

CORRUPTION IN MEXICO: A THREAT TO THE RULE OF LAW

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Corruption threatens the rule of law by undermining its very foundation. If a state cannot guarantee the preeminence of law, then the effectiveness of its government is undermined,¹ and there is a heightened risk of institutional collapse.²

Anti-corruption is, along with security, one of the core issues of the public agenda in Mexico. Unfortunately, it is widely known that Mexico has been dealing with rampant corruption for years.³ For example, the previous administration under President Enrique Peña Nieto has been accused of tremendous acts of corruption, which require serious investigation.⁴

Paradoxically, the former Peña Nieto administration carried out some of the most prominent anti-corruption reforms in the last several years. A breakthrough came with the creation of the National Anti-Corruption

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¹ The principle of preeminence of the law has been linked to the principle of foreseeability of the law and legal certainty. See Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331, 342 (2008) (explaining that the “core definition” of the rule of law is “the supremacy of the law”).

² If there is no preeminence of law, it can constitute a lack of protection against arbitrariness. See *id.* at 333 (“[A] ruler consents to exercise power in a non-arbitrary fashion.”).

³ In 2018, International Transparency’s Corruption Perception Index evaluated the Mexican population perception of corruption; Mexico received a score of thirty on a scale where 100 represents the least amount of corruption and zero is the greatest, putting it in 138th place of all countries in the world ordered by level of corruption. *Corruption Perceptions Index 2018*, TRANSPARENCY INT’L, <https://www.transparency.org/cpi2018#results> (last visited Feb. 18, 2020).

⁴ One of the most relevant cases of corruption is that one of the “Casa Blanca”: The official residence of Mexico’s president is Los Pinos, but during his administration, Enrique Peña Nieto owned a side residence with a value of seven million U.S. dollars, which was registered under the name of Grupo Higa, a “favored government contractor.” Joshua Partlow, *Mexico’s President Apologized for a Corruption Scandal. But the Nightmare Goes On for the Reporter Who Uncovered It.*, WASH. POST: WORLDVIEWS (July 22, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/07/22/mexicos-president-apologized-for-a-corruption-scandal-but-the-nightmare-goes-on-for-the-reporter-who-uncovered-it>.

System—the agency in charge of coordinating efforts between both federal and state agencies, as well as the executive, legislative, and judicial branches—for the purpose of efficiently attacking various forms of corruption.⁵

The legal framework of anti-corruption in Mexico today is based on the constitutional and other legal reforms of 2015–19⁶ and 2016, respectively,⁷ which focus on preventing, investigating and sanctioning corrupt practices.⁸ Examples of anti-corruption legal reforms include the following laws (the legislative branch modified some and others are new):

- a) General Law of the National Anti-Corruption System (*Ley General del Sistema Nacional Anticorrupción*);⁹
- b) General Law of Administrative Liabilities (*Ley General de Responsabilidades Administrativas*);¹⁰
- c) Organizational Law of the Federal Court of Administrative Justice (*Ley Orgánica del Tribunal Federal de Justicia Administrativa*);¹¹

⁵ MAUREEN MEYER & GINA HINOJOSA, THE WASH. OFFICE ON LATIN AM., MEXICO'S NATIONAL ANTI-CORRUPTION SYSTEM 3–4 (2018), <https://www.wola.org/wp-content/uploads/2018/05/ENGL-Corruption-Report.pdf>.

⁶ On May 27, 2015, the official gazette of the federal government of Mexico published a decree that reformed, added, and repealed several articles of the Federal Constitution for the purpose of fighting corruption. Constitución Política de los Estados Unidos Mexicanos [CP], arts. 108–18, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 27-05-2015 (Mex.). Since then, several newly created laws and institutions, finding their support in the constitution, have complemented and strengthened the reforms undertaken since 2015.

⁷ In 2016, the Mexican government issued one of the most important laws in the anti-corruption field, the General Law of the National Anti-Corruption System. Memorandum from Carlos A. Chávez, J.A. Treviño Abogados, Mexico's New Anti-Corruption Legal Framework 1–2 (July 18, 2016), http://www.jatabogados.com/publications/articles/20160718-Mexicos-New_Anti-Corruption_Framework.pdf.

⁸ One of the aims of the new system was to encourage dialogue between government organs in order to maintain crosscutting cooperation and guarantee greater force in the investigation and prosecution of corruption. *Id.* at 2. This encouragement is important because historically, public exercise of power in Mexico has been carried out through a vertical system in which the responsibilities were not shared equally in all spheres of government, which generated an inefficient system. *Id.* at 1.

⁹ Ley General del Sistema Nacional Anticorrupción [LGSNA], Diario Oficial de la Federación [DOF] 18-07-2016 (Mex.). This law was issued because of the constitutional reforms; it establishes the bases of coordination between the federal government, the states, the municipalities, and the mayors' offices of Mexico City for the operation of the National Anti-Corruption System, so that the competent authorities can prevent, investigate, and punish administrative misconduct and acts of corruption. *Id.* arts. 1–2.

¹⁰ Ley General de Responsabilidades Administrativas [LGRA], Diario Oficial de la Federación [DOF] 18-07-2016, últimas reformas DOF 19-11-2019 (Mex.). This statute, which was modified since the constitutional reform, aims to distribute competencies among the orders of government to establish the administrative responsibilities and obligations of public servants; applicable sanctions for acts or omissions committed by public servants and those individuals linked to serious administrative offenses; and procedures for the application of such sanctions. *Id.* art. 2.

¹¹ Ley Orgánica del Tribunal Federal de Justicia Administrativa [LOTFJA], Diario Oficial de la Federación [DOF] 18-07-2016 (Mex.). This statute, published after the

- d) Organic Law of Federal Public Administration (*Ley Orgánica de la Administración Pública Federal*);¹²
- e) Audit and Federal Accountability Law (*Ley de Fiscalización y Rendición de Cuentas de la Federación*);¹³
- f) Fiscal Coordination Law (*Ley de Coordinación Fiscal*);¹⁴
- g) General Accounting Law (*Ley General de Contabilidad Gubernamental*);¹⁵
- h) Federal Law of Republican Austerity (*Ley Federal de Austeridad Republicana*);¹⁶
- i) Organic Law of the Attorney General's Office (*Ley Orgánica de la Fiscalía General de la República*);¹⁷ and
- j) Federal Criminal Code (*Código Penal Federal*).¹⁸

These laws comprise Mexico's anti-corruption legal framework, and are intended to be interconnected in order to equally distribute powers

constitutional reform, determines the integration, organization, powers, and functioning of the Federal Court of Administrative Justice. *Id.* art. 1.

¹² *Ley Orgánica de la Administración Pública Federal* [LOAPF], Diario Oficial de la Federación [DOF] 29-12-1976, últimas reformas DOF 22-01-2020 (Mex.). This statute, modified since the constitutional reform, establishes the basis for the organization of the Federal Public Administration, which is centralized and parastatal. *Id.* art. 1.

¹³ *Ley de Fiscalización y Rendición de Cuentas de la Federación* [LFRCF], Diario Oficial de la Federación [DOF] 18-07-2016 (Mex.). This statute, published after the constitutional reform, concerns the review and control of: the public account; irregular situations with respect to the fiscal year; the application of the formulas for distribution, administration, and exercise of federal participations; and the destination and exercise of the resources from financing that the states and municipalities have contracted. *Id.* art. 1.

¹⁴ *Ley de Coordinación Fiscal* [LCF], Diario Oficial de la Federación [DOF] 27-12-1978, últimas reformas DOF 30-01-2018 (Mex.). This statute, modified since the constitutional reform, coordinates the federal tax system with federal entities, as well as with municipalities and territorial districts, in order to establish the share of their public finances in federal income and to distribute such shares among them. *Id.* art. 1. In addition, it establishes rules for administrative cooperation among the various tax authorities, forms bodies for tax coordination, and provides the basis for the organization and operation of such bodies. *Id.*

¹⁵ *Ley General de Contabilidad Gubernamental* [LGCG], Diario Oficial de la Federación [DOF] 31-12-2008, últimas reformas DOF 30-01-2018 (Mex.). This statute, modified since the constitutional reform, establishes criteria for regulation of government accounting and the issuance of financial information from public entities, the goal of achieving adequate harmonization. *Id.* art. 1.

¹⁶ *Ley Federal de Austeridad Republicana* [LFAR], Diario Oficial de la Federación [DOF] 19-11-2019 (Mex.). This statute, published in 2019, regulates the austerity measures that must be observed in the exercise of federal public spending in order to help ensure that available economic resources are managed in an effective, efficient, economical, transparent, and honest way. *Id.* art. 1.

¹⁷ *Ley Orgánica de la Fiscalía General de la República* [LOFGR], Diario Oficial de la Federación [DOF] 14-12-2018 (Mex.). This statute, published in 2018, regulates the organization, operation, and exercise of the powers of the Attorney General's Office as an autonomous public body. *Id.* art. 1.

¹⁸ *Código Penal Federal* [CPF], arts. 212–13, Diario Oficial de la Federación [DOF] 14-08-1931, últimas reformas DOF 24-01-2020 (Mex.). The Federal Criminal Code, modified since the constitutional reform, describes the crimes of corruption in federal matters, as well as the associated punishments. *Id.*

between the three branches of government, which can in turn act in a coordinated and efficient manner against corrupt conduct by individuals (private citizens or public servants) and entities. The following individual actions are considered serious violations:

- a) Bribery;
- b) Unlawful participation in administrative procedures;
- c) Influence peddling;
- d) Use of false information;
- e) Obstruction of investigations;
- f) Collusion;
- g) Misuse of public resources; and
- h) Improper hiring of former public servants.¹⁹

Reflecting the involvement of all three branches of government in anti-corruption measures, the authorities tasked with fighting corruption are:

- a) The Department of Governmental Affairs (*Secretaría de la Función Pública*), part of the executive branch of government;²⁰
- b) The Government Accountability Office (GAO) (*Auditoría Superior de la Federación*), part of the legislative branch;²¹
- c) The Federal Court of Administrative Justice (*Tribunal Federal de Justicia Administrativa*), part of the executive branch;²²
- d) The Supreme Court and the Council of the Federal Judiciary (*Suprema Corte de Justicia de la Nación y el Consejo de la Judicatura Federal*), both part of the judicial branch;²³ and

¹⁹ This list represents several actions that different laws consider serious violations. For an example of such a law treating these actions seriously, see, e.g., *id.* arts. 214, 217, 221–24.

²⁰ The mission of this department is to establish new public service work ethic and organizational balance that generates honesty, efficiency, professionalization, and transparency of public service in compliance with the law. *¿Qué Hacemos? Secretaría de la Función Pública [What Do We Do? Public Function Secretary]*, GOBIERNO DE MÉXICO [GOVERNMENT OF MEXICO], <https://www.gob.mx/sfp/que-hacemos> (last visited Feb. 19, 2020).

²¹ The main obligation of the GAO is to present to Mexico's Congress of the Union, on dates determined by law, a General Executive Report of the Result of the Superior Audit of the Public Account, which is a brief of the results of inspections and Individual Audit Reports. *Acerca de la ASF [About ASF]*, AUDITORÍA SUPERIOR DE LA FEDERACIÓN [SUPERIOR AUDIT OF THE FEDERATION], https://www.asf.gob.mx/Section/45_Acerca_de_la_ASF (last visited Feb. 16, 2020).

²² The Federal Court of Administrative Justice is a court of law that resolves, in the first instance, fiscal disputes, including those related to corruption. *Nuestra Historia [Our History]*, TRIBUNAL FEDERAL DE JUSTICIA ADMINISTRATIVA [FEDERAL COURT OF ADMINISTRATIVE JUSTICE], <http://www.tfjfa.gob.mx/tribunal/historia> (last visited Feb. 19, 2020).

²³ The Supreme Court, Mexico's highest constitutional court and head of the judicial branch of the government, has the several responsibilities, which include: defending the order established by the constitution; maintaining the balance between the different powers and spheres of government through the judicial resolutions it issues; and resolving, in a

- e) All the counterparts of the above authorities in Mexico's states and municipalities.²⁴

In addition to the aforementioned reforms, the new legal framework enacts a key change of separating the work of the investigator (or auditor) from enforcement tasks in some cases:

- a) The GAO maintains the functions of research, confirmation, and qualification of administrative violations (serious or non-serious); and
b) The GAO will confirm and resolve the necessary procedures and, where appropriate, impose sanctions when dealing with non-serious administrative violations by public servants.²⁵

The key to the Mexican government's reforms is the strengthening of the agencies that fight corruption between public servants and private persons. The primary objective of strengthening sanctions and expanding the scope of legislation is to improve interagency cooperation in the investigation, prosecution, and sanctioning of unlawful conduct.

Notably, one of the main reforms to the Federal Criminal Code extended penalties associated with this kind of conduct. Similarly, the broader scope of the laws that can subject public servants and private persons to a penalty (of liberty and financial) was also a primary reform. For individuals, the maximum penalty is around half a million U.S. dollars, and for companies, the maximum is around six million U.S. dollars.²⁶ In addition, the authorities can order dissolution in cases involving companies.²⁷

Broadly, the whole reform focuses on empowering authorities in charge of preventing specific conduct to collaborate effectively. Before

definitive manner, issues that are of great importance to society. Constitución Política de los Estados Unidos Mexicanos [CP], art. 94, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 27-05-2015 (Mex.). The Council of the Federal Judiciary is tasked with the administration and oversight of the federal judiciary. *Id.*

²⁴ In Mexico's thirty-two states, there are government agencies that perform the same activities, but specific to each state; for example, the tax administration service has offices in every state that are responsible for collecting state taxes. DELOITTE, TAXATION AND INVESTMENT MEXICO 2016, at 1, 14 (2016), <https://www2.deloitte.com/content/dam/Deloitte/cn/Documents/international-business-support/deloitte-cn-ibs-mexico-tax-invest-en-2016.pdf>.

²⁵ Ley General de Responsabilidades Administrativas [LGRA], arts. 11, 115, Diario Oficial de la Federación [DOF] 18-07-2016, últimas reformas DOF 19-11-2019 (Mex.).

²⁶ These amounts are based on the *Unidad de Medida y Actualización*, which is the economic reference in pesos to determine the amount of the payment of obligations and cases foreseen in the federal laws, of the federal entities, and in the legal dispositions that emanate from all the previous ones; the daily value in 2019 was 84.49 pesos. *Unidad de Medida y Actualización [Unit of Measurement and Update]*, INSTITUTO NACIONAL DE ESTADÍSTICA Y GEOGRAFÍA [NATIONAL INSTITUTE OF STATISTICS AND GEOGRAPHY], <https://www.inegi.org.mx/temas/uma> (last visited Feb. 20, 2020); see Código Penal Federal [CPF], arts. 212, 216, 220–24, Diario Oficial de la Federación [DOF] 14-08-1931, últimas reformas DOF 24-01-2020 (Mex.) (explaining that the maximum penalties for the listed crimes are based on the *Unidad de Medida y Actualización*).

²⁷ Código Penal Federal [CPF], art. 11, Diario Oficial de la Federación [DOF] 14-08-1931, últimas reformas DOF 24-01-2020 (Mex.).

these changes, the cooperation between authorities was not clear in matters of anti-corruption, as there was a lack of regulation of the powers of each authority and the scope of those powers. This, of course, was a major issue because without the cooperation of all the agencies in all branches of government, the investigation and prosecution of corruption becomes impossible. As a result of this, the government made structural changes and the horizontalized the integration of the system in order to coordinate the institutions responsible for transparency and the fight against corruption.

One example of this transversal cooperation is the efficient cooperation between the Tax Administration Service (SAT) and the GAO.²⁸ Close collaboration between these two agencies returns better results when fighting the types of illegal activities that can be uncovered with a proper audit of the incomes of suspect entities or individuals.

In addition, it is important to mention that the broader powers for the GAO allow this legislative agency to perform investigations and issue reports with increased accuracy. This is due to the audit powers that can be exercised when the GAO determines it necessary, thanks to its ability to review public accounts.²⁹

Still more of the recent reforms deserve attention. One such reform crucial to this topic is the treatment of corruption as equivalent to organized crime;³⁰ this means that corruption is now a serious offense, committed by individuals against the state. Another key reform grants more independence to the *Fiscalía General de la República* (the Mexican equivalent to U.S. Department of Justice), endowing it with more power to prosecute corrupt conduct.³¹

The *Fiscalía General de la República* has several prevention mechanisms at its disposal. The first is public servant statements: all public servants are obliged to present three statements: financial statements; declaration of interests; and annual overall.³² The statements will be made

²⁸ Jorge Arturo Rodríguez Ruiz & Christian Solís Martínez, *Tax Controversy in Mexico*, LEXOLOGY (Mar. 20, 2019), <https://www.lexology.com/library/detail.aspx?g=718609da-59d5-4386-bf0a-846cf09475d7>.

²⁹ Org. for Econ. Co-operation & Dev. [OECD], *Mexico's National Auditing System: Strengthening Accountability and Integrity*, at 8–10 (2015), <http://www.sefisver.gob.mx/XXVAsamblea/subtemas/Informe%20OCDE%20SNF/Informe%20Prelim%20Rev%20OCDE%20ENG.pdf>.

³⁰ According to the Mexican constitution, organized crime is defined as a de facto organization of three or more individuals who come together to commit crimes on a permanent or repeated basis. Constitución Política de los Estados Unidos Mexicanos [CP], art. 16, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 27-05-2015 (Mex.). Organized crime is a serious offense, so the law sanctions these actions with the most severe measures. *See id.* (describing the consequences of felonies committed by organized crime).

³¹ *Id.* art. 102.

³² Ley Orgánica de la Fiscalía General de la República [LOFGR], art. 39, Diario Oficial de la Federación [DOF] 14-12-2018 (Mex.).

public, except for those that could affect privacy.³³ The GAO and its counterparts in local agencies and the Internal Control Organ,³⁴ are empowered to audit the companies' financial statements with the understanding that any unexplained growth will lead to the submission of complaints to the *Fiscalía General de la República*.³⁵

The second prevention mechanism is the protocol of performance in public contracting. The Coordination Committee of the National Anti-Corruption System will issue the protocol for performance in public contracting, which Mexico's Department of Government Affairs will implement.³⁶ According to the protocol, public servants that participate in public contracting will submit forms for individuals to use to disclose business, personal, or familial relationships that may represent possible conflicts of interest.³⁷ Conflicts of interest exist when there is possible influence on objective and impartial performance of the functions of public servants due to business, personal, or familial interests.

The third procedural mechanism of the *Fiscalía General de la República* is the policy of integrity for legal entities. In determining the responsibility of legal entities, the department will consider whether the entities have an integrity policy, which, at a minimum, should contain the following elements:

- a) An organizational and procedural manual;
- b) A code of conduct;
- c) A control, supervision and auditing system;
- d) A complaint system, as disciplinary procedure;
- e) Adequate systems and procedures for the training and implementation of ethics measures;
- f) A human resources policy; and
- g) Mechanisms that ensure the transparency and openness of their interests.³⁸

Finally, there are several legal initiatives in the legislative branch to strengthen the judicial branch. In particular, the organic reform initiative of the judicial branch creates a new court, independent from the Mexican

³³ *Id.* art. 24.

³⁴ The Internal Control Body responsibilities include implementing the system of government control and evaluation, and ensuring that the processes and procedures carried out by public servants in federal agencies and entities are in keeping with the law and contribute to the substantive objectives of these institutions. *Id.* art. 34.

³⁵ The *Fiscalía General de la República* has many functions—the most important of which is the exercise of criminal action—and has its own organic law that regulates the organization, operation, and exercise of powers of the *Fiscalía*. Ximena Suarez-Enriquez, *Three Key Points About Mexico's New Fiscalía*, WASH. OFF. ON LATIN AM. (Oct. 25, 2016), <http://www.wola.org/analysis/three-key-points-about-mexicos-new-fiscalia>.

³⁶ Org. for Econ. Co-operation & Dev. [OECD], *Follow Up Report on the OECD Integrity Review of Mexico: Responding to Citizens' Expectations*, at 28–29, 58 (2019), <http://www.oecd.org/gov/ethics/follow-up-integrity-review-mexico.pdf>.

³⁷ *Id.* at 12.

³⁸ Ley General de Responsabilidades Administrativas [LGRA], art. 25, Diario Oficial de la Federación [DOF] 18-07-2016, últimas reformas DOF 19-11-2019 (Mex.).

Supreme Court of Justice, with jurisdiction limited to corruption trials initiated by the *Fiscalía General de la República*.³⁹

Under this framework, Mexican law firms need to be very careful regarding clients who retain them. Once a firm has a professional relationship, it must handle new information with care. Currently, there is a huge debate regarding the attorney-client privilege in Mexico. To combat this, the authors' firm, White & Case, has a standardized process for working with new clients, called the "Know Your Client" policy.⁴⁰ It involves a highly scrutinized review (subject to due diligence) of the client's background, as well as sensitive operations and politically exposed persons involved in ongoing matters.⁴¹

In the future, this type of policy will be strengthened by a new form of government inspection that will increase obligations for law firms. One example of such policy is a bill that obligates tax advisors to disclose the tax planning operations of their clients to the SAT.⁴² A key question arises as to whether or how this requirement affects attorney-client privilege.⁴³

The tax-planning reporting obligation would likely impact attorney-client privilege. While the state needs amplified the power of authorities to investigate, prosecute, and prevent corruption—and these types of policies are certainly needed—it is important to preserve the attorney-client privilege. Of course, the attorney-client privilege cannot be absolute. Exceptions should be made when, for example, there are indications of a possible crime. The privilege subsists as long as it does not result in a violation of rights or any type of law.

This article suggests that there is much work to be done to alleviate corruption. The legal framework will not be effective if the people in charge depend on political decisions, and yet, oftentimes, the enforcement of the law is hampered by the personal interests of politicians. Therefore, full transparency and an extended participation of civil society are instrumental in strengthening efforts to address corruption.

³⁹ Ley Orgánica del Tribunal Federal de Justicia Administrativa [LOTFJA], art. 1, Diario Oficial de la Federación [DOF] 18-07-2016 (Mex.).

⁴⁰ *Privacy Policy*, WHITE & CASE ALUMNI NETWORK (Nov. 28, 2018), <https://alumni.whitecase.com/etc/tend4.php>.

⁴¹ *Id.* Law firm client information should be protected, but law firms also must protect their interests and image; knowing clients and their history is key to the firm's ability to predict the impact and likely outcome of a case.

⁴² Ricardo Gonzalez Orta & Mauricio Martinez, *Tax Fraud To Become Type of Organized Crime*, DELOITTE TAX@HAND (Oct. 22, 2019), <https://www.taxathand.com/article/12397/Mexico/2019/Tax-fraud-to-become-type-of-organized-crime->

⁴³ This privilege can be seen as a contractual obligation or as an ethical obligation, and seeks to maintain as confidential the communications between a client and his or her attorney. NATHAN M. CRYSTAL & GRACE M. GIESEL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 137–38 (7th ed. 2020).