

GAINING ACCESS TO JUSTICE: A SUBNATIONAL STUDY OF PUBLIC DEFENDER OFFICES IN MEXICO

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ABSTRACT: *With the transition to democracy, Latin American countries have embarked on implementing judicial reforms to redesign justice-sector institutions and build up the rule of law in the region. Reform efforts included empowering the courts, granting political independence to the public prosecutor's office, professionalizing the public defender offices and implementing the accusatory criminal system in justice-sector institutions. To what extent are the reforms targeted at the public defender offices changing the way legal defense is provided? In this article, after discussing a theoretical framework that captures and operationalizes the concepts of a merit-based career system, an accusatory criminal justice system and effective legal representation, I examine the extent to which the changes of transitioning from an inquisitorial to an adversarial system and from a non-merit-based career system to a merit-based career system have affected the way legal counsel is provided at subnational public defender offices. To accomplish this, I provide both a de jure and de facto measures (indicators of reform implementation). To identify the de jure indicators, I consulted legal texts (constitutions and secondary laws), and to gauge how the de facto indicators work, I relied on interviews with public defenders, reports and academic documents. I collected 50 interviews with public defense attorneys from three Mexican states: Baja California Sur, Jalisco and Nuevo León. Findings from these states suggest that as reform implementation advances, public defenders have more tools to offer legal representation; more specifically, they are better trained, in addition to having higher salaries, a lower caseload per defender and increased access to forensic services.*

KEYWORDS: *Judicial reform, public defenders, legal representation, accusatory criminal justice procedure, merit-based career system.*

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RESUMEN: *Con la transición a la democracia, los países latinoamericanos introdujeron reformas judiciales para rediseñar las instituciones del sector justicia y construir el Estado de derecho en la región. Las reformas incluyeron aspectos como empoderar a las cortes supremas, otorgar independencia política al ministerio público, profesionalizar la defensoría pública o implementar el sistema penal acusatorio en las instituciones del sector justicia. ¿En qué medida las reformas dirigidas a las defensorías públicas están cambiando la provisión de la defensa legal? En este trabajo, después de presentar los debates teóricos para capturar y operacionalizar los conceptos de sistema profesional de carrera, procedimiento penal acusatorio y representación legal efectiva, exploro cómo las reformas institucionales en materia de procedimiento penal y sistema profesional de carrera modificaron la forma en que los defensores públicos ofrecen defensa legal en el área penal. Para lograr esto, proporciono medidas tanto de jure como de facto (indicadores de implementación de reformas). Para identificar los indicadores de jure, utilizo textos legales (constituciones y leyes secundarias), y para evaluar cómo funcionan estos indicadores de facto, uso 50 entrevistas con defensores públicos en tres estados mexicanos: Baja California Sur, Jalisco y Nuevo León. Los hallazgos de estos estados sugieren que a medida que avanza la implementación de la reforma, los defensores públicos adquieren más herramientas para ofrecer una representación legal efectiva, en particular, están mejor capacitados, tienen salarios más altos, menos carga de trabajo por defensor y aumentan su acceso a los servicios forenses.*

PALABRAS CLAVE: *Reforma judicial, defensores públicos, defensa legal, sistema penal acusatorio, servicio civil de carrera.*

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I. INTRODUCTION

Legal representation is crucial for obtaining a fair trial. In many countries, the public defender offices (PDO) is in charge of guaranteeing the provision of this human right and providing those accused of committing a crime access to the courts. PDO services in criminal matters are mainly required by the most vulnerable sectors of society. Public Defender Offices (PDOs) are a channel to justice, especially (but not only) for the poor. As a matter of fact, in Mexico and developed countries like the United States, around 80 to 90 percent of the people facing felony charges have a public defender appointed to handle their cases.¹ This fact is critical for PDOs, especially when they are underfunded and understaffed, as usually happens.

With the transition to democracy, Latin American countries embarked on judicial reforms to create or redesign justice-sector institutions and build up the rule of law in the region. One reform that swept across Latin America was changing the criminal procedural system from an inquisitorial to adversarial one. Administrative reforms aimed at improving the internal management of justice-sector institutions, particularly the professional profile of legal agents, were also introduced. These reforms touched on the performance of courts, the public prosecutor's office, the police, and the public defender offices: they were expected to improve access to and the administration/delivery of justice. In the case of public defenders, these reforms were intended to bolster the provision of effective legal representation. So, to what extent are these reforms changing the provision of legal counsel to defendants?

Effective legal representation is a complex concept that includes several rights that need to be provided and protected at each stage of the criminal justice process. For instance, there is the right to be presumed innocent, the right against self-incrimination or the right to not be held in pretrial detention during the process, i.e., to ensure that innocents do not end up in jail.² Research has shown that effective legal representation varies due to several reasons which include institutional design,³ the defender being a “repeat

¹ Velázquez quoted by Juan Carlos C. Razo, *Por una Defensoría Pública Nacional*, special number, INST. FED. DE DEF. PÚBLICA REV. 11, 27 (2012); Amy Goodman, Gideon's Army: Young Public Defenders Brave Staggering Caseloads, Low Pay to Represent the Poor, DEMOCRACY NOW!, January 24, 2013, at 1/24; John Pfaff, A Mockery of Justice for the Poor, N.Y. TIMES, April 29, 2016, at 4/30.

² American Convention on Human Rights Relative to the Right to a Fair Trial art. 8, November 22, 1969, Chapter II Civil and Political Rights.

³ Ligia M. Madeira, *Institutionalisation, Reform and Independence of the Public Defender's Office in Brazil*, 8 (2) BR. POL. SCI. REV. 48, 69 (2014).

player”,⁴ a sound budget for the PDO, forensic services, internal management, case assignment, regular training for defenders, caseload, or the defender’s position and relation with other actors in the justice sector, such as public prosecutors and judges.

In this article, I explore the variations in the provision of effective legal representation in settings with and without the implementation of the above-mentioned institutional reforms in two major areas: criminal procedural system and merit-based career system in subnational public defender offices. I contend that institutional reforms in these areas foster public attorneys’ capacities and resources to provide effective legal defense. I use evidence from three Mexican states: Baja California, Jalisco and Nuevo León, which have introduced and implemented different levels of reform at the time the data for this work were collected. This makes it possible to observe the differences in how justice is provided by public defenders before and after the introduction of said reforms. My work seeks to contribute to prior research conducted on public defender offices in Mexico⁵ and in Latin America.⁶

In this article, I show the extent to which changes from an inquisitorial to an adversarial system and from a non-merit-based career system to a merit-based career system have affected the provision of legal counsel at subnational public defender offices. To accomplish this, I provide both *de jure* and *de facto* measures (indicators of the implementation of reforms). While legal provisions are important to improve the adversarial nature of the system and the professionalization of defense attorneys, it is crucial that they are fully operational; we gain little with embellished laws that are poorly enforced.

To identify the *de jure* indicators, I examined legal texts (constitutions and secondary laws), and to gauge how the *de facto* indicators work, I consulted interviews with public defenders, reports and academic documents. I collected 50 interviews with criminal defense attorneys and reviewed legal texts and reports from three Mexican states: Baja California Sur, Jalisco and Nuevo León. Findings from these states suggest that as the implementation of reforms advances, public defenders have more tools to offer effective legal representation.

⁴ Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 (2) LAW & SOCIETY REV. 95, 160 (1974); Humbert Kritzer and Susan Silberry (eds.), *In Litigation: Do the “Haves” Still Come Out Ahead?* 9 (1) STANFORD UNIV. PRESS. 95, 160 (2004).

⁵ Héctor Fix-Fierro & Alberto Abad Suárez Ávila, *Hacia una Defensa Pública de Calidad. El Nuevo Diseño Institucional de las Defensorías Públicas en las Entidades Federativas de la República Mexicana*, 32 CUEST. CONST. REV. MEXICANA DE DER. CN. 157, 200 (2015); Azul A. A. Aguilar, in LA SEGURIDAD Y LA JUSTICIA EN JALISCO: ESCENARIOS Y PROPUESTAS 352, 369 (Coecyt-Jal./Universidad de Guadalajara/Casade 2016); ANGÉLICA C. VÁZQUEZ, LOS JUICIOS ORALES EN EL ESTADO DE MORELOS: LAS NUEVAS PRÁCTICAS (Facultad de Ciencias Políticas y Sociales-UNAM/Sitesa, 2017); Héctor Fix-Fierro & Alberto Abad Suárez Ávila, *El Servicio Profesional de Carrera en la Defensoría Pública en México*, 25 POLÍT. GOB. 301, 338 (2018).

⁶ CATALINA SMULOVITZ, PUBLIC DEFENSE AND ACCESS TO JUSTICE IN A FEDERAL CONTEXT: WHO GETS WHAT, AND HOW IN THE ARGENTINIAN PROVINCES (Notre Dame University Press, 2019); Juan F. G. Bertomeu, *Different Ways of Losing: Public Defenders (and Private Counsel) at the Supreme Court of Argentina*, LAW AND SOCIETY REV. 354, 390 (2020).

In this article, I proceed in four additional steps. Section 2 presents a review of the literature on the three key concepts of this research: effective legal representation, the adversarial system and the merit-based career system. Section 3 walks through data and case selection. Based on the evidence of three local PDOs in Mexico, Section 4 is divided into three sub-sections: *a)* the operation of the adversarial criminal system; *b)* the merit-based career system; and *c)* effective legal defense. The final section draws conclusions, pointing out some of the implications of my findings on future research.

II. THEORETICAL DEBATES ON CRIMINAL PROCEDURE, THE MERIT-BASED CAREER SYSTEM AND EFFECTIVE LEGAL REPRESENTATION

What allows criminal justice actors to expand their power or protect rights? Legal and political science scholars offer several explanations that range from judicial actors' strategic concerns,⁷ ideology,⁸ ideas, beliefs and credible commitments⁹ to institutional factors.¹⁰ Other scholars also point out that multiple factors motivate judicial actors¹¹ to extend their power or defend citizens' rights.

In this article, I follow an institutional approach to frame the legal protection of rights offered by public defenders. Institutions shape human interactions¹²

⁷ Jack K. L. Epstein & Olga Shvetsova, *The Supreme Court as a Strategic National Policymaker*, 50 (1) EMORY LAW JOURN. (2001); GRETCHEN HELMKE, *COURTS UNDER CONSTRAINTS: COURTS, GENERALS AND PRESIDENTS IN ARGENTINA* (Cambridge University Press, 2005); JEFFREY K. STATON, *JUDICIAL POWER AND STRATEGIC COMMUNICATION IN MEXICO* (Cambridge University Press, 2010).

⁸ JEFFREY SEGAL & HAROLD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (Cambridge University Press, 2002); Santiago Basabe-Serrano, *Judges without Robes and Judicial. Voting in Contexts of Institutional Instability: The Case of Ecuador's Constitutional Court*, 44 LATIN AMERICAN STUDIES JOURN. 127, 161 (2012).

⁹ LISA HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE* (Cambridge University Press, 2007); Rodrigo Nunes, *Ideational Origins of Progressive Judicial Activism*, 52 (3) LATIN AMERICAN POLITICS AND SOC. 67, 97 (2010); Mathew Ingram, *Crafting Courts in New Democracies. Ideology and Judicial Council Reform in Three Mexican States*, 44 (4) COMPARATIVE POLIT. 439, 458 (2012).

¹⁰ Gretchen Helmke & Julio Ríos-Figueroa (eds.), 'Introduction. Courts in Latin America'. In *Courts in Latin America*, eds. Helmke, Gretchen & Julio Ríos Figueroa (Cambridge University Press, 2011); Javier Couso & Lisa Hilbink, 'From Quietism to Incipient Activism. The Institutional and Ideological Roots of Rights Adjudication', in RÍOS-FIGUEROA, *COURTS IN LATIN AMERICA*.

¹¹ MARTÍN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (University of Chicago Press, 1981); Diana Kapiszewski, *Tactical Balancing: High Court Decision Making on Politically Crucial Cases*, 45 (2) LAW AND SOCIETY REV. 471, 506 (2011).

¹² DOUGLAS NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 03 (Cambridge University Press, 1990); JAMES MARCH & JOHAN OLSEN, *REDESCUBRIENDO LAS INSTITUCIONES. LA BASE ORGANIZATIVA DE LA POLÍTICA* (FCE, 1997); Bo. Rothstein, *Political Institutions:*

and steer individual behavior; they establish limits and influence the actions of their community. In other words, rules guide the actions of individuals, particularly of those working in justice system institutions. Since this article seeks to assess the extent to which a change in formal rules produces a change in the way duties are performed within public defender offices, I expect to find actors working in justice sector institutions to adapt their behavior (even if poorly) to the rules introduced by the institutional reforms. That is, in a legalistic and formalistic environment like that of justice sector actors in Mexico, public defenders would first need a rule in order to act. Modifying behavior, however, does not occur instantly or without resistance. It takes time for the rule to be socialized, especially after incoming cadres come into the institution under the newly crafted rules. It is at this moment when institutions can more palpably shape behavior. This is the case, for example, of recently hired lower-ranking judges in Chile.¹³

The institutional approach I present is built on three variables, two independent ones: the adversarial criminal model and the merit-based career system; and a dependent one: effective legal representation. In the next section, I discuss the main theoretical ideas contained in these three concepts and, in the empirical section, I analyze both the formal rules of game (*de jure*) and how actors actually play or interact with those rules (*de facto*). This distinction between *de jure* and *de facto* is imperative and very simple: the first denotes formalized (i.e. constitutionalized) rules, while the second refers to how and by which means and actions those rules are enforced in practice.¹⁴ I do not claim that institutions and institutional designs are the cure for all our ills, but only that they play an important role in how individuals behave.

1. *Criminal Procedure*

In Western countries two different types of criminal procedure have emerged: the inquisitorial system, characteristic of continental countries; and the adversarial tradition, distinctive of Anglo-American countries. The administration of justice in the continental tradition was inquisitorial, born “in the secret chambers of Romano-canonistic procedure, exemplified by the Inquisition”.¹⁵

An Overview, in ROBERT E. GOODIN AND HANS-DIETER KLINGEMANN. A NEW HANDBOOK OF POLITICAL SCIENCE (Oxford University Press, 2002).

¹³ Couso and Hilbink, *supra* note 10.

¹⁴ For more information on *de jure* and *de facto* measures, see Ríos-Figueroa, Julio & Jeffrey Staton, Unpacking the Rule of Law. A Review of Judicial Independence Measures, CELS 4th Annual Conference on Empirical Legal Studies Paper, (2009), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434234.

¹⁵ Mattei Ugo & Luca G. Pes, ‘Civil Law and Common Law: Toward a Convergence?’, in THE OXFORD HANDBOOK OF LAW AND POLITICS, EDS. WHITTINGTON KEITH, DANIEL KELEMEN & GREGORY CALDEIRA 276 (Oxford University Press, 2008).

Therefore, the process was conducted by and consolidated in the hands of a judge. In such a system, the legal process takes place between an “individual (the accused) and the State”,¹⁶ a dual process —judge-claimant/defendant— of conflict resolution.¹⁷ The Anglo-American tradition is typically adversarial, taking its “shape from a contest or a dispute: it unfolds as an engagement of two adversaries before a relatively passive decision maker (the judge) whose principal duty is to reach a verdict”;¹⁸ it is a triadic model —judge/claimant/defendant— of conflict resolution.¹⁹

Nowadays these sharp differences do not apply in real practice. Therefore, it is better to classify a legal system as *predominantly* adversarial or inquisitorial and leave the previous separation as a historical reference.²⁰ Indeed, adversarial and inquisitorial models started to merge in continental Europe after the French Revolution when practitioners of the adversarial system saw fit to consider some of the classic features of the inquisitorial system such as the “creation of a professional police force and of a public prosecutor, to investigate the commission of crimes, compile evidence (and) conduct the criminal proceeding on behalf of the state”.²¹ Furthermore, after the Second World War, when democratic regimes flourished, “the American legal system (became) the most influential legal system in the world”.²² It spread throughout European and Latin American countries as a result of the wave of reforms to justice systems inspired by the United States model. As a matter of fact, criminal systems in Latin American democracies underwent a substantial change from inquisitorial to *predominantly* adversarial models or hybrid models in the third wave of democratization.²³

The introduction of the adversarial model affected the performance not just of the judiciary, but also other institutions such as the police, the PDO and the public prosecutor’s office (PPO). In terms of the PDO, the adversarial

¹⁶ JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION. AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 127 (Stanford University Press, 1985).

¹⁷ CARLO GUARNIERI, *PUBBLICO MINISTERO E SISTEMA POLITICO* 127 (Casa Editrice Dott. Antonio Milani, 1984).

¹⁸ MIRJAN DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY. A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 03 (Yale University Press, 1986).

¹⁹ Guarnieri, *supra* note 17, 127.

²⁰ Thomas Weigend, *Criminal Procedure: Comparative Aspects*, in *ENCYCLOPEDIA OF CRIME AND JUSTICE*, 444, 457 (MacMillan, 2002).

²¹ Merryman, *supra* note 16, 127, 128.

²² Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 (1) *HARV. INT. L. JOURNAL* (2004).

²³ Mauricio Duce & Andrés Baytelman, *Evaluación de la Reforma Procesal Penal: Estado de una Reforma en Marcha* (Universidad Diego Portales, 2003); Alberto M. Binder, *La justicia penal en la transición a la democracia en América Latina*, (November 23, 2019, 16:00), http://perso.unifi.ch/derecho-penal/assets/files/anuario/an_1994_04.pdf; David Shirk, *Criminal Justice Reform in Mexico: An Overview*, III (2) *MEX. L. REV.* 189, 228 (2011).

system implied the introduction of rules and principles including oral litigation, alternative justice, publicity, immediacy, concentration and contradiction of proceedings and equality between the parties.²⁴

Several Latin American scholars have shown that this type of system offers both the plaintiff and the defendant more tools to access a more transparent and expeditious judicial proceeding than the inquisitorial system used to offer.²⁵ By analyzing the PDO, I demonstrate how the introduction of an adversarial criminal model affects the provision of effective legal representation. I expect to find that public attorneys have more tools to protect rights and offer effective counsel when working under a predominantly adversarial system. I do not claim that an adversarial model is good in itself or that PDOs could only solve their problems if this type of criminal procedure is implemented, but that in certain conditions and contexts (i.e. professionalized or well-financed institutions), the attributes of adversarial legal systems contribute to the provision of an effective defense better than the inquisitorial model does.

2. *Professionalization and Merit-Based Career System*

The professional profile of judicial actors plays a key role in the delivery of justice. No one is against the argument that the most qualified individuals should serve in office, whether that be the court, the prosecutor's office, the PDO or any other department in the justice realm. Some scholars argue that a meritocratic system lays the foundation to achieve the best professional-quality judges and separate justice from political influences.²⁶ To select the best-qualified lawyers for justice institutions is then the first stone on which to build up a substantive rule of law. The European-continental legal tradition acknowledged this very well and thus crafted bureaucratic models to manage the process of judicial selection, training and evaluation.²⁷

The meritocratic system in justice institutions is valuable not only for the way judges, prosecutors or defense attorneys are selected, but also for the ca-

²⁴ Fix-Fierro & Suárez Ávila, *supra* note 5; Aguiar-Aguilar, *supra* note 5.

²⁵ Lydia Tiede Brashear, *Chile's Criminal Law Reform: Enhancing Defendants' Rights and Citizen Security*, 54 (3) LATIN AMERICAN POL. AND SOC. 65,93 (2012); GUILLERMO ZEPEDA LECUONA, BUENAS PRÁCTICAS EN LA IMPLEMENTACIÓN Y OPERACIÓN DEL NUEVO SISTEMA DE JUSTICIA PENAL EN MÉXICO (USAID, 2014).

²⁶ J. Andrew Crompton, *Pennsylvanians Should Adopt a Merit Selection System for State Appellate Court Judges*, 106 (4) DICKINSON LAW REV. 755,68 (2002); GIUSEPPE DI FEDERICO, RECRUITMENT, PROFESSIONAL EVALUATION AND CAREER OF JUDGES AND PROSECUTORS IN EUROPE: AUSTRIA, FRANCE, GERMANY, ITALY, THE NETHERLANDS AND SPAIN (Lo Scarabeo, 2005); Thomas R. Phillips, *The Merits of Merit Selection*, 32 (1) HARV. JOURN. OF LAW & PUB. POL. (2009).

²⁷ Carlo Guarnieri, *Professional Qualification of the Judiciary in Italy, France and Germany*, GLOBAL CORRUPTION REPORT, TRANSPARENCY INTERNATIONAL (2007); Daniela Piana, *Beyond Judicial Independence: Rule of Law and Judicial Accountabilities in Assessing Democratic Quality*, 9 COMPARATIVE SOCIOLOGY, 40-64 (2010).

reer they are compelled to follow. This is particularly important in countries with recent authoritarian pasts where the patronage system was the most common way to fill positions in public institutions.

Concerning the professionalization of judicial actors, comparative legal studies have looked at the role played by judicial councils or commissions.²⁸ The experience of several countries (France, Italy, Germany, Spain, Brazil and Mexico) shows that judicial councils are bureaucratic models of judicial governance,²⁹ i.e., guardians of the professional profile of the officers and the performance of the institution. Councils engage in careful recruitment, training, evaluations and promotion processes. A core function of judicial councils is to regulate and manage the judicial career.

Professionalization within judicial councils implies the existence of a merit-based career system to guide the professional career of lower and medium-ranking officers in justice-sector institutions. In cases such as France, Germany and Italy, judicial councils administer the career of judges and prosecutors with the aim of not only insulating them from political influences, but especially of professionalizing them and holding them accountable: judges and prosecutors undergo several evaluations before and after obtaining life tenure.

Public defenders are civil servants and as such need to follow a career system to avoid patronage and unprofessional profiles. A career system for public defenders implies an internal governance model, a systematized recruitment process, training, evaluation, promotion, salary protection, reallocation and a dismissal regulation.³⁰

3. *Effective Legal Representation*

From the American Convention of Human Rights to the Charter of Fundamental Rights of the European Union, the African Charter on Human and Peoples' Rights, or the landmark decision of the United States Supreme Court in the case *Gideon v. Wainwright*, the right to effective legal representation is formally guaranteed, particularly in cases of low-income individuals accused of criminal offenses. With the aim of ensuring the right to a fair trial, countries and societies have developed different models to access justice that range from

²⁸ Guarnieri, *supra* note 27; Nuno Garoupa and Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, *Public Law and Legal Theory*, working paper n. 250 THE LAW SCHOOL, THE UNIVERSITY OF CHICAGO (2008); Di Federico, *supra* note 26; Nuno Garoupa, Marian Gili, & Fernando G. Pomar, *Political Influence and Career Judges: An Empirical Analysis of Administrative Review by the Spanish Supreme Court*, 9 (4) JOURN. OF EMP. LEGAL STUDIES, 795, 826 (2012); Julio R. Figueroa, *El Gobierno Judicial y Los Consejos de La Judicatura*, in GOBIERNO Y POLÍTICA EN MÉXICO 49, 79 (Fontamara, IJJ-UNAM, TEPJF, 2019)

²⁹ Piana, *supra* note 27.

³⁰ Di Federico, *supra* note 26; Carl Russell Fish, 'The Civil Service and the Patronage', Russell & Russell INC. (New York, 1963).

public defender offices, to court-appointed counsel, to private lawyers hired by the government (contract-service system), to law school clinics or pro-bono centers (volunteer legal aid).

As stated above, effective legal defense is not an easy concept to grasp. Literature on legal representation points to two approaches: input and output oriented. On the one hand, the input-orientation posits that effective legal defense can be observed to the extent defense attorneys are “meeting with clients, contacting witnesses, conducting research, and carefully reviewing presentence investigation reports”.³¹ On the other hand, the output orientation is more common in the literature and points to the outcome of the case as an indicator of the public defenders effectiveness.³² Comparing the results achieved by public defenders *vis-a-vis* private defense lawyers in criminal cases, output-orientation studies observe effective legal counsel in the rulings handed down: conviction or non-conviction, non-custodial sentences, probation rate, length of incarceration, life sentence, time established to serve at prison, among others.³³ With the aim of better capturing the provision of effective legal counsel, Hartley, Miller and Spohn³⁴ observe the effectiveness of public defenders by considering their performance at different stages in the criminal justice process: the bail decision, the plea bargaining decision, and two sentencing decisions (imprisonment and incarceration rate).

To empirically assess the concept of effective legal representation, one can also look at the defense attorney’s perspective (input-oriented approach), i.e., what public defenders need in order to offer an adequate and effective defense. Informed by the theoretical proposal of Hanson, Ostrom, Hewitt and Lomvardias,³⁵ international human rights treaties and the original empirical data collected in interviews with public defenders, I also highlight the following conditions as essential for an effective legal defense: a) free access to

³¹ ROGER HANSON ET AL., *INDIGENT DEFENDERS GET THE JOB DONE AND DONE WELL. STUDY OF THE INDIGENT DEFENSE SYSTEMS IN NINE U.S. JURISDICTIONS* 51 (National Center for State Courts, 1992).

³² Dean J. Champion, *Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records, and Leniency in Plea Bargaining*, 17 (4) *JOURN. OF CRIMINAL JUST.* 253, 263 (1989); Floyd Feeney & Patrick Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter*, 22 (2) *RUTGERS LAW JOURN.* 361 (1991); M. Hoffman, P. Rubin & J. Shepherd Hoffman, *An Empirical Study of Public Defender Effectiveness: Self Selection by the Marginally Indigent*, 3 *OHIO STATE JOURN. OF CRIMINAL L.* 223, 55 (2005); R. D. Hartley, H. V. Miller & C. Spohn, *Do You Get What You Pay For? Type of Counsel and its Effect on Criminal Court Outcomes*, 38 *JOURN. OF CRIMINAL JUST.* 1063, 1070 (2010).

³³ Gerald R. Wheeler & Carol L. Wheeler, *Reflections on Legal Representation of the Economically Disadvantaged: Beyond Assembly Line Justice Type of Counsel, Pretrial Detention, and Outcomes in Houston*, 26 (3) *CRIME AND DELINQUENCY*, 319, 332 (1980); Hanson, Hewitt, Ostrom & Lomvardias, *supra* note 31, 51.

³⁴ Hartley, Miller & Spohn, *supra* note 32, 1065.

³⁵ Hanson, Ostrom, Hewitt & Lomvardias, *supra* note 31, 51.

forensic services; *b*) a law degree and postgraduate studies; *c*) regular training; and *d*) caseload per defender.

To observe effective legal representation, I selected indicators of both the input-and output-oriented approaches for this work: caseload per defender, access to forensic services, and one stage of the criminal justice process: the outcome regarding pretrial detention. This last measure sheds light on how defenders perform their duty. Accordingly, one consequence of inadequate legal representation is the defendant going to pretrial detention, especially when it is the case of having committed minor crimes. While it is true that there are crimes for which pretrial detention is mandatory, in modern criminal procedures, non-serious criminal offenses should find other ways of punitive resolution and avoid pretrial detention. Public defenders play a crucial role in making this possible: they must keep their defendants from going to jail before a judge delivers a sentence. Like others, I assume that the defender is “an important influence in advocating for the release of the defendant”³⁶ or in getting pretrial release with conditions, i.e., under supervision. Thus, the pretrial detention rate can portray the extent to which a public defender is doing her job well.

III. CASE SELECTION AND DATA

For this article I selected local PDOs in the states of Baja California Sur (BCS), Jalisco and Nuevo León. For the selection of cases I considered the stage of implementation of an adversarial system in the state. At the time fieldwork was conducted (March to April 2015), Baja California Sur was an instance of a state where the adversarial system was not implemented in any of its municipalities; Jalisco represented a case where the adversarial model was implemented in some municipalities; while Nuevo León was an example where the adversarial system was functioning in almost all its municipalities.³⁷ This selection guaranteed variation across the cases and allowed for an assessment of how public defender offices performed before and after the implementation of the reforms. In the case of Baja California Sur and Jalisco, the adversarial system was not operating in the city or the metropolitan area where the fieldwork was conducted, even though there were differences among public defenders in those states, since in Jalisco, some municipalities have implemented the reforms.

I chose to interview public defenders in PDOs located in the capital cities or metropolitan areas because that is where most public defenders are concentrated. I focused on gathering interviews only from defenders working on

³⁶ Hartley, Miller & Spohn, *supra* note 32, p. 1065.

³⁷ SETEC, Implementación de la Reforma Penal, (2015), available at <http://www.setec.go.b.mx/>.

criminal matters. I proceeded by contacting the head of Public Defender Offices in each state and explained the project in a formal letter. Once I had obtained their approval, I got in touch with the directors of criminal matters and, through them, I could establish contact and schedule appointments with the public defenders who wanted to participate in the project.³⁸ For this work, a total of 50 personal interviews with public defenders were conducted: 13 out of 16 public defenders working in criminal matters in the capital city of Baja California Sur, 14 out of 38 in the metropolitan area of Jalisco, and 23 out of 120 in the metropolitan area of Nuevo León. Each interview lasted an average of 60 minutes.

The questionnaire contained 64 questions and was divided into three sections: 1) general working conditions at the public defender offices and daily work; 2) the professional profile of public defenders and the accusatory system; and 3) motivation, ideas and interests about being a public defender. For this article, I only used the data in Section 2; that is, 25 questions related, among other things, to how and when public attorneys were hired, what type of work contract they have, how the selection and appointment process was carried out, who can dismiss them from their position, whether they take training courses regularly and what type, whether the PDO offers them training courses, what type of material resources they have at their disposal to perform their job effectively, how much they are paid a month, whether they consider there is a merit-based career system or whether they think they are well-trained in the accusatorial system. In the next section, I make a qualitative analysis using the public defenders' individual answers to structure the argument on the extent to which practices have changed after the introduction of institutional reforms.

IV. LEGAL COUNSEL IN SUBNATIONAL PUBLIC DEFENDER OFFICES

In this section I first present a brief overview of the formal institutional setting in which public defender offices in BCS, Jalisco and Nuevo León perform their duties. Then, in the three sub-sections, I analyze the data collected from the interviews, constitutions, reports and documents in the three states where fieldwork was conducted.

The local constitutions and secondary regulations of BCS, Jalisco and Nuevo León indicate the attributes and the duties of the PDO. They also determine where the PDO is institutionally located, what type of institution it is, how it is organized, and which areas are under its jurisdiction, among others. Table 1 summarizes these issues.

³⁸ It is worth noting that public defenders were very open to be interviewed and to tell their story about the conditions under which they were performing their jobs.

TABLE 1. THE PUBLIC DEFENDER'S OFFICE
IN BCS, JALISCO AND NUEVO LEÓN

<i>Characteristics</i>	<i>BCS</i>	<i>Jalisco</i>	<i>Nuevo León</i>
Name	Public Defender's Office	Social Prosecutor's Office	Public Defender's Institute
Regulations	Constitution Organic Law	Constitution Organic Law	Constitution Organic Law Regulation
Institutional location	Executive Branch	Executive Branch	Executive Branch
Institutional category	General Office	Procuracy	Institute
Areas of defense	Criminal, civil and family	Criminal, civil, family, commercial and labor	Criminal, civil, family, commercial and administrative

SOURCE: Baja California Sur Constitution, 2014; Jalisco Constitution, 2014; and Nuevo León Constitution, 2009.

The PDOs in these three states are administratively part of the Executive branch and the governor freely appoints and dismisses top officials. In Baja California Sur, the PDO defends criminal, civil and family cases. Besides those types of cases, the Jalisco public defense attorneys also offer legal assistance in commercial and labor areas, while in Nuevo León these lawyers defend administrative cases, too (labor excluded). In this work, I only consider defenders working in the criminal field. Along these lines, the number of public defense attorneys in the PDOs of the capital city of Baja California Sur is 16 and of the metropolitan areas of Jalisco and Nuevo León is 38 and 120, respectively.

TABLE 2. PUBLIC DEFENSE ATTORNEYS
IN CRIMINAL MATTERS

	<i>BCS</i>	<i>Jalisco</i>	<i>Nuevo León</i>
No. of defenders	16	38	120
Population	251,871	4,434,878	4,057,631
No. of defenders per 100,000 inhabitants	6.4	0.9	3

SOURCE: Interviews with public defenders and information provided by PDOs; INEGI, 2010.

Considering the population of the metropolitan areas of Jalisco and Nuevo León, or the capital city in the case of Baja California Sur, there are about 6.4 defenders for every 100,000 inhabitants in Baja California Sur, 0.9 in Jalisco and 3 in Nuevo León.

1. *Adversarial System*

Since 2008, states have been required by the Mexican federal constitution to implement the adversarial system by 2016. The three states analyzed here have introduced legislative changes to adopt the new model. According to Mexico's Technical Secretary of the Coordinating Council for the Implementation of the Criminal Justice System,³⁹ Nuevo León introduced the adversarial system in 2006, well before the federal constitutional reform; Jalisco introduced constitutional changes and a few judicial districts started to operate under the new system in 2014; finally, BCS adopted the new system in 2013, but it did not start operating in some regions until 2016. In Nuevo León, the adversarial system was running in almost all the municipalities at the time this fieldwork was conducted. To what extent has the adversarial system been adopted, *de jure* and *de facto*, by the PDO and by public defense attorneys? The formal adoption of the rule has varied in the *de facto* operation of the adversarial system. Considering the indicators discussed in the theoretical debates on criminal procedure, Table 3 reports *de jure* (DJ) measures; that is, what legal texts state, and *de facto* (DF) measures, namely, public defenders' self-reported behavior regarding each indicator:

TABLE 3. ADVERSARIAL SYSTEM IN PUBLIC DEFENDER OFFICES

<i>Indicator</i>	<i>BCS</i>		<i>Jalisco</i>		<i>Nuevo León</i>	
	<i>DJ</i>	<i>DF</i>	<i>DJ</i>	<i>DF</i>	<i>DJ</i>	<i>DF</i>
Oral litigation	1	0	1	0	1	1
Alternative dispute resolution	1	0	1	1	1	1
Publicity	1	0	1	0	1	1
Immediacy	1	0	1	0	1	1
Concentration	1	0	1	0	1	1
Contradiction	1	0	1	0	1	1
Equality between the parties	1	0	1	0	1	1
Total number of indicators found	7/7	0/7	7/7	1/7	7/7	7/7

DJ: *De jure*; DF: *De facto*.

SOURCE: Baja California Sur Constitution, 2014; Jalisco Constitution, 2014; Nuevo León Constitution, 2009; LODP/BCS 2014; LOPS/JAL 2007; LIDP/NL 2013; Regulation of the LIDP/NL 2011.

A. *Baja California Sur*

Even though the local constitutional reform took place in 2013, the adversarial system was not yet fully operational when the interviews were con-

³⁹ SETEC, *supra* note 37.

ducted. Public defenders, however, were aware of federal and local legislative changes, but they did not know this new system well and admitted that more training was required (see below), especially practical training such as how an oral trial can be performed.⁴⁰ Litigation was still done through written files, and principles like publicity, immediacy, concentration and contradiction were absent during the trial.

Defenders acknowledged that the constitutional equality between the parties would most certainly be a very useful tool of the new system:

The new system will be horizontal. Judges, defenders and prosecutors will be at the same level, not like in the current inquisitorial system where the process is vertical: at the top you have the judge; in the middle, the prosecutor; and at the bottom, the public attorney. This is totally disproportionate and out of context (to protect) due process.⁴¹

Finally, defenders are familiar with alternative justice but they claimed that it was not widely used as a mechanism to resolve disputes: “Alternative justice is a new area and we do not use it frequently because we do not have much knowledge about how to implement alternative mechanisms of dispute resolution to the cases we have”.⁴²

B. Jalisco

In Jalisco the adversarial system started operations in some state municipalities in 2014. Public defense attorneys affirmed that they knew the adversarial system and had been offered some courses on the rules and procedures of this new criminal model, 85% of the defenders claimed that practical training was needed: “We need more practice. I think we have received too much theory, but we still do not know how the system operates in practice”.⁴³ For instance, they did not know how to conduct oral arguments during a trial. Proceedings continued to be inquisitorial: there was no publicity, orality, immediacy or contradiction during the trials. In this sense, defenders argued that with the new system they hope will be “more transparency during the process and more access to resources to conduct investigations”,⁴⁴ but also “the judge will be present during the trial to solve the dispute between the parties. It will be different from the traditional system in which the judge only sits in his office and clerks do all the work, hear the parties and decide on cases”.⁴⁵

⁴⁰ Interview with Public Defenders 4 and 7, BCS (Mar. 2015).

⁴¹ Interview with Public Defender 8, BCS (Mar. 2015).

⁴² Interview with Public Defender 5, BCS (Mar. 2015), as well as interviews with Public Defenders 1, 3, 9, 11 & 13.

⁴³ Interview with Public Defender 7, JAL (Mar. 2015).

⁴⁴ Interview with Public Defender 4, JAL (Mar. 2015).

⁴⁵ Interview with Public Defender 5, JAL (Mar. 2015).

Public attorneys strongly believed that the adversarial model would radically change one of the most pervasive characteristics of the traditional inquisitorial system: the disparities between prosecutors and defenders.

I think the government (currently) does not devote as much attention to public defense as to prosecution. You can notice it simply by looking at the staff and our salaries. In the Public Prosecutor's Office, each prosecutor appointed to a court has two secretaries and a clerk. In my case at the Public Defense, it is only me as a defender and I do not even have an assistant and I earn less than a prosecutor... The adversarial system will correct these anomalies.⁴⁶

Overall, public defense attorneys in Jalisco have taken more training courses on the new model than in BCS (but fewer than in Nuevo León), and claimed to make frequent use of some of its mechanisms, such as alternative justice, even when the adversarial system had not been introduced in the metropolitan area where they worked:⁴⁷ “We are using alternative mechanisms of dispute resolution very frequently because our managers constantly require it from us in order to reduce the caseload”.⁴⁸

C. Nuevo León

The adversarial system was operating in almost all municipalities in Nuevo León (including the metropolitan area of the city where the interviews were conducted). Almost all public defense attorneys in Nuevo León affirmed that they knew the new system procedures very well and especially recognized their advantages: “the new criminal procedure is more expeditious than the traditional (inquisitorial) one”.⁴⁹ Even when several disparities persist in the judiciary, the public prosecutor's office and the public defender office,⁵⁰ public defenders also claim that:

Currently, judges, prosecutors and defenders have more equal conditions than they did under the past inquisitorial system.⁵¹

Now, our salary conditions are equal to that of prosecutors'; that constitutional premise has operated very well. However, we do not have equal material conditions (cars, gasoline) to conduct our investigations.⁵²

⁴⁶ Interview with Public Defender 5, JAL (Mar. 2015).

⁴⁷ This is also because Jalisco passed its first Alternative Justice Law in 2007 and the Institute of Alternative Justice started to work in 2011.

⁴⁸ Interview with Public Defender 6, JAL (Mar. 2015).

⁴⁹ Interview with Public Defender 9, NL (Apr. 2015).

⁵⁰ Interview with Public Defenders 11, 12 & 17, NL (Apr. 2015).

⁵¹ Interview with Public Defender 13, NL (Apr. 2015).

⁵² Interview with Public Defender 3, NL (Apr. 2015).

Regarding their training in the new criminal accusatorial system, public defense attorneys were proud of their institution because the Professional Training Center (responsible for organizing training courses) was the only one of its kind in Mexico: “it is not to brag but, among PDOs in Mexico, ours is currently recognized as the most professionally trained for the new criminal model”.⁵³ From alternative mechanisms for conflict resolution to publicity, immediacy, oral litigation, concentration and contradiction during the trial, defense attorneys agreed that these procedures had helped them to provide a better defense. The new adversarial system “works much better. Procedures are simpler and faster; it is a cleaner, more transparent and less corrupt type of justice. Everything is faster without so much paperwork”.⁵⁴ Public defenders claimed that, since the reforms, their salary was equal to that of prosecutors.⁵⁵

To conclude, the adversarial system has been introduced in all three states, but only works well in practice in the state of Nuevo León, where more progress has been made in its implementation. This is also so because, as stated before, the introduction of legislative changes took place earlier in this state and defenders have been working under the new system since 2006.

2. Merit-Based Career System

Since 2009 and then in 2013, public defender laws in the states of Nuevo León⁵⁶ and Baja California Sur,⁵⁷ respectively, have specified the *de jure* existence of a public defender career system (PDCS). In the case of Jalisco, no law has stipulated the conditions for the operation of a public defender career system. Thus, Jalisco did not even have a *de jure* PDCS. Considering the indicators outlined in the theoretical section, the following table illustrates the extent to which *de jure* and *de facto* dimensions exist when talking about the PDCS.

TABLE 4. PUBLIC DEFENDER CAREER SYSTEM IN BAJA CALIFORNIA SUR, JALISCO AND NUEVO LEÓN

Indicator	Description	BCS		Jalisco		Nuevo León	
		DJ	DF	DJ	DF	DJ	DF
Council	Internal governance model	0	0	0	0	1	1

⁵³ Interview with Public Defenders 3 & 5, NL (Apr. 2015).

⁵⁴ Interview with Public Defender 3, NL (Apr. 2015).

⁵⁵ Interview with Public Defender 10, NL (Apr. 2015).

⁵⁶ Ley de Defensoría Pública para el Estado de Nuevo León (Public Defender’s Office Law for the State of Nuevo León). L.D.P.N.L, Art. 44, Feb. 6, 2009, MX.

⁵⁷ Ley Orgánica de la Defensoría Pública del Estado de Baja California Sur [L.O.D.P.B.C.S] [Organic Law of the Public Defender’s Office for the state of Baja California Sur], Art. 30, 31 de julio de 2017 (Mex.).

Indicator	Description	BCS		Jalisco		Nuevo León	
		DJ	DF	DJ	DF	DJ	DF
Recruitment	Open and public call	0	0	0	0	1	1
	Written and oral exams	0	0	0	0	1	1
	On-the-job training	0	0	0	0	1	1
	Collegial appointment	0	0	0	0	1	0
Training	Regular courses	1	0	0	0	1	1
	Free and mandatory	1	0	0	0	1	1
Evaluation	Fulfill professional requirements	1	0	0	0	1	1
Salary	Fixed	1	1	0	0	1	1
	Equal salary per rank	1	1	0	0	1	1
Promotion	Different ranks	0	0	0	0	1	0
Reallocations	Based on defenders' capacities	0	0	0	0	0	0
Dismissal	Infringement of rules	1	1	1	1	1	1
	Collegial removal	0	0	0	0	0	0
Total number of indicators found		6/14	3/14	1/14	1/14	12/14	10/14

DJ: *De jure*; DF: *De facto*.

SOURCE: LODP/BCS 2014; LOPS/JAL 2007; LIDP/NL 2013; Regulation of the LIDP/NL 2011. Interviews with public defenders in BCS, Jalisco and Nuevo León.

A. Baja California Sur

Concerning the *de jure* existence of a PDCS, I found 6 of 14 indicators. The Organic Law of the Public Defender's Office in BCS (LODP/BCS) states that calls to fill positions in the PDO can be open or closed,⁵⁸ i.e., it can be for the general public or for a previously selected pool of candidates. The law contains specifications regarding the appointment procedure,⁵⁹ which is carried out by the head of the office. Training, promotions⁶⁰ (Art. 34), remuneration,⁶¹ evaluations and dismissals⁶² are also stipulated. This law, however, does not point to anything regarding written and oral exams, a period of on-the-job training or transfers. Finally, it is worth noting that Article 31 of the LODP/BCS is in itself conflicting: it states that the career service includes positions *de confianza* for public defenders, legal advisors, and public defenders' regional coordina-

⁵⁸ *Supra* note 57, Art. 32.

⁵⁹ *Supra* note 57, Art. 33.

⁶⁰ *Supra* note 57, Art. 34.

⁶¹ *Supra* note 57, Art. 35.

⁶² *Supra* note 57, Arts. 36 & 37.

tors, among others. In Mexico this type of position grants top officials (within or outside the institution) the opportunity to appoint and dismiss employees discretionally.

The *de facto* existence of a PDCS differs from the *de jure* dimension. Only 3 out of 14 indicators were present. According to all interviewees, there was no professional career system in operation. For instance, most public defenders earned a position in the PDO only because they sent their resume to the head of the office, performed some type of social service or unpaid internship in the institution or, sometimes, received help from a friend in the government. Their selection process included an interview and, in some cases, a general-knowledge exam:

I was informed that the public defender's office required personnel. So, I presented my application, I fulfilled all the requirements and I entered the institution as an unpaid intern and later I obtained my post.⁶³

In my case, I took a general knowledge exam to get a position, but I was also backed by a friend working in the government.⁶⁴

I left my job application at the public defender's office and when they called me, I first came to work as an unpaid intern for 8 months.⁶⁵

I simply left my job application.⁶⁶

Public defenders affirmed that since the introduction of the adversarial system, they had received more training in the past years and had been invited by other institutions —the judiciary or the SETEC— to take courses on oral trials.⁶⁷ The local judiciary offered some of those courses for free. However, there was generally a fee. Additionally, training courses were not compulsory.⁶⁸ Most defenders admitted that more training was needed.

To be honest, the institution had not offered us many courses; those that we have taken are organized by the local judiciary or the Cultural Center of the Supreme Court.⁶⁹

Since the reforms to criminal procedure took place, the institution has offered us several courses, but I believe they are not enough, and we need more training.⁷⁰

As reported by public attorneys, no system of promotion was in place and some of them thought that “nobody gives your work any merit”.⁷¹ Profes-

⁶³ Interview with Public Defender 1, BCS (Mar. 2015).

⁶⁴ Interview with Public Defender 4, BCS (Mar. 2015).

⁶⁵ Interview with Public Defender 7, BCS (Mar. 2015).

⁶⁶ Interview with Public Defender 10, BCS (Mar. 2015).

⁶⁷ Interview with Public Defender 3, BCS (Mar. 2015).

⁶⁸ Interview with Public Defenders 2 & 5, BCS (Mar. 2015).

⁶⁹ Interview with Public Defender 3, BCS (Mar. 2015).

⁷⁰ Interview with Public Defender 5, BCS (Mar. 2015).

⁷¹ Interview with Public Defender 13, BCS (Mar. 2015).

sional evaluations were non-existent. Relocations from one area to another were based on institutional needs, without considering the defender's professional profile. All defenders agreed that the reasons for removals were related to a breach of law; however, dismissals were mostly effected only by the head of the office. Finally, the Baja California Sur PDO offered its attorneys a salary that was equal and fixed for same-ranking members, even though it was very low: an average \$530 USD monthly. According to the data provided by Suárez and Fix, public defenders in BCS were among those who received less than the average (\$720 USD) salary for local public defenders in Mexico.⁷²

B. Jalisco

The Organic Law of the Public Defender's Office in Jalisco (LOPS/JAL) does not contemplate a PDCS. As a matter of fact, I found only 1 of the 14 attributes of a career system. The LOPS specifies that the appointment and dismissal of a public defender is the responsibility of the head of the office.⁷³ Nothing is said about open public calls to fill positions, on-the-job training, promotions, remuneration, evaluations or transfers. The law does not point at the organization of free regular courses, but claims that the public defender deputy prosecutor must present the head of the office with an "Annual Planning Program"⁷⁴ of the courses to be offered. As pointed out by Suárez Ávila and Fix, "the absence of provisions that regulate the Merit-Based Career System is a significant deficiency that undermines the constitutional mandate and the institution's perspectives of further development".⁷⁵

As claimed by public defense attorneys in Jalisco, no PDCS was running at the time. As a matter of fact, only 1 of the 14 indicators was found. Regarding recruitment, defenders argued that it varied. In 2007, the PDO was transferred from the local judiciary to the executive branch. Hence, public defense attorneys that joined the institution prior to 2007 participated in a public call and took exams. But for those that came after, their appointment process was mainly due to having done a period of unpaid internship in the institution, taking psychological and legal tests, and having a friend in government:

I was accepted in the public defender's office for an unpaid internship and later I got the opportunity to hold a post. Of course, before being formally hired I taken various exams.⁷⁶

⁷² Suárez Ávila & Fix-Fierro, *supra* note 5, p. 321.

⁷³ Ley Orgánica de la Procuraduría Social, Estado de Jalisco [L.O.P.S.J] [Organic Law for the Public Defender's Office for the State of Jalisco] Art. 9, n. VIII; and Art. 44, 16 de enero de 2007 (Mex.).

⁷⁴ *Supra* note 73, Art. 14.

⁷⁵ Suárez Ávila & Fix-Fierro, *supra* note 5, p. 311.

⁷⁶ Interview with Public Defender 4, JAL (Mar. 2015).

I obtained a post, how can I say, not through a recommendation but because I was working on the government transition team and then I joined the public defender's office.⁷⁷

I passed an exam. I participated with other two lawyers and my score on the exam was the highest. That is why I was hired.⁷⁸

Public defense attorneys' different appointment processes also had implications on their salaries. Even when they had a position at the same rank, those who were hired when the PDO belonged to the judiciary had higher salaries —*circa* USD \$960— than those that were recruited after the institution was moved to the executive branch —*circa* USD \$530—. ⁷⁹ The PDO by itself does not organize training courses on a regular basis, but allows public defenders to attend those offered by other authorities, especially after the criminal reform was approved. One defender indicated, however, that attending courses sometimes proved to be difficult given their heavy workload.⁸⁰ Overall, they had received training after the approval of criminal reform but claimed more training was needed:

We receive training courses especially to be updated in the new criminal process and the delivery of justice in criminal matters. For instance, we have taken courses on oral trials. In any case, I believe more training is needed.⁸¹

We take approximately two training courses per year. These courses are in criminal law, constitutional law or oral trials. The frequency is two per year and the length ranges from 3 to 6 months and there are others that last up to a year. Some courses are optional, but others are mandatory and we have to attend them.⁸²

The last course we took was on oral trials in October 2014. The courses are free of charge and are organized by the University of Guadalajara, the public prosecutor's office, the SETEC, but to tell the truth, there are not many from the public defender's office.⁸³

Concerning evaluations, there were no established mechanisms to carry them out. Furthermore, public defenders acknowledged that no promotion mechanisms existed either. In the experience of the defenders, transfers from one area to another were based on institutional needs. Indeed, one interviewee pointed that being moved to “the criminal area in Puente Grande penitentiary is a type of punishment”.⁸⁴ Finally, dismissals occurred when the law was broken.

⁷⁷ Interview with Public Defender 5, JAL (Mar. 2015).

⁷⁸ Interview with Public Defender 9, JAL (Mar. 2015).

⁷⁹ Interview with Public Defender 7, JAL (Mar. 2015).

⁸⁰ Interview with Public Defender 13, JAL (Mar. 2015).

⁸¹ Interview with Public Defender 4, JAL (Mar. 2015).

⁸² Interview with Public Defender 8, JAL (Mar. 2015).

⁸³ Interview with Public Defender 13, JAL (Mar. 2015).

⁸⁴ Interview with Public Defender 7, JAL (Mar. 2015).

C. *Nuevo León*

The Organic Law of the Institute of the Public Defender (LIDP/NL) and its regulations (RLIDP/NL) are the main legal framework for the PDO in Nuevo León. *De jure* the PDO presents 12 out of 14 indicators. In this vein, the RLIDP stipulates that the head of the office invites the Advisory Council—formed of citizens with honorary membership—to conduct the selection, appointment and promotion process of public defenders.⁸⁵ Candidates must pass theoretical and practical exams on legal matters and undergo a period of on-the-job training to improve their abilities to work under an adversarial system.⁸⁶ There is a defender’s school called Professional Training Center. Besides, the head of the office is in charge of managing cooperation exchanges with universities, government authorities, and the judiciary in order to regularly train public defenders.⁸⁷ Training courses are mandatory.⁸⁸ Public defense attorneys’ remuneration is fixed and equal among same-ranking members. Sanctions are linked to the non-fulfillment of professional requirements, such as not offering an adequate defense and are enforced by the Advisory Council.⁸⁹ Finally, relocations are made to meet institutional needs and the removal of public defenders is decided by the head of the office.⁹⁰

Defenders in Nuevo León acknowledged that the PDCS is fully operational. According to interviewees, 10 out of 14 indicators were present. All defenders in the PDO obtained a position there after passing practical and written legal exams.⁹¹ They confirmed the existence of a Professional Training Center, in charge of implementing an on-the-job training program for newly hired defenders, as well as personnel training courses. In the same vein, defenders were offered regular, mandatory and free-of-charge courses,⁹² as well as the opportunity (and money) to apply for a master’s or PhD degree program⁹³ in different universities. These results are consistent with the data provided by Suárez and Fix, who argued that “Nuevo Leon is the state with the highest rates of education”⁹⁴ among public defenders. Accordingly, defenders pointed out that:

⁸⁵ Reglamento de la Ley de Defensoría Pública para el Estado de Nuevo León [R.L.D.P.N.L] [Regulations of Public Defender’s Office Law for the State of Nuevo León], Art. 65, 68 & 69; & *supra* note 56, Art. 18, 6 de febrero de 2009 (Mex.).

⁸⁶ *Supra* note 85, Arts. 66 & 69.

⁸⁷ *Supra* note 85, Art. 70.

⁸⁸ *Supra* note 85, Art. 60.

⁸⁹ *Supra* note 56, Article 41.

⁹⁰ *Supra* note 85, Article 17, n. IV & V.

⁹¹ Interviews with Public Defenders 1, 23, NL (Apr. 2015).

⁹² Interviews with Public Defenders 1, 23, NL (Apr. 2015).

⁹³ Interview with Public Defender 4, NL (Apr. 2015).

⁹⁴ Suárez Ávila and Fix-Fierro, *supra* note 5, p. 314.

The institution requires us to take courses and organizes our schedules to attend them. Last year I took a 100-hour one about the new National Code. It was an intensive course from 9 am to 8 pm.⁹⁵

During the year, the Public Defender's Professional Training Center constantly organizes courses on several topics, e.g., oral trials, *amparo*, civil or family law. Furthermore, the public defender's office also funds us (66% and we pay the other 34%) to study master's and PhD programs in national or international universities.⁹⁶

We have training courses. In fact, we have the Public Defender's Professional Training Center which is very well equipped for the new system: we have an oral trial courtroom in the professional training area. By law, we must take at least 200 hours of training courses.⁹⁷

Most public defenders, however, did not recognize the existence of a system of promotions: higher positions (General Offices) were few and the way they were assigned took into account not only the defender's professional profile but also his or her political relations since the head of the office and the governor were in charge of appointments.⁹⁸ Some other defenders indicated, however, that there was a system of promotion in the different ranks (A, B, C) of defenders.⁹⁹ The salary was fixed and equal among same-ranking members.¹⁰⁰ Additionally, their remuneration was around \$2,100 USD per month. Reasons for relocation were based on institutional needs: defenders were sent where they were needed.¹⁰¹ Finally, all public defenders agreed that dismissals occurred because of an infringement of the law; for instance, when a public defense attorney asked for money in exchange for services rendered.¹⁰²

To conclude, a PDCS exists both *the jure* and *de facto* in Nuevo León, while in BCS it exists only *de jure* but not *de facto*. Finally, in Jalisco there is no PDCS either *de jure* or *de facto*.

3. *Effective Legal Defense in BCS, Jalisco and Nuevo León*

The public defender offices in the three states are formally charged with providing free legal counsel and protecting defendants' due process and human rights.¹⁰³ As argued in the theoretical part, one way to observe effective

⁹⁵ Interview with Public Defender 1, NL (Apr. 2015).

⁹⁶ Interview with Public Defender 3, NL (Apr. 2015).

⁹⁷ Interview with Public Defender 14, NL (Apr. 2015).

⁹⁸ Interview with Public Defender 3, NL (Apr. 2015).

⁹⁹ Interview with Public Defender 5, NL (Apr. 2015).

¹⁰⁰ Interview with Public Defender 5, NL (Apr. 2015).

¹⁰¹ Interviews with Public Defenders 10, 23, NL (Apr. 2015).

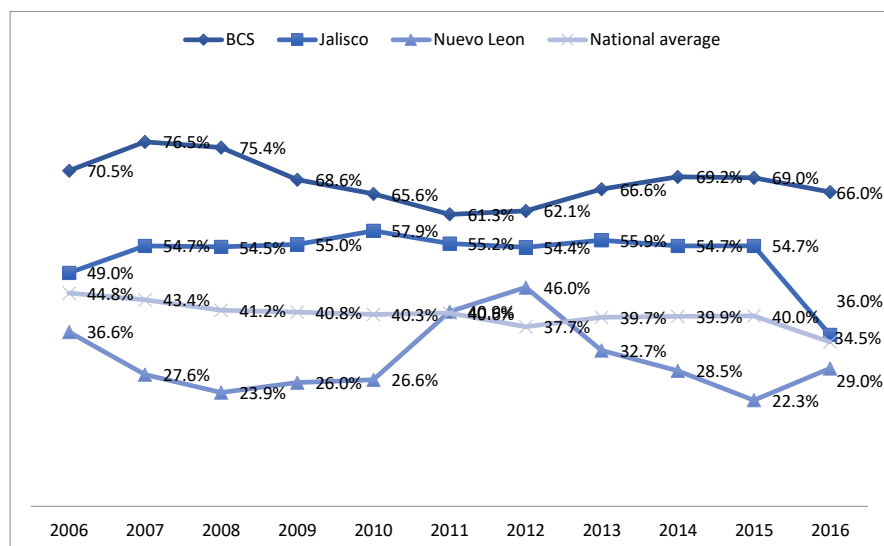
¹⁰² Interviews with Public Defenders 1, 23, NL (Apr. 2015).

¹⁰³ See Art. 19, letter A, part VIII, BCS Constitution; art 8, no. XX, art. 5, no. II, LODP/BCS; Art. 7, part II, letter h, Jalisco Constitution; Art. 9, letter A, part IX, Nuevo León Constitution; Art. 10, no. VI, LIDP/NL.

legal representation is through the outcome of a case (output-oriented approach). Thus, we can look at the rate of pretrial detention, a measure that helps us to understand the *de facto* implementation of some crucial aspects of the adversarial criminal procedure in terms of the work performed by justice system actors, *inter alia*, public defenders.

Pretrial detention in Mexico can be determined in two different ways: *a)* at the request of the prosecutor given the danger the defendant may pose and the seriousness of the imputed crime; *b)* *ex officio*, by a judge in cases of violent crimes such as homicide and those related to organized crime. Despite institutional reforms aimed at reducing the use of pretrial detention, data show that it continues to be a very severe problem in Mexico. In 2016, around 40% of inmates were awaiting trial,¹⁰⁴ i.e., technically 40% of prisoners could be presumed innocent because a judicial decision had yet to be delivered. The situation at the subnational level is also critical and, in many cases, much worse than nationally. To what extent has pretrial detention varied since reforms were introduced at local levels? Is it possible to assert that the pretrial detention rates have shown no positive variation in contexts of no local reforms while they have fallen in jurisdictions where these reforms have been implemented? The following graph shows the extent to which pretrial detention varied in BCS, Jalisco and Nuevo León from 2006 to 2016:

GRAPH 1. PRETRIAL DETAINEES AT STATE LEVEL
 (% OF TOTAL INCARCERATED POPULATION)



SOURCE: Data provided by Jurimetría, 2017. Zepeda Lecuona, 2017.

¹⁰⁴ Guillermo Z. Lecuona, *El Fenómeno de la Prisión Preventiva en México Bajo la Vigencia del Sistema de Justicia Penal de Corte Acusatorio*, *El sistema acusatorio en México* (UNAM: Instituto de Investigaciones Jurídicas, 2017).

From the graph we can say that BCS has the highest pretrial detention rate, followed by Jalisco and then by Nuevo León. The case of BCS is critical because, on average, 65% of its incarcerated population were awaiting trial. Additionally, the rate of pretrial detention in BCS and Jalisco was even higher than the national average, while in Nuevo León it was consistently lower compared to both other states and Mexico in general —only in 2011 and 2012 were the rates in this state higher than the national average but not higher than other states. The trends of pretrial detention show a pattern of decline nationally, in Nuevo León and in Jalisco (in the latter state, this was only for 2016) while BCS has maintained similar levels and in some years even the number of incarcerated population awaiting trial increased.

As discussed in the theoretical sections, other ways to approach public defenders' performance in legal representation is through their access to forensic experts' services and the caseload per defender (input-oriented approach). Access to forensic services is restricted in the three states. According to the 2015 National Census on State Government, Public Security and Penitentiary System, PDOs in BCS and Jalisco do not have personnel registered as forensic experts, while Nuevo León reported 19 experts.¹⁰⁵ The PDO in BCS does not have its own forensic division and when services are needed, they are requested from the PPO. In Jalisco, defenders struggle to obtain certified and impartial forensic proof: "We need forensic services and we do not have them. We request them from Jalisco's Forensic Sciences Institute. It is supposedly a decentralized department, independent of the PPO, but in real practice they receive orders from this office (and) we end up asking the defendant's family to pay for private forensic experts".¹⁰⁶ In Nuevo León, the PDO does not have its own forensic services division, as the local PPO does: "the Prosecutor's Office currently has around 600 forensic experts... In the PDO we have around 21. It is so out of proportion; but well in other states, Public Defender Offices don't have a single forensic expert appointed to the PDO".¹⁰⁷

Regarding caseload, each defender has an average of 100 open cases in Baja California, 350 in Jalisco and 50 in Nuevo León per year. Putting this into perspective, a private attorney works normally with 30 to 40 open cases per year. The caseload per defender is excessive in Jalisco and less so, but still quite high, in Baja California Sur. Public defenders in Nuevo León have a less demanding workload. Defenders in the three states agreed that 30 to 40 cases per defender per year would be a proper amount of work, allowing them to offer effective legal representation. Working with such a heavy caseload, they argued, had a significant impact on their ability to provide a proper defense:

The truth here is that we sacrifice quantity for quality because it is a lot of work and we cannot devote much time to the cases. That's why we want the gover-

¹⁰⁵ INEGI, 'Censo nacional de gobierno, seguridad pública y sistema penitenciario estatales 2015', (2015), available at <https://www.inegi.org.mx/programas/cngspse/2015/>.

¹⁰⁶ Interview with Public Defender 7, JAL (Mar. 2015).

¹⁰⁷ Interview with Public Defender 21, NL (Apr. 2015).

nment to open more positions for public defenders, so that each defender can take the time that each case is due and get better results.¹⁰⁸

We have a lot of work so we cannot provide an adequate defense. Why is it not an adequate defense? Because we do defend them, yes, we are there to assist them, to help them, but unfortunately, we cannot do our job properly. Why? Because having to attend four meetings displaying simultaneously... affects our attendance record too much. I think this affects a proper defense.¹⁰⁹

If the number of cases is overwhelming, you cannot pay enough attention to each one of them. Sometimes your defendants come to you and you do not remember them, you have to ask them to provide you with context. In addition, we are short of time. It often happens that we cannot make it to the appointment we gave to discuss a case because we have to run to a preliminary hearing.¹¹⁰

Based on the evidence analyzed in this last sub-section, one can argue that public attorneys in Nuevo León are able to protect their clients' rights better than their counterparts in BCS and Jalisco are. Institutional reforms appear to be related to the differences between PDOs concerning access to forensic services and caseload per defender. Access to forensic services, even if restricted, is more readily available in Nuevo León since defenders in BCS and Jalisco do not have any forensic expert appointed to the institution. As stated by one public defender in Jalisco, they have to ask the defendant's family to pay for these services in order to have reliable evidence to defend a client.¹¹¹ The caseload is lower in Nuevo León compared with that in BCS and Jalisco and this makes an important difference when one is protecting a person's rights, particularly because public defense attorneys will have the time to do investigations, take depositions or be present during the trial.

To conclude this section, if we consider both the input-oriented approach (access to forensic services and caseload per defender) and the output-oriented approach (pretrial detention) in the light of the evidence and the interviews in Baja California Sur, Jalisco and Nuevo León, their findings indicate that variations in the implementation of the reform plays an important role. As stated by interviewees, the criminal reform and the public defender career system provide a new institutional framework to better protect the rights of victims but especially those of defendants, who were mostly treated as guilty (and imprisoned) before any judicial decision could be reached.

The new (accusatorial) system improves the way justice is delivered because it has more tools to offer and adequate defense and we can use international treaties to protect human rights. Additionally, justice is prompter and more expeditious.¹¹²

¹⁰⁸ Interview with Public Defender 11, BCS (Mar. 2015).

¹⁰⁹ Interview with Public Defender 5, JAL (Mar. 2015).

¹¹⁰ Interview with Public Defender 1, NL (Apr. 2015).

¹¹¹ Interview with Public Defender 5, JAL (Mar. 2015).

¹¹² Interview with Public Defender 11, BCS (Mar. 2015).

Effective defense will be provided under the new accusatorial system because torture and solitary confinement of the defendant will fade away and the defendant will be presumed innocent until proved guilty. Not like now. Currently, they catch you, you are treated as if guilty and you have to prove your innocence. We are operating the other way around. I am fascinated by the new system.¹¹³

We received training courses on international human rights treaties... and, in general, I use the Tokyo Rules to guarantee that my defendants are not subjected to preventive imprisonment.¹¹⁴

As stated in the theoretical part, the attributes of these systems put public attorneys in a position where they can expand their power before the prosecutor and the judge, to be trained and prepared to defend their clients in oral trials or to use alternative dispute resolutions to avoid pretrial detention and convictions. As shown above, Nuevo León reformed its constitution in 2006 to introduce an adversarial criminal procedure i.e., two years before the federal constitutional reform, which took place in 2008, while the criminal system reforms in BCS and Jalisco were passed in 2013 and 2014, respectively. We can note a constant decline in pretrial detention, a reduction of open cases per defender and an increase in the number of forensic experts assigned to PDOs where institutional reforms have been adopted. Meanwhile, in states where these reforms are not present or are not fully running yet (BSC and Jalisco), the number of inmates without having been sentenced was found to be high, cases per defendant were also higher and PDOs did not account with their own forensic services.

V. CONCLUSIONS

The effective protection of rights comes from different institutions: national and international courts, prosecution services, human rights commissions, the police or the public defender offices. The role of this last institution in providing access to justice is crucial, especially for the most vulnerable sector of society: the poor and minorities who suffer from discrimination (indigenous or black people, for instance). Prisons from Mexico to Brazil or Argentina are full of poor people, who are oftentimes also innocent and whose only mistake was to be in the wrong place at the wrong time and not to have the money to hire a lawyer to defend them. Thus, the government appoints them one, but under institutional conditions hampering the defender from offering effective legal advice. Justice has an institutional, social and racial bias in these situations. This goes against the roots of the democratic rule of law and violates human rights.

Institutional arguments are powerful tools to explain behavior. In this work I analyzed how legal representation varies across non-reformed and reformed

¹¹³ Interview with Public Defender 7, JAL (Mar. 2015).

¹¹⁴ Interview with Public Defender 17, NL (Apr. 2015).

Public Defender Offices. As suggested in the main expectations of this work, the case of Nuevo León shows that, as the implementation of rules advances, defenders tend to follow the rules in practice not only because they have a wider knowledge of those rules, but also because they feel helped or constrained by the rules they work under. In the cases of BCS and Jalisco, where rules have been introduced but not implemented—or worse, not even legally introduced as in the case of the public defender career system in Jalisco—defenders were found to have less knowledge, fewer abilities and scarcer incentives to use tools that open up the way they protect rights and offer an effective defense. These findings are also consistent with other works conducted in local public defender offices in Mexico.¹¹⁵ However, to fully ascertain this, future work would need to explore, at least, the following two paths.

The first would be to better estimate the role PDO financial support (and its consequences on a heavy caseload) might play in offering effective legal counsel. In several countries, “public defense finds itself starved of resources while facing impossible caseloads that mock the idea of justice for the poor”.¹¹⁶ This assertion applies to Mexico’s local PDOs, but it can apply just as easily to many Latin American countries. More funds to improve the legal representation of the impoverished are unquestionably needed, but to what extent would this solve the problems PDOs currently face in offering an effective legal defense? We need to evaluate the provision of more government resources for the PDO, especially in the face of its counterpart, the prosecution services, which in many cases happen to be better funded.

A second path worth exploring is the role of other institutions in the justice system. It is important to understand justice as a system in which the actions of other actors and institutions affect the outcomes produced in, for instance, pretrial detention. In this work, I focused on the role of public defenders in providing effective legal representation (i.e. avoiding that their client end up in jail). Future work should also estimate how and to what extent the police and prosecutors’ performance also contributes to the protection of rights or lower pretrial detention rates by, for example, locking fewer people up and thus providing citizens genuine access to justice.

¹¹⁵ See Suárez Ávila & Fix-Fierro, *supra* note 5.

¹¹⁶ Pfaff, ‘A Mockery of Justice for the Poor’.