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Supreme Court Rules that Holding Suspects of Serious Crimes Without Trial Passes Constitutional Muster

by Carlos Navarro

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In a very narrow vote, Mexico's high court (Suprema Corte de Justicia de la Nación, SCJN) voted to uphold the constitutional basis for the arraigo, a process under which authorities can detain individuals accused of serious crimes for as long as 80 days without filing formal charges. The 6-5 vote reflects a divide in Mexico's legal community, with human rights advocates saying that detention without trial is a human rights violation, while law-enforcement authorities believe the arraigo is a necessary tool in the fight against organized crime.

A day after issuing the decision on the use of the arraigo at the national level, the SCJN declared a practice employed by Mexico City authorities, known as *detención con control judicial* (detention under judicial control), unconstitutional. Under the practice, allowed by Article 270 of the capital city's penal code (Código de Procedimientos Penales del Distrito Federal), authorities are allowed to petition a judge that a suspect of a crime, no matter the gravity, be held in detention for five to 10 days without trial.

Even though the rulings seem contradictory, the difference is the gravity of the crime a suspect is accused of having committed. The ruling on the federal law applies to detention without trial for what are considered serious crimes, while the Mexico City law would have allowed a short detention for any crime. Furthermore, the SCJN justices ruled that the determination on whether an arraigo should be allowed falls under federal and not local jurisdiction.

The high court's narrow vote reaffirms Article 133 of the Código Federal de Procedimientos Penales, which allows the Procuraduría General de la República (PGR) to request an arraigo against individuals involved in serious federal crimes.

The SCJN decision is temporary, however, as a new system of oral trials is set to go into effect in 2016. When the new set of legal codes goes into effect, the arraigo will only be used for violations specifically designated organized-crime-related offenses.

Still, there are serious questions of what constitutes a "serious crime." Some observers pointed out that the Constitution is very firm that arraigo should be used only for violations deemed to represent acts of organized crime but that enabling legislation broadened the definition to allow authorities to use it for what they deemed serious crimes. "The inferior law not only allows the prosecution of organized-crime violations but 93 other infractions that have been deemed 'serious,' but which are not covered by the text of the Constitution," legal expert José Elías Romero Apis wrote in a guest column in the daily newspaper *Excélsior*.

The case came to the court in the first place because of a lawsuit filed by Cuauhtémoc Pérez García, a former warden of the Durango state penitentiary in the capital city of Gómez Palacio. Authorities accused Pérez García of allowing the escape of five prisoners and held him under arraigo for an extended period. The warden filed a lawsuit that eventually made its way to the SCJN.

Court deeply divided

The vote was extremely tight, with the five dissenting judges questioning whether the arraigo is legal. Justice Juan Silva Meza argued that the process violates Article 7 of the American Convention on Human Rights and other treaties that Mexico has signed. He says Mexican authorities have traditionally conceived of the arraigo as a special instrument that "gives them absolute power to override basic rights, personal freedom, presumption of innocence, due process, and effective legal remedy, thus fostering arbitrariness and authoritarianism, which is contrary to the democratic rule of law our Constitution has designed."

Justices Olga Sánchez Cordero, Arturo Zaldívar, José Ramón Cossío, and SCJN President Luis María Aguilar joined Silva Meza in the dissent.

The six justices who voted to uphold the arraigo argued that the proceeding is provided for in Mexico's charter. "Legal tools like the arraigo, even though they appear questionable, also end up upholding the rights of the victims of the crimes that were committed," explained Justice Jorge Mario Pardo Rebolledo.

Justices Margarita Luna Ramos, Fernando Franco, Alberto Pérez Dayán, Alfredo Gutiérrez Ortiz Mena, and Eduardo Medina Mora also voted to uphold the constitutionality of the arraigo. The controversial election of Medina Mora to the high court in March ([SourceMex, March 18, 2015](#)) probably gave supporters of the arraigo the final vote that allowed the measure to succeed. Medina Mora had a long career in law enforcement, having served as attorney general, public safety secretary, and director of the Centro de Investigación y Seguridad Nacional (CISEN).

Still, there were those who questioned the interpretation of the justices who voted to uphold the arraigo. "This ruling by the 'winners' is based on reasonable arguments, such as security, but the reasoning is unacceptable," said Romero Apis, who is also president of the Academia Nacional, A. C. "What they should be considering is not merits of the enabling law but the constitutionality of the practice."

A violation of human rights

Human rights advocates—including the semi-independent Comisión Nacional de los Derechos Humanos (CNDH) and its Mexico City counterpart the Comisión de Derechos Humanos del Distrito Federal, (CDHDF)—sided with the dissenting judges. CNDH president Luis Raúl González Pérez said the arraigo overrides the principle of presumption of innocence.

González Pérez, who was appointed human rights ombud in November 2014 ([SourceMex, Nov. 19, 2014](#)), said the commission is "totally respectful" of the decisions of the SCJN, including the latest ruling. However, he also pointed out that the use of the arraigo has been under question for many years and that several national and international organizations have called for the practice to be eliminated.

The CDHDF was more forceful in its condemnation of the practice, saying that the continuation of the practice "is contrary to Article 7 of the American Convention on Human Rights, which addresses the right of personal liberty of individuals in signatory countries." The convention, established under the auspices of the Organization of American States (OAS), states, "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide

without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful," the Mexico City human rights commission said.

Authorities have also acknowledged that the arraigo has been misused. For example, in February 2013, the officials responsible for protecting human rights at the PGR and the Secretaría de Gobernación (SEGOB) openly acknowledged that the arraigo has only served to violate the human rights of citizens and not to bring criminals to justice.

"In 96.7% of the cases of arraigo between 2008 and 2013, authorities failed in the task of bringing criminals to justice because prosecutors were unable to present the adequate proof," said a special report published by *Excélsior*, citing testimony presented before the Senate and the CDHDF.

The report said the PGR also acknowledged that the practice has led to a consistent violation of human rights. "It has become an excuse to practice torture and to detain first and investigate later, when the opposite should occur," said *Excélsior*.

Some observers pointed out that former attorney general Jesús Murillo Karam recommended in 2012 that the arraigo be eliminated because of its potential to violate human rights. "Despite these comments, [Murillo] made use of this tool during his tenure at the PGR," said the online news site *La Otra Opinión*, published by journalist and news commentator Ricardo Alemán.

"Regardless of the justification [given for its continued use], the arraigo has to be reviewed with an eye on its potential to foment the violation of human rights," said Javier Hernández, representative of the UN Office of the High Commissioner for Human Rights (OHCHR) in Mexico.

Hernández said the review should occur not only in Mexico but in all countries that have signed conventions committing them to the protection of individual rights.

Mexico City practice struck down

On the day after upholding the federal arraigo, the SCJN unanimously struck down the Mexico law that allowed authorities to detain criminals for as long as 10 days without charging them. The Mexico City legislature (Asamblea Legislativa del Distrito Federal, ALDF) devised this practice in May 2013 after deciding to completely eliminate the use of the arraigo. However, justices said *detención con control judicial* was simply "arraigo under a different name."

The Mexico City law prompted lawsuits from the CNDH and CDHDF, and the measure eventually made it to the high court.

Justice Sánchez Cordero, who wrote an initial opinion on the case, said the consideration of the arraigo is purely a federal matter and the ALDF was not empowered to make a decision on the practice, even at the local level.

Other justices offered a harsher assessment of the Mexico City law. "What [the ALDF] did was technically a fraud against the Constitution," said Justice Zaldívar

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