShowBinary?nodeId=/BEA%20Repository/90856//archivo> (last visited in October 2007).

²⁹ <http://www.commondreams.org/headlines06/0608-05.htm>

secondary education in Mexico, there are over twice the number of students per teacher compared to the average of other OECD countries.³⁰ Moreover, spending per primary student in Mexico is very low—approximately one third of the OECD average.³¹ By comparison, the money used to house and clothe about 82,000 pretrial detainees is 6.5 million pesos every day; that money could send nearly 250,000 students to school every day.³²

If we wanted to invest more directly in something that would prevent crime, we could train more police officers to engage in prevention of crime rather than arrests after crimes have been committed. We could also pay those officers more so that they will not engage in corrupt practices. There are in fact a multitude of efficient criminal justice interventions that experts would recommend to invest in rather than continue building jails and detaining people indiscriminately.

Promoting Inefficient and Harmful Policing Practices

As pointed to above, an intervention such as pretrial detention that doesn't work, prevents investment in more effective interventions. But the collateral consequences of this misuse of funds are greater and more insidious. Citizens begin believing that the government cares more about the appearance of security than about true security, and the judges, prosecutors, defenders and police offices are disincentivized to do the real hard work of preventing crime, solving crimes, punishing those responsible, and rehabilitating the same. Victimization surveys prove this point by indicating that most crime in Mexico is not reported because people feel that it's a waste of time.³³

As the author of this essay on pretrial detention points out:

Of course, in spite of the prior criticisms, pretrial detention would be justified if, it were used out of sheer necessity, if it were the only means of ensuring that the accused doesn't escape. But...

Technology has rendered these old justifications baseless. A little electronic bracelet suffices to ensure that an accused can be located at all times. This and in some cases efficient police supervision—much less onerous than the care and support of a detained—would prevent subversion of justice while at the same time avoiding the atrocious consequences of pretrial detention. In some cases, bail of a

³⁰ Education at a glance 2007; OECD briefing note for Mexico, p. 4. On the Web at: <http://www.oecd.org/dataoecd/22/29/39317492.pdf>

³¹ Ibid. at p. 3.

³² As noted on the first page there are about 90,000 pretrial detainees currently in Mexico. *The Myths of Pretrial Detention in Mexico*, Guillermo Zepeda Lecuona, http://www.justiceinitiative.org/db/resource2?res_id=102330

³³ Aguilar Zinser, Adolfo, "La cifra negra," *Reforma*, Mexico City Federal District, (June 29, 2001). See also, Cecilia Sayeg Seade, Director of Operations of ICESI: "Las cifras sobre el nivel de denuncia están íntimamente ligadas con el nivel de credibilidad y eficacia de las instituciones que procuran e imparten justicia...En América Latina la gente no denuncia porque considera -o sabe- que no sirve de nada. Así lo demuestran los datos recabados por la ONU a través de su encuesta internacional sobre victimización (International Crime Victimization Survey –ICVS-)." *¿Por que y para que denunciar?*, (2004)

reasonable amount, sufficient to cover the possible reparation of harm, and the guarantee to remain far from the victim and stay within a certain geographic area, would be the only requirements to allow provisional release.³⁴

Fair and cost effective alternatives to pretrial detention do exist. Pretrial supervision after evaluation, house arrest and technological solutions such as the “bracelets”³⁵ are but a few. Legislation in a small but growing number of Mexican states provides another useful tool to reduce pretrial detention, particularly for persons accused of low-level crimes, called suspension. Under this scheme people have their charges held in abeyance while they comply with a series of conditions. If the person completes their period of supervision having fully complied with those conditions, the charges are dismissed and the person can re-enter society without the taint of a criminal record. More importantly because the conditions of release usually relate to participating in activities that enable work, and family relationships that person remains socialized in their community.

While the encouragement of bad police practices renders society unsafe and insecure, the overuse of pretrial detention also enables two downright harmful effects: torture and corruption. In many countries torture occurs because there is simply too much temptation for the police to use all means necessary to obtain a confession before the person is taken in front of a judge or is seen by a defense attorney (when there is one). As will be seen later in the stories contained herein, this temptation also exists, and is acted on, in Mexico.

Torture renders the criminal justice process meaningless; the more torture is used the fewer true criminals are found and incarcerated. It is after all easier for police to torture the first person they find into confessing rather than perform the arduous and complicated job of investigating a crime to find the true culprit.

Corruption is enabled in this case because a formal process for people to challenge their detention is either nonexistent or underused, creating incentives for opportunistic actors in the criminal justice system to create a black market process. It is not uncommon around the world for people to pay bribes to be granted bail³⁶ (something that should be available to a large percentage of accused). Once the process goes down this path the chances of a fair determination of guilt are slim. It is not surprising then, that as seen above, the people charged and detained are most often low income people; the rich have a “system” for obtaining release.

In an essay on judicial reform and the fight against corruption in Mexico, the author discusses the need for, and adequacy of, pending criminal justice reform in Mexico to help resolve this problem. He states that:

³⁴ Luis de la Barrera Solorzano, Citizen’s Institute on Insecurity Studies (ICESI), http://www.icesi.org.mx/publicaciones/articulos/2006/presos_sin_condena.asp

³⁵ http://www.nodo50.org/tortuga/article.php3?id_article=4749

³⁶ Prof. E.V.O. Dankwa, *Prisons in the Central African Republic*, Report on a visit by Special Rapporteur on Prisons and Conditions of Detention in Africa, June 19-29, 2000 (African Commission on Human and People’s Rights, Series IV, No. 7). 7.

The Mexican justice system reform proposal seeks to broaden the transparency of proceedings, establish equality between people and as such, to break with the old structures that bureaucratized, and hampered the operation of justice, creating an environment that bred corruption. ... The building block of any accusatory justice system is the recognition and respect for one of the most important human rights the right to the presumption of innocence; any person accused of a crime has the right to be presumed innocent as long as their guilt is not legally proven.³⁷

Mexican citizens have always bemoaned the persistence of corruption in their country. One of the ways to help curb this practice is to demand effective criminal justice interventions that don't just have the appearance that the state is invested in resolving the issue of citizen insecurity. Pretrial detention is but a smoke-screen, effective interventions such as pretrial evaluation and supervision, and increased use of suspension are the real solution.

Conclusion

Whether the reader of this piece is sympathetic to people involved in the justice system or not, it is important to remember that when the system's attempts to investigate and solve crime are indiscriminate and harsh everyone in society suffers. The innocent are swept up, the guilty can go free, and costly economic and societal consequences ensue. This is particularly true for the overuse of pretrial detention.

The negative consequences mentioned in this piece are complementary and mutually reinforcing. For example, a person who becomes infected by a debilitating disease while in detention is even less likely to find employment. This, in turn, makes that person and his family even poorer, which, in turn, increases the incentive for that person to engage in criminal activities in order to survive. In other words, while each of the consequences discussed here are serious in themselves, their cumulative impact is significantly worse than the sum of the individual impacts.

At the time of writing a few vanguard states implemented criminal procedure reforms that have resulted in a decline in the use of PTD without any evidence of a concurrent increase in levels of crime or the fear of crime. This demonstrates that rights-based PTD reform is possible in Mexico. In addition, there is compelling evidence from around the world—in rich and poor countries alike—that PTD reform is possible.³⁸ What is needed is political will and commitment, and for that to happen the public needs to be informed about the dangers and consequences of the irrational and excessive use of PTD; this book hopes to contribute towards this objective.

³⁷ La lucha contra la corrupción en México: la reforma integral en materia de justicia en el marco jurídico mexicano frente al reto de la lucha anticorrupción, Sandro García Rojas Castillo; IX Congreso Internacional del CLAD sobre la Reforma del Estado y de la Administración Pública, Madrid, España, 2 – 5 Nov. 2004. En el Web: <http://www.clad.org.ve/fulltext/0049908.pdf>

³⁸ See, *Justice Initiatives: Pretrial Detention*, Spring 2008 edition, Open Society Institute. On the Web at: http://www.justiceinitiative.org/db/resource2?res_id=104079

The cost of inefficient and ineffective interventions to society is clear. The stories in this tome will help the reader understand that deprivation of liberty, even for a short amount of time, has life-altering and irreparable consequences for many unfortunate individuals. Freedom is a basic human need and right. Let's ensure that we do not flippantly deprive people of it without incontrovertible evidence of danger or guilt.

Denise Tomasini-Joshi
Associate Legal Officer
National Criminal Justice Reform
Open Society Justice Initiative