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BIG TECH PLATFORMS, DEMOCRACY AND THE LAW: GLOBAL PROBLEMS, LEGAL PERSPECTIVES AND THE MEXICAN EXPERIENCE

Mauricio Figueroa-Torres*

Abstract: *How do Big Tech platforms affect the exercise of fundamental rights? What can the States do, in the context of their sovereignty, to moderate these actors' powers? What has been explored in the context of Mexico? This article discusses how Big Tech platforms, such as Facebook and Google, may impact our collective lives and democracy. It highlights the legal implications of access to information and freedom of expression. This research provides an overall legal framework on this issue, to later place in context the Mexican draft bill introduced in 2021 to regulate platforms' content moderation practices, analyzing its flaws and areas of improvement, and suggesting specific elements for further legal discussion to prevent abuse of power from these companies within the Latin American and Mexican context. A comparative legal methodology is used, resorting to elements of American and European Law, to later discuss the Mexican legal framework.*

Keywords: *Digital Platforms, Content Moderation, Freedom of Speech, Digital Democracy, Self-regulation, Self-jurisdiction.*

Resumen: *¿Cómo afectan las plataformas digitales el ejercicio de derechos constitucionales?, ¿qué pueden hacer los Estados, en el marco de su soberanía, para regular el poder de estos actores?, ¿Qué se ha intentado en el caso mexicano*

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al respecto? El presente artículo analiza cómo las plataformas digitales del sector Big Tech, tales como Facebook y Google, pueden afectar la democracia y nuestras vidas colectivas. Este artículo resalta las implicaciones jurídicas de acceso a la información y al ejercicio de la libertad de expresión. Esta investigación presenta un análisis general del marco jurídico aplicable, para luego analizar en mayor contexto el borrador de iniciativa propuesto en 2021, que tenía como objeto regular las prácticas de moderación de contenidos en plataformas digitales. La metodología empleada es derecho comparado, para contrastar en un primer momento elementos de derecho europeo y estadounidense, y posteriormente el marco normativo mexicano.

Palabras clave: *Plataformas digitales, moderación de contenidos, libertad de expresión, democracia digital, autorregulación, auto-juridiscción.*

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I. Introduction

The digital space is a common ground where people gather vast amounts of information on different topics and express their viewpoints on diverse issues. The relationship between the Internet and democracy spans across other fields and phenomena. It is indeed a widely analyzed topic of research across various fields. This article analyzes the legal implications of Internet use and democracy in the context of politics and freedom of expression.

This article first describes Big Tech platforms and their power and influence in three different aspects from a global perspective, resorting to American and European Law: search engine manipulation, privacy, and content moderation. It then examines the Mexican proposed bill on the regulation of digital platforms, discussing its challenges, possible outcomes, and limitations. Lastly, conclusions and suggestions are presented for further research relevant to the overall discussion of this complex phenomenon.

II. Big Tech Platforms, Their Power, and Effects on Democracy. Three Main Aspects

Even though many celebrate the freedom of the Internet and its apparently anarchic and free nature, Birnhack and Elkin-Koren remind us of the origins of the Internet as an innovation conceived of by military strategists that was only later privatized.[1] Indeed, today the cyberspace is home and marketplace to a diverse number of companies. However, it is evident that there are some tech giants or titans that rule the Internet. This is what Amy Webb refers to as *the Big Nine*: Amazon, Google, Facebook (which has now rebranded itself as Meta[2]), Tencent, Baidu, Alibaba, Microsoft, IBM, and Apple.[3] The *Big Nine* can be grouped into two main tribes, the American *G-MAFIA* (Google, Microsoft, Apple, Facebook, IBM, and Amazon) and the Chinese *BAT* (Baidu, Alibaba and Tencent).

If these companies are considered in a wider context, one will realize that only three of the ten biggest firms worldwide are not part of the Big Nine. These exceptions are the Saudi Arabian Oil Company, the electric vehicle and clean energy company Tesla, and, lastly, the conglomerate holding company Berkshire Hathaway.

Table 1

	Company	*Market capitalization in billions of USA dollars (2021)*
1	Apple (United States)	$2252.3
2	Microsoft (United States)	$1966.6
3	Saudi Arabian Oil Company Aramco (Saudi Arabia)	$1897.2
4	Amazon (United States)	$1711.8
5	Alphabet (United States)	$1538.9
6	Facebook (United States)	$870.5
7	Tencent Holdings (China)	$773.8
8	Tesla (United States)	$710.1
9	Alibaba Group (China)	$657.5
10	Berkshire Hathaway (United States)	$624.4

Source: Own chart, made with information from FORBES, "The 100 largest companies in the world by market capitalization in 2021 (in billion U.S. dollars)" Chart, May 13, 2021, in STATISTA <https://www.statista.com/statistics/263264/top-companies> (Accessed on December 03, 2021).

[1] Michael D Birnhack & Niva Elkin-Koren, *The invisible handshake: The reemergence of the state in the digital environment*, 8 Va. JL & Tech., 9 (2003).

[2] In the interest of clarity, throughout this article the term "Facebook" will be used to refer to the platform's environment, whereas "Facebook/Meta" will be used to imply the company.

[3] Amy Webb, The big nine: How the tech titans and their thinking machines could warp humanity, 12-18 (Hachette UK. 2019).

The Big Nine play a crucial role in providing social media sites and search engines. For instance, Facebook, Instagram, and WhatsApp are owned by Facebook/Meta; Gmail, YouTube and the most-used search engine belong to Google; Tencent owns WeChat, the overreaching app that has revolutionized how millions of Chinese communicate.[4]

It must be noted that —while most social media and search engines belong to one of the Big Nine— there are some exceptions, such as *Twitter*, *TikTok* or *SnapChat*. Therefore, these companies may not be part of the *Big Nine*, but they are not small at all and play mostly by the same logic.

In this part, the article broadly explains three different ways in which people use digital platforms and their possible harms to democracy, presenting a specific legal analysis of each one. Given the impact of their products and their presence, several references will be made to Google and Facebook/Meta, resorting mostly to elements of American and European law where applicable.

1. *We See*

Media provides citizens with information to make voting decisions and stimulates interest in elections. In fact, there is vast literature that explains how and to what extent voters learn from a variety of media sources including newspapers, TV, Radio, internet and so forth. In that regard, the media reinforces political interest and voting intentions.

It cannot be reasonably challenged that citizens do use and engage with the media to learn about issues and topics relevant to the political arena, such as candidates' traits, proposals, or careers.[5]

On this matter, the evolution of technology and the development of different digital tools have gradually allowed citizens to obtain information and make up their minds before an election.

It is well known that the internet plays a significant role in people engaging with news and information around the globe. For example, in the United States, it is estimated that 37% of American adults get their news from the internet, followed by Radio (27%) and print newspapers (20%). The internet is only second to TV (57%).[6]

While TV is still a major source of information, Internet and digital platforms are thriving. In Germany, for example, it is reported that TV was the

[4] Interesting to note, however, that vast majority of Internet Law scholarship is still rooted in a Western perspective, disregarding Chinese tech companies in terms of privacy dynamics and freedom of speech.

[5] Caroline J. Tolbert & Ramona S. McNeal, *Unraveling the effects of the Internet on political participation?*, 56 Political research quarterly, 176 (2003).

[6] Valentino Larcinese & Luke Miner, *The Political Impact of the Internet on US Presidential Elections*, 63 Economic Organisation and Public Policy Discussion Papers Series, 2 (2017).

main source of news in 2013 with 82%; by 2018 it was still the major force of information, but it dropped down to 74%.[7] Additionally, Internet has taken a paramount place as an information provider. Both social media and search engines are the relevant venues in which users consume digital news. It is important to highlight that despite the rise of social media platforms such as Twitter or Facebook, search engines remain a strong channel through which people gain access to online information.[8] Internet users seem to trust search engines — mainly Google — almost blindly to the point that they would first question "their own ability to search properly before doubting the effectiveness of Google's algorithm." This applies mainly to young users, whose first experience with the internet came with Google itself.[9]

It shall not be ignored that Google, as a US-based company, is the main player in the field, with approximately 90% of the market share worldwide, leaving the remaining percentage as follows:

TABLE 2

Europe		*South America*		*North America*	
Google	91.32%	Google	96.66%	Google	88.66%
Bing	3.84%	Bing	1.66%	Bing	6.77%
Yahoo	1.32%	Yahoo	1.57%	Yahoo	3.62%
Yandex	2.44%	DuckDuckGo	0.05%	DuckDuckGo	0.58%

SOURCE: Own chart, made with information from Statcounter <http://gs.statcounter.com/search-engine-market-share> (Accessed on June 2, 2018).

As shown, online search —which Google has taken over— is crucial for citizens when obtaining information regarding politics, elections, and other public issues. At the same time, search engines offer a full spectrum of digital marketing tools and techniques and so-called "ad products", designed for political campaigns, which this paper will discuss in the next section.

The quality and content of digital information may vary across political issues and regions. This allows different kinds of media bias to take place, as well as the manipulation of public opinion.

One may observe these biases in barefaced totalitarian or undemocratic regimes. However, even in the absence of evident manipulation, market play-

[7] REUTERS INSTITUTE FOR THE STUDY OF JOURNALISM, DIGITAL NEWS REPORT 2018, pp. 80-81. Accessed on December 03. 2021. https://reutersinstitute.politics.ox.ac.uk/sites/default/files/digital-news-report-2018.pdf/.

[8] Filippo Trevisan, et al., *The Google voter: Search engines and elections in the new media ecology*, 21 INFORMATION, COMMUNICATION & SOCIETY, 118 (2018).

[9] *Id.*

ers can still exercise a tendentious influence on public opinion strengthening voters' predispositions by "pervasive selection and filtering".[10]

In this context, scholars point stress a fundamental difference when it comes to users analyzing search results[11]:

— The visible area; and
— The scrolling area.

The "visible area" is what users see immediately in the search results page, whereas all information below, which is not directly visible, is the "scrolling area." That is, the first few results (the visible area) are the elements relevant for the user, the ones that they may engage and interact with, while the rest (the ones remaining in the "scrolling area") would rarely be of interest to the user.

The visible area may be formed of both organic results and sponsored results. The first ones come from the search engine's algorithm, while sponsored results are links coming from advertising, which is being paid for and appear in the results page.

However, previous studies suggest that Internet users rarely engage with sponsored results and prefer to open organic links instead. For example, one study shows that in more than 80% of the searches, participants would go first to the results identified as organic, suggesting that users tend to ignore sponsored results.[12] At the same time, usual practice points out that web users prefer to adjust their search terms instead of moving to the next results page.

Having said that, this article now goes on to explore what does the law say with regards to this issue, and what are the legal implications of the results that come out of a search query. It has been demonstrated that altering the organic results in the visible area may affect the users' impressions, perspectives, and thoughts regarding different aspects of life, including politics and democracy. The impact of such manipulation in the light of the existing literature may be grouped up into six explanatory points.

1) As it was previously explained, higher-ranked links attract more clicks and, consequently, users tend to spend more time on websites associated with those higher-ranked search results. This is so because people trust search engines to assign higher ranks to the results best suited to their needs.[13]

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[10] Oliver Falck, et al, *E-lections: Voting Behavior and the Internet*, 104 American Economic Review, 7 (2014).

[11] Nadine Höchstötter & Dirk Lewandowski, *What users see – Structures in Search Engine Results Pages*, 179 Journal of Information Sciences, 1797 (2009).

[12] *Id.* at 1801.

[13] Robert Epstein & Ronald E. Robertson, *The Search Engine Manipulation Effect (SEME) and Its Possible Impact on the Outcomes of Elections*, 112 Proceedings of the National Academy of Sciences, 4512 (2015).

On this note, Robert Epstein introduced the term *Search Engine Manipulation Effect* (SEME) to refer to the alteration of the ranking in the search results and its impact in elections outcomes. Epstein carried out five different experiments in two countries (three in the United States and two in India), uncovering the power SEME, and reporting the following results:

— SEME can shift the voting preferences of undecided voters by 20%,
— Such a shift can be much higher in some demographic groups, and
— The rankings can be disguised so users show no awareness of the manipulation.

2) Changing voting preferences and shifting elections is the ultimate outcome of SEME. People's thoughts and actions can change —according to Epstein— by simply modifying the order in which the results appear on results page. Basically, the first page of results and the order in which it is structured influence the voters' minds.

In addition to the above, Epstein's work maintains that most users show no awareness that they are viewing biased search results. Given that biased search rankings can sway the voting preferences of undecided voters without their awareness and without fair competition from opposing candidates, SEME appears to be a powerful tool for manipulating elections in this century.[14] This hypothetic scenario implies that a search engine may deliberately favor one candidate, one political party or doctrine, and diminish others. While this may seem for some unfeasible or unrealistic, it is certainly possible and overall –and until now– mostly legal.

3) In the context of competition law, it must be highlighted that there are several critiques towards Google, to the extent that it may be favoring its own products, manipulating its rank to benefit itself.[15] But in the context of democracy and politics, Google can technically and legally support a candidate, a campaign, or an ideology.

4) For example, if a political candidate from Tijuana, Baja California considers that Google is manipulating its search results since the first three links that appear in the screen's visible area are news discrediting him, they would

[14] *Id.* at 4518.

[15] Tansy Woan, *Searching for an Answer: Can Google Legally Manipulate Search Engine Results*, 16 U. OF PA. J. BUSINESS L 297-298 (2013): "*For example, as of October 28, 2013, a Google search for 'maps' produces Google Maps as its first search result. Critics argue that Google unfairly prioritizes its own products and services, such as Google Maps, over the products and services of its competitors, such as MapQuest and Bing Maps, by listing its own services first. The critics argue that this practice deceives the public into believing that Google's products and services are objectively more relevant and therefore superior, driving Google's competitors out of business. On the other hand, Google counters that search manipulation allows Google to deliver more relevant results, and it denies unfairly prioritizing its own products over others'. Google is not alone in this regard. Most search engines are guilty of search engine manipulation, since it is through this manipulation that search engines are able to produce relevant results*".

find little success in challenging that. First, because the said candidate would likely face several complications in terms of jurisdiction and international private law,[16] since Google is an American company incorporated and based in California, United States. Even if it has presence worldwide, it claims to be mostly governed by American law and its courts. Secondly, even if the plaintiff manages to bring a case before a court of law, whether in Mexico, the United States or elsewhere, he would not be able to find out why the search algorithm is ranking those results in that specific order. This is because the algorithm protected under trade secret, and Google, being a private for-profit company, is under no obligation to publish or share its industrial property. Thirdly, the candidate would then realize that Google —as any other search engine— is perfectly entitled to support one political figure or another, as it enjoys freedom of speech. The American constitutional framework protects the so-called "Google Speech," which can favor one political candidate or another. These two last elements will be discussed in more detail in the following paragraph.

5) Regarding patent protection, scholars point out that well-known search engines have always refused to fully disclose the methods and techniques by which they score and rank their search results. Naturally, Google's search algorithms are perhaps the most famous of these secrets. Critics of search bias claim that these unknown formulas lead to a "black box effect": users do not know neither the method through which search results are computed prior to any assigned 'bias' nor the adjustments search engines make purposely.[17]

While it is true that Google patented its first PageRank algorithm back in the late 1990's —and as in any patent procedure, the entity seeking for patent protection needs to disclose information and after a certain period of time, that protection expires—, it is also true that, as technology has evolved, Google has made several updates and changes to the algorithm. It also makes use of other complementary algorithms to improve its search results. For instance, PageRank was the original algorithm used for Google queries, but later on the company introduced new elements to optimize their results, such as Panda, Penguin, Hummingbird and so forth. In other words, trade secret law protects all subsequent adjustments Google makes to the original algorithm.[18]

As Oren Bracha and Frank Pasquale point out, the proper balance between secrecy and transparency is indeed a major normative challenge in the search engine context, because on the one hand certain degree of secrecy is of legitimate interest, but at the same time —both authors stress— society

[16] The complications of jurisdiction and forum shopping will be addressed in the following sections of this article.

[17] Geoffrey A. Manne & Joshua D. Wright, *If Search Neutrality is the Answer, What's the Question?*, 14 Lewis & Clark Law School Legal Research Paper Series 10-11 (2011).

[18] *Id.* at 90.

has a strong interest in transparency and accountability. In various contexts people are becoming aware of the troubling aspects of a "black box society," in which private firms are basically uncontested when locking away information despite a strong public interest in disclosure. However, the idea of a regulatory regime for Search Engines does not seem to have attracted the mainstream of legal scholars.[19]

6) The judicial experience has not changed this view. There are three cases relevant for this analysis: 1) *Search King v. Google*, 2) *Langdon v. Google et al.*, and 3) *KinderStart.com v. Google.*

In *Search King v. Google*, the complaint was about intentional and malicious de-ranking of specific websites in Google's search results. The court upheld Google's argument to the extent that its PageRank system represents speech protected by the First Amendment, and "any act aimed at knowingly and intentionally modifying the ranking of websites is a legitimate expression of the freedom of speech."[20]

Consequently, for the Court, PageRank consists merely of "opinions on the relevance of certain websites." As such, there is no way to prove that the ranking for a given website is *false* —all of it is subjective— and this is how the Court concluded that Google was entitled to "full constitutional protection."[21]

Then, in *Langdon v. Google et al.*, the situation was slightly different. In this case, the plaintiff Christopher Langdon was running two websites, one exposing the alleged fraud perpetrated by North Carolina Officials, and another highlighting atrocities executed by the Chinese Government. He sought online advertisements for his websites in different search engines, such as Google and Yahoo. They all refused to run them. Langdon argued that such refusal translated into a violation of his First Amendment right. The Court ruled in favor of Google and the other search engines since they were entitled to editorial discretion in "deciding whether to publish, withdraw, postpone, or alter content" as they see fit. Even more, the Court clarified the legal nature of Google and other search engines: a private, for-profit company that "uses the internet as a medium to conduct business."[22]

Finally, in *KinderStart.com v. Google*, the ranking for KinderStart dropped to zero. It brought similar claims as the ones previously discussed, which failed to prove Google's responsibility. KinderStart claimed that Google's search engine was a public forum because everyone online could access Google's website (or any number of thousands of other websites having a "Google

19 Oren Bracha & Frank Pasquale, *Federal Search Commission-Access, Fairness, and Accountability in the Law of Search*, 93 Cornell L. Rev., 1201-1202 (2007).

20 Stavroula Karapapa & Maurizio Borghi, *Search engine liability for autocomplete suggestions: personality, privacy, and the power of the algorithm*, 23 International Journal of Law and Information Technology, 267 (2015).

21 Woan, *supra* note 15, at 316-317.

22 *Id.* at 318.

Search Box" as provided by Google) and everybody use its engine without any payment or charge. According to KinderStart, Google had willfully and continuously dedicated the engine for public use and public benefit. As previously mentioned, the Court did not uphold this claim, basing its reasoning on the lack of precedents to support such contentions. Even more, the question of when a search engine may eventually become a public forum has remained unsolved.[23]

As can be seen, there is an increasing need to regulate this complex phenomenon. But acknowledging the need of rules and principles is not the end of the story. Where should that regulation come from? From the market, statutory law, or government regulatory authorities? The idea of market discipline sounds attractive for scholars supporting the *laissez faire, laissez passer* economic model. It can be summarized as follows:

> Fortunately, market forces limit the scope of search engine bias. Searchers have high expectations for search engines: they expect search engines to read their minds and infer their intent based solely on a small number of search keywords. Search engines that disappoint (either by failing to deliver relevant results, or by burying relevant results under too many unhelpful results) are held accountable by fickle searchers. There are multiple search engines available to searchers, and few barriers to switching between them. As a result, searchers will shop around if they do not get the results they want, and this competitive pressure constrains search engine bias. If a search engine bias degrades the relevancy of search results, searchers will explore alternatives even if searchers do not realize that the results are biased.[24]

This idea would be undisputed if the market had diverse competitors providing search engines. Unfortunately —as it was shown in the first part of this article— the data proved that one specific search engine holds the vast majority of the market share. As Bracha & Pasquale highlight:

> The market discipline argument is based on two key premises: robust competition in the search market and users' responsiveness to abuse. Unfortunately, both premises are highly problematic […] It is unclear whether search engines fall under the strict definition of a natural monopoly, but they exhibit very similar characteristics. [Additionally] In many, if not most cases, consumers lack both the incentive and even the ability to detect such manipulation or determine its reasons. Given the lack of transparency of the search algorithms, search consumers simply cannot reverse engineer the hundreds of factors that go into a ranking, and they have little incentive to compare dozens of search results to assess the relative efficacy of different search engines.[25]

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[23] *Id.* at 321-323.

[24] Eric Goldman, *Search engine bias and the demise of search engine utopianism*, in Web Search 128-129 (Amanda Spink & Michael Zimmer eds., 2008) Springer, Berlin, 2008, pp. 128-129.

[25] Bracha & Pasquale, *supra* note 19, at 1180-1183.

This leads us to the concluding remark that market forces alone cannot deal with the risk of search engine manipulation and prevent major harms to democracy. Nevertheless, this issue cannot be addressed alone but rather as part of a wider context in which digital platforms can affect our thinking, our political views and civic engagement. The next two aspects are even more complex and require a deep analysis and reflection.

2. *We Think*

Digital platforms know what users do, and who they are. They also manipulate their consumer habits: what to buy, where to go, what to watch, and so forth. Lilian Edwards states that in the last two decades we have seen a major change in online marketing, since it moved from broadcasted ads, where millions of people would see the same content delivered by email spam or banner ads on websites, to the more complex targeted ads based on users' behavior (Online Behavioral Advertising, or OBA).[26] As Edwards summarizes: the theory goes that since these ads are "tailored to individual desires," recipients are more likely to read them, to click through to actual websites and engage with that content.[27]

For some it may not be completely clear how the "targeting" and "tailoring" take place. Where do Big Tech companies gather information about users, to then analyze it and then capture their attention? In this regard, it is appropriate to bring to this discussion Shoshanna Zuboff's explanation on the matter:

> Nothing is too trivial or ephemeral for this harvesting: Facebook 'likes,' Google searches, emails, texts, photos, songs, and videos, location, communication patterns, networks, purchases, movements, every click, misspelled word, page view, and more. Such data are acquired, datafied, abstracted, aggregated, analyzed, packaged, sold, further analyzed, and sold again. These data flows have been labeled by technologists as "data exhaust." Presumably, once the data are redefined as waste material, their extraction and eventual monetization are less likely to be contested.
>
> Subjectivities are converted into objects that repurpose the subjective for commodification […] Populations are the sources from which data extraction proceeds and the ultimate targets of the utilities such data produce.[28]

This new economic logic, that Zuboff has dubbed as "Surveillance Capitalism", brings with it a new tool for political advertising: micro-targeting,

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[26] Lilian Edwards, *Data Protection and e-Privacy: From Spam and Cookies to Big Data, Machine Learning and Profiling*, in Law, Policy and the Internet 120 (Lilian Edwards ed., 2018).

[27] *Id.*

[28] Shoshana Zuboff, *Big other: Surveillance Capitalism and the prospects of an Information Civilization*, 30 Journal of Information Technology, 79 (2015).

which usually involves, as explained above, monitoring people's online behavior, and using the collected data, to catch the user's attention and display political advertisements tailored to their views.

Additionally, Jacob Silverman sheds light on the power of digital platforms and their political effects. He claims that social media increases the voting turnout. While increasing political participation seems plausible, it may also trigger serious concerns on how this knowledge might be repurposed if, for instance, Facebook/Meta would encourage people in some districts to vote while "saying nothing to others."[29] This one company possesses vast power to sort the information people see and is capable to nudge them towards certain behavior. As Silverman enquires "could it influence the fate of elections, not to mention specific policies?" or even worse "would we ever know if it did?"[30]

One piece of literature is of particular interest for this analysis. In 2015, one year before the US Presidential Election that would trigger the infamous Cambridge Analytica scandal, Zeynep Tufekci recounted the following:

> In 2010, a massive experiment (performed without being noticed by any of the sixty-one million subjects, none of whom were asked for permission), Facebook demonstrated that it could alter the U.S. electoral turnout by hundreds of thousands of votes, merely by nudging people to vote through slightly different, experimentally manipulated, get-out-the-vote messages. In this experiment, some messages geared toward Facebook users appeared stand-alone while other, more potent ones, were socially embedded, showing a "your friend voted" extra nudge.
>
> […]
>
> Facebook has stated explicitly that they had tried to keep their 2010 experiment from skewing the election. However, had Facebook not published the results, and had they intended to shape the electorate to favor one candidate over another, the algorithmic gatekeeping enabled through computational agency would have been virtually unnoticeable, since such algorithmic manipulation is neither public, nor visible, nor easily discernible.[31]

Again, this problem reiterates the power that digital platforms hold and how they can affect not only what users see, but also trigger their behavior and therefore our collective political decisions.

There are some legal instruments across specific jurisdictions, particularly in Europe, to fight this possible abuse, such as the General European Data Protection Regulation (GDPR).[32] It should be noted that the Mexican legal

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[29] Jacob Silverman, *Privacy under Surveillance Capitalism*, 84 Social Research: An International Quarterly, 158 (2017).

[30] *Id*.

[31] Zeynep Tufekci, *Algorithmic harms beyond Facebook and Google: Emergent challenges of computational agency*, 13 Colorado Technology Law Journal 215-216 (2015).

[32] For a comprehensive analysis, *see* Lilian Edwards, *Data Protection: Enter the General Data Protection Regulation* in Law, Policy and the Internet; *supra* note 26.

system has certainly similarities with the GDPR with one notorious difference: the legitimate interest exception. That is, the use of personal data of an individual without their express consent. The Mexican legislation on data protection requires express consent from the subject to process that data.

However, this is not precisely promising, since the ways in which "consent" is expressed in the digital age are evidently vague, abusive, and almost unnoticed. This is characterized by "pre-formulated declarations of consent," or "clickwrap" contracts, that hide extensive privacy policies, well-known for "taking a disproportionate amount of time to go through and require reading comprehension abilities at university level,"[33] and this translates into millions of users clicking "I accept" or "Yes" on declarations of consent that they do not actually understand or make sense of, and thus feeding the economic logic of data extraction, commodification and personalized advertisements and publications that restrain their way of thinking.

3. *We Say*

Freedom of speech has changed with the advent of Internet, but more particularly with social media platforms, such as Facebook or Twitter. This has even led to the Supreme Court of Justice of the United States to say that "the vast democratic forums of the Internet in general, and social media in particular" are "the most important places […] for the exchange of views," but as some scholars have pointed out, the digital age has also imposed users of social media an unprecedented regime of private censorship.[34]

But how did we get here? It is necessary to bring Lilian Edwards' explanation to understand this issue:

> Content often carries with it legal liability, which may be civil or criminal […] how far should online intermediaries be responsible for this content, or contrarily, how far should responsibility stay with the original content author or provider?
>
> The EC Electronic Commerce Directive 2000 (or E-Commerce Directive or ECD) alongside the Digital Millennium Copyright Act (DMCA) in the USA effectively established the ideas of limited liability and "notice and take down" (NTD) as the template for intermediary responsibility, a solution which had remarkable reach for over a decade and remains the pattern of many Organization for Economic Co-operation and Development (OECD) laws […]
>
> Underneath it all, perhaps, lies the feeling, among both users and traditional state governments, that the giant "GAFAM" platforms (Google Amazon

[33] Midas Nouwens, et al., *Dark patterns after the GDPR: Scraping consent pop-ups and demonstrating their influence*, in Proceedings of the 2020 CHI conference on human factors in computing systems, 2 (2020).

[34] Kyle Langvardt, *Regulating Online Content Moderation*, 106 Geo. L. J. 5, 1353-1388 (2018).

> Facebook Apple Microsoft) now exert power greater than any prior private companies and possibly than some elected governments […]
>
> Since 2000, automated content curation has become steadily more sophisticated and prevalent, especially in relation to copyright "take downs", and with the rise of machine learning (ML), automated blocking has begun to look more feasible, even in heavily contextual and cultural areas, such as "fake news" and indecency, albeit with more successful application to images than text […] the public has arguably begun to comprehend that algorithms used by platforms to distribute, moderate and filter content can and do incorporate value-judgements and inherent bias, and can be used to apparently modify public emotions and opinions. The dawning horror at this covert manipulation of everything from buying choices to democratic decision making may have finally killed off once and for all the notion of platforms as innocent intermediaries.[35]

In that regard, scholars Frederik Stjernfelt and Anne Mette Lauritzen provide an interesting perspective on this issue. They argue that today's freedom of speech is under pressure. This is because Big Tech companies have amassed political power and they can lay down the rules of public conversation and access to information, leaving private individuals and even governments with little or no rights of defense against their decisions".[36]

In 2018, a group of human rights organizations and academics launched a set of core principles to limit and frame the increasing powers of Tech giants on moderation of user-generated content: the Santa Clara Principles.[37]

Later that year, one of these Tech giants, Facebook/Meta, in a desperate attempt to cope with the increasing demands for greater accountability and transparency to users about how it controls the flow of speech in the web, decided to launch an external independent appellate body: The Oversight Board.

The idea behind the board is to give users a way to challenge content removal decisions on Facebook or Instagram. More specifically, "if you have already requested that Facebook or Instagram reviews one of its content decisions and you disagree with the final decision, you can appeal to the board".[38]

Nevertheless, there are some issues that trigger concern about the Oversight Board's functioning: I) independence, and II) self-regulation. As to the first, the Oversight Board is run by a Facebook/Meta-funded trust that exercises administrative powers, such as "the ability to enter into Board member contracts and service agreements, remove and appoint members and staff

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[35] Lilian Edwards, '*With Great Power Comes Great Responsibility?': The Rise of Platform Liability*, in Law, Policy and the Internet 253-259 (Lilian Edwards ed., 2018).

[36] Frederik Stjernfelt & Anne Mette Lauritzen, Your Post has been Removed: Tech giants and freedom of speech 178 (Springer Nature, 2020).

[37] Santa Clara Principles (Jan. 9, 2022) https://santaclaraprinciples.org/

[38] *Id.*

issue payment and compensation, and […] research expenses"[39], therefore, Members of the Board —the ones who deliberate which content remains online— are factually being paid by Zuckerberg's company. While some may argue that funds *come* from Facebook/Meta but it is the Board, a legally and technically independent body, the one who *manages* the payroll, the truth is that there is also a lack of *intellectual* independence, since the only method of external input for selecting Board members "is a public portal through which members of the public, Facebook, and Board members can submit candidate recommendations,"[40] leaving no room for external candidates proposed directly by human rights organizations, activists, or academics. In relation to the second point, the Board is Facebook/Meta's own creation to self-control its own decisions, that is, it is trying to solve by itself the extensive critiques regarding abuse on content moderation practices and criteria, establishing its own sort of judicial branch. In a certain way, Facebook/Meta is just transferring the power of decision from its corporate executives to the Members of the Board, all within the atmosphere of its own corporate governance.[41]

In a very interesting critique, Aldo Iannotti della Valle explains that the Oversight Board arose as a *para-jurisdictional* body in the context of the "erosion" characterized by the State —as a political entity— losing jurisdictional power over the cyberspace, allowing these Big Tech companies to evolve from self-regulation to self-jurisdiction schemes.[42]

Regardless of the launch of Oversight Board, the truth is that Big Tech corporations exercise power that affect the way we express ourselves in the digital age and it is still unclear how to build an appropriate framework that allows these companies to function but at the same time limits their abuse of power.

This resonates with Giovanni De Gregorio's extensive research on Digital Constitutionalism, since he states that online platforms, while establishing the standard of free speech and shaping democratic culture on a global scale, disclose little information about their practices and procedures on content moderation, making it all "opaque or lawless." While there are other interesting proposals —whose analysis exceeds the research limits of this article—, such as the Manila principles or the Internet Governance Forum Dynamic Coalition on Platform Responsibility, users still must deal with "discretion-

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39 Kate Klonick, *The Facebook Oversight Board: Creating an independent institution to adjudicate online free expression*, 129 Yale L. J., 2482 (2020).

40 *Id*. at 2484.

41 Mårten Schultz, *Six Problems with Facebook's Oversight Board. Not enough contract law, too much human rights*, in Perspectives on Platform Regulation 160-161 (Ronald Broemel, et al. eds., 2021).

42 Aldo Iannotti Della Valle, *La giurisdizione privata nel mondo digitale al tempo della crisi della sovranità: il 'modello' dell'Oversight Board di Facebook*, 26 Federalismi.it: Revista di Diritto Pubblico Italiano, Comparato e Europeo, 153 (2021).

ary and voluntary mechanisms," since there is no binding force on online platforms.[43]

III. The Mexican Approach for Regulation: Limits, Challenges, and Implications

In february 2021, after several weeks of press coverage and media speculation on the intention to legislate on social media platforms and their content removal procedures in Mexico, the whip of the majority party in the Mexican Senate released a draft bill that intended to reform the Telecommunications and Broadcasting National Act (Ley Federal de Telecomunicaciones y Radiodifusión).[44]

The normative provisions in question attempted to give the Federal Communications Institute (Instituto Federal de Telecomunicaciones, IFT) new duties and powers regarding social media platforms. In sum, the draft bill proposed: I) an obligation for social media platforms to register and secure approval of their Terms of Service (ToS) before the IFT in order to operate within the Mexican territory; II) a procedure for users to contest the removal of content, suspension or deletion of accounts done by a social media platform in alignment with their terms of service, and III) the power of the IFT to order the reestablishment of the content removed or the account — with the possibility to fine the social media platform in the event of non-compliance or negligence with the procedure or the resolution.[45]

It has been studied that, at least since 2005, tech companies have expended hundreds of millions of USD dollars in lobbying, in order to tackle and fight any policies and laws that may threaten their business models.[46] This evident lobbying power along with the multiple flaws in the draft made it impossible to advance and turn it into a feasible bill to be voted in the Senate and the Chamber of Deputies accordingly.

The draft bill was received mostly with negative critiques, from NGOs, consultants, academics and —naturally— social media companies.

The public discussion did not necessarily address the core issue of the draft bill, i.e., giving users the right to challenge a social media platform before the State over decisions related to content removal or accounts' suspension

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[43] Giovanni de Gregorio, Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society, 186-189 (Cambridge University Press. 2022).

[44] Borrador de Iniciativa con proyecto de Decreto por el que se REFORMAN y ADICIONAN diversas disposiciones de la Ley Federal de Telecomunicaciones y Radiodifusión (Jan 3, 2022) https://ricardomonrealavila.com/wp-content/uploads/2021/02/REDES-SOCIALES-Propuesta-Iniciativa-29.01.21.pdf

[45] *Id.*

[46] Pawel Popiel, *The Tech Lobby: Tracing the Contours of New Media Elite Lobbying Power*, 11 Communication Culture & Critique 4, (566-585) 2018.

or deletion. The public debate rather followed the groundless narrative that somehow the proposed bill wanted to give the State —through the IFT— the power to censor digital content and thus shape users' web speech, and —on more justifiable concern— that such reform could carry implications and possible breaches of obligations under the United States-Mexico-Canada Agreement (USMCA), the successor of the North America Free Trade Agreement (NAFTA).

The fact remains that the draft had several areas for improvement, to say the least. For instance,

- It distinguished social media platforms in two categories: *ordinary* and *relevant*. In the language of the draft, if a platform reaches more than one million users, it is considered *relevant*. This categorization has two effects. Firstly, it imposes an obligation on the platform to request registration before the IFT. Secondly, it makes it subject to its procedure for analyzing and revoking decisions on content removal and account suspensions or deletions.

But this category is unsound: Does it refer to 1 million users worldwide or in Mexico? Does it imply active users or total users? Why would it matter to make this differentiation in the law when in practice most complains would come from users from Google, Facebook/Meta and Twitter? According to this definition a considerable number of platforms could arguably fall within this category, such as Reddit, Telegram or even Flickr or Soundcloud, to the extent that the definition of social media platforms is not narrowed enough in the draft bill to focus on digital speech platforms.

This distinction is unnecessary, and it does not provide clarity but rather confusion on who is affected and what is the legal target of the proposed bill. The draft attempted to impose an obligation on platforms to register before the IFT to operate within Mexico. This specific part of the proposal triggered concern since for some critics this could become a violation under Chapter 19 to the USMCA, which specifies regulation for digital trade, and establishes "Non-Discriminatory Treatment of Digital Products."[47] Critics suggested that the proposed obligation does not find equivalent under the United States and Canada law, and since they are not requiring the same authorization, this may be considered a discriminatory treatment.

It is relevant to point out, however, that this registration would not be discriminating a company because of its nationality (e.g., imposing an obligation for Twitter to register before the IFT because it is an *American* company). And if a Mexican platform emerges and then reaches the category of *relevant* social media platform, it would then be bound to comply with the obligation before the IFT. But in any event, this registration is troubling because it does

[47] USMCA Article 19.4: Non-Discriminatory Treatment of Digital Products. *1. No Party shall accord less favorable treatment to a digital product created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of another Party, or to a digital product of which the author, performer, producer, developer, or owner is a person of another Party, than it accords to other like digital products*.

not place the user at the center of the proposal, but rather imposes an obligation on certain platforms to operate and —as it was mentioned in the previous section— it is not clear which platform is considered *relevant*, collaterally affecting the operation of different platforms and services to the extent that they also would have to register and secure authorization of their terms of service.

Again, if the intention of this bill was to give users the right to contest digital platforms before the State, this registration, as well as the distinction above mentioned, are not necessarily relevant.

- In accordance with the draft, social media platforms must secure authorization of their ToS before the IFT (the proposed bill did not take into account how unpractical it would be, for example, for a company to modify its ToS on the IFT´s request once it has attained more than one million users). To grant this authorization, the proposed bill mandates that the IFT must take into consideration if the terms prevent fake news and hate speech, and protect minors, among other elements. This is a careless measure, because ToS encompass not only the content that is shared in the platform and how it may be removed, but also other topics such as privacy, jurisdiction, expected usage or payment details.

It seems that under such a scenario the IFT would be first validating the narrative and language of the ToS, to later use them as the main lens to solve eventual disputes. But instead, it should actually be employing a constitutional framework of fundamental rights protecting the users' digital speech. It is evident that this proposed new role of the IFT as a ToS validator is inconvenient and unclear, not to mention the implications of reviewing several parts of the terms that are not related to content removal.

- Lastly, the role of the IFT as a digital speech umpire was also found puzzling. This is because the IFT is a constitutional independent body tasked with very specific duties on telecommunications and broadcasting services, and while it does deal with Internet Service Providers (ISP), it is not concerned directly with social media platforms, and its nature is that of a regulatory body, not of adjudication.

At the same time, it is necessary to remember the infamous *forum selection clause* that certain media platforms use in their terms of service. They usually nominate the State of California as the exclusive forum for dispute resolution, with the intention to prevent users to sue in their home countries. For example, Facebook/Meta has a *forum selection clause* that establishes Ireland[48]

[48] Facebook/Meta Commercial Terms (Feb 2, 2022) https://www.facebook.com/legal/commercial_terms Any Commercial Claim between you and Meta Platforms, Inc. must be resolved exclusively in the US District Court for the Northern District of California or a state court located in San Mateo County, that you submit to the personal jurisdiction of either of these courts for the purpose of litigating any such claim and that the laws of the State of California will govern these Commercial Terms and any such claim, without regard to conflict of law provisions.

as the exclusive jurisdiction for users in the European Union, and California[49] for the rest of the world. With the interesting exception of Tumblr (that opted for New York State), California takes the crown when it comes to digital platforms' forum shopping. These clauses have traditionally blocked the access to justice for several users around the globe since they make it unpractical and unbearable to bring a claim against these companies before a court of law. However, in recent years judicial decisions have tended to favor users and allow them to bring a claim in their home country. This was the case in Canada, where the majority of the Supreme Court of that country considered that given that Facebook —regardless of the existence of a *forum selection clause* in the terms of use— could have breached rights protected under Canadian Law and local statutes applicable to British Columbia residents, the local courts were "better placed to adjudicate these sorts of claims" instead of those in California.[50]

Having clarified that, the draft at hand preferred to grant the IFT new powers and changed its nature instead of drawing feasible ways of action for users to bring these companies before a court.

Notwithstanding the above, the draft had in its roots something positive. It had the clear intention to make Big Tech platforms subject to State authority and challenge the increasing amount of power they have accumulated in the last two decades. These corporations have evolved in what Michael Kwet denominates "private overlords of critical information infrastructure" —in their majority American companies— that have the "power to regulate the press, speech and association in foreign territories, as they see fit" in the context of a not-so-new but evolving phenomenon: *digital colonialism*.[51]

IV. Conclusions

Big Tech companies and their platforms have gained control of different aspects of our daily life. They not only affect our individual sphere, but also, they diminish our collective future. What is the role of the State and the law on this issue? This article argued that it must counter the abuse and accumulation of power these companies have amassed. The State must build or take

[49] *Id.* Any Commercial Claim between you and Meta Platforms Ireland Limited must be resolved exclusively in the courts of the Republic of Ireland, that you submit to the personal jurisdiction of the Republic of Ireland for the purpose of litigating any such claim, and the laws of the Republic of Ireland will govern these Commercial Terms and any such claim, without regard to conflict of law provisions.

[50] Tanya Monestier, *Forum Selection Clauses and Consumer Contracts in Canada*, 36 Boston University International Law Journal 2, 194, (2018).

[51] Michael Kwet, *Digital Colonialism: US Empire and the New Imperialism in the Global South*, 60 Race & Class 4, 12 (2019).

part in normative frameworks that reclaim State sovereignty and grant rights and effective remedies to users.

The draft bill introduced and discussed in Mexico in 2021 must be understood in the wider context of the unchallenged authority that Big Tech corporations have built, behind the fortress of surveillance capitalism and digital colonialism. These companies shall not be considered untouchable or immune to any legal regime outside the USA or Europe —not to mention that, in some cases, they do not even comply with regulations from those regions of the world.

It is in this challenging context that governments and courts must analyze and reflect on how to effectively protect their citizens and provide them with the appropriate means to contest the decisions of digital platforms.

The draft bill here analyzed, however, was technically insufficient and its preparation did not follow a comprehensive legal reflection that would take into consideration appropriate alternatives to be translated into empowerment of users before the decisions of Big Tech platforms. This ended up in a poor public discussion that not only diminished the draft's attempt to pass any possible State legislation on the matter, but also argued in favor of self-regulation.

Even some well-known scholars who have once supported the idea of self-regulation are now acknowledging its multiples flaws. They stress that "as it might have been worth trying, self-regulation did not work […] self-regulation needs to be replaced by the law."[52] And such law must come not only from the US and Europe, while the rest of the world and its citizens wait for something not that far from a messianic solution. For example, as of 2021, China, India, Indonesia and Brazil —all countries in the Global South— are 4 of the 5 countries with the most Internet users in the world.[53] Therefore, other regions, including Mexico, need to be part of the discussion and open the debate to introduce appropriate legal instruments to challenge this abuse of authority and reclaim State sovereignty.

The question for further research, particularly in the Latin American context, should not be *whether* the State can regulate social media platforms and ensure users' rights, but rather *how* can the State frame that regulation and enforce it. Hopefully the academic discussion will follow this direction.

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[52] Luciano Floridi, *The End of an Era: from Self-Regulation to Hard Law for the Digital Industry*, 34 Philosophy & Technology 4, 619-622 (2021).

[53] *Internet World Stats*, March 7, 2021, *Countries with the highest number of internet users as of Q1 2021* (in millions), in *Statista*, Retrieved January 27, 2022, from https://www.statista.com/statistics/262966/number-of-internet-users-in-selected-countries/.

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TOWARDS A PERIODIZATION OF OSCAR CORREAS' CRITICAL LEGAL THEORY

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Abstract: *Óscar Correas is undoubtedly a key figure in Latin American Marxist Critical Legal Theory as a cornerstone of critical legal thought and one of the founders of the "Latin American Critical Legal Theory" [Crítica Jurídica Latinoamericana or CJL] movement. His training as a jurist allowed him to posit legal questions and theories that were fundamental to understandings of reality, overcoming narrow visions of law that had been popularized in social sciences. Correas' thought underwent changes over the course of new readings and evolving sociopolitical conditions—the crisis of the prevailing Stalinism in the Soviet Union and the irruption of the indigenous movement in México in the form of the Zapatista Liberation Army uprising, to mention two paradigmatic examples—. It should be no surprise that, in the 1990s, Correas would critique and debate the Marxism of Pashukanis. In this sense, I propose the hypothesis of the existence of a "First Correas" and a "Second Correas." The first, aligned with the Marxism of the critique of political economy (this from the 1970s to the late 1980s), and the second, with a markedly linguistic turn, embracing skepticism, although he never completely abandons Marx's position (this from the 1990s to until his death in 2020).*

Keywords: *Óscar Correas, Marxism, Critical Legal Theory, Latin American, Periodization.*

Resumen: *Óscar Correas es sin duda una pieza clave de la crítica marxista del derecho en América Latina. Es una de las piedras angulares para criticar al derecho moderno y fue el fundador del movimiento denominado "Crítica Jurídica Latinoamericana" (CJL). Su formación como jurista le permitió plantear preguntas y teorías en relación con lo jurídico que fueron fundamentales para entender la realidad. Superando visiones estrechas respecto al derecho que se habían popularizado en las ciencias sociales. El pensamiento de Correas va sufriendo cambios debido a las nuevas lecturas realizadas y distintas condiciones político-sociales (la crisis del estalinismo prevaleciente en la Unión Soviética y la irrupción en México del movimiento indígena vía el levantamiento del*

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Ejército Zapatista de Liberación Nacional, por mencionar dos ejemplos paradigmáticos para el mundo), no debe sorprendernos que, en la década de 1990, Correas criticará y polemizará con el marxismo de Pashukanis. En este sentido podemos señalar como hipótesis que existe un "Primer Correas" y un "Segundo Correas". El primero, apegado al marxismo de la crítica economía política (que esta entre la década de 1970 y finales de los ochenta) y el segundo, con un marcado giro lingüístico, llegando incluso al escepticismo, aunque no abandona por completo la posición de Marx (principios de la década de 1990 hasta su fallecimiento en 2020).

Palabras clave: *Óscar Correas, Marxismo, Crítica Jurídica, América Latina, Periodización.*

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I. Introduction

Latin American Critical Legal Theory (CLJ) was born Marxist in nature,[1] a fact which did not inhibit it from giving voice to other tendencies of critical thinking.[2] This school of thought developed in Latin America seeks to demystify and de-fetichize both law and the State with tools rarely used by legal scholars. It points at the limitations of legal-State concepts and practices and is founded in differentiating the deontic and ideological meanings of law. While some of its epistemic frameworks approach those of French *Critique du droit* or US Critical Legal Studies, CJL has a citizenship of its own, proposing specific theories and methodologies to understand Latin America and its particularities.

In this sense, I propose the hypothesis of the existence of a "First Correas" and a "Second Correas." The first aligns itself with Marx's critique of political economy (from the 1970s to the late 1980s), and the second, with a markedly linguistic turn, embraces skepticism —although the Marxist outlook is

[1] Arturo Berumen Campos, *Óscar Correas o la izquierda kelseniana. Entrevista a Óscar Correas*, in Introducción dialógica al derecho 226, 228 (UAM Azcapotzalco, 2018).

[2] Óscar Correas, *Presentación*, Crítica Jurídica. Revista Latinoamericana de Política, Filosofía y Derecho, 1983 at 2.

never completely abandoned (from the 1990s to the present).[3] This article centers on the "First Correas." We will focus on the two books[4] he published in the 1980s: *La ciencia jurídica* and *Introducción a la crítica del derecho moderno (esbozo)*.[5] I will also discuss the articles from *Crítica Jurídica* Nos. 0-8,[6] which refer to law and Marx's critique of political economy.

1988 is key in this periodization because at that moment, it is possible to distinguish between the "first" and "second" Correas. This claim is based on the author's own statements (in the 1970s), when he declares his adherence to Marxism,[7] as well as on his books, which use Marx's method to analyze law, only to later affirm his evident reproachment with linguistic studies, which would lead to his 1992 doctoral thesis, entitled, *La critique du droit comme analyse du discours,* later published in Spanish as *Crítica de la ideología jurídica. Ensayo sociosemiológico.*[8] Similarly, I believe it is possible to trace Óscar Correas' intellectual evolution as parallel to the crisis of a certain kind of Marxism and perspective of world revolution. It would be more accurate, however, to say that the author was influenced by the crisis of the prevailing Stalinism in the Soviet Union, which had proclaimed itself the dominant form of Marxist thought.

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[3] Víctor Romero Escalante & Napoleón Conde Gaxiola, *Breve aclaración para la presente edición*, in Debates actuales de la crítica jurídica latinoamericana 27 (Editorial Torres Asociados, 2019).

[4] In 1995, *Ideología Jurídica* was published as a collection of journal articles Correas published between 1981 and 1983. We do not consider this a book *per se*, but more of a unified discursive body. These works are certainly important to understand the author's thinking. *See* Óscar Correas, Ideología jurídica (Universidad Autónoma de Puebla, 1983).

[5] This book deserves special mention since it was his theoretical debut to present a broad and complete reflection on law using Marx's method of critique of political economy in Latin America. We would hazard to say that Óscar Correas' book is a continuation of Pashukanis' *The General Theory of Law and Marxism,* published in 1924 following the October Revolution's triumph over foreign intervention. Both texts reach similar conclusions, such as the "'circulationist' and equivalent" nature of the legal form proposed by the former and Correas's concept of "legal ideology," which is present in law, but does not eliminate its normative specificity. Both authors reject the economistic interpretation that sees law as a mere reflection of economic relations. However, Correas's book does not contain a single citation of Pashukanis' work, perhaps the result of Correas' effort to distinguish himself from the Soviet intellectual. In brief, we believe that the two authors have more in common —at least with regard to the "First Correas"— than is commonly considered. It is also important to note the significant differences between the first edition of *Introducción a la crítica del derecho* and the last (fourth) edition, particularly in terms of his approach to Kelsen. Nevertheless, we will not delve further into this matter.

[6] These issues were published between 1983-1988.

[7] Óscar Correas, ¿Una *dialéctica del Derecho? (Acerca del Libro de E.B. Pashukanis, La Teoría General del Derecho)* 4, Dialéctica, Jan. 1978 at 245.

[8] Óscar Correas, *Testimonios sobre la filosofía del derecho contemporáneo en México* 7, Revista de Teoría y Filosofía del Derecho, Oct. 1997 at 30.

II. Formative Years

For the purpose of providing his background, Óscar Correas was born to a middle-class family in Córdoba, Argentina, in 1943. His father, Óscar Correas, was a doctor who always wished his son to get a university education with solid moral principles. This explains why young Correas was enrolled in the Catholic University of Córdoba, where he received a Christian humanist education and received his first taste of philosophy. However, at that time the position of the Catholic Church (specifically, the Jesuits, who ran the University) was extremely conservative.

Of course, this education conflicted with the prevailing political climate of the 1960s, when young people worldwide had radicalized, inspired by May 68 in France, the Cuban Revolution, the end of capital's high economic growth, etc. It seemed as though the moment for the world revolution had arrived. So, it was that Óscar Correas turned decisively to the left, challenging university authorities —an attitude that nearly cost him his law degree and which, after graduating, drove him to donate his legal services to unions, community organizations, and political prisoners.

In his own words:

> In this militancy, undertaken as an *ad later* task in my professional practice, we find Marxist thought. Leading intellectuals like José Aricó played an important role in those years: bringing Marxism closer to the Christian spirit of dissent. Those were the times of the early reign of Althusser, of Leninist parties, of the *Cordobazo*,[9] of the student rebellions in France and Mexico, and the romantic exploits of Ché [Guevara].[10]

These social conditions led the young lawyer from Córdoba and an entire generation to dream and take action for a better world, one without exploiters or the exploited. However, as the author himself states, "I was still far from Marx."[11] In 1973, he joined the university Philosophy and Letters department, where he began to study philosophy systematically under the tutelage of Nimio de Anquin, among others.

The 1976 civilian-military dictatorship and his activism with lawyers for democracy forced him to leave the country and only Mexico would do. He arrived at the Philosophy and Letters department of the Distinguished Autonomous University of Puebla, where he taught the Greek philosophy he

[9] This term refers to a mass uprising led by workers and students in Córdoba, Argentina. For several days, protesters held the city, trouncing the police and erecting barricades to take on State forces. The Argentine government mobilized the army, which unleashed violent repression leaving dozens dead and wounded and hundreds detained.

[10] Óscar Correas, *supra* note 9 at 31.

[11] *Id.*

had learned from Nimio de Anquin. It was then that he met another of his teachers, Óscar del Barco, with whom he read Marx and received the teachings that would lead him to understand rationalism as the core of Western thought. This was the path that led him to a philosophy of law.[12]

By this point, Correas had already espoused a particular reading of Marxism, but he had yet to reach a more orderly and original reflection. Class struggle was influential in this respect, but even more so were the defeats suffered by the working class at this historical moment. Salvador Allende had been defeated by the coup d'état led by Pinochet; a savage dictatorship installed itself in Argentina; most of South America was governed by dictatorial regimes that imposed a new socio-economic logic, and left-wing forces, in both their *foquista*-guerilla[13] variants and political party forms, were unable to incite a mass movement strong enough to overthrow the national bourgeoisie.

These conditions paved the way for legal theorization, above all because in this moment of revolutionary flight, it was necessary to understand how legal institutionalization operated so as to, in some cases, defeat it and repurpose it as tool to benefit the exploited. However, in less fortunate cases, some "leftists" would use it to position themselves in the dominant system. Regardless, crises provide moments of epistemic creation *par excellence*, moments of great creativity that can help advance human thought.

According to Bolívar Echeverría, the concept of "crisis" should be understood as the historical moment at which social reproduction, i.e., economic, social, cultural, and legal norms, reaches a limit by which it can no longer reproduce as before. At that moment, considering the impossibility of the old society to continue on its course, there is the possibility of another society emerging as a revolutionary transformation.[14] The same occurs with respect to knowledge, and law in particular. When the legitimacy and functionality of legal doctrine is questioned in detail, space opens up to propose new readings and practices of the legal form. The most radical revolutions in history, such as the French Revolution of 1789 and the Russian Revolution of 1917, demonstrated their depth by questioning the very existence of the prevalent legal system.

The rejection of the legal form is at the same time a rejection of a moral, economic and political system. When a critique seeks to advance to its logical conclusion, it must attempt to liquidate the existing order to overcome all that "is" in order to reach what has yet to "be." Otherwise, I find ourselves with a fragmented criticism, one that only seeks to change one aspect of reality while leaving the rest intact. Seeking to change legal norms or established morals without modifying economic and political relations, or vice versa,

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[12] *Id.*

[13] *Foquismo* refers to a guerilla warfare strategy associated with Che Guevara.

[14] Bolívar Echeverría, El discurso crítico de Marx 191 (Fondo de Cultura Económica-Itaca, 2017) (1986).

leads to the project's failure. When such a situation occurs, the premises are considered erroneous,[15] without asking whether the criticism had arrived at the root of the problem.

In this way, Óscar Correas, armed with Marxist tools, entered history offering a possible solution to the historical crisis of legal thought. It was no coincidence that it was in Latin America, a region fraught with some of the most powerful contradictions in the world, where alternatives like "transitional States" toward socialism were also being developed. These later ones devolved because of material conditions and the impossibility to sustain them over time, as in Cuba, obliging us to consider the mistakes made and how to avoid them in the future. We hazard this in light of the realities currently seen under capitalism: increasing rather than decreasing world hunger; the persistence of war; fascist and xenophobic hatred on the rise; the terrible reality of climate change —and this long and shameful list goes on.

III. Óscar Correas' Marxism

It must be first noted that the Marxist intellectual and political tradition in Mexico arrived several years after it had in other Latin American counties (for example: Chile or Argentina had socialist parties affiliated to the Second International). Mexico did not have close contact with the advanced ideas of revolutionary Marxism, let alone its forms of political organization. In fact, the first socialist party in Mexico did not emerge until 1919 and would later become the Mexican Communist Party.

The tragic defeat of the Republicans in the Spanish Civil War transformed Mexico into a refuge for a large number of republican thinkers. This event strengthened the Mexican intellectual field spectacularly; some of the émigrés were critical leftist s jurists like Wenceslao Roces (whose famed translation of Marx's *Capital* was published by the Fondo de Cultura Económica), Mario de la Cueva (who wrote an excellent work on labor law with clear references to Marxist theories), and Adolfo Sánchez Vásquez (an intellectual who introduced Pashukanis[16] to the Spanish-speaking world), among many others.[17]

From 1940 to the 1960s, Marxist law-related intellectual production began to flourish, although it was somewhat spread across several European nations like France, Italy, Germany, Russia, and Spain. In Latin America, and in Mexico, especially, notable debates had yet to occur. Material was scarce,

[15] This by no means implies that premises should not also be questioned.

[16] Evgeny Pashukanis (1891-1937), was a Soviet jurist, known for his work on legal theory and Marxism. His most important work, "General Theory of Law and Marxism", in which he argued that law only makes sense in situations of commodity exchange, therefore, law and the state would disappear when the communist society is achieved.

[17] Víctor Romero Escalante, *Pashukanis y su recepción en México,* 19 Verinotio Revista on Line de Filosofía e Ciencias Humanas 127, (2015).

and those that could be found were not usually in Spanish. The discussion really began in 1976 when Grijalbo publishers published a translation of revolutionary Russian jurist Evegy Pashukanis's *The General Theory of Law and Marxism (ObschiaTeoria Prava I Markism*). The edition was forwarded by Adolfo Sánchez Vásquez (ASV), who details the principal arguments of the book from a philosophical and historical perspective.

1976 was a key year with two significant events: Óscar Correas's arrival in Mexico and the publication of Pashukanis' book. The Russian jurist greatly influenced Correas, despite the intellectual tension between them. In 1980, sponsored by the Autonomous University of Sinaloa, Correas published his first book, *La Ciencia Jurídica*.[18] It was not the author's first written publication. He was on the Editorial Board and Leadership Committee of the famous Marxist journal *Dialéctica,* edited at the Distinguished Autonomous University of Puebla, and had contributed several articles since its first issue, thus revealing his extensive knowledge of Greek philosophy and Marxism.

Correas recognizes Pashukanis' effort to explain law and economics under the concept of "form," but, at the same time, our Latin American jurist believes that rather than starting from the idea of a legal "subject," as Pashukanis does, one should begin with the concept of the "object." Correas finds Pashukanis' handling of civil law systems reductionist as it omits the concept of the legal "norm." Furthermore, Correas criticizes the leap from the mercantile legal form to the legal form in general. Unlike the Soviet jurist, Correas also notes that in the USSR, the law, far from extinguishing itself, had become more robust, which is to say that planning does not tend to extinguish the legal form.[19]

This is because, among many other factors, in the USSR, the prevailing "socialist legality" was presented as the proletarian version of bourgeois legality. The theoretical father of this approach was Adrei Vyshinsky, Stalin's prosecutor, who defined it as a State apparatus capable of guaranteeing social stability, i.e., the policy of socialism in a given country. He considered a State and its repressive machinery necessary, but he did not broach the question of changes in the relations of production, the elimination of the commodity

[18] We emphasize this book not only for being Correas' first, but because he outlines practically all the theories to be later developed in greater depth in the 1990s. It is already possible to catch sight of his concerns about teaching law in the university and how it atrophies the critical potential of young lawyers. Criticism of legal ideology is only just explored, but he already poses the question as to how it operates. Democracy is another important theme that appears in the book, the direct corollary to human rights. In the first pages of the book, he examines the question regarding law's status as science, which entailed the problematization of the concept of "Truth." The theory of discourse and language is also present. The only concern that did not appear was that of legal pluralism and, therefore, that of indigenous and non-State legal systems. Curiously, *La Ciencia Jurídica* is one of his lesser-known works and, consequently, one of the most underappreciated.

[19] Correas, *supra* note 5 at 19-22.

form and the law of value, or workers' democracy. Rather, everything was aimed at strengthening military force, the repressive apparatus, and high-level bureaucratic positions. In the end, it was no more than a collection of ideologies to justify Stalinist bureaucracy, which served to impose the legitimating idea that his program was identified with a socialist one. In this case, by assigning a colossal role to the State, they sought to shield their own privileges.[20]

I ought to make an observation here. The Soviet Union's bureaucratization process was precisely the opposite of what Pashukanis believed necessary for the refoundation of property. Instead of democratizing production and eliminating the specialized bodies that dictated production, workers' democracy was liquidated and substituted with bureaucratic bodies that grew increasingly distant from the working masses and, consequently, gained greater privileges.[21] In sum, the material and cultural conditions that would allow the extinction of the law and the State were defeated, leading to Pashukanis' execution and the "decree" of the "error" of his ideas, as though the truth could still be issued by decree.[22]

Returning to *La ciencia jurídica*, Correas begins with the idea that "we are speaking here of the exploitation of the work of others, monopoly accumulation, wars led by corporate moguls."[23] From the outset, I can observe his concern for the division of labor and imperialism, two classic subjects of Marxism. The division of social classes is based on the dispossession of the better part of the population of means of production, depriving them of a means of survival. All the majority has is their labor power, their biological and intellectual body. This forces them to interact with other human beings —in a state of subordination— if they want to obtain daily sustenance and additional objects needed to live.

IV. Constructing Categories for Law from Capital

By this point, Correas' reasons for adopting Marxism seem obvious, but how can this position in *Capital* be epistemologically grounded to create new categories? One possible response is that Correas' position is based on the analysis of political economy which is, at the same time, an expression of class, a manifestation of the revolutionary workers' movement, aimed at the historic

[20] Víctor Romero Escalante, *De la legalidad revolucionaria a la legalidad 'socialista' de Stalin*, Ideas de Izquierda, (Nov. 2, 2021, 11:05 AM), https://www.laizquierdadiario.mx/De-la-legalidad-revolucionaria-a-la-legalidad-socialista-de-Stalin/.

[21] Evegny Pashukanis, *Os dez anos de o estado e a revolução de Lenin*, in A Teoria Geral Do Direito e o Marxsimo 299 (Lucas Simone trans., Sudermann/ ideas baratas 2017).

[22] On the process of counterrevolution in the Soviet Union *see*: Víctor Serge, Memorias de mundos desaparecidos (1901-1941) 30-50 (Tómas Sogovia trans., Siglo XXI, 2002) (1951).

[23] Óscar Correas, La ciencia jurídica 9 (Universidad Autónoma de Sinaloa, 1980).

transformation of the world. If we accept the postulates of *Capital*, we must also accept their political and legal consequences.

To that regard, Karl Korsch noted that the fetishistic nature of economic forms and the objectification of human relations change the phenomena of society and, with them, their perception. For Korsch, bourgeois science is situated simply and dogmatically in the terrain of capitalist society, uncritically accepting its essence, its objective structure, and its laws as the immutable foundation of "science."[24]

For these reasons, Marxist Critical Legal Theory does not fit within the boundaries of "science." Rather, it supersedes them, obliterating the dominant categories and proposing new ones. This is precisely because the movement of history, contradictory and always in motion, constitutes new social phenomena that remain tied to the logic of capitalism. Thus, all that remains is to generate new concepts that fundamentally seek to modify reality, and not just to explain it. As such, it is both possible and necessary to use Marxism to problematize law.

Correas states that the construction of the legal category of "person" should be based on the concept of "exchange" of "objects," with reference to the concept of "commodity" and the circuit of commodity-capital.[25] In the introduction to the *Grundrisse*, Marx contends:

> Hegel, for example, correctly begins the Philosophy of Right with possession, this being the subject's simplest juridical relation. […] Thus, in this respect it may be said that the simpler category can express the dominant relations of a less developed whole, or else those subordinate relations of a more developed whole which already had a historic existence before this whole developed in the direction expressed by a more concrete category. […] As a rule, the most general abstractions arise only in the midst of the richest possible concrete development, where one thing appears as common to many, to all.[26]

Marx returns to these same methodological guidelines in *Capital*:

> The wealth of those societies in which the capitalist mode of production prevails, presents itself as "an immense accumulation of commodities," its unit being a single commodity. […] Exchange value, at first sight, presents itself as a quantitative relation, as the proportion in which values in use of one sort are exchanged for those of another sort, a relation constantly changing with time and place.[27]

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[24] Karl Korsch, Tres ensayos sobre el marxismo 7 (Ana María Palos trans., Era, 1979).

[25] *Id.*, at 19.

[26] Karl Marx, Elementos fundamentales para la crítica de la economía política (grundisse) 20, 25 (Pedro Scaron trans., Siglo XXI, 1973) (1939).

[27] Karl Marx, El capital, V. I 125-126 (Pedro Scaron trans., Siglo XXI, 1982) (1867).

In this way, the idea of "equivalence" —in addition to being decisive for understanding the legal form —appears for the first time in Correas's work. In his book, *Introducción a la critica del derecho moderno (esbozo)*, the concepts of "circulation" and "equivalence" emerge fully developed. According to traditional doctrine, private law, is an assemblage of rules governing individuals. In a distinct sense, our jurist states that "private" refers to a level of law in which the phenomenon of circulation appears. In this sense, I can say the same of agrarian law, mining law, criminal, labor law, etc., as all imply the circulation of commodities.[28]

The essence of law is distinct from the essence of positive law, just as the essence of voluntary exchange is distinct from its appearance.[29] Here I find the seeds of the concepts of "effectiveness" and "efficiency" that Correas would further develop in his writings on the sociology of the law. Hence, Correas considers it legitimate to construct a sociology of the law grounded on Marx's *Capital* and *Grundrisse,* but without recourse to the texts of the revolutionary Tréveris,[30] and largely basing himself on Hume to analyze the legal form and to criticize Marxists.[31,32]

The form constitutes concrete existence, the underlying matter. In Critical Legal Theory, unity is indispensable. If we separate law from the economy, we have no way whatsoever to account for the legal phenomenon in all its fullness. The idea of form is what allows this unity to come into being: law is a social form, a form of social relations that permits us to distinguish, within the legal form, ways of mandating, permitting, or prohibiting certain behaviors.[33]

It should be mentioned that civil suits are disputes between persons over contracts that put objects into circulation. Equivalency exists as the free will of said persons and therefore serves as a reflection: State intervention is required when the equivalency is violated, in the form of the court. Therefore, the State —at the level of commodity circulation— has two essential functions: to protect equivalency and to guarantee circulation. When commodities or money come to a stop, the State mobilizes itself to reactivate the cir-

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[28] Óscar Correas, Introducción a la crítica del derecho moderno (esbozo) 89-90 (Universidad Autónoma de Guerrero, Universidad Autónoma de Puebla, 1982).

[29] Correas, *supra* 23 note at 46.

[30] Óscar Correas, *Teoría sociológica del derecho y sociología jurídica (parte I)* 7 Crítica Jurídica. Revista Latinoamericana de Política, Filosofía y Derecho 100 (1987).

[31] *Id.,* at 101.

[32] By 1988, Correas no longer believed —at least in the short term— that revolution in the classical sense of the word would come to Latin America, declaring that "our great task is the construction of democracy." This statement appears quite in line with the social climate of the period. *See* Óscar Correas, *Teoría sociológica del derecho y sociología jurídica (parte II)* 8 Crítica Jurídica. Revista Latinoamericana de Política, Filosofía y Derecho, (1988).

[33] Óscar Correas, *supra* note 5 at 9-16.

cuit.[34] This is why crime rises, at least in lower courts. An attack against the reproduction of capital is an attack against the heart of legal rules.

In issue No. 0 of the *Revista Crítica Jurídica* in 1983, Óscar Correas bolsters this idea, considering property a later moment, an element posed by exchange. If he recognized the need for legal property, it was precisely because of the prior existence of exchange and, therefore, of equivalence. When this situation is obscured by affirmations that "property" is the foundational institution, we fall into a legalistic idea specific to the apologetic positions of bourgeois society, like that of Kelsen.[35]

It is interesting to note that in this stage of Marxist critique of political economy, Correas levels harsh criticism against Hans Kelsen, yet he also expresses sympathy for the Austrian jurist. This may be explained by the fact that the revolutionary struggle of the 1970s was still in recent memory. Furthermore, the study of law from a Marxist perspective was still influenced by Pashukanis, who directed devastating criticism against Kelsen, who naturally responded in kind.

To explain the emergence of the legal relationship, Correas turns again to *Capital*, which explains that in order for objects to relate to each other as commodities, owners must relate to each other as persons whose will resides in said objects. Through a mutual act of free will, they appropriate the alien commodity by alienating their own, and must recognize each other as private proprietors. This legal relationship, under the form of a contract, is a relationship between wills in which the economic relationship is reflected.[36]

It appears that the idea of the "truth" is quite present for our Marxist jurist; he considered the world to be structured in a certain way, conditioned by the capitalist form of production. The problem of language as a means of organizing the world and of legitimating violence are still in an embryonic state, although quite latent. Evidence of this is seen in 1980, when he foresees in his book *La ciencia…* problems like: "[Legal] technique is a specialized procedure […] it is a term that we should use in different senses. The problem is that we have no alternative words."[37] This concern for the study of language is latent and appears from this early stage of his thinking, but it does not become central to his discourse until a certain Marxism—that of the Stalinist USSR—enters its decline.

In *Introducción a la crítica…* the way of engaging the legal form becomes evident, and the directive is decisive:

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[34] *Id.,* at 92.

[35] Óscar Correas, *La concepción juridicista del Estado en el pensamiento marxista* 0 Crítica Jurídica. Revista Latinoamericana de Política, Filosofía y Derecho 3, (1983); *See* first footnote in the first chapter of Correas, *supra* note 28 at 337.

[36] Marx, *supra* note 27 at 103.

[37] Correas, *supra* note 23 at 17.

> The theory of law, in the critical sense, should begin at the same point as the critique of political economy and of capitalist society; that is to say, it should begin with the difference between use value and exchange value. This distinction permits the establishment of a theoretical space between "the social" and "the natural." Immediately after establishing the difference between use value and exchange value, the critique should abandon the former and focus on the analysis of value.[38]

The same should be done in the case of Critical Legal Theory; private law is only concerned with exchange value.[39]

This idea is founded on an elemental consideration for Correas: the distinction between essence and appearance in social phenomena. The problem resides in the fact that social reality in general is not what we initially perceive it, to be; phenomena do not disclose their full ontological potential. It is not a "lie" or a "not-being," but rather that the most superficial part of it does not express all the richness of the content in question. For the author, exposing appearances is not a matter of an inversion of appearances, but rather of signaling the inversion of reality. Reality is inverted in capitalist society because the machine dominates the worker rather than the other way around.[40]

To conclude, Correas is categorical when he writes that:

> Óscar del Barco shows in his aforementioned work that the matter is methodological *only in appearance;* in "essence" the matter is political, and it manifests precisely as the apparently apolitical nature of science. Classical economics, principally Smith and Ricardo (which we could compare to our classical law), is comprised of analyses of surface phenomena without warning that it engages with the *apparent form* and not with its essence. The same occurs with the legal positivists, Kelsen included. The Marxist position, as del Barco explains, consists in declaring that classical economics was incapable of arriving at the essence of the phenomenon, because that implied an imminent critique of society; the same occurs in the case of the legal sociologists; exposing the appearance means revealing the very society that they attempt to justify. And in the case of Kelsen, although much more so, the capitalist apology consists in denying any link between the study of the law and the content of the law.[41]

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[38] By 1987, he insists that, methodologically, the root of the matter is found in the concept of "value" as a social relation. Nevertheless, Correas already expresses doubts regarding this principle, writing, "[…] if Marx believed that his writings were free of political subjectivity, if he believed in the Truth, there is no doubt that he was wrong." At the same time, however, he states that it was the best starting place that he had. In other words, each step towards Kelsen is a step away from a certain kind of Marxism. *See* Óscar Correas, *Kelsen y las dificultades del marxismo* 5 Crítica Jurídica. Revista Latinoamericana de Política, Filosofía y Derecho 56, (1987).

[39] Correas, *supra* note 28 at 26-27.

[40] Correas, *supra* note 28 at 36-38.

[41] Correas, *supra* note 28 at 39.

This is what is known in Marxist *argot* as "alienation." The legal form is alienating, or, to put it another way, it hands over the natural and intellectual power of human beings, the singularity of the subject, to an alien force. The objective creation of materiality—i.e., the creation of concrete labor— is no longer the integral realization of the person, but the production and reproduction of the system itself. The individual registers no direct benefit beyond continuing to live and breathe.[42]

This division between essence and appearance originates in the social division of labor. Labor is the sum of all efforts, practical and theoretical, that a human being must employ to survive. This process combines physical and mental activity, and this human energy is objectified in the product of labor. The human being objectifies themselves in the thing they have created, but this object appears to have an existence of its own.

This thoughtless, almost unconscious repetition generates a non-problematization of the act itself, which is coerced by necessity, i.e., the obligation to continue engaging in the same activity in order to continue reproducing human life. Later, the division of labor is accentuated when certain members of the community appropriate the basic means of production, through superior technical knowledge, violence, etc. The social whole can only function if each member carries out their specific task. Thus, the idea of "general interest" begins to prevail in the consciousness of the subjects in the community. The social body can survive without one member, but that member cannot survive without the social body.

Why, then, is there a difference between essence and appearance? Why does the essence, the significant part, not present itself to us plainly? By unconsciously distancing themselves from the cause of this division, human beings began to attribute the social consequences of exploitation to forces outside them. The essence lies in the community and its reproduction, but instead of seeking it there, they turned to relations external to the social body. The essence/appearance dichotomy is nothing more than a split between the driving force of society (the social division of labor) and the mental representation of that force, which is generally attributed to external and autonomous powers.[43]

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[42] Víctor Romero Escalante, *Programa de trabajo mínimo para una lectura de la forma jurídica desde Marx* in Debates actuales en la crítica jurídica latinoamericana 246 (Editorial Torres Asociados, 2019).

[43] According to German philosopher Hans Barth, the world's division into a secular world and a philosophical or religious world originates in the disassociation of the relationship between being and consciousness. This disassociation is itself, in a double sense, a consequence of the social division of labor. That is to say that the separation of intellectual and manual labor prompts consciousness to create its own object: the world of spiritual essence, of ideas, which appears as the driving force and the purpose of history and of society. The division of labor conditions the birth of this strange power over man. *See* Hans Barth, Verdad e ideología 114 (J. Bazant trans., Fondo de Cultura Económica, 1951) (1945).

The causes of the social division of labor are unknown to the subject because those controlling production create an entire ideological discourse[44] to legitimize existing injustice. The oppressors consider their privileged position natural, but they need to convince the oppressed that no better world is possible. Thus, they develop sophisticated discourses and practices to maintain the existing order. In sum, the social division of labor creates the division between essence and appearance.

V. Towards the First Correas

It would seem that only in a society founded on egoism —in the sense of survival conditioned by the (artificial) scarcity of the means of subsistence (for the majority)— it is possible for law to exist with its present characteristics. The First Correas appears to insist on this idea. Exploitation and accumulation are the underlying rules of the current socio-legal system. If that were not so, it would be impossible to understand how the world has more and more legal rules, especially those concerning human rights, and yet those laws are violated without any consequences; or why is it that systems that seemed quite solid, like that of Chile, totter after only two months of social mobilizations because street protests revealed how unjust and predatory the model is for the working class and for the environment, while a rapacious minority continues to enrich itself.

One theme that reinforces our discussion of a First and Second Correas is that of the extinction of the State. Between 1980 and 1983, our jurist believed the following: "[…] That therefore it is possible —and necessary to pursue— for modern law to be totally eradicated from a society in which the production process no longer exists solely for the profit of the owner of capital."[45] Correas also criticized the USSR: "[…] This is to say that Soviet political practice, far from nearing its objective of the extinction of the State, moves in the direction of the concretization of an ever-more powerful State that continues, despite being 'socialist,' to severe civil society from the apparatus of political decision-making."[46]

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[44] Engels conceives ideology as "a process accomplished by the so-called thinker" (for the most part), "but with false consciousness. The real motives impelling him remain unknown to him, otherwise it would not be an ideological process at all. Hence, he imagines false or apparent motives. Because it is a process of thought he derives both its form and its content from pure thought, either his own or that of his predecessors. It works with mere thought material which he accepts without examination as the product of thought, he does not investigate further for a more remote process independent of thought…" *See*: Carlos Marx & Federico Engels, Correspondencia 635 (Wenceslao Roces trans., Ediciones de Cultura Popular, 1978) (1951).

[45] Correas, *supra* note 23 at 78.

[46] Correas, *supra* note 5 at 203.

These quotes show that Correas was following the position of Marx,[47] Engels, Lenin, and Pashukanis, who believed that the configuration of society responded entirely to the necessities of capital, and that therefore, the only truly viable way to modify the manner in which human beings relate to one another and to nature is through a revolution of the State (law), which is to say, by destroying it.

This is so because the contradiction between value and labor will be entirely overcome under communism. If we follow Pashukanis, who understood law as a relationship between proprietors of commodities, we can see that the mainstay of his definition of law is based on the exchange of commodities, i.e., the exchange of values (accumulated labor), whose antinomy is, to put it briefly, placing the commodity the center of the relationship instead of (as it ought to be) the subject. Law would lose all sense, given that under capitalism, the needs that are met are those of capital, by valorizing value itself, instead of meeting the needs of the mass of humanity. From this, I can conclude that the relationship that brings law to life would cease to exist.

A transitional society would continue to conserve the form of the exchange of equivalents, which would also conserve law since, according to Pashukanis himself, "law can only consist, by nature, of the application of an equal measure." Given the form of equivalent exchange, law and State power could endure for a time, even once class divisions ceased to exist. As Pashukanis puts it (following Marx), the disappearance of law and with it, the State, only happens once "labor is no longer a mere means of life, but a vital necessity. In conclusion, once the relation of equivalence is definitively overcome."[48]

Correas perceives the possibility of the State's extinction as real, which is to say that, revolution is a relatively upcoming and possible scenario. In 1980, the Sandinista Revolution had just triumphed, opening an offensive for the arrival of socialism in Latin America, while, on the other side of the planet, the USSR had proven itself a nearly invincible power, offering hope for a better world. In Mexico, struggles for democracy had forced the PRI regime to initiate a feeble opening up to democracy. Thus, Marxist studies worldwide enjoyed good health, especially those devoted to Latin America.

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[47] There is debate over Marx's attitude on this topic. Some consider that he initially advocated for the "extinction of the State," but that he was later inclined towards its "transformation." We are inclined towards the first option, because upon following not only Marx's theoretical activity but also his revolutionary activity, he always sought a fundamental change of society, to commence "the history of humanity" and leave behind its "prehistory," which is only possible by destroying the existing social order.

[48] Evgeni Pashukanis, La teoría general del derecho y el marxismo 41-42 (Carlos Castro trans., Grijalbo, 1976) (1924).

It should be emphasized that Correas also specifies "modern law,"[49] which indicates he conceived it as the "law of the exchange of equivalents and subjective law."[50]

A recurrent topic among legal theorists is the debate over whether "law" has existed at other historical moments. I have no intention of opening this discussion, but merely to state that Marx's ideas about the mutability of social forms are present in the problematization of law. The First Correas pays tribute to these ideas. It is noteworthy that the topic does not stand out in *Introducción a la crítica…* One possible explanation is that, as the book followed the expository method of Volume I of *Capital*, which does not mention the State, Correas respected that argumentative logic and did not broach the subject either.

His attitude had changed by 1987. In *Crítica Jurídica,* the author declared that modern law is not necessarily an instrument of class domination. The extinction of law and the State is only possible in terms of the philosophy of history, more like that of Engels than that of Marx. At the same time, he indicates that man's ethical nature and the fact that some men impose themselves over others has existed in society since its inception, though he astutely accepts that revolutions are not consummated in parliaments, but in constituent assemblies.[51]

What prompted this change of position? To begin with, we find ourselves at a moment of transition. The rupture is not only theoretical but political. As mentioned, the social struggles worldwide were facing clear setbacks or, to put it plainly, defeats at the hands of imperialist governments and their allies. Undoubtably, this situation influenced most social thinkers of the time. For Latin America, the reality was (and is) quite difficult: the better part of guerilla movements were in decline, and neoliberal policies had been imposed —sometimes by force, in other cases, smoothly implemented— and the USSR was on the verge of collapse.

The return of most South American nations to democracy[52] posed the question of how to make revolutionary Marxism compatible with a liberal institution like democracy. This quandary was resolved in favor of political liberalism, which essentially contradicts Marx. The theoretical studies of the

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[49] In 1986, Correas recognizes that the idea of the law as a social phenomenon and subject to disappearance is congruent with Marx's logic and thought, though it is possible by then to identify a certain distancing from this contention. *See* Óscar Correas, *Kelsen y Marx: de la ciencia a la filosofía* 4 Crítica Jurídica. Revista de Política, Filosofía y Derecho 105, (1986).

[50] Correas states the following: "The modern world is an immense arsenal of commodities, and these are immediate units of *use value* and *exchange value*." Correas, *supra* note 23 at 25.

[51] Correas, *supra* note 38 at 62-69.

[52] Correas had already begun to pose the question of democracy in 1977, together with the role that lawyers should play. He would return to this subject with *gusto* in 1990. *See* Óscar Correas, El derecho y las luchas democráticas (Universidad Autónoma de Puebla, 1977); Óscar Correas, La democracia en la UAP (Universidad Autónoma de Puebla, 1990).

law found a method in the theory of argumentation with which to legitimize themselves before society; as the idea of the law's scientific nature is unable to convince most people to voluntarily follow legal rules, they must be persuaded with "reasons," a task given to legal argumentation. Incidentally, over time, achieving that objective has proven impossible, not because of poor arguments, but because these arguments cannot offer a solution to hunger, to war, and to the injustices of the capitalist system. To the contrary, they justify many of the most damaging decisions against the dispossessed classes.

Already attracted to the study of language and discourse, Correas used them as a means to continue his criticism,[53] somewhat distant from certain Marxist political positions but not without the theoretical and emancipating knowledge of the theory of value and class struggle. In this sense, the best homage that we can give this author is to go back to his ideas, discuss them, and problematize them. I cannot shirk from frontal but fraternal debate, or we risk falling into dogmatism and the cult of personality. I believe that turning Óscar Correas into a cold and inoffensive idol would go against the Marxist tradition. No, his theory should serve to transform the world and be criticized when necessary.

VI. Conclusions

To briefly conclude, one important point is that the division between the "First Correas" and the "Second Correas" is not as clear as it may have seemed initially in epistemological terms, as the author had already explored the topics he would later develop with intellectual vigor in his early writings. Nevertheless, there are sufficient elements to claim that the distinction remains valid, at least on some topics: understanding the author's intellectual evolution, the concepts that are key to his critical legal thought, and the reasons these were abandoned or fortified over time.

However, what really constitutes the difference between the First and Second Correas is his political position. On this issue, the division is clear: the First defends fundamental elements of revolutionary Marxism, while the Second rejects several such postulates. I can see the paradigmatic example in the theory regarding the extinction of the State, in which Correas opts for the impossibility of the extinction of law (and the State).

[53] The Berlin Wall, a symbol of the dissolution of the socialist camp, fell in 1989. The 1990s were characterized by bourgeois triumphalism, the end of history. To speak of Marxism or revolution was for anachronistic fools who did not understand the world they lived in. Without a doubt, those were difficult years for the Left, which was largely demoralized in its defeat. Nevertheless, the capitalist crises that produce misery and pain are also the midwives of new movements that, over time, acquired the consciousness of struggle against the economic and social system. Furthermore, new generations, unburdened by the defeats of the past, are returning to the idea of "social revolution."

The concepts of "equivalence" and "exchange" are therefore integral parts of Correas' Marxist Critical Legal Theory. Without them, it is impossible to understand the internal dynamics of the legal form. At the same time, however, this Latin American intellectual casts doubt on the Marxist maxim on the eventual extinction of law.

As has been said repeatedly, the specific political conditions of the time had a decisive influence on this political and theoretical turn. The defeat of the international workers' movement and the mutation of USSR bureaucracy into a new bourgeoisie, together with the emergence of new social movements, shaped his thoughts from 1990 onwards. We may or may not agree with the conclusions to which the author arrived at that stage. From our point of view, the First Correas exhibits his full critical potential when he makes use of the critique of political economy because he seeks radical social transformation. Nevertheless, his thoughts are not static, but open to debate and self-criticism —most importantly, perhaps, in the face of defeat. As a result, all that is left for us to do is to follow through with both practical and theoretical action to the final consequences.

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LEGAL PROCESS AUTOMATION AS A TOOL FOR ACCESS TO JUSTICE: A PROPOSAL TO RESTRUCTURE FIRST CONTACT INTERVIEWS IN THE FEDERAL INSTITUTE OF PUBLIC DEFENDERS

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Abstract: *This article argues that digitalization (which includes legal process automation) is a tool for bridging the gap of access to justice and improving operational performance through features that are scalable, standardized, asynchronous and accessible. Firstly, the article provides an introduction to digital justice and technology use in legal services, including subsections about the countries that are leading the way in digital justice. This article also develops an implementation proposal, using Mexico and the first-contact interview of the Federal Institute of Public Defenders (FIPD) as a possible example of legal process automation. Thus, the third section offers background information on access to justice in Mexico and the FIPD, as well as some ideas on the complexities of a first contact interview, and what elements should be taken into account when automating this process (software, databases, plain language and design). The final section presents the interview prototype through which the principles and ideas discussed in the previous sections are put into practice, ultimately demonstrating the feasibility of the proposal.*

Keywords: *Legal process automation, access to justice.*

Resumen: *Este artículo argumenta que la digitalización (la cual incluye, la automatización de procesos legales) es un medio para cerrar la brecha del acceso a la justicia y mejorar el desempeño operativo a través de herramientas que son escalables, estandarizadas, asíncronas y accesibles. En primer lugar, el artículo proporciona una introducción a la justicia digital y al uso de tecnología en los servicios legales, incluyendo subsecciones específicas sobre los países líderes en justicia digital. El artículo también presenta una propuesta de implementación,*

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usando México y la entrevista de primer contacto del Instituto Federal de la Defensoría Pública (IFDP) como ejemplo posible de automatización de un proceso legal. En consecuencia, la tercera sección ofrece información contextual sobre el acceso a la justicia en México y el IFDP, así como algunas ideas sobre la complejidad de una entrevista de primer contacto y qué elementos se deben tomar en cuenta al automatizar ese proceso (software, bases de datos, lenguaje accesible y diseño). La última sección presenta el prototipo de entrevista, a través del cual los principios e ideas discutidos en las secciones previas son puestos en práctica, demostrando la factibilidad de la propuesta.

Palabras clave: *Automatización de procesos judiciales, acceso a la justicia.*

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I. Introduction

The COVID-19 pandemic has been a loud wake-up call for legal professionals around the world. Indeed, justice reform in many countries was long overdue before the pandemic. However, the stress on justice systems derived from long lockdowns during most of 2020 has magnified problems related to backlogs, delays, and access barriers. Mexico is certainly one of those cases in which the pandemic crippled for the most part the government's capacity to continue delivering public services, including justice and other public legal services.

With that context in mind, this article argues that technological improvements can further access to justice through legal process automation and digitalization, which will translate into more efficiency, better data and better user experience. The first part analyzes the experience, promises and perils of technology implementation in the provision of public legal services, including three case studies on best practices. The second part hashes out the situation of access to justice in Mexico and the mandate, structure and resources of the Federal Institute of Public Defenders (hereinafter, FIPD), which is the institution selected for prototype development. The third part explains the importance of first contact interviews as the best moment to execute an efficient and effective triage because they are the first contact with users/citizenry and the welcome point for users. The fourth part explains step by step how an automated interview would look like, along with an internal triage proposal.

Although this article focuses on the FIPD for purposes of exemplification, the ideas put forward are useful and relevant for any organization that provides legal services. Overall, the point is that well implemented technological improvements are a way not only of guaranteeing the continuity and innovation of public services, but also a way of helping crystallize access to justice, to legal counsel, and to the realization of human rights and liberties in general.

II. Process Automation and Technology in Public Legal Services

Most things in life are a process. On a daily basis, we have to follow a series of steps to achieve different results from everyday tasks (like getting to work or school, grocery shopping, ordering take-out) to more sophisticated endeavors (like coding software, performing a surgery). The law is not that much different in this regard, as it is full of procedures and procedural rules that are necessary to achieve results (like signing a contract, filing a suit, getting evidence admitted), but lawyers are not used to see them from a performance perspective and how they can be digitalized for better service delivery.[1]

[1] Deborah Rhode & Scott L. Cummings, *Access to Justice: Looking Back, Thinking Ahead*, 30

Thus, this section starts with some introductory ideas on digital justice and legal process automation to understand the logic behind proposing this solution as a means for access to justice. Secondly, it will elaborate on specific countries that are leading the way in justice digitalization in order to demonstrate that these are changes being successfully implemented in different jurisdictions.

1. *Introduction to Digital Justice*

Digital technology has improved our lives considerably, although the legal sector has been a late adopter of digitalization compared to other sectors. There is, however, a silver lining to the extent that technology adoption in the legal industry is continually increasing and bringing clear benefits.

In private practice, tech adoption was sparked in the aftermath of the 2008 financial crisis as corporate clients demanded more efficiency, predictability, and alternative fee arrangements from law firms.[2] This forced lawyers to view the delivery of legal services from a more operational perspective, developing a field known as legal operations.[3] In this evolution, the publication of the seminal paper by Clifford Chance on the application of continuous improvement to the delivery of high-end legal services was a pivotal moment.[4] Using process improvement methodologies, digitalizing, measuring and monitoring legal processes brings value and allows to further innovate. Nowadays, there is a growing market on legal tech that is expected to keep growing considerably.[5]

These developments had made little impact in the realm of public law or public legal services. As Hartung et al. bluntly state it: "Courts try to manage 21st-century complexity with 19th-century tools such as paper file keeping."[6]

The Georgetown Journal of Legal Ethics 485-500, 488, (2017), https://papers.ssrn.com/abstract=3045369 (last visited Aug 10, 2022).

[2] Gibson Dunn, *How the global financial crisis changed the legal profession*, The Lawyer (2017), https://www.thelawyer.com/global-financial-crisis-changed-legal-profession/ (last visited Jul 22, 2022); Braun, Amanda, *Law-Gile™ an Evolution*, Project Management Institute (2015), https://www.pmi.org/learning/library/law-offices-choosing-agile-approach-9925 (last visited Mar 25, 2022).

[3] What is Legal Ops, CLOC, (2020), https://cloc.org/what-is-legal-ops/ (last visited Mar 23, 2022); ACC Legal Operations Maturity Model 2.0, Association of Corporate Counsel, https://www.acc.com/maturity (last visited Mar 23, 2022).

[4] Clifford Chance, Applying Continuous Improvement to high-end legal services, 10 (2014), https://www.cliffordchance.com/content/dam/cliffordchance/About_us/Continuous_Improvement_White_Paper.pdf (last visited Aug 14, 2022).

[5] Flaherty, Casey & Um, Jae, *Legal Technology: Why the Legal Tech Boom is Just Getting Started*, Nasdaq (2021), https://www.nasdaq.com/articles/legal-technology%3A-why-the-legal-tech-boom-is-just-getting-started-2021-10-11 (last visited Jul 22, 2022).

[6] Hartung, Dirk et al., The Future of Digital Justice 30, at 4, (2022), https://legaltechcenter.de/en/studies.html (last visited Aug 1, 2022).

Susskind made a similar argument that not only courts, but that more broadly the legal profession and education are stuck in the 19th and 20th centuries, totally ill-equipped for the needs and challenges of our century.[7] Arguably, these statements are applicable to the whole justice system and public services in general.

The Covid-19 pandemic has been the catalyst to modernize, improve and digitalize public services in the same way that the financial crisis did for the private sector.[8] Undeniably, courts worldwide are jumping into remote hearings and different versions of digitalization.[9] Digitalization and legal process automation are necessary stepping stones for implementing more sophisticated technology, like analytics, document assembly or even artificial intelligence (AI), in the legal sector. It is impossible to evolve from paper trail and spreadsheets to AI without improving data and processes.[10]

The main logic behind offering online justice stems from both the lack of access to justice that billions of people face around the world, but also from the inefficiencies and costs related to the way courts and tribunals around the world currently work.[11] According to the Commission on Legal Empowerment of the Poor, 4 billion people are excluded from the rule of law, perpetuating and exacerbating poorness and vulnerabilities.[12] Later, the World Justice Project estimated that 5.1 billion people face at least one of the following justice issues: they cannot obtain access to functioning justice institutions; they lack legal tools to protect their assets or access economic opportunities or public services; or they live in extreme conditions of injustice.[13]

In the Commission's opinion, legal empowerment is a key component of the solution to poverty, but one that is frequently overlooked,[14] and access to justice is one aspect of it, to the extent that it is a way to protect rights and interests.[15] In this regard, the 2030 Agenda for Sustainable Development,

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[7] Richard E. Susskind, Online Courts and the Future of Justice 14 (First Edition ed. 2019).

[8] Hartung, Dirk et al., *supra* note 7 at 10.

[9] Remote Courts, https://remotecourts.org/ (last visited Jul 22, 2022).

[10] Hartung, Dirk et al., *supra* note 7.

[11] William Roberts, *Digital Justice*, 34 Wash. Law. 18-23 (2019-2020).

[12] Making the Law Work for Everyone. Report of the Commission on Legal Empowerment of the Poor, 19-20 (Commission on Legal Empowerment of the Poor & United Nations Development Programme eds., 2008), https://www.un.org/ruleoflaw/blog/document/making-the-law-work-for-everyone-vol-1-report-of-the-commission-on-legal-empowerment-of-the-poor/ (last visited Aug 10, 2022).

[13] World Justice Project, *Measuring the Justice Gap. A People-Centered Assessment of Unmet Justice Needs Around the World* 45, 4-5, (2019), https://worldjusticeproject.org/our-work/research-and-data/access-justice/measuring-justice-gap (last visited Aug 10, 2022).

[14] Making the Law Work for Everyone. Report of the Commission on Legal Empowerment of the Poor, *supra* note 13 at 21-22.

[15] *Id.* at 26.

through Goal 16.3, recognizes the importance of rule of law and access to justice for development and for the fulfillment of other goals.[16]

Complementary to these facts, Katsh and Rabinovich also argue that to the extent that innovation and entrepreneurship bring new products and services, disputes around them will also increase.[17] Some of these disputes can be solved with the existing law, case law and legal doctrines, but some are in themselves creating new areas of law (for instance, personal data protection, cyberspace or cybersecurity) or even new avenues for dispute resolution.[18] Regardless of the substantive law, our legal processes and their execution to get justice done in this century are quite divorced from the speed and complexity of current technology and social interactions in general;[19] in other words, our processes and institutions are mostly outdated. In this context, digitalization (which includes process automation) is an avenue for solving problems to prevent, anticipate and solve disputes in a way that is equitable and accessible.[20] Gillian Hadfield also argues the many instances in which the law (substantive and procedural) is insufficient to address the challenges of the 21st century.[21]

Given the extent of the issue, Tashea's proposal on the scope of access to justice is right on point: "To foster access to justice means building connections to the justice system's physical infrastructure, like courts and prisons; its services, like legal aid or social benefits; or a remedy, including formal and informal resolution, like mediation."[22] This author proposes that justice should be conceptualized as a platform where state and citizens converge for exchanging information and getting services.[23] This view of justice beyond the physical space has also been extensively argued by Richard Susskind.[24]

Valid concerns exist that digitalization of public services will become a barrier for users that are not tech savvy or that lack stable connectivity or any connectivity at all, magnifying existing access gaps between the haves and not-haves. If telecommunication infrastructure is not good enough, it would make legal services haphazard and less accessible overall. These are very valid concerns when thinking how to innovate in the public service landscape,

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16 Naciones Unidas México, Sustainable Development Goal 16: Paz, justicia e instituciones sólidas, https://mexico.un.org/es/sdgs/16 (last visited Aug 10, 2022).

17 Ethan Katsh & Orna Rabinovich-Einy, *Digital Justice: Introduction*, 3 IJODR 102-124, 105-107 (2016).

18 *Id.,* at 109-112.

19 *Id.,* at 117-120.

20 *Id.,* at 105.

21 Gillian K. Hadfield, Rules for a Flat World: Why Humans Invented Law and How to Reinvent it for a Complex Global Economy (2017).

22 Jason Tashea, *Justice-as-a-Platform*, MIT Computational Law Report, 3, (2021), https://law.mit.edu/pub/justiceasaplatform (last visited Aug 3, 2022).

23 *Id.,* at 6.

24 Susskind, *supra* note 8.

and sadly, there are good examples on how this is not a theoretical possibility, given how some roll outs have happened,[25] and considering that connectivity worldwide is far from universal.[26]

Addressing these concerns requires building a bridge between high-level vision and low-level implementation, so that the details and specifics of digitalization do not derail the quest for better access to justice. Decision-makers must take into account that correctly planning and designing digitalization initiatives, considering account users' needs, are paramount for success. That being said, this is not an "all or nothing" dilemma because incremental technological implementation can and should be done menawhile, while or regardless of whether Internet infrastructure is improved.[27]

Additionally, in-person services can and should continue when they are necessary for accessibility or fairness reasons, but institutions must migrate to one workflow and one data-managing system instead of having two systems (digital and physical) coexisting.[28]

A final word of caution would be to choose wisely where to take the first steps towards digitalization and other tech initiatives. Experts agree that high volume and low stakes issues are the best place to start,[29] which means that criminal law or family law would be the last areas where innovation should disrupt. Furthermore, there are strong arguments avoiding virtual hearings in some cases or contexts where incommunicado detention and torture or mistreatment of detainees are rampant or prevalent.[30] Nevertheless, virtual hearings are just a small part of digitalization and tech in the justice system; some other aspects of digitalization could certainly be brought in, such as e-filing,

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[25] People & Power, *Online Justice*, AlJazeera, April 21, 2022, https://www.aljazeera.com/program/people-power/2022/4/21/online-justice (last visited Aug 10, 2022); Ramírez, Ramón, *En CdMx, abogados protestan contra sistema de citas en Poder Judicial*, Telediario: Comunidad, February 17, 2022, https://www.telediario.mx/comunidad/cdmx-abogados-protestan-sistema-citas-judicial (last visited Feb 21, 2022); Gómez Flores, Laura, *Protestan en el Poder Judicial de la CDMX por lentitud en resolución de casos*, La Jornada: Capital, February 14, 2022, https://www.jornada.com.mx/notas/2022/02/14/capital/protestan-en-el-poder-judicial-de-por-acuerdo-que-obstaculiza-los-casos/ (last visited Feb 21, 2022).

[26] Dann Okith, *New report suggests shocking state of global internet connectivity*, World Eco. Forum, (2022), https://www.weforum.org/agenda/2022/03/reliable-internet-unavailable-poorest-global-population/ (last visited Aug 10, 2022); Advancing Meaningful Connectivity: Towards Active and Participatory Digital Societies, A4AI (2022), https://a4ai.org/research/advancing-meaningful-connectivity-towards-active-and-participatory-digital-societies/ (last visited Aug 10, 2022).

[27] Richard E. Susskind, Online Courts and the Future of Justice 215-221 (First Edition (reprint) ed. 2021).

[28] *Id.*, at 219.

[29] Susskind, *supra* note 8 at 105, 202; Roberts, *supra* note 12 at 21; Daily Matters, *Shannon Salter, Chair at Civil Resolution Tribunal*, https://www.clio.com/podcast/shannon-salter/ (last visited Apr 7, 2021).

[30] Online Justice, *supra* note 26.

electronic case management, process automation, dashboards, performance monitoring, document assembly, and so on.

2. *Legal Process Automation*

For digitalization to fulfill its promise of better and more efficient public legal services, institutions must be aware of the different layers and aspects that technological implementation entail. At the high-level, institutions must develop a strategy that allows to set goals, priorities, technology solutions, and a path to get there. At a low-level, digitalization entails dissecting specific processes to quantify them, improve them, and then automate them; processes that are not correctly documented and cleaned up will most likely migrate their defects, bottlenecks and inefficiencies to their digital versions, hampering the benefits and return on investment of technology.[31] This piece focuses more on the low-level concerns towards digitalization and automation (using as example, an intake form), as will be explained in the following sections.

Legal processes can be studied as services, and under that perspective they can be analyzed, designed, redesigned and improved based on specific "business goals", just as any other service like hospitality, marketing or banking.[32] Different approaches are useful for process improvement, such as design thinking, lean, agile and six sigma, and their principles and methodologies can all be applied in the improvement of the design and implementation of the law. There are three reasons why improving legal services through the use of methodologies should be part of the discussion on digital justice and access to justice:

1. Process improvement and design thinking forces to think about legal processes from customer-centered or human-centered perspective, and when it comes to public services, we all benefit from that mindset.[33]

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[31] Shannon Salter: Chair, Civil Resolution Tribunal, Canada - Access to Justice and Technology Summit, (2019), https://www.youtube.com/watch?v=1YWMgpueDIM&list=PLCcQWZN2g5voDDJyGpwwKTMePEXZItW5O&index=6 (last visited Mar 5, 2021); Roberts, *supra* note 12 at 22.

[32] Catherine Alman MacDonagh, Lean Six Sigma for Law Firms, (2014); Linna, Daniel & Stephen Poor, *Ingrained Innovation: Creating a Resilient, Efficient Law Firm*, https://legaltalknetwork.com/podcasts/law-technology-now/2019/07/ingrained-innovation-creating-a-resilient-efficient-law-firm/ (last visited Mar 25, 2022); Hagan, Margaret, *Six Sigma as Law Redesign*, Open Law Lab (2013), https://www.openlawlab.com/2013/06/18/six-sigma-as-law-redesign/ (last visited Mar 24, 2022); You're Not Out of Order! Applying Lean Six Sigma To Law Firms, (2017), https://www.sixsigmadaily.com/applying-lean-six-sigma-law-firms/ (last visited Mar 24, 2022).

[33] Shannon Salter & Darin Thompson, *Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal*, 3 McGill J. Disp. Resol. 113-153 (2016-2017); Shannon Salter, *supra* note 32; Ronald W Staudt, *All the Wild Possibilities: Technology that Attacks*

This encompasses tools for project scoping, listening to customers and users, gathering information to address their needs and experiences, and piloting solutions before roll-out. Some complementary ideas on human-centered design will be developed on section 4, regarding plain language and interview structure.

2. Quantitative-oriented methodologies require establishing baselines and to define what data is required for monitoring and continuous improvement. This will be further discussed in section 4.1, regarding software and databases.

The documentation of a process and its improvement are the stepping stones for digitalizing and automating, which in combination allow to offer scalable, standardized, asynchronous and accessible services that benefit both overwhelmed legal aid institutions, and stressed users in the following aspects:

1) *Scalability*: Resources are always limited, and for most institutions significantly expanding personnel is prohibitive.[34] Public institutions and non-profits should look for solutions that allow them to reach the largest number of users with the least resources possible. The only way to scale up first contact interviews or intake is through digitalization and web-based services.
2) *Standardization*: Though most legal aid organizations may have a list of issues or questions to address during a first contact interview, fully standardizing first contact interviews make it possible to retrieve critical information in order to triage their cases (which is why forms are created in the first place).[35] Standardizing information is the first step towards building more robust data sets that allow further analysis for strategic planning, based on user demographics and case characteristics. Ideally, creating web-based solutions should also be coupled with creating more appropriate databases, rather than having fractured information in different hands, formats and sources.

   Electronic databases make centralization easier, instead of taking handwritten notes or even filling out separate electronic documents (like Word documents or PDFs) that remain scattered in local drives or paper files. This is also the only way of to generate a trove of data and metadata that would lead to the creation of deeper performance intelligence, as well as information for decision-making and smarter resource allocation, as will be explained later when the paper touches upon software

Barriers to Access to Justice, 42 Loy. L.A. L. Rev. 1117-1145, 1129-1130 (2009), https://digitalcommons.lmu.edu/llr/vol42/iss4/9/.

[34] Mexico is a good example on this as budget and personnel for public institutions have been drastically reduced in the past years.

[35] Staudt, *supra* note 34 at 1127-1128.

and data bases (sections 4.1 and 4.2). In sum, tackling variability is a crucial aspect of service and process improvement.

3) *Asynchrony:* Already under pre-pandemic circumstances, requesting legal aid entailed an investment of time and resources for users that is hardly justified. People would need to ask permission to skip work (in some of these cases, absorbing income loss), plan for childcare, pay for transportation, and invest at least a couple of hours to request legal aid in person.[36] Phone lines can certainly cut down some of those obstacles, but they still rely on fix service hours and on having personnel available to carry out a first contact interview.[37]

   Transitioning to a web-based automated interview cuts down most hurdles for users, with the added value of letting them contact legal aid organization whenever it is feasible. Individuals facing the challenges of the pandemic (homeschooling, home office, providing care for other relatives, running a household, and generally making ends meet) have even more limited availability for a first contact interview, and allowing them to request legal aid whenever it is most convenient for them will increase user engagement and satisfaction.

   From an institutional perspective, this also saves time for personnel (arguably, facing the same pandemic challenges in their households as the average citizen) that would not need to type down information from the user, spend precious time on menial administrative tasks (like photocopying or physically moving documents around), or even waste time waiting for walk-ins to arrive. Hopefully, this would allow them to work in more substantial tasks like legal analysis, case preparation and follow-up, communication with users, research, and the like.

4) *Accessibility*: Web-based options, for some of the reasons cited above, make services more accessible for individuals with schedule constraints, but they also do so for individuals who face mobility challenges due to sickness, age or location, and for individuals with disabilities. Designing services that fit the needs of those individuals, who are already vulnerable, is a testament to a true commitment on access to justice. If legal aid services are available for the widest array of cases and circumstances, access gaps start to close slowly. Indeed, phone lines and in-person assistance should always remain available, but web-based services allow to relief pressure from contact points that require human involvement, so

[36] Roberts, *supra* note 12.

[37] Phone lines and offices should always remain available for users that lack internet connection, are illiterate, cannot read or speak Spanish, are not tech savvy, or have any kind of disability that makes it impossible for them to use an automated web-based interview. In any case, personnel at call centers or offices should follow the same interview or script, feeding it to the same data base through a web session. This is what Richard Susskind calls the "two door" option, instead of running two parallel services (Susskind, *supra* note 8 at 219).

that they can serve better those who, for whatever reason, cannot access a website.

Digitalization and automation also reduce the costs of filing: keeping physical archives is actually pretty expensive because of the paper and equipment needed for printing, the space needed to keep a physical archive, and the added infrastructure that comes with it (temperature, humidity and light must be constantly controlled to keep paper in good state). In this regard, Mexico's General Law on Archives (article 2, section IV) establishes as a goal to "promote the use of information technologies to improve archive management,"[38] and recognizes as "archive" all documents produced by the authorities, regardless of the means or place in which they are saved or stored[39] (this includes digital interfaces); this law has also a special chapter on electronic archives.[40]

3. *International Best Practices*

This section will briefly address three specific examples on best practices regarding digitalization and digital justice, strengthening the point that technology (thoughtfully implemented) can really improve access to justice. These case studies are just a handful of examples, but numerous countries are implementing innovative initiatives to be noted.[41]

A. *Canada*[42]

Canada (British Columbia) is at the forefront of digital justice thanks to its Civil Resolution Tribunal (CRT), which has become an international reference for online justice and user-centered design.[43] Thus, this section only elaborates on this specific tribunal, not the Canadian justice system at large,

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[38] Ley General de Archivos [L.G.A] [General Law on Archives], as amended on April 5, 2022, art. 2-IV, Diario Oficial de la Federación [D.O.], 2022), https://www.diputados.gob.mx/LeyesBiblio/ref/lga.htm (last visited Sep 15, 2022).

[39] *Id.*, art. 4-III.

[40] *Id.*, arts. 41-49.

[41] Tashea, *supra* note 23; Remote Courts, *supra* note 10.

[42] This section is based on the author's doctoral dissertation (Patricia Villa Berger, *A Primer for Lawyers on Technological Implementation in the Legal Sector* [Unpublished doctoral dissertation], 2022).

[43] Susskind, *supra* note 8 at 98, 168; Lawyerist Podcast, *Online Dispute Resolution & Public Interest Design with Shannon Salter*, https://legaltalknetwork.com/podcasts/lawyerist-podcast/2018/01/157-online-dispute-resolution-public-interest-design/ (last visited Apr 7, 2021); Clio, *supra* note 30; Shannon Salter, *supra* note 32.

but it is worth mentioning that Canada has the 12th place (from 139 countries) in the WJP Rule of Law Index.[44]

The CRT, launched in 2016, is "an independent, quasi-judicial tribunal operating under the authority of the *Civil Resolution Tribunal Act*… [it is] Canada's first online tribunal, currently providing end-to-end dispute resolution services for strata property[45] disputes of any amount, small claims up to $5 000, motor vehicle personal injury disputes under $50 000, disputes with the government auto insurer regarding no-fault accident benefits, disputes with the government auto insurer regarding no-fault accident benefits, and disputes involving incorporated societies and cooperative associations."[46]

The CRT was envisioned from the outset as an online dispute resolution service,[47] taking inspiration from online dispute resolution mechanisms in the private sector, namely from PayPal and eBay.[48] It was designed from scratch, and that is sometimes easier than adapting a pre-existing system into a digital version. This does not mean that getting a new justice system up and running is an easy task: the CRT worked for five years in setting up its service before it opened its doors.[49]

The CRT offers three stages of service and information for its users, namely self-help tools, negotiation and mediation, before adjudication of cases by the tribunal members for a final decision. All materials (website, forms, letters,

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[44] World Justice Project et al., The World justice project: Rule of law index 2021. 62, (2021), https://worldjusticeproject.org/sites/default/files/documents/WJP-INDEX-21.pdf.

[45] In British Columbia, strata property includes condominiums, but also other kinds of property can be strata too, such as single-family homes in bare land strata, marinas, stables, hotels, duplexes, townhouses, restaurants, retail spaces, and others. A property is not strata because of its type or looks, but rather by the way it is legally created. *See* Office of Housing and Construction Standards, *Strata Glossary - Province of British Columbia*, https://www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/more-help-and-support/glossary#:~:text=Condominium%20is%20the%20word%20used%20for%20strata%20properties,homes%20in%20bare%20land%20strata%20corporations%20%28%22strata-%20subdivisions%22%29. (last visited Mar 17, 2022); Office of Housing and Construction Standards, *Different kinds of stratas - Province of British Columbia*, https://www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/understanding-stratas/kinds-of-stratas (last visited Mar 17, 2022).

[46] Civil Resolution Tribunal, *2019-2020 Annual Report*, 37 1, https://civilresolutionbc.ca/wp-content/uploads/CRT-Annual-Report-2019-2020.pdf; Vehicle Accident Disputes, https://civilresolutionbc.ca/how-the-crt-works/getting-started/motor-vehicle-accidents-and-injuries/ (last visited Mar 17, 2022).

[47] Civil Resolution Tribunal Act, [SBC 2012] CHAPTER 25, (2012), https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/12025_01#part1 (last visited Apr 7, 2021).

[48] Clio, *supra* note 30.

[49] Lawyerist Podcast, *supra* note 44; Deep Dive Interview with Richard Rogers (Executive Director of Operations) into CRT's operations, (2021).

brochures, emails and even decisions) are written in plain language, based on the average reading level in Canada, which makes the substantive and procedural informational accessible for everyone.[50] In this respect, human-centered design is a toolbox that includes both online and offline tools, each solving specific problems and meeting users where they are.[51]

Regarding the back end, the CRT manages its workflow with Salesforce, which is a cloud-based software for customer relationship management, that was customized to fit the needs of the CRT, and other tribunals in British Columbia.[52] This decision was initially controversial, but ultimately the management of legal cases and the storage of that information is not fundamentally that different from other service relationships in the business context.[53]

One of the most important aspects of the CRT is offering asynchronous services, which allows individuals to take care of their cases at times that suit them, within fix deadlines to still guarantee speedy resolution,[54] instead of congregating on a fixed date with all the logistical challenges that this entails for the average citizen (such as commuting, loss of income, missing work or school, anticipating for child care).[55] Asynchrony is also promoted by Susskind, who considers that this feature should be an integral component of justice in the future when it comes to civil disputes, particularly low value ones, to bridge gaps in access to justice and the huge backlogs around the world.[56]

As part of its continuous improvement and transparency, the CRT reports the aggregate survey results in its annual report,[57] as well as monthly reports that include selected comments from users on what they liked and what could be improved.[58] While limited or imperfect, surveys produce much more information than what traditional courts or most legal services providers do to gather users' insights on their experience.

Satisfaction is slightly variable over time, but so far the figures are encouraging: 96% of users considers the staff to be professional, 94% agreed that CRT provides information for dispute resolution, 91% found the process accessible or easy to understand, 88% felt they were treated fairly.[59] How many

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50 Salter and Thompson, *supra* note 34 at 124.

51 Daily Matters, *supra* note 30.

52 Lawyerist Podcast, *supra* note 44; Rogers, Richard, *RE: [Ext] RE: Follow-up*, (2021).

53 Lawyerist Podcast, *supra* note 44.

54 Civil Resolution Tribunal, *Rules of the Civil Resolution Tribunal (effective May 1, 2021)*, 39 (2021), https://civilresolutionbc.ca/wp-content/uploads/CRT-Rules-in-force-May-1-2021.pdf.

55 Clio, *supra* note 30; Lawyerist Podcast, *supra* note 44.

56 Susskind, *supra* note 8.

57 Civil Resolution Tribunal, *supra* note 47 at 29-30.

58 Participant Satisfaction Survey - April 2021, (2021), https://civilresolutionbc.ca/participant-satisfaction-survey-april-2021/ (last visited May 27, 2021).

59 *Id.*

courts or tribunals around the world can report satisfaction rates this high or satisfaction rates at all? Not most of them today, but hopefully all of them in the future.

B. *United Kingdom*

The United Kingdom (UK), which has the 16th place (from 139 countries) in the WJP Rule of Law Index,[60] is a great example on investing in an ambitious and expansive vision of justice digitalization. Since 2016, it has invested more than a billion pounds into more than 50 projects aimed towards more efficiency and access to justice, involving 16,100 full-time staff, 341 courts and tribunal centers, and 4.4 million cases annually.[61]

To that end, *Her Majesty's Courts and Tribunals Service* is the agency of the Ministry of Justice that developed the reform program and it is also in charge of coordinating and reporting on the reform's progress.[62] More specifically, the reform program includes the following elements: automation of case management, widespread videoconferencing, new facilities for parties to file applications and upload documents, workforce changes, among others.[63]

Experts note three important elements in the UK's justice reform project:

1) Public discussions, public reporting and engagement of stakeholders (academia, legal professionals, civil society and lawtech, as well as internal ones), which help to foster buy-in and to get valuable input for the projects.[64]
2) Independent evaluation to ensure the reform actually improves access to justice.[65]
3) Data on court operations and consequences for the economy, by means of collecting performance data through a unified digital case management system for continuous improvement. Data collection is viewed as a cornerstone of success in this reform.[66] According to Hartung et al., the system "has led to a deeper understanding of stakeholder needs, enables a more efficient organization of administrative matters, and shortened average case durations. It functions as an important pillar of

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60 World Justice Project et al., *supra* note 45 at 170.

61 Roberts, *supra* note 12 at 20; Natalie Byrom, Digital Justice: HMCTS data strategy and delivering access to justice 48, 2 (2019), https://research.thelegaleducationfoundation.org/wp-content/uploads/2019/09/DigitalJusticeFINAL.pdf (last visited Aug 3, 2022); Hartung, Dirk et al., *supra* note 7 at 15.

62 Hartung, Dirk et al., *supra* note 7 at 15-16.

63 Byrom, *supra* note 62 at 14.

64 *Id.,* at 14-30; Hartung, Dirk et al., *supra* note 7 at 16.

65 Byrom, *supra* note 62 at 18-22; Hartung, Dirk et al., *supra* note 7 at 16.

66 Byrom, *supra* note 62 at 11-13.

future reform, providing reliable and accurate data as a basis for management decisions."[67]

One of the most important lessons from this case study is that technological innovation is not at odds with a deliberative process, legal compliance or fairness. The UK is making great efforts in doing extensive consultations with experts and stakeholders (which will certainly translate in better design and implementation). The collection and use of data are carefully reviewed to measure vulnerabilities while complying with GDPR and other privacy standards. And finally, the reform program is invested in measuring access to justice in four components, namely access to the legal system, access to a fair and effective hearing, access to a determination and access to a remedy.

C. *Singapore*

Singapore is an island-state of roughly 5.5 million people that follows the common law tradition. It has the 17th place (from 139 countries) in the WJP Rule of Law Index.[68] Some scholars consider this country as the global leader in justice digitalization,[69] but it must be noted that this accomplishment is the result of larger national strategies (adopted since the early 1980s) towards innovation and technology adoption in the broader public sector, as well as education and industry.[70]

In the high-level aspect mentioned in section 2.2, a taskforce on the courts of the future created a plan in 2016 to adopt online dispute resolution (ODR) and artificial intelligence.[71] An initial ODR component was rolled in 2017 for e-negotiation between parties, while the court is developing and testing an outcome simulator for claimants in personal injury claims.[72]

Since 2000, courts mandated e-filing for all civil cases, giving no option to litigators to continue physical filing.[73] If we break down what e-filing entails, it is evident that documenting and identifying inefficiencies is paramount to successfully digitalize that specific legal process. Providing a stable interface

67 Hartung, Dirk et al., *supra* note 7 at 16.

68 World Justice Project et al., *supra* note 45 at 149.

69 Hartung, Dirk et al., *supra* note 7 at 11-12; Susskind, *supra* note 28 at 171.

70 ITU, *Singapore's Data Strategy Targets Regional Growth*, (2018), https://news.itu.int/singapores-data-strategy-targets-regional-growth/ (last visited Jul 26, 2021); Singapore's big ambitions for big data in 2019, (2018), http://www.edb.gov.sg/en/business-insights/insights/singapore-s-big-ambitions-for-big-data-in-2019.html (last visited Jul 26, 2021); Smart Nation Singapore, (2022), https://www.smartnation.gov.sg// (last visited Aug 3, 2022).

71 Susskind, *supra* note 28 at 171.

72 *Id.,* at 171-172.

73 *Id.,* at 171.

to users is also crucial, which can only be achieved through good planning, designing, and a great deal of testing.

In 2013, Singapore went beyond the simple digitalization and automation of this process by implementing interactive online forms that can ensure filings actually follow court rules.[74] This has evolved into an end-to-end case management system for all jurisdictions and parties that includes analytics, key performance indicators, identity and payment systems, scheduling tools, virtual hearing app, caseload analysis and prediction.[75] This is an example on how high-level vision must be executed on the low-level processes, and basically how both pillars feedback each other, as well as how an initial endeavor becomes the stepping stone for future tech developments.

Singapore has been investing in their digital justice strategy for at least 20 years, which proves that there are really no quick fixes for improving justice. The most important accomplishments of Singapore's digital justice strategy is achieving full integration of their justice systems.[76] This is no small feat, as frequently institutions work in a siloed manner not only between them, but sometimes within them, and sustaining a long-term vision is quite challenging. Finally, Singapore's discipline to commit itself to a long term vision of what the justice of the future should look like is a key piece for its success.

III. Context

In order to frame the case study better, this section focuses first on the situation of access to justice in Mexico, and secondly, on explaining the FIPD as an organization (mandate, resources, services, etc.).

1. *Access to Justice in Mexico*

Access to justice in Mexico, as in most jurisdictions worldwide, is a huge problem. According to the World Justice Project (WJP), 49% of Mexicans have experienced legal problems in the past 2 years, but only 23% of them got expert advice or help.[77] A large part of those legal issues do not even make it to courts or other formal dispute resolution mechanisms.[78] From the 23% that actually looked for some kind of advice, the breakdown on the type of advice is the following:

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74 *Id.*

75 Hartung, Dirk et al., *supra* note 7 at 12.

76 *Id.*

77 Half of Mexicans Experience Legal Problems, Only 1 in 4 Get Help, (2018), https://worldjusticeproject.mx/access-to-justice-problems/ (last visited Nov 25, 2020).

78 *Id.*

Type of advice	*Proportion*
Lawyers	36%
Relatives, friends or acquaintances	27%
Government legal aid	11%

The WJP's Rule of Law Index ranks countries by scoring 7 factors (being civil and criminal justice two of them) and several sub-factors.[79] The scale ranges from 0 to 1, where 1 indicates the strongest adherence to rule of law. For 2021, Mexico's overall national average is 0.43, and notably, civil justice and criminal justice have national averages of 0.37 and 0.29, respectively.[80]

The WJP, based on its global index, has created a rule of law index tailored to Mexico that ranks its states and provides a national average.[81] Although the scores between the global and Mexican indexes are similar, they are neither exactly the same nor comparable.[82] Specifically for civil justice, the Mexican index redistributes measurements "to give more weight and specificity to the concept of accessibility."[83] Regarding criminal justice, the Mexican index includes the protection of victims.[84]

According to the Mexican index, the national averages for civil and criminal justice are 0.37 in both cases.[85] The scores for the most relevant sub-factors on civil and criminal justice for purposes of this piece are the following:[86]

Civil justice	*National average score 2020*	*National average score 2021*
1. Access to information and affordable quality legal counsel.	0.39	0.39
2. People can easily solve their legal problems without high costs and bureaucratic processes.	0.30	0.30

[79] World Justice Project et al., *supra* note 45 at 18-19.

[80] *Id.*, at 23-35.

[81] Mexico States Rule of Law Index 2020-2021, 101 (2021), https://worldjusticeproject.mx/wp-content/uploads/2021/04/2_msi-2020-2021-ENG.pdf.

[82] *Id.*, at 63-65.

[83] *Id.*, at 64.

[84] *Id.*, at 65.

[85] *Id.*, at 17.

[86] World Justice Project, The World Justice Project: Mexico States Rule of Law Index 2018. Perceptions and Experiences in 32 States, (2018), https://worldjusticeproject.org/our-work/publications/country-reports/wjp-mexico-states-rule-law-index-2018 (last visited Aug 1, 2022) at 27; Mexico States Rule of Law Index 2020-2021, *supra* note 82.

Civil justice	*National average score 2020*	*National average score 2021*
3. Whether civil justice system guarantees a quality process.	0.37	0.39
4. Civil justice system conducts procedures promptly and without unreasonable delays.	0.30	0.30

Criminal justice	*National average score 2020*	*National average score 2021*
1. Due process of the law for the accused is effectively guaranteed (this includes the right to adequate defense).	0.46	0.34
2. Victim's rights are effectively guaranteed (this includes legal counsel).	0.44	0.44
3. Timely and effective criminal adjudication system.	0.37	0.36

Mexico has major shortcomings regarding rule of law and access of justice. But beyond that self-evident fact, the most interesting finding from analyzing these data points is that the highest ranked sub-factors from the preceding tables are the ones in which access to legal counsel or representation are embedded (although they are not highly scored by any measure).

Costs, bureaucratic hurdles and delays seem to be more important barriers for access to justice, which is not so self-evident at all. Arguably, these barriers are more related to process design, resource allocation (including human resources), and time-consuming practices that create a lot of friction for users. Traditionally, the legal sector tackles many issues by increasing personnel,[87] instead of critically approaching its structure and process design. Yet, as it can be appreciated from these scores, other aspects of access to justice should not be overlooked. Finding an integral and sustainable solution to the problem of access to justice goes beyond increasing personnel, as important as this may be in many instances.

According to the global Rule of Law Index, Covid-19 pandemic has impacted access to justice around the world. Mexico is not an exception: it dropped one position in the global Rule of Law Index, ranking 113 out of

[87] Rhode, Deborah L. & Cummings, Scott L., *Access to Justice: Looking Back, Thinking Ahead*, 30 Geo. J. Legal Ethics 485, 489, (2017).

139 countries, 27 out of 32 for Latin America and Caribbean region, and 37 out of 40 among upper-middle income countries, with significant delays in civil and criminal justice.[88]

Services have generally been less available due to work place and mobility restrictions. In-person intake or other old-fashion practices that rely on making users be physically present, paper trail requirements, fix services hours, and deficient digitalization will certainly keep straining even more the provision of legal counsel and representation in Mexico. In the context of a global pandemic, a lot of these practices have proven to be extremely inefficient, and legal aid organizations that rely on them are scrambling to adjust their services to those circumstances, and to process the backlog (both historic and exacerbated by lockdowns).

Regarding Internet access, although Mexico has a clear rural-urban divide in Internet usage (50.4% versus 78.3%, respectively), 72% of the population older than 6 uses the web (that is 84 million individuals).[89] Similarly, 66.3 million individuals use smartphones with Internet connection,[90] and 95.3% of Internet users access the web through a smartphone.[91] Also, more people are accessing government services through the internet, as this means of communication increased 9.6 percentage points between 2019 and 2021, while in-person service decreased by 10.9 percentage points.[92]

2. *Background Information. Understanding the FIPD*

Most literature on technology and justice is focused on dispute resolution, whether that is alternative dispute resolution (public or private) and court modernization. However, very little has been said in this context about modernization of public defense, and the chain of justice is as strong as its weakest link. If courts take the whole spotlight, with the effect of neglecting other public services connected to the justice system, the benefits of digitalization will be marginal, if any. Accordingly, this piece is also an opportunity to re-

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[88] World Justice Project et al., *supra* note 45; World Justice Project, *Mexico ranked 113 out of 139 countries on rule of law, dropping one position - Country Press Release*, (2021), https://worldjusticeproject.org/sites/default/files/documents/Mexico_2021%20WJP%20Rule%20of%20Law%20Index%20Country%20Press%20Release.pdf.

[89] INEGI, *Usuarios de tecnologías de la información en áreas urbano rural, 2020*, (2020), https://www.inegi.org.mx/programas/dutih/2020/#Tabulados (last visited Feb 24, 2022).

[90] INEGI, *Usuarios de teléfono celular inteligente con conexión móvil a internet, según condición, 2015 a 2020*, (2020), https://www.inegi.org.mx/programas/dutih/2020/#Tabulados (last visited Feb 24, 2022).

[91] Secretaría de Comunicaciones y Transportes, *¿Cuántos usuarios de internet somos en México?*, (2020), http://www.gob.mx/sct/articulos/cuantos-usuarios-de-internet-somos-en-mexico (last visited Feb 24, 2022).

[92] INEGI, *Encuesta Nacional de Calidad e Impacto Gubernamental (ENCIG) 2021*, (2021), https://www.inegi.org.mx/programas/encig/2021/ (last visited Aug 15, 2022).

flect on how to bring digitalization to other key (but often overlooked) actors of the justice system.

Hence, this paper proposes a solution towards intake or first contact interview that is standardized, scalable and asynchronous. The prototype focuses on the FIPD; however, the ideas on this piece are equally applicable and adjustable to other government legal aid services (whether at federal, state, or municipal levels), the judiciary (federal and local), public services in general, and even non-profits that provide similar services.

The FIPD, created in 1922, is an independent organ of the Federal Judiciary,[93] which means its budget and resources are managed through the budget of the Federal Judiciary.[94] The FIPD has offices in all states across Mexico. Its mission is to "guarantee the right to legal defense in criminal and labor matters, *amparo* in familiy matters as well as to guarantee access to justice through counseling, orientation and legal representation in other matters according to the rules set by the law."[95] All services provided by the FIPD are free by law. From a merely philosophical perspective of access to justice, offering free legal counsel on such a wide array of areas of the law is quite commendable, but in practice there is a lot of strain in its resources and capacity to provide a high-quality and timely service.

The FIPD provides legal representation for all federal criminal cases upon request,[96] but also in other subject matters (such as civil, administrative, tax, *amparo*,[97] migration, labor). Accordingly, the Law on Public Defenders estab-

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[93] Ley Federal de Defensoría Pública [L.F.D.P.], [Federal Law of Public Defense], art. 3, Diario Oficial de la Federación [D.O.], 18 de mayo de 2022 (Mex.), http://www.diputados.gob.mx/LeyesBiblio/pdf/LFDefP.pdf (last visited Aug 10, 2022).

[94] *Id., a*rt. 1 and 2. The FIPD is ascribed to the Council for the Federal Judiciary, which is in charge of drawing judicial circuits, managing judicial promotions and training, performing oversight and discipline procedures, and managing resources for the federal judiciary (except for the Supreme Court and the Electoral Tribunal). It has 5 auxiliary entities, being the FIPD one of them.

[95] *Id.*, art. 1.

[96] Pursuant to article 20, section B, num. VIII of the Federal Constitution, in a criminal trial everyone is entitled to an adequate defense provided by a lawyer. If the defendant does not or cannot appoint a lawyer, a judge will appoint a public defender. See: Constitución Política de los Estados Unidos Mexicanos, [Const.], as amended, Diario Oficial de la Federación [D.O.], 28 de mayo de 2021 (Mex.), http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum.htm (last visited Aug 15, 2022). Some federal courts have even interpreted that crime victims also have a right to adequate counsel or defense, which at some point expanded the scope of the FIPD until a specialized federal agency for crime victims was created. However, some cases of crime victim representation remain in the FIPD docket as they were taken in before the specialized agency was inaugurated.

[97] *Amparo* is a special federal process to challenge the constitutionality of a specific authority act (whether from a federal or local authority). This constitutional relief is solved exclusively by federal judges, hence becoming a federal matter. Consequently, the FIPD could eventually provide legal representation in those cases, despite the fact that the act of authority may be originally from local jurisdiction.

lishes 8 circumstances that make individuals eligible for legal counseling or representation in non-criminal cases,[98] namely:

1) Unemployed individuals and those not receiving any income.
2) Retirees and their spouses.
3) Temporary employees or underemployed individuals.
4) Having a monthly income lower than 12 times of either the daily minimum wage in Mexico City or of the Unit of Measurement and Update.[99]
5) Belonging to an indigenous community.
6) Individuals with a disability.
7) Specific labor cases determined by federal courts.

Generally speaking, the FIPD will conduct a socio-economic assessment to verify that, the user fulfills the conditions to receive the counseling or representation in non-criminal cases, unless the case or situation is urgent. In this circumstance, the FIPD will provide the service once without having the results of the socio-economic assessment for the sake of preserving the rights or standing of the user in those cases.[100]

The FIPD has 2 812 employees, from which 1 078 are lawyers either representing users in criminal cases (855), or representing and advising users in non-criminal cases (262).[101] These lawyers rely on 1 256 legal assistants and 38 administrative assistants.[102] This ultimately means that at least 87.7% of the personnel (2 372 employees) is actually operative, rather than administrative.

During 2020-2021, the FIPD represented 50 910 individuals in criminal cases.[103] This number adds for representation in the inquisitorial and accu-

[98] Ley Federal de Defensoría Pública, *supra* note 94, arts. 15 and 16; Junta Directiva del Instituto Federal de Defensoría Pública, *Bases Generales de Organización y Funcionamiento del Instituto Federal de Defensoría Pública*, art. 44, Diario Oficial de la Federación [D.O.] 19 de marzo de 2020, https://www.ifdp.cjf.gob.mx/resources/documentos/2020/basesGeneralesIFDPVigentes_19032020.pdf (last visited Nov 16, 2020).

[99] This is equivalent to something between $2,074.44 and $2,925.09, which is equivalent to roughly USD96.94 and USD136.70. See: Junta Directiva del Instituto Federal de Defensoría Pública, *supra* note 99; Comisión Nacional de los Salarios Mínimos, *Incremento a los Salarios Mínimos para 2022*, (2021), http://www.gob.mx/conasami/articulos/incremento-a-los-salarios-minimos-para-2022?idiom=es (last visited Mar 8, 2022); INEGI, *Unidad de Medida y Actualización (UMA)*, https://www.inegi.org.mx/temas/uma/ (last visited Oct 30, 2019).

[100] Junta Directiva del Instituto Federal de Defensoría Pública, *supra* note 99, arts. 41 and 45.

[101] Instituto Federal de la Defensoría Pública, *Informe Anual de Labores 2020 - 2021*, 124 160 (2021), https://www.ifdp.cjf.gob.mx/resources/informeAnual/informeAnual_2020_2021-v2.pdf (last visited Aug 2, 2022).

[102] *Id.*

[103] *Id.*, at 8, 14, 28.

satory systems, as well as minors, and it roughly means that in average each public defender represented 59 individuals in that period.[104]

For non-criminal cases,[105] the FIPD provided the following services:

Type of service	*Description*	*Number of cases (2020-2021)*
Orientation	General opinion on a case, in which the FIPD is incompetent, that helps redirect the user to the competent authority.	4 060
Advice	The FIPD issues a legal opinion for a case for which it is competent, but the individual requesting the service is not eligible or there is not a legal action to undertake.	2 094
Representation	The FIPD legally represents an individual throughout the process because it is competent and the user is eligible.	15 894
TOTAL		22 048

If we divide the total of non-criminal service requests between the lawyers ascribed to this area (262), it roughly means that each lawyer handled 84 cases or requests during 2020-2021. Evidently, each of the three services requires a significantly different time investment, being representation the one that entails a longer-term relationship, more resource commitment, and more in-depth legal analysis and planning.

From these numbers, a natural conclusion is that lawyers within the FIPD are overwhelmed with cases, and this potentially compromises the quality of the service they can offer to their users.

The FIPD does not carry out satisfaction surveys, so it is impossible to know what is the actual experience of users. Implementing these surveys would certainly generate valuable information for continuous improvement within the FIPD. Public service providers are increasingly more invested in gathering data from user experience to improve and control their processes; for example, the Civil Resolution Tribunal of British Columbia surveys all their users to monitor for service quality.[106]

[104] This figure should also include the number of represented individuals in execution of criminal sentences (*ejecución penal*). However, the FIPD annual report for 2020-2021 does not mention the number of users for this specific procedure as it does with the other criminal procedures.

[105] Instituto Federal de la Defensoría Pública, *supra* note 102 at 46.

[106] Civil Resolution Tribunal, *supra* note 47 at 29-30.

Though solving problems on over-burdened staff and quality service would require a larger analysis of internal processes, budget constraints, and resource allocation, we argue that having a clear intake triage strategy based on an automated first-contact interview would contribute to a better user experience, and also to a better internal organization, thus ultimately leading to a better service.

A first contact interview is the moment to evaluate a request for legal services. The FIPD lawyers undertaking such interviews need to understand whether there is competence to take the case, whether the user is eligible, and if there are urgent actions or deadlines to comply with. In practice, when it comes to criminal cases, most of the intake happens directly at the district attorneys' offices, police stations or at court, either because the defendant directly requests a lawyer, or because he/she does not have a lawyer and gets one appointed by the court. That being said, a very slim part of criminal cases may get to the FIPD differently, for instance, requested by a relative of the defendant or substituting a private attorney at some point of the process. In non-criminal cases, on the other hand, users contact the FIPD via phone or by showing up in any of the offices.

The FIPD has not released information on how much time each interview takes or how many they carry out, but it has established a maximum of 15 minutes during first contact interviews in order to determine whether it has competence in a given case.[107] Nevertheless, there is no accurate information publicly available on the duration and the amount of first contact interviews, except for the FIPD's vague assertion that waiting times have been reduced during the 2020-2021 period.[108] In practice, however, first contact interviews can probably last more than that; users in many cases may want to vent about situations that are affecting them or they may have a hard time conveying the relevant information to the lawyer carrying out the interview.

Intake forms of criminal cases are different from forms of non-criminal cases. Different areas of the FIPD handle each area of service, thus each one of them has tailored a form to its needs or practice. While this may be justified for practical reasons, this paper does not analyze this point but rather proposes a unified online interview to intake and triage all cases that the FIPD receives, as will be explained in the following section. If the FIPD wanted to implement a project of this kind, all forms necessary can be easily programmed.

A final word about training is necessary. Being a FIPD lawyer requires a deep knowledge of the law to guide and represent users, and at the same time a very wide breadth of knowledge on auxiliary subjects (such as forensics, migration, gender perspective, administrative tasks, and the like), and within this

[107] Junta Directiva del Instituto Federal de Defensoría Pública, *supra* note 99, art. 29; Instituto Federal de la Defensoría Pública, *supra* note 102 at 205.

[108] Instituto Federal de la Defensoría Pública, *supra* note 102 at 205.

toolkit training in soft skills should not be overlooked. Some basic training on how to conduct interviews, how to communicate more effectively with users, or how to contain difficult situations in a sensitive manner definitely contributes to a more successful engagement. Ultimately, the effectiveness and efficiency of intake, triage and processing do not lie exclusively on automation and web interfaces, but on setting a goal of improving communication, which entails both human and technological aspects.

IV. Prototype Solution

This section develops the prototype solution for a first-contact interview to offer evidence on the short-term viability of automating this process (or any other for that matter). Developing this prototype has the goal to exemplify how to connect high-level vision and principles of technology for access to justice with a low-level application. Ultimately, making this connection translates into the long-term viability of these initiatives.

However, before explaining how the automated first-contact interview would work, it is important to develop some foundational elements for a correct implementation and user friendliness, namely: software (including databases) and plain language. Lawyers, though not expected to be experts or substitute software engineers, must become conversant with these technical issues,[109] and not doing so is a driver for slow and deficient technological adoption in the legal sector.[110] Increasingly, solutions to the delivery of legal services and access to justice are framed as a multi-disciplinary problem, which is why lawyers need to engage more effectively with other professional communities, particularly the computer science community.

In order to frame a proposal for a standardized and automated first contact interview, we used the FIPD form for non-criminal cases as a blueprint, but incorporating some changes for users' ease. The main purpose is to demonstrate how a form that may be daunting for users and time-consuming for lawyers to fill out by hand could be presented in a friendlier way for both internal and external users.

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[109] Mark A. Cohen, *Skills And Education For Legal Professionals In The 2020's*, (2020), https://www.forbes.com/sites/markcohen1/2020/07/01/skills-and-education-for-legal-professionals-in-the-2020s/ (last visited Apr 8, 2022); Nuevos Perfiles jurídicos derivados de la innovación, (2018), https://www.youtube.com/watch?v=lAa8szTq0Ms (last visited May 26, 2022); Peter Connor, *The T Shaped Lawyer*, (2017), https://www.legalbusinessworld.com/post/2017/12/22/the-t-shaped-lawyer (last visited Aug 3, 2022); The T-shaped lawyer: The new skills every future lawyers needs to succeed, (2019), https://www.ie.edu/law-school/news-events/news/t-shaped-lawyers-taking-legal-industry/ (last visited Aug 3, 2022); Richard E. Susskind, Tomorrow's lawyers: An introduction to your future (2013).

[110] Hartung, Dirk et al., *supra* note 7 at 7-10; Rhode, Deborah L. and Cummings, Scott L., *supra* note 88 at 492, 499-500.

1. *Software (and Databases)*

For the software component, A2J Author[111] was the tool selected to create this basic prototype, but this could be implemented through other off-the-shelf solutions[112] or a bespoke web application, according to the needs, resources available, and other administrative constraints.

In any case, organizations should take their time to analyze how to best approach digitalization to avoid important pitfalls, such as: buying different types of software that cannot be interconnected, spending too much money in a buying frenzy, avoiding a process and culture analysis before going digital, buying some tech solution that does not respond to the users' needs,[113] disregarding the human resources needed to support an in-house development or the resources needed for a third party to do this, disregarding the need to train personnel in the use of new solutions, imposing solutions without consulting with the final user or other relevant stakeholders, poor planning, among many others.[114] Evidently, these issues are even more important when dealing with public services and public budget, because there is a constitutional and legal obligation to spend wisely, to provide public services in an effective and efficient fashion, and to be held accountable for such actions.[115]

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111 A2J Author is a cloud based software tool that allows non-technical users to build and implement web-based guided interviews, document assembly projects for non-commercial use (that is for legal aid organizations, government entities, courts, non-profits, universities). This software was created in 2004 through a partnership between Chicago-Kent College of Law's Center for Access to Justice and Technology and the Center for Computer-Assisted Legal Instruction. Recent upgrades also allow for e-filing in some local USA jurisdictions. See: A2J Author, https://www.a2jauthor.org/ (last visited Nov 27, 2020); Staudt, *supra* note 34.

112 For example, the Civil Resolution Tribunal of British Columbia (Canada) created its digital workflow with Salesforce, a customer relation management service (CRM) more typically used by private companies for customer service processes. Nowadays, there is a wide range of vendors that provide CRM solutions for small, medium and large organizations that can be adapted for public and private organizations that provide legal services. For a non-promotional list of vendor examples, please Jose Maria Delos Santos, *Best CRM for Small Business 2022, Project-Management*, (2021), https://project-management.com/crm-for-small-business/ (last visited Jan 27, 2022); Andrei, Ioana, *Best CRM software for 2022*, (2022), https://www.techradar.com/best/the-best-crm-software (last visited Jan 27, 2022).

113 Avoiding Tech First Failures When Improving Legal Workflows & Processes with Casey Flaherty (Lex Fusion), https://tlpodcast.com/avoiding-tech-first-failures-when-improving-legal-processes-with-casey-flaherty-lex-fusion/ (last visited Jan 27, 2022); Flaherty, Casey, *Tech-First Failures - Value Storytelling (#6)*, (2021), https://www.geeklawblog.com/2021/12/tech-first-failures-value-storytelling-6.html (last visited Jan 27, 2022).

114 Susskind, *supra* note 8 at 243-250.

115 Constitución Política de los Estados Unidos Mexicanos, *supra* note 97, article 134; Ley Federal de Presupuesto y Responsabilidad Hacendaria [L.F.P.R.H.], [Fedaral Law on Budget and Fiscal Responsibility], arts. 3 and 4, Diario Oficial de la Federación [D.O] 27 de

Database design is the cornerstone of any technological project that intends to automate processes and create critical mass for more sophisticated initiatives, such as artificial intelligence for predictive purposes or natural language processing. Without a clear understanding of data through all of its stages (production, usage, storage, flow and security), no institution is able to step up its game into the digital reality of the 21st century.[116] It is no exaggeration to say that data has become a critical component of any organizational strategy that allows to better organize internal processes, service delivery, and knowledge management. The following list provides some guiding principles on databases for organizations that provide legal services:

1) *Centralization*: Managing data that is scattered in a nonsensical way is nearly impossible. In order to create institutional intelligence and data management capabilities, data must be centralized. Migrating to centralization requires a heavy investment in time and resources, especially when organizations have different data standards and sources, but the pay off will surely be worth it down the road. Centralizing data does not mean that everyone should access everything; different credentials have to be created to adapt to different users, depending on what information they can look at and what they can do with it, even inside the same area or team. In this case, for example, FIPD criminal lawyers should not be able to look at civil cases or even at other criminal cases, they are not handling (except maybe to run a conflict of interest review). This is one aspect of what Hartung et al. have named as "enabler technologies", which should be part of tech infrastructure.[117]
2) *Ownership and stewardship*: If an organization decides to hire a vendor to procure software or IT services, data ownership and management should be a part of the negotiation. In this regard, ownership must remain with the hiring organization, and this entails an obligation form the vendor to adapt to the data standards and requirements of the hiring party, and an easy exit strategy in case the organization wants to switch vendors. Digitalizing legal services should never translate in ending up kidnapped by one or a handful of vendors because a contract was poorly negotiated or drafted.[118] Ideally, open data standards should be part of this equation to allow for users and other institutions to interact with the processes of the organization, regardless of the software they operate with.[119] This makes it possible for services to remain acces-

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febrero de 2002 (Mex.), http://www.diputados.gob.mx/LeyesBiblio/ref/lfprh.htm (last visited Aug 15, 2022).

116 Hartung, Dirk et al., *supra* note 7 at 8; Tashea, *supra* note 23 at 9-10.

117 Hartung, Dirk et al., *supra* note 7 at 7-8.

118 Colarusso, David & Rickard, Erika J., *Speaking the Same Language: Data Standards and Disruptive Technologies in the Administration of Justice*, 50 Suffolk U. L. Rev. 387, 403 (2017).

119 *Id.*, at 403-404.

sible for everyone, as well as avoiding tech monopolies in the justice system. Colarusso and Rickard, explaining this issue around courts, have brilliantly stated: "Yet when a court mistakenly conflates the need for a common vendor with the need for common standards, it distorts incentives. It moves the center of power towards vendors, distancing it from user-centered interests and exacerbating the justice gap by prioritizing the preferences of third-party vendors over litigants."[120]

Whether an organization decides to procure software from a third-party vendor or develop it in-house, stewardship in the highest hierarchical level is paramount. Managing data cannot be the sole responsibility of the IT department, but it rather needs to be part of an organizational strategy in order to reap the benefits of the digital revolution, while handling data carefully and securely. In other words, buy-in, political will and involvement at all levels of the organization are necessary to bring changes in data strategy.

3) *Strengthening know-how and internal expertise*: Centralized databases create a trove of data and metadata that can be further analyzed to better know the dynamics of legal services for purposes of operational excellence. Beyond easing the retrieval of some outcomes for reporting, data analysis allows to dissect the full pipeline of an organization, which makes easier to identify bottlenecks and frictions in order to improve the delivery of a legal service. Enough granularity in the data allows to zoom in into the performance of specific areas and even individual collaborators. Likewise, a well planned data strategy can result in better knowledge management, saving lots of time in the provision of a legal services. In this example, the FIPD could focus its current efforts into creating a library for retrieving information on cases that helps other lawyers on their own research, instead of having everyone working in isolation or depending on a small network of good-willed colleagues; or it could create an interface for document assembly.

4) *Security*: With great power comes great responsibility, and data management is no exception. An organization that creates, stores and uses a larger quantity of data (including personal data) is legally compelled to implement safeguards around it to protect the data subjects. To the extent that an organization digitalizes its legal services, it must create a structure that establishes governance, access, and security rules for data processing.[121] When it comes to security, any organization going digital must create a cybersecurity strategy,[122] implementing at the outset some basic measures such as two-factor authentication, online and offli-

120 *Id.*, at 404.

121 Tashea, *supra* note 23 at 10-12; Hartung, Dirk et al., *supra* note 7 at 7-8.

122 National Institute of Standards and Technology, *Cybersecurity Framework*, (2013), https://www.nist.gov/cyberframework (last visited Mar 25, 2022).

ne backups, check-list of very simple dos and don'ts for personnel, and ideally a plan of response and recovery for cyber incidents.[123]

2. *Plain Language*

As was mentioned before, granular information on the interaction of FIPD personnel and users during first contact interviews is not available. However, one of two options is possible: either the first contact lawyer asks questions and fills out the form while talking to the user, or the user may fill out the form on his/her own.

Though in times of high demand, it may save some time to hand out the form and make users fill them out, transferring that responsibility to users may not always be advisable. In the most extreme case, some users may be illiterate or may not have enough language skills to understand the form; in less extreme cases, we must face the fact that forms may be daunting to a large part of the public.

Coming back to the aspect of design, forms are usually thought as an instrument for the institution providing a service, and are rarely designed with final users in mind. This is true not only for the aspect of the form, but also for the language and terminology they may have. Laypeople do not understand legal terms such as competence, deadlines, subject matters, representation, legal processes, statute of limitations, and the list goes on. Institutions like the FIPD are responsible for conveying all those technicalities in a comprehensible way, and that starts from the very first contact with users.

Making legal services accessible is not only about making them available, but also conveying information in plain language. All technical fields, legal being no exception, tend to communicate and gravitate around their own lexicon, leaving outside anyone who does not share that specialized knowledge. From a perspective of access to justice, abusing technical language becomes a barrier for users, as they cannot confidently navigate the justice system.[124] Arguably, legalese needs a translator as much as a foreign language for everyone who is not a lawyer,[125] and while there are good reasons to use technical

[123] Organizations may suffer cyber incidents that are targeted or an overspill from another incident. The conflict between Russia and Ukraine offers good examples on how hostilities at the other side of the world effects in jurisdictions can have that are not directly involved. *See* Andy Greenberg, *The Untold Story of NotPetya, the Most Devastating Cyberattack in History*, Wired, https://www.wired.com/story/notpetya-cyberattack-ukraine-russia-code-crashed-the-world/ (last visited Jun 14, 2020); David E. Sanger, Julian E. Barnes & Kate Conger, *Los tanques entraron a Ucrania y también los programas de "malware." Entonces Microsoft se involucró en la guerra*, The New York Times: en Español, March 1, 2022, https://www.nytimes.com/es/2022/03/01/espanol/rusia-ucrania-microsoft.html (last visited Mar 2, 2022).

[124] Byrom, *supra* note 62 at 29.

[125] Feito Torrez, María Victoria, *Plain language as a requisite for an effective access to justice*, Edito-

language to protect the clients' interests,[126] and to properly regulate the complexity of certain social phenomena, there is also a professional obligation from lawyers and public institutions to convey ideas clearly enough for all users to comprehend them.

The Federal Constitution and the human rights treaties ratified by Mexico contain a legal basis for the obligation of using plain language. Firstly, article 20 section B-III establishes the right of the accused to be informed about the accusation and their rights, while section C-I enshrines the right to inform the victims about their rights.[127] Secondly, article 8.2 of the American Convention on Human Rights recognizes the right to an interpreter and prior notification of charges, which are ultimately guarantees around communication.[128] Articles 9.2 and 14.3 of the ICCPR have equivalent provisions.[129] For these guarantees to be meaningful, the authorities should inform the accused in a language, he or she comprehends, and that includes conveying technical details in a comprehensible manner; otherwise, communication in the context of a legal procedure becomes a mere formality devoid of real protection. Mexico's Supreme Court has addressed the importance of plain language around the rights of children and the mentally disabled,[130] which also signals the importance of adding additional safeguards for vulnerable populations.

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rial Astrea 15, (2020), https://www.academia.edu/45539750/Plain_Language_as_a_Requisite_for_an_Effective_Access_to_Justice?email_work_card=abstract-read-more.

126 Bo Bingham, *Lawyers speak 'legalese' for a reason*, https://www.thespectrum.com/story/life/features/mesquite/2015/10/06/lawyers-speak-legalese-reason/73460860/ (last visited Feb 2, 2022).

127 Constitución Política de los Estados Unidos Mexicanos, *supra* note 97, art. 20, sections B-III and C-I.

128 Organización de Estados Americanos, *Convención Americana sobre Derechos Humanos, suscrita en la Conferencia Especializada Interamericana sobre Derechos Humanos (B.32)*, art. 8.2, (1969), http://www.oas.org/dil/esp/tratados_B-32_Convencion_Americana_sobre_Derechos_Humanos.htm (last visited Jun 3, 2022).

129 Pacto Internacional de Derechos Civiles y Políticos, arts. 9.2 and 14.3, (1976), https://www.ohchr.org/es/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights (last visited Jun 3, 2022).

130 Derecho de los menores de edad a participar en los procedimientos jurisdiccionales que afecten su esfera jurídica. Lineamientos para su ejercicio. Primera Sala de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta, Décima Época, Libro 40, Marzo de 2017, Tomo I, página 288, Tesis 1a./J. 12/2017 (10a.) - registro 2013952 (Mex.), https://sjf2.scjn.gob.mx/detalle/tesis/2013952 (last visited Feb 2, 2022); Justicia para menores. La ley relativa del estado de San Luis Potosí no transgrede la garantía de debido proceso legal (Periódico Oficial de la entidad del 5 de septiembre de 2006). Pleno de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Semanario Judicial de la Federación y su Gaceta. Tomo XXVIII, Septiembre de 2008, página 596, Tesis P./J. 83/2008 - Registro 168883, https://sjf2.scjn.gob.mx/detalle/tesis/168883 (last visited Feb 2, 2022); Estado de interdicción. Durante el procedimiento respectivo, el juez deberá sostener una serie de pláticas con la persona con discapacidad, y si ésta así lo desea, podrá elegir a una persona de su confianza que le asista en tales diligencias (inter-

The Federal Law on Public Defense stipulates as obligations of public defenders and counselors to inform the defendants, their families or trusted persons about the status of their case and the next steps to be followed.[131] In the same vein, the FIPD's Protocol on Assistance to Users establishes as a performance rule for lawyers to explain in a simple manner the services the FIPD offers, what the FIPD can and cannot do for the user, the status of the case, and to solve any questions, while avoiding the use of technical terminology as much as possible or, at least, explain it clearly.[132]

Finally, the argument can also be constructed around the prohibition to discriminate, which is enshrined in human rights treaties and democratic constitutions around the world, including Mexico's,[133] and has been declared a norm of *ius cogens*.[134] To the extent that public services are made unavailable due to language constraints, authorities are discriminating (even if inadvertently), based on language, age, national or social origin, gender, or economic status. Discrimination that stems from language inaccessibility affects foreigners, indigenous communities, illiterate individuals, under-educated individuals, minors, people with some disabilities, the poor, and very frequently women who tend to be more affected by a lack of access to education. Accordingly, the use of plain language is a requirement of non-discrimination to make justice and legal services accessible.

Regarding language structure, this proposal was drafted aiming at explaining everything in plain language. As previously described, not only this is necessary from a philosophical perspective on access to justice, but also it is the only way to guarantee its usability for a larger audience that would be requesting a public service on their own.

Throughout the interview prototype, multiple choice answers and drop-down choices are preferred as much as possible. This is not only simpler for the user while filling out the interview, but also for the institution as it avoids typos, misspelling errors, inconsistencies in the use of capital letters or syntax. If that data will later be analyzed for monitoring, evaluation and reporting, these initial design choices make further work down the pipeline considerably easier for everyone.

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pretación del artículo 904 del Código de Procedimientos Civiles para el Distrito Federal). Primera Sala de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Gaceta del Semanario Judicial de la Federación. Libro 1, Diciembre de 2013, Tomo I, página 517, Tesis 1a. CCCL/2013 (10a.) - Registro 2005121, https://sjf2.scjn.gob.mx/detalle/tesis/2005121 (last visited Feb 2, 2022).

131 Ley Federal de Defensoría Pública, *supra* note 94, arts. 11-VI, 12-XIV, 12 Bis-III.

132 Protocolo de Atención al Usuario, (2018), https://www.ifdp.cjf.gob.mx/resources/documentos/2018/protocoloAtencionUsuario.pdf (last visited Feb 3, 2022).

133 Constitución Política de los Estados Unidos Mexicanos, *supra* note 97, art. 1.

134 Opinión Consultiva OC-18/03 sobre la Condición Jurídica y Derechos de los Migrantes Indocumentados, Inter-Am. Ct.H.R., at 97-101, 2003 https://www.corteidh.or.cr/docs/opiniones/seriea_18_esp.pdf (last visited Aug 15, 2022).

Specifically, A2J Author has an analytic feature that grades each question and the overall interview with the Flesch-Kincaid grade level test, in order to determine to what U.S. grade level a passage corresponds.[135] The recommendation is to aim for a 5th grade reading level.[136] Here is an example on how the same questions may look differently for users depending on the language:

	Option 1	*Option 2*
1	Please provide the personal information of the individual(s) you are filling this interview for.	Please tell us more about the person(s) you are helping.
	Please provide the factual elements of your case.	Please describe your case.

Though both columns are roughly the same length, option 2 clearly avoids language that complicates the idea, such as "provide," "personal information," "individuals," "factual," "elements." While questions in option 1 are graded for level 8.2 and 3.2, questions in option 2 are graded at 0.5 and -2.8. Getting to the same point in a more straightforward and comprehensible manner is a way of making justice and public services in general more inclusive and usable.

The prototype of automated interview designed for this proposal obtained an overall Flesch-Kinkaid grade of 1.7 (less than 6 is good), which guarantees that a larger audience, from all walks of life, will understand the questions and can fill out the interview successfully.

Though the Flesch-Kincaid method does not have a Spanish version as such, some other scales are available to grade readability.[137] Thoroughly revising language accessibility is a time-consuming yet necessary step to guarantee the effectiveness of web-based applications for public services. The ultimate test for that, nonetheless, will always be piloting a solution with end users and gathering their feedback before roll out. This is the cornerstone of human-centered design: building services and systems around the community and users, rather than lawyers. Shannon Salter, former Chair of the Civil Resolution Tribunal of British Columbia, brilliantly delivers this idea as follows:

> Nobody should feel like they've landed on Mars when they're trying to engage with their own justice system, it belongs to them. It is a fundamental right of being a citizen or a resident in a democracy. And so you shouldn't feel like you're an alien. You shouldn't feel stupid. You shouldn't feel confused. It's our

[135] Plain Language, (2013), https://www.youtube.com/watch?v=yP-1WTZ2cWs (last visited Nov 28, 2020).

[136] *Id.*

[137] Alejandro Muñoz Fernández, *Analizador de legibilidad de texto*, (2016), https://legible.es/ (last visited Jan 27, 2022).

responsibility as the public justice system to make sure that you feel that this is a process that is fair, one in which you were being heard and a process that ultimately confirms and hopefully builds on your confidence in the justice system.[138]

3. *Interview structure*

The automated interview prototype has six sections appearing in the following order: introduction, demographic information, case information, detailed contact information, detailed case information, and exit. The user only sees the sections on detailed contact information and detailed case information if the case is *prima facie* eligible.

Similarly, and in order to make the whole exercise easier for the users, some specific questions are only shown to them if necessary. For instance, the questions on translation are not shown if the user declares his/her first language is Spanish, or questions about data on represented individuals do not appear if the user declares to be filling out the interview only for himself or herself.

A. *Introduction*

The purpose of the interview is explained, and we ask the name of the user. A learn more banner is added to explain the user that the FIPD can only take in federal cases. A2J Author offers an avatar to resemble an in-person interview as much as possible.

FIGURE 1. MANAGING EXPECTATIONS FROM THE BEGINNING IS CRUCIAL FOR A GOOD COMMUNICATION

138 CLIO, *supra* note 30.

B. *Contact information*

The user provides e-mail and phone number, as well as demographic characteristics (sex, date of birth,[139] nationality, marital status, education level, state of residence) from drop-down menus for user ease and to simplify the handling of the information. In this section, the user also declares his/her proficiency in Spanish (in case a translator may be needed), and whether he/she belongs to any vulnerable group.

FIGURE 2. INPUTTING INFORMATION WITH CLICKS AND MENUS IS EASIER FOR THE USER AND THE ORGANIZATION

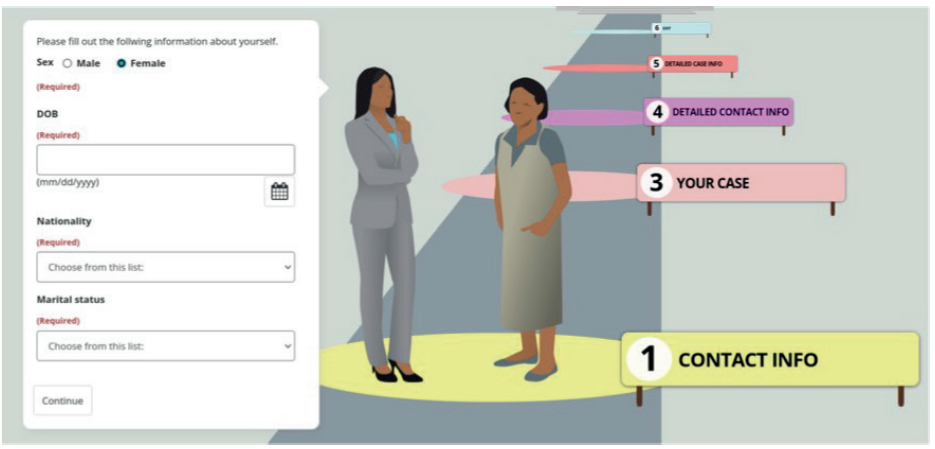
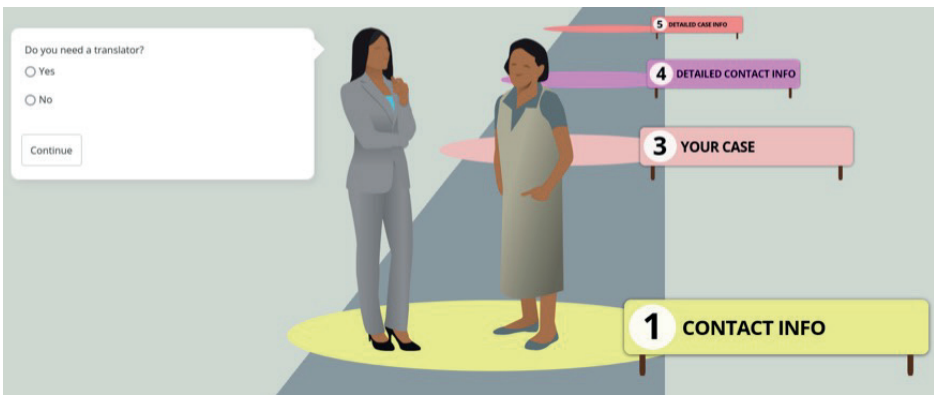


FIGURE 3. INPUTTING INFORMATION WITH CLICKS AND MENUS IS EASIER FOR THE USER AND THE ORGANIZATION



139 In this interview prototype, the user is asked date of birth instead of age, so it can be automatically converted to an age. If an implementation project entailed a data base overhaul, it would be better to record dates of birth rather than ages because that allows to calculate age at any given moment, while age remains an immutable data point.

At this point of the interview, no further personal information is asked because the case could be either eligible or ineligible. From a user experience perspective, filling out all your personal information and then being told your case cannot be taken brings about a waste of time, and probably some disappointment. From an organizational perspective, personal data becomes information that needs to be stored and protected, although it ends up being of no practical use for non-eligible cases. Furthermore, Mexico's General Law on Data Protection by Obliged Subjects establishes principles for treatment of personal data by public entities, including the obligation to only process personal data that are adequate, relevant and strictly necessary.[140]

C. *Case information*

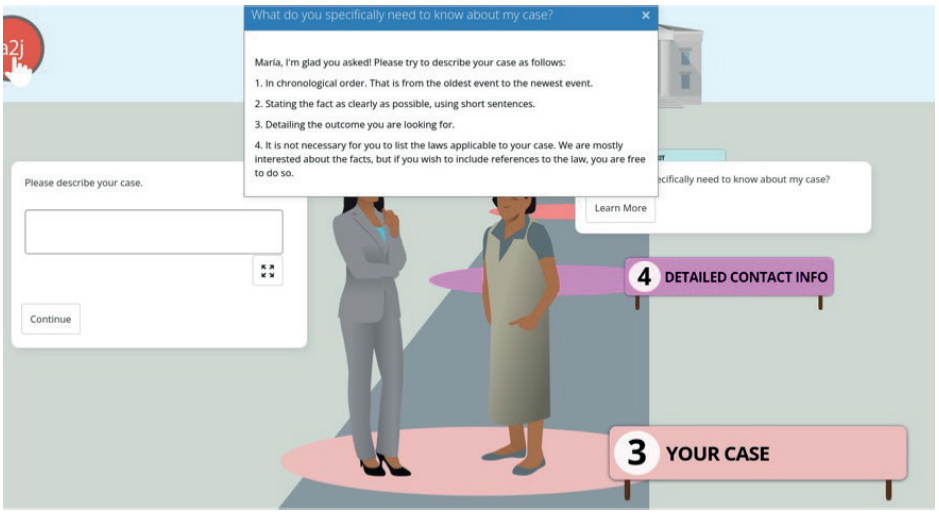
The user picks the authority handling the case from a drop-down menu, and can be guided on how to figure out which authority to choose with the option of typing the name if the authority is not in the list:

FIGURE 4. THE USER GETS TIPS ON HOW TO FIGURE OUT THE AUTHORITY HE OR SHE IS DEALING WITH

The user then describes the case, and can get some tips on how to do it more efficiently:

140 LEY GENERAL DE PROTECCIÓN DE DATOS PERSONALES EN POSESIÓN DE SUJETOS OBLIGADOS [L.G.P.D.P.P.S.O], [GENERAL LAW ON DATA PROTECTION BY OBLIGED SUBJECTS], arts. 16 and 29, Diario Oficial de la Federación [D.O.], 26 de enero de 2017, https://www.diputados.gob.mx/LeyesBiblio/pdf/LGPDPPSO.pdf (last visited Aug 15, 2022).

FIGURE 5. IN JUST FOUR SIMPLE STEPS, THE FIPD CAN HELP THE USER DESCRIBE THE CASE BETTER



The user then chooses a subject matter, with an option of marking "unsure". Though it is helpful to know these data points at the outset, some users may not know or may even choose an option incorrectly. The FIPD personnel should always be able to corroborate that through a further call and correct that if needed.

FIGURE 6. IT IS IMPORTANT TO REASSURE USERS THAT NOT KNOWING THE LAW WILL NOT DERAIL THEIR REQUESTS

If the authority is not federal, the user will be escorted to the end of the interview, and that the case is not eligible, but that a lawyer of FIPD will reach out to further explain the situation.

D. *Detailed contact information*

If the case is federal, the user is directed to a screen where more personal information is retrieved, namely personal address, profession and income. As explained before, income is an important element to consider user eligibility in non-criminal cases. This information is usually asked with paper forms, regardless of whether the petition or request will move forward. Users can understandably get frustrated when asked to provide a great deal of information only to be ultimately rejected. While this may have been unavoidable with paper-based forms, well planned flows, web-based forms, and databases make possible to ask only relevant information, saving the citizenry hours of needless typing.

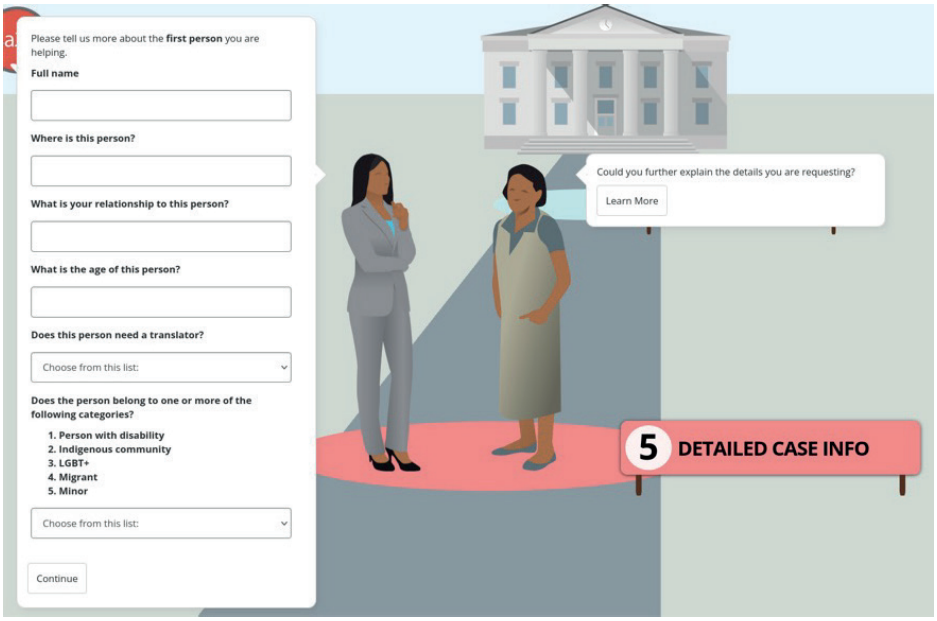
E. *Detailed case information*

If the case is federal, the user is directed to a second section that goes deeper in case details, namely:

1) If the user is requesting the service for others or for oneself. If it is the former, then the user is directed to a screen that asks on behalf of how many individuals is the service being requested and details on them, such as name, location, age, fluency in Spanish, relationship to that person, and whether he/she/they belong to a vulnerable group.

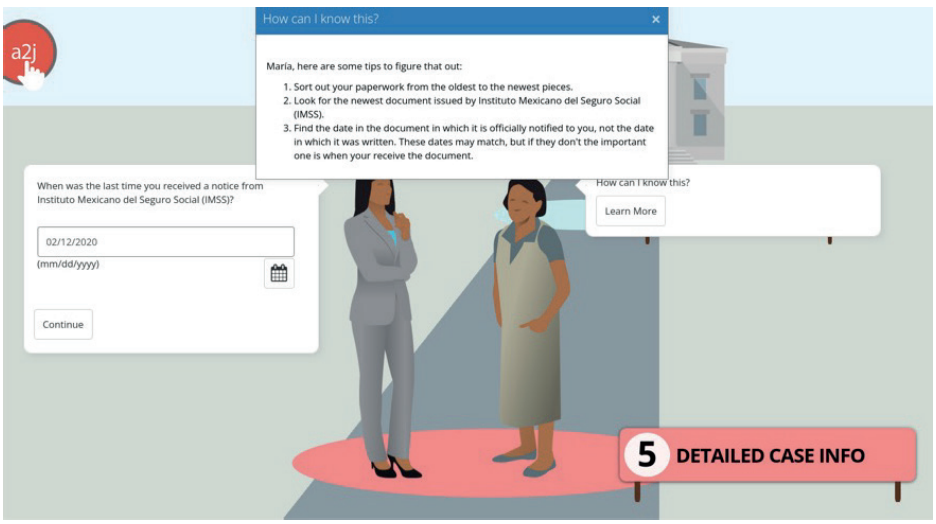
FIGURE 7. EXPLAINING WHAT "ON BEHALF OF SOMEONE ELSE" MEANS

FIGURE 8. THE FORM ONLY DISPLAYS THIS WINDOW WHEN THE USER IS REQUESTING THE SERVICE ON BEHALF OF SOMEONE ELSE



2) Date of latest notice from the corresponding federal authority. This is important in order to determine whether there is a legal action to be taken and its urgency. The interview calculates the number of days since the notice took place until today, informing it to the user and including that in the generated form.

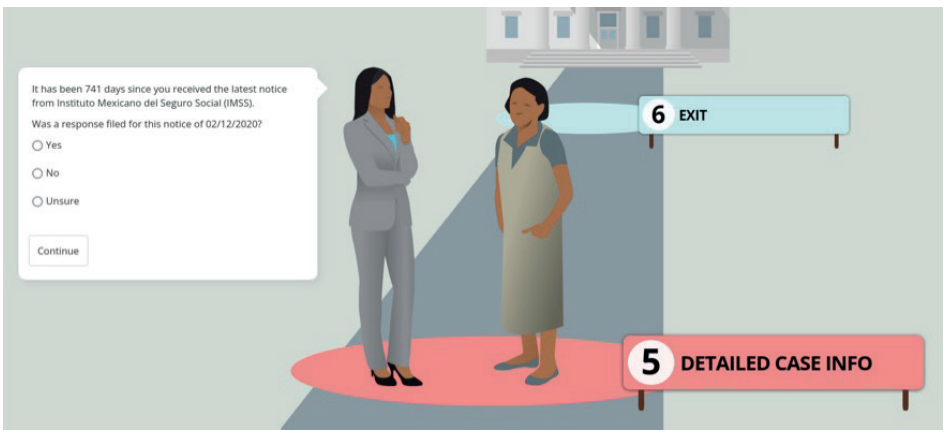
FIGURE 9. THE USER GETS TIPS TO FIGURE OUT THE DATE OF LATEST NOTICE



Though it would be ideal to inform the user on how many days he/she still has to act, the fact that the FIPD is competent in so many areas of the federal law makes this quite complicated for a prototype, but it is something that could be done for real roll-out with enough research, time and resources.

3) Response to such notice. In order to evaluate whether there is urgent action or deadlines ahead, the FIPD must know if the user responded to the latest notice, but the "unsure" option is also available as sometimes people may have a private lawyer or representative handling the case without keeping the user in the loop, or they may simply forget details of what they have done themselves.

FIGURE 10. THE FORM CAN BE PROGRAMMED TO CALCULATE DAYS AND DEADLINES

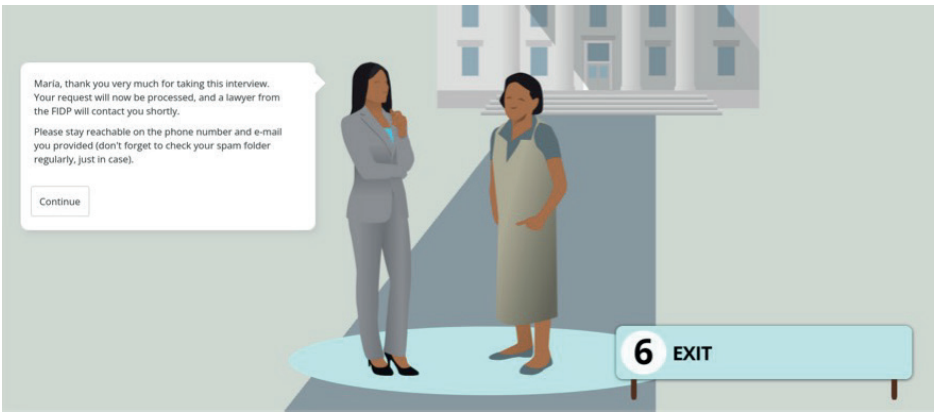


F. *Exit*

In this last screen, whether the FIPD is competent or incompetent, the users reads a message thanking for his/her patience, and reminding him/her to remain available because a FIPD lawyer will be in touch shortly.

If an automated interview is to be implemented, finishing the interview could generate an acknowledgment of receipt via email with a request number for future tracking and follow-up. The software could even generate a PDF for the users with the answers provided that would help them to keep their own records in order.

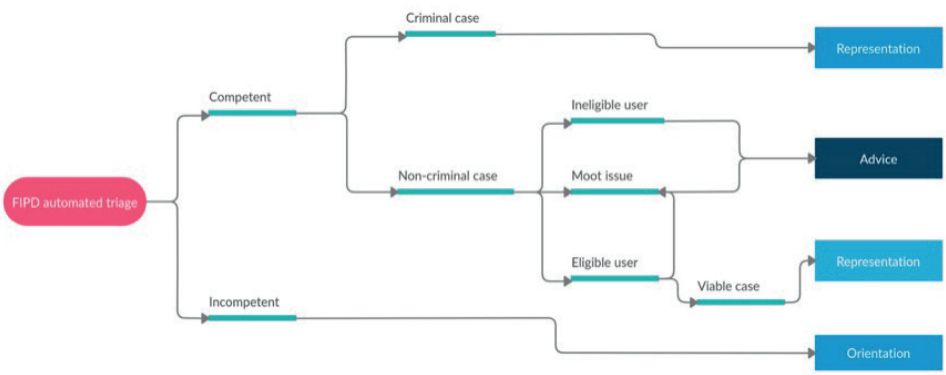
FIGURE 11. THE USER GETS INFORMATION ON HOW THE FIPD WILL BE IN TOUCH



4. *Triage*

This automated interview prototype allows to program if/then conditions that could be a stepping stone for further process automation within the FIPD based on users' responses regarding jurisdiction, authority, subject matter, and personal circumstances. Personnel working in each service department would automatically receive the cases, in order to carry out the corresponding follow-up actions, which would save time and resources from this first contact stage. If well implemented, a solution of this kind would help more lawyers to work on substantive legal service, rather than intake. The case triage would look like this:

FIGURE 12. PROPOSAL OF AUTOMATED TRIAGE



Nonetheless, as has been mentioned throughout this piece, technology can only be a positive force in furthering access to justice and efficiency when it is thoughtfully implemented, and takes into consideration the complexities and challenges in each context. Sloppy implementations not only do not reap the promised benefits, but also become yet another source of dissatisfaction and frustration among stakeholders.[141]

V. Conclusions

The Covid-19 pandemic was the catalyst for speeding up technological innovation in public legal services, although reforms regarding access to justice were long overdue. Bridging the access to justice gap requires thinking about goals and values at the high-level, but also on executing at the low-level.

In this latter aspect, solutions must be scalable, standardized, asynchronous and accessible. However, in order to do that institutions must use methodologies that allow them to correctly scope, plan, measure and improve legal processes around users' needs; in most cases, a database and data management overhauls may be needed too. Without these elements, efforts for legal process automation (or any other tech initiative for that matter) are most likely doomed to fail.

Today, there are sufficient best practices in several jurisdictions to argue that digitalization of justice is possible, and that it brings value to the justice system for both internal and external stakeholders. This paper offered only three examples (namely, Canada, United Kingdom and Singapore), but other success stories abound. That being said, failure cases are also numerous, and each jurisdiction should take into account its context and resources to plan and execute accordingly.

Through the prototype developed in this piece, it was demonstrated that digitalizing processes and forms is a doable endeavor, which allows automating and centralizing intake and triage with the characteristics developed throughout the paper (scalability, standardization, asynchrony, and accessibility).

[141] A good example of this situation is the recent protest in Mexico City by hundreds of lawyers that blocked circulation around the different city courts for several days to demand more expediency in processing cases and stopping the use of the electronic appointment system. In their opinion, this system does not work, makes litigation even slower than what it was in pre-Covid times, and has not decreased corruption. *See* Gómez Flores, Laura, *supra* note 26; Ramírez, Ramón, *supra* note 26.

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THE INSTITUTIONAL DEFICIENCIES WHICH CAUSE MEXICO'S 95% IMPUNITY RATE

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Abstract: *According to reports released by México Evalúa in October of 2021, the current rate of impunity for violent crimes in Mexico is estimated to be 94.8% and this is occurring as the number of homicides and disappearances continues to rise nationwide. To understand how the country remains caught in a perpetual state of extreme violence requires a deeply complex and multi-faceted analysis to determine which specific institutional deficiencies in Mexico might be contributing to the rise and ongoing dominance of organized crime. This article seeks to provide a concise yet broad perspective from which to begin to answer such questions by addressing the problematic development of Mexico's justice system from the adoption of the 1917 Constitution to the present day, the endemic corruption at all levels of government and security institutions, the tactical imbalances between law enforcement and organized crime due to misuse of funding and illegal arms trafficking, and the failed attempts at bilateral cooperation with the US despite the two nations' shared interest in disempowering the drug cartels. This comprehensive overview will provide a foundation from which possible solutions will be examined. These solutions include policy changes related to the relationship between the US and Mexico which could improve bilateral cooperation in combatting crime and corruption despite the recent diplomatic breakdown involving the US Drug Enforcement Agency's arrest and subsequent release of Mexican General Salvador Cienfuegos. Reforms of the justice and law enforcement systems will then be explored which will include proposals that encourage the involvement of international institutions such as the United Nations Committee on Enforced Disappearances and the International Criminal Court.*

Keywords: *Impunity, organized crime, corruption, forced disappearances, bilateral cooperation.*

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Resumen: *Según informes difundidos por México Evalúa en octubre de 2021, la tasa actual de impunidad por delitos violentos en México se estima en 94.8% en medio de un aumento constante de homicidios y desapariciones a nivel nacional. Una explicación de cómo el país parece estar atrapado en un estado perpetuo de extrema violencia requiere una mirada profundamente compleja y multifacética sobre qué deficiencias institucionales en México podrían ser los factores que más contribuyen al establecimiento y dominio continuo del crimen organizado. Este artículo busca brindar una perspectiva concisa pero amplia desde la cual comenzar a responder tales preguntas al abordar el desarrollo problemático del sistema de justicia de México desde la constitución de 1917 hasta la actualidad, la corrupción endémica en todos los niveles del gobierno, las instituciones de seguridad, los desequilibrios tácticos entre la aplicación de la ley y el crimen organizado debido al mal uso del financiamiento y el tráfico ilegal de armas, fracasó en la cooperación bilateral con los Estados Unidos a pesar de una responsabilidad compartida en el empoderamiento de los cárteles de la droga. Esta descripción general proporciona una base a partir de la cual se exploran las soluciones que incluyen cambios de política en las relaciones entre los Estados Unidos y México que podrían mejorar la cooperación bilateral en la lucha contra el crimen y la corrupción tras la reciente ruptura diplomática que involucró el arresto y la posterior liberación del general mexicano Salvador Cienfuegos por parte de la Agencia Antidrogas de Estados Unidos. Con respecto a una reforma más eficaz del sistema de justicia y la aplicación de la ley, se han propuesto soluciones que involucran a instituciones internacionales como el Comité de las Naciones Unidas contra las Desapariciones Forzadas y la Corte Penal Internacional.*

Palabras clave: *Impunidad, crimen organizado, corrupción, desapariciones forzadas, cooperación bilateral.*

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I. Introduction

Mexico has suffered greatly as the result of the astonishing rise to power of criminal organizations over the past several decades. These groups first began to appear in the 1980s, but violence has increased exponentially across the

country and impunity has reached unprecedented levels following the government's declaration of war on the drug cartels in 2006. Recent reports by México Evalúa estimate the rate of impunity for violent crimes in Mexico to be 94.8%. Meanwhile, clandestine graves containing the remnants of thousands of "disappeared" persons are continuously discovered as the public awaits answers regarding the now infamous Ayotzinapa 43, femicides reach new records, and political assassinations take place in broad daylight as organized crime overpowers vastly underequipped police forces.[1]

This violent crime impunity rate of nearly 95% is the result of a complex mixture of innate flaws in the development of Mexico's criminal justice and law enforcement systems, deep-seated institutional corruption, and failed attempts at bilateral cooperation with the US. The extensive and multidimensional nature of such a colossal problem has shared roots in the United States regarding issues such as illicit drug demand, arms sales, and corrupt actors.

Nevertheless, this paper will primarily employ a Mexican institutional perspective with only a limited acknowledgment of the effects resulting specifically from Mexico's relationship with its northern neighbor. This paper will first investigate the institutional weaknesses that have led to such an extreme impunity rate by providing a review of the problematic development of Mexico's judicial system and law enforcement institutions since the adoption of the 1917 Constitution.

From this comprehensive perspective, the continued efforts to fight corruption and the failure of bilateral cooperation can then be adequately analyzed, these being perhaps the two greatest obstacles facing in modern Mexico's struggle with organized crime. Potential solutions involving a more thorough reform of the justice system, as well as improved collaboration with the relevant agencies of the United States government, the United Nations Committee on Forced Disappearances (UNCED), and the International Criminal Court (ICC), can also be considered.

II. Deficiencies in Justice System Development: 1917 Constitution – Present

To understand the current problematic state of Mexico's justice system, a review of its development is necessary. A wealth of literature on modern Mexico explains how the problematic development of both its court and law enforcement systems, combined with endemic corruption and the resultant culture of distrust, has given birth to a grossly ineffective justice system. The problem begins with the 1917 Constitution. The enactment of the Constitu-

[1] For extensive data on Mexican crime and its justice system, *see* México Evalúa, *Hallazgos 2020: Evaluación del Sistema de Justicia Penal en México*, (Oct. 5, 2021), *https://www.mexicoevalua.org/hallazgos-2020-evaluacion-del-sistema-de-justicia-penal-en-mexico.*

tion following the end of the Mexican Revolution in February of 1917 was the first stepping-stone in the development of the modern Mexican government. At the time of the Constitution's adoption, Mexico continued to operate under an inquisitorial court system inherited from Spain in which judges held significant power to control both the investigations and the outcomes of criminal cases. Although the writers of the Constitution of 1917 openly called for an accusatorial system more conducive to fair trials, the idea did not take root, and the updated criminal codes of 1931 only further hindered progress. The new codes produced a hybridization of the inquisitorial and accusatorial models but generally maintained its historical, inquisitorial structure and included accusatorial procedures only near the end of court proceedings, which served as a merely symbolic gesture. As a result, the accused, at trial, was still subject to arbitrary rulings by a judge or prosecutor and faced "an opposing party rather than a neutral and detached magistrate."[2]

This system is still the norm across Mexico today and has led to a situation where public prosecutors hold near absolute power over court decisions. As Hine-Ramsberger explains, "What sets Mexico's procedural system apart from the majority of modern legal systems is the almost plenary power and expansive role of the public prosecutor," as they dominate court proceedings generally unchallenged by the defense and have "unfettered freedom to collect and admit into trial any evidence he or she wishes." Perhaps unsurprisingly, evidence is obtained without independent oversight.[3] This system has been identified as a prime facilitator of the continued rise of organized crime since securing the compliance of the relatively few actors who hold power over court outcomes is the only obstacle preventing criminals from going unpunished. Years after President Calderón proposed reforms of Mexico's court system in 2008, reforms which have progressed at a glacial pace, the current system still "leaves prosecutors (and police, judges, customs officials, and prison administrators) susceptible to bribery and corruption."[4]

The institutional infestation of corruption to such levels is due to the rise in power and influence of drug cartels following the breakdown of the long-term "working relationship" they had enjoyed with the Partido Revolucionario Institucional (PRI), which had held one-party rule in Mexico for over 70 years. Throughout this "relationship," which Hine-Ramsberger refers to as a "live and let live approach," the PRI had practiced a strategy of "containment" over confrontation with organized crime. This created an environment of relative peace in terms of the relationship between the cartels, the government, and the public. However, the storm to come was developing as

[2] William Hine-Ramsberger, *Drug Violence and Constitutional Revisions: Mexico's 2008 Criminal Justice Reform and the Formation of Rule of Law*, 37 Brooklyn Journal of International Law, 291, 294, (2011), *https://heinonline.org/HOL/P?h=hein.journals/bjil37&i=293*.

[3] *Id.* at 296.

[4] *Id.* at 299.

the infrastructural capabilities of drug cartels were allowed to grow exponentially during this time.[5] This period of relative peace was shattered soon after the PRI's reign ended in 2001 and President Felipe Calderón declared war against organized crime in 2006, which led to an enormous rise in violence across the country as heavily armed cartels faced off against both government forces and rival cartels alike.

As Mexico's streets became bloody warzones following Calderón's declaration of war against the cartels, the judicial reforms introduced in 2008 sought to reinforce the policy of direct confrontation with a systematic revitalization. These reforms called for more accusatorial methods comparable to the US system featuring the addition of oral court proceedings and greater courtroom prerogatives for the accused. The President introduced these changes, along with a requirement that all Mexican states implement the new measures by 2016, as a means to directly combat organized crime and corruption, and he optimistically asserted that these changes would restore the rule of law.[6] However, progress has been hindered by a mixture of factors. Mexico's economic struggles inhibited implementation of the reforms and, as the 2016 deadline approached, state governors complained of inadequate allocation of federal funds to successfully carry out the necessary changes which included the construction of courtrooms and other costly institutional changes. One aspect of the institutional change envisioned included the gargantuan task of creating a new wave of sufficiently trained lawyers capable of operating within a more intricate court system. This required a "parallel reform of the Mexican legal education system" to compliment that of the courts.[7] Many governors have also claimed that these setbacks are compounded by a lack of political will to change a system since the beneficiaries of rampant corruption profit from the status quo and will continue to do so until more federal support is given.

Perhaps the most daunting setback has been the violent backlash from the cartels in the form of "special victim" assassinations which target judges, journalists, and law enforcement. On many occasions, the victim is approached by a lawyer on behalf of a criminal organization and is directly threatened to comply with their demands. In some cases, threats go further than targeting a single individual. In 2009, for example, Calderón's government had made significant advances in exposing corrupt officials who had been colluding with the notorious drug cartel known as La Familia Michoacana. Judicial officials in Michoacán then received a simple yet ominous letter declaring "La Familia is watching you."[8] This dark cloud of fear which enshrouds the judi-

[5] *Id.* at 301.

[6] *Id.* at 302.

[7] *Id.* at 312.

[8] For substantial data sets regarding trends in criminality, justice system development, and tactical weapons deficiencies on a state-by-state level, *see* S. Schatz & S. Tobias, *State Ineffec-*

cial community has left it in a state aptly described by Schatz and Tobias as "condemned to mediocrity in homicide sentencing to achieve stability" since they have to deal not only with these types of security concerns but the myriad other challenges facing the Mexican judicial system as well. Those who do not bend to the will of organized crime often pay the price. This became clear following the initial announcement of the judicial reforms. For example, El Universal reported that "between 2008 and July 2010, various organized crime groups have been responsible for killing ninety-eight members of the Chihuahua State Attorney General's Office who had received training in the implementation of the procedural reforms." Such trends arose in state after state.[9] The ongoing chaos has fostered public distrust in the Mexican court system, which creates yet another obstacle to change since citizens tend to avoid seeking the help of law enforcement, "furthering impunity for perpetrators and incentivizing corrupt practices."[10]

Despite the grim outlook regarding the progress of reform of the court system, it was not entirely a failure from the beginning. In certain outlier states, which for a time showed promise in implementing the changes, rates of homicide sentencing increased significantly when comparing the available data from 2009 to that of 2014/2015. In Chihuahua, the first Mexican state to implement oral court proceedings in 2007, there was an 85% increase in homicide sentencing, which increased the rate of sentencing to 1 out of every 4 homicides compared to only 1 out of 37 in 2009.[11] Similar positive trends were seen in notoriously violent states such as Sinaloa, Michoacán, and Mexico's capital, the Distrito Federal. However, these states were unable to improve upon or even maintain such progress as their court systems eventually struggled to develop rapidly enough to accommodate the rising wave of violent crime across the country. Some states saw homicide rates increase as much as 400-600%.[12] As of 2014, the vast majority of Mexican courts continued using the traditional system and had undergone little or no reform at all, and those that had were inundated with new cases leaving little chance of success. The entire justice system was facing chronic congestion across the spectrum of criminal processes from the issuing of arrest warrants to trials and sentencing. This limited court capacity left some cases delayed for years and caused critical issues such as the assassination of journalists to be virtually ignored. The dismissal of one particular case involving the murder of

tiveness in Deterring Organized Crime Style Homicide in Mexico: A Vicious Cycle, 76 Crime, Law, and Social Change, (2021), *https://doi.org/10.1007/s10611-021-09946-1*.

9 Evangelina Hernández, *Narcoguerra rebasa a la reforma judicial*, El Universal, (July 9, 2010), *https://archivo.eluniversal.com.mx/primera/35257.html*.

10 Hine-Ramsberger, *supra* note 2, at 300.

11 Schatz and Tobias, *supra* note 8.

12 *Id.*

three police chiefs due to "deficient labor" added to the climate of distrust both from the public and police officers who felt unprotected.[13]

Mexican law enforcement systems which are meant to share a symbiotic partnership with the courts have their own distinct deficiencies. Perhaps the greatest challenge is the tactical disparity between underequipped local police units and drug cartels who are kept in constant supply of new weaponry via the "iron river" of illegal arms trafficking. This illicit flow of weapons, a large percentage of which comes from the US, helps create organized crime's de facto armies. Heavy automatic weapons, military grade explosives, RPGs, and IAFVs (Improvised Armored Fighting Vehicles) are readily available whereas municipal police forces are left relatively powerless due to the scant supply of weapons, extremely poor-quality body armor, and a lack of personnel in general.[14] Municipal police units have taken the brunt of the criticism due to cartel activity being "highly localized" and "geographically specific," generally taking place in only 54% of Mexico's municipalities.[15] This geographic containment does appear to aid law enforcement in combatting organized crime since the military has the ability to intervene and focus on certain regions for any period of time deemed necessary. However, over the long-term, this tactic becomes a country-wide game of whack-a-mole and neither law enforcement nor the military have the infrastructure to effectively combat the cartels on a national level.

There was some hope that a program called Fortaseg (Programa de Fortalecimiento de la Seguridad) would be able to provide a solution for these under-equipped municipal police forces. Fortaseg, which began in 2016, is a government-subsidized program designed to direct funds to municipalities specifically in need concerning this issue. However, this program appears to have been an overall failure for two principal reasons. First, municipalities have found it extremely difficult to obtain approval for funding. There are 2,448 municipalities in Mexico, yet funding is limited to 206 of these, and each applicant must meet a "high intensity" classification regarding crime rates in order to be awarded funding.[16] These highly selective restrictions also feature a bias that privileges the most populated municipalities despite the fact that there are significantly higher homicide rates in other less populated areas. Second, mismanagement and corruption appear to be preventing any progress in municipalities which are granted funding. Local police have accused officials of funneling Fortaseg funds into their own pockets. Government audits appear to support these claims, concluding that 44.5% of Fortaseg funds have been spent on "personal and technical services" and "other purchases/expenses." Some municipal police units face armed criminals with

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

no weapons whatsoever, while others report the disappearance of weapons from caches with restricted access (likely due to corrupt suppliers to cartels), shipments of supplies that never arrive, and a severe lack of ammunition, inferior armor, and the selling of reconditioned vehicles as new vehicles. These complaints were found to be common grievances nationwide.[17] Law enforcement and the military are outgunned and outmanned while at the same time both are suffering from debilitating levels of corruption.

Another flaw in Mexico's law enforcement system post-2006 has been its aggressive, militarized response which has brought with it a litany of human rights abuses.[18] Such conduct is contrary to, and ultimately undermines, the rule of law and is a principal driver of the endemic distrust of law enforcement by the general population in Mexico. This generalized disengagement remains a notable factor fostering impunity. Various human rights commissions have investigated numerous claims of arbitrary imprisonment and use of excessive force, as well as thousands of reports of torture.[19] Although major institutions such as the Inter-American Commission on Human Rights (IACHR) have called on the Mexican government to take immediate remedial action, these abuses have gone largely unacknowledged and a deep rift between the public and law enforcement prevails.

III. Failed Bilateral Cooperation and Continued Corruption

In 2008, a security agreement entitled the Merida Initiative was established between the US, Mexico, and the Central American nations with the goal of combatting organized crime in the region. The following year, the US Department of Justice described Mexican drug trafficking as "the greatest organized crime threat to the United States."[20] This raises the question as to why so little progress has been made in combatting organized crime when Mexico shares common cause with its powerful northern neighbor on this issue. Although the Merida Initiative explicitly highlighted the importance of targeting money laundering, relatively little funding was allocated to specifically target money laundering, and funding for various other goals of the initiative appear to have lacked any focused approach as well.[21] In addition to the initiative's weak start, modern, sophisticated methods of moving of

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17 *Id.*

18 Paula I. Rosa Rodriguez, *Criminal Justice, Due Process and the Rule of Law in Mexico*, 12 Mexican Law Review, 147, 153, (Jan. 2019), http://dx.doi.org/10.22201/iij.24485306e.2019.1.13131.

19 *Id.* at 168.

20 Eric L. Olson, et al., *Shared Responsibility: US – Mexico Policy Options for Confronting Organized Crime,* Woodrow Wilson International Center for Scholars, Mexico Institute, 141 (Oct. 2010).

21 *Id.* at 142.

funds obtained via the drug trade have worked in favor of organized crime and exacerbated the problem. As the power of Mexican organized crime has eclipsed that of the Colombian cartels further south, there is less of a need to move cash into and out of Mexico and the rapid advancements in technology which obviate the need for the physical transport of bulk cash across borders are an advantage for organized crime. Meanwhile, on the northern side of the border, there is no centralized US entity which collects and consolidates information regarding money seizures by its various law enforcement institutions, so the data which could be used to advance the initiative in a substantial manner is simply not available.[22] In addition, the US government has not been able to devise any effective method of inhibiting the flow of contraband transported by vehicle due to the overwhelming amount of traffic at US-Mexico border crossings.[23] The Merida Initiative has essentially been ineffective since its inception and any progress that has been made has been overshadowed by more disconcerting issues in US-Mexico collaboration efforts resulting from corruption.

Mexico's current president, Andrés Manuel López Obrador (AMLO), has appeared to make a genuine attempt at fulfilling his campaign promise to crack down on corruption, however, any sign of progress has yet to be seen, and the sincerity of his efforts have been subject to a high level of scrutiny. AMLO has utilized Mexico's Financial Intelligence Unit (FIU) to a far greater degree than his predecessors had in order to combat money laundering (one of organized crime's greatest tools) and he has not shied away from targeting high-level corruption. After his first year in office, corruption-linked bank accounts blocked by the FIU had increased by 1,400%, and the number of pesos frozen had increased by more than 5,500%. AMLO's government also introduced reforms which allowed for "non-conviction-based asset forfeiture" which has proven to be a productive tool against corruption.[24] Despite the impressive numbers, this apparent progress is no significant detriment to the colossal system of organized crime. Additionally, these anti-money laundering efforts are plagued by a lack of institutional cooperation (frozen accounts are often freed by court rulings), inefficient monitoring of and adaptation to progressing technology, and inadequate investigation of "threats through nonfinancial businesses."[25] AMLO has also faced harsh criticism for appearing to have personal biases regarding targeted corruption. His administration boasts of acting against high-profile corruption, but there is a notable lack of action against his own associates or political allies, and he turns a blind

[22] *Id.* at 144.

[23] *Id.* at 148.

[24] Andres Martinez Fernandez, *Money Laundering and Corruption in Mexico: Confronting Threats to Prosperity, Security, and the US – Mexico Relationship*, American Enterprise Institute, 4, (Feb. 2021), http://www.jstor.org/stable/resrep30205.

[25] *Id.* at 4.

eye to accusations against his family members.[26] In addition, there has been a failure to include any part of the military in AMLO's anti-corruption efforts. This was highlighted by the controversial arrest of General Salvador Cienfuegos by the US Drug Enforcement Administration (DEA). Following his arrest, AMLO's administration took a hard stance in his defense and successfully negotiated his release after threatening to disallow any future DEA operations in Mexico. Furthermore, DEA agents in Mexico no longer have diplomatic immunity and must share any intelligence information they obtain with Mexican officials.[27] These types of diplomatic breakdowns impede bilateral cooperation between Mexico and the United States which is a crucial factor in combatting organized crime. Cases such as the General Cienfuegos debacle not only exacerbate the distrust between US and Mexican officials, but also demonstrate an attitude of tolerance toward organized crime which further promotes impunity.

IV. Proposed Solutions

Experts and analysts of Mexico's domestic and international policies have posited some viable solutions to these problems. Regarding bilateral cooperation with the US, there are institutional changes which, if implemented in both countries, might mend the damaged diplomatic relationship, and greatly improve the efficacy of efforts to combat organized crime and corruption on both sides of the border. Although this paper's analysis proceeds from a Mexican institutional perspective, the Cienfuegos incident underscores how AMLO's reluctance to include military personnel in his sworn fight against high-profile corruption puts an impenetrable roadblock in the path of progress. As a result, the US needs to be the catalyst for progress until either new leadership comes to power in Mexico or unexpected changes in policy take place. The US should take action to enhance the capabilities of the DEA, the Department of Justice, and the Treasury Department to fight illicit drug demand, cash smuggling, and money laundering by providing more targeted funding to operations such as the Financial Crimes Enforcement Network. Such action could inspire Mexican officials to seek a more cooperative relationship with the US due to its display of genuine commitment to the issue.[28] With actions such as these providing a starting point for the improvement of relations between the two nations, new specialized bilateral task forces could be created to facilitate stronger cooperation and to address common problems such as the need for more effective information sharing mechanisms and more coordination in the setting of priorities. Such efforts would, of course,

[26] *Id.* at 19.

[27] *Id.* at 11.

[28] *Id.* at 22.

face the ever-present factor hindering progress, which is corruption at all levels. On the US side, increased sanctions on Mexican officials would not only disable the cycle of judicial corruption that frees accounts previously frozen by Mexico's FIU, but could also target military and security entities which are being ignored by the current administration.[29] In terms of Mexico's contribution, a broad and depoliticized anti-corruption effort is necessary. AMLO's administration needs to abandon its apparent preference for excluding political allies and the security sector from investigation. This can be achieved by giving institutions such as the FIU greater independence and reversing the recent decisions antagonistic to DEA cooperation. In addition, although AMLO's fixation on high profile corruption is necessary, efforts to combat middle and low-level corruption have been neglected.[30] These lower levels of corruption extend throughout the country and are the foundation of the national problem. Eliminating such corruption will require better communication and cooperation between local, state, and federal institutions. If steps such as these are undertaken, the level of cooperation between the US and Mexico could surpass anything achieved previously.

In addition to reinvigorating bilateral cooperation with the US, other solutions proposing intervention by international institutions hold some hope that Mexico might be nudged into taking legitimate steps in combatting organized crime and corruption. One set of solutions seeks to reform Mexico's policies which have permitted the ongoing impunity in the area of forced disappearances. Mexico has a dark history of forced disappearances. Amid the civil strife of the 1960s, forced disappearances were perpetrated by the military. Disappearances began to increase even more with the rise of organized crime, with a particularly dramatic increase occurring after the onset of the Drug War in 2006. "Forced disappearances" are distinct from cases of "missing persons" in that the disappearance is carried out by state actors or outside agents with the "authorization, support, or acquiescence of the state."[31] Data available concerning the staggering (and still increasing) number of disappearances in Mexico contain little information as to whether a case can be considered "forced," but the numbers do offer some implications. As of 2018, the number of missing persons in the country had reached 34,656, yet in the previous year only 732 investigations had been opened and only 9 convictions had resulted from these cases. The IACHR had already declared disappearances to be at "critical levels."[32] As of May 2022, the official number of disappearances recorded since 1964 had surpassed

[29] *Id.* at 22.

[30] *Id.* at 24.

[31] J. A. Guevara Bermúdez, & L. G. Chávez Vargas, *La impunidad en el contexto de la desaparición forzada en México*, 14 Eunomía. Revista en la Cultura de la Legalidad, 162, 163, (Apr. 2018), *https://doi.org/10.20318/eunomia.2018.4161*.

[32] *Id.* at 165.

100,000, with the majority of these taking place following President Calderón's War on Drugs.[33] While these numbers are already alarmingly high, Mexico's legal system is susceptible to underreporting in this area which is yet another factor contributing to the country's high level of impunity. The National Survey of Victimization and Perception of Public Security estimates unreported crimes to be at 93%, citing general distrust of law enforcement as the cause. For cases that are reported, persons making the report are typically asked for the context and cause of the disappearance that many cannot provide, and this further contributes to underreporting.[34] At the institutional level, the management of cases of reported disappearances is delayed by the aforementioned congestion within Mexico's judicial system. Perhaps the most substantial factor, however, is the law itself, which grants virtual immunity to the military. Mexico's military codes permit military personnel to carry out unrestricted and undefined activities under the guise of "internal security" which are entitled to confidentiality.[35]

In 2016, Mexico created a prosecutor's office independent from the executive branch in an attempt to shield prosecutors from corrupt influences. While this does offer some hope for progress, Guevara explains that civil servants continue to call for far more action such as the demilitarization of public security and specifically defining the operational limits of the military. This is necessary since the military has been the primary offender regarding abuses involving excessive force, arbitrary detentions, withholding of evidence, and forced disappearances.[36] In addition to these measures, Guevara asserts that the only hope for lasting change is international oversight similar to the moderately successful Comisión Internacional contra la Impunidad en Guatemala (CICIG). An example of this type of oversight occurred amid the increased scrutiny of Mexico's justice system in the aftermath of the forced disappearance of 43 students in the city of Iguala. The United Nations Committee on Enforced Disappearances (UNCED) provided Mexico with a set of guidelines to address its seemingly insurmountable level of corruption and impunity. The recommendations consisted of the following: *(i)* adopt a general law regulating and facilitating the search for victims as well as the prevention, investigation, and prosecution of the act at both the federal and state levels; *(ii)* create and maintain a national register with comprehensive statistics regarding victims of enforced disappearance; *(iii)* reform the federal and state criminal codes so that they uniformly recognize the crime as autonomous from others and provide a definition in accordance with the International Convention on Enforced Disappearances; *(iv)* guarantee both (a)

[33] Vanessa Buschschlüter, *Mexico Disappearances Reach Record High of 100,000 Amid Impunity*, BBC, (May 17, 2002), https://www.bbc.com/news/world-latin-america-61477704.

[34] Guevara, *supra* note 31, at 169.

[35] *Id.* at 170.

[36] *Id.* at 171.

that all state entities or agents that could have been involved in a disappearance are investigated and (b) that those members of civil or military security forces that could have been involved be excluded from participating in such investigations, in order to ensure that Mexican officials conduct exhaustive and impartial investigations.[37] Saenz explains that there is a general consensus that implementation of these guidelines, complimented by continued US extradition of drug cartel leaders and prosecution of high-profile cases of corruption, could be a true catalyst for change in Mexico.

Direct involvement of the International Criminal Court (ICC) and its Officer of the Prosecutor (OTP) could put additional pressure on Mexico to improve its justice system. Given the dire levels of corruption and forced disappearances in Mexico, a preliminary investigation of these problems would almost certainly lead to a full intervention by the ICC and would pressure Mexican officials to seek legitimate reform in the justice and public security systems, dissuade them from protecting corrupt actors, and likely uncover information regarding unresolved cases of forced disappearances.[38] Due to the corrupt nature of Mexico's government, it is extremely unlikely to request or welcome an initial examination by the OTP, and such external involvement has been resisted in the past. Nevertheless, Mexico has been subject to the jurisdiction of the ICC since it ratified the Rome Statute in 2005, thus, the ICC could assert its authority in Mexico with the full support of international law even without such a request. Widespread pleas for direct involvement by entities such as the ICC increase the likelihood of a self-initiated investigation by the OTP or a request for intervention by the United Nations Security Council. While this remains a reason for hope, the complex procedural requirements which must be fulfilled before a full investigation can occur present another formidable challenge.[39] Given Mexico's current chaotic situation, the mere presence of the OTP in Mexico could lead to dramatic improvements for the people of Mexico even if a full ICC investigation were never initiated. Saenz explains that the OTP has tools and resources which could put considerable pressure on government officials even before a full ICC investigation has commenced since opposition to reforms proposed by the OTP would be perceived as an indicator of possible corruption. In addition, the OTP would likely make use of the work previously done by human rights organizations and other NGOs which would add more gravity and credibility to their claims and enhance the legitimacy of these organizations. The powerful influence of the OTP's presence in the country might inspire

[37] Rodolfo D. Saenz, *Confronting Mexico's Enforced Disappearance Monsters: How the ICC Can Contribute to the Process of Realizing Criminal Justice Reform in Mexico*, 50 Vanderbilt Journal of International Law, 45, 53 (January 2017), https://heinonline.org/HOL/Page?handle=hein.journals/vantl50&collection=usjournals&id=55&startid=55&endid=122.

[38] *Id.* at 77.

[39] *Id.* at 77.

other influential organizations to join the effort to pressure the Mexican government to implement genuine reform.[40]

V. Conclusion

As mentioned above, data compiled by México Evalúa currently estimates the rate of impunity for violent crimes in Mexico to be 94.8%. Investigation into the causes of such a high impunity rate has led to an abundance of literature on the subject. The sources referenced in this review provide a foundation for identifying and understanding the set of institutional deficiencies inherent in Mexico's governmental and law enforcement systems that have facilitated such a deep-seated political culture of corruption and impunity.

Although literature on the subject is plentiful, especially following the spike in violence after the initiation of Calderón's Drug War in 2006, acquiring consistent and up-to-date data appears to be an ongoing challenge. This appears to be the result of the confluence of factors identified in this article which hinders an effective governmental response to the problem, and also suggests why much of the literature cites the work of NGOs and human rights organizations instead of reports produced by the Mexican government itself.

However, experts in law and criminal justice, non-governmental entities, as well as both Mexican and international authorities, have produced source material which provides reliable assessments of the enduring defects of Mexico's justice system and have recommended specific courses of action which could bring about genuine change in the country.

[40] *Id.* at 107.

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INFORMATION SOCIETY AND TAXATION: THE CASE OF E-COMMERCE

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Abstract: *The use of information technologies in business activities has led to significant changes, some of them of a legal nature. Among them, those related to taxation have gained relevance, since electronic commerce generates many financial transactions that may result in taxation. Therefore, these new manifestations of online economic activities bring about the problem of the concept of "functional" sovereignty and various issues related to fiscal responsibility for e-commerce. This forced us to analyze the new solutions adapted to the delocalized nature of electronic commerce, as the European Union did with the now called "Amazon Tax." In this article, we will try to make a comparative study, between Mexico and the European Union, seeking to clarify the historical evolution, as well as the pragmatic solutions and regulatory problems posed by the taxation of e-commerce.*

Keywords: *Tax obligations, e-commerce, Amazon Tax.*

Resumen: *El uso de las tecnologías de la información en la actividad empresarial ha supuesto importantes cambios, algunos de ellos de carácter legal. Y entre ellos cobran importancia los relacionados con la tributación, ya que el comercio electrónico genera muchas transacciones financieras que pueden dar lugar a tributación. Por lo tanto, estas nuevas manifestaciones de actividades económicas en línea introducen el problema del concepto de soberanía "funcional" y varias cuestiones relacionadas con la responsabilidad fiscal para el comercio electrónico. Eso nos obligó a analizar las nuevas soluciones adaptadas al carácter deslocalizado del comercio electrónico, como hizo la Unión Europea con la ahora denominada "Tarifa Amazon". En este artículo intentaremos hacer un estudio comparativo, entre México y la Unión Europea, buscando esclarecer la*

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evolución histórica y las soluciones pragmáticas y los problemas regulatorios que plantea la tributación del Comercio Electrónico.

Palabras clave: *Obligaciones fiscales, comercio electrónico, impuesto de Amazon.*

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I. Introduction

The circumstances in which people interact with each other have changed dramatically since the 1980s, so that social, economic, commercial, political, and fiscal practices have become transnational. These changes were intro-

duced by a set of circumstances in which local, national, and global relations stimulated by the invention of new communication technologies caused a growing economic interdependence and development of a new structure in international trade, as well as new online consume behaviors. It can be stated that, today, "e-commerce is everywhere, offering customers new and used products, —and becoming a global force in the fields of logistics and retail."[1]

The use of information technology in business activities has led to important changes, some of them of a legal nature. And among them those related to taxation acquire great importance, since electronic commerce generates many financial transactions susceptible to taxation.

Consequently, new manifestations of economic capacity have emerged that pose the problem of the functional concept of sovereignty, and, within this, issues related to fiscal powers in electronic commerce. This forces us to seek new solutions adapted to the delocalized nature of electronic commerce, as the European Union did with the so-called "Amazon tax," introduced by a new regulation "of the Value Added Tax that obliges all online stores to invoice this tax in the buyer's country of origin and not where the service provider is located."[2]

Contributions are taxes on manifestations of economic capacity, and it is clear that in new digital environments, and particularly in electronic commerce (e-commerce), events that can be considered as such occur.

We can consider that they fit in the definition stated above: 1) transactions between companies ("Business-to-Business," "B2B"); 2) transactions between companies and final consumers ("Business-to-Consumer," "B2C"); 3) transactions between final consumers ("Consumer-to-Consumer", "C2C"); 4) transactions between companies and public administrations ("Business-to-Government," "B2G").

Therefore, we can place various nodal questions, which we will try to answer throughout this presentation and which we can summarize as follows: 1) Is there a difference between who acquires a merchandise through any of the traditional methods and who does it through the Internet? 2) From the point of view of taxation, are the incomes different when gained by a merchant or a businessman who uses open communication networks to obtain them?

Obviously, the answer to the previous questions must be negative; hence we will face important problems. Although it is true that electronic commerce cannot be conceived as an easy formula to defraud, it is no less so that in practice there are numerous problems that need to be solved.[3]

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[1] Spence, Michael, *La lógica inexorable de la economía colaborativa*, Project Syndicate, (Sept. 28, 2015), https://www.project-syndicate.org/commentary/inexorable-logic-sharing-economy-by-michael-spence-2015-09/spanish.

[2] *See Claves del nuevo IVA para el Comercio Electrónico*, Pymes Consultants/asesor de Pymes, https://www.cesce.es/es/w/asesores-de-pymes/claves-del-nuevo-iva-para-el-comercio-electronico.

[3] Teresa Maria Da Cunha Lopes & Martha Ochoa León, *El control de la administración tribu-*

To draw valid conclusions on these issues, it is convenient to refer, first, to taxes levied on electronic commerce, so we therefore consider the comparative approach to be more productive.

We will highlight, on the one hand, the taxes that, under current regulations in Mexico, fall on income: Personal Income Tax,[4] Income Tax for Non-Residents in Mexico, the Corporate Income Tax and, on the other hand, the Value Added Tax levied on consumption. Those other contributions also affect electronic contracting, although to a lesser extent, and to which we will briefly refer.[5]

Moreover, based on the application of the comparative method with the European Union, we will try to analyze the innovative solutions that have allowed the taxation of transnational e-commerce companies and online service providers —which we will call "serial" tax evaders—, like Amazon and Google.

II. The Problems Inherent to the Specific Nature of E-Commerce

In the first instance we must refer to the specific characteristics of the nature of Internet transactions. These are variables that, from the point of view of taxation, impact the widespread growth of electronic commerce and online contracting operations and, therefore, require tax solutions appropriate to the new possibilities for expansion of e-commerce.

These variables are:[6] 1) Increasing business efficiency through the use of new possibilities for communication; 2) The multiplication of access points in time and space (fewer restrictions and geographic relocation of businesses); 3) The digitization of economic activity (intangible available services); 4)The emergence of new intermediaries; 5) The increase in the value of human capital in companies, and the introduction of new labor structures[7] of the "new economy",[8] 6) The generalized use of the languages with the greatest

taria sobre el comercio electrónico, 4 Der. Bio. y Nuevas Tec., (August 11, 2021) https://www.researchgate.net/publication/301607629_EL_CONTROL_DE_LA_ADMINISTRACION_TRIBUTARIA_SOBRE_EL_COMERCIO_ELECTRONICO.

4 Ley de Impuesto sobre la Renta [LISR], Nov. 12, 2021, https://www.diputados.gob.mx/LeyesBiblio/pdf/LISR.pdf

5 LISR, Title II ISR NP, Title II, Nov. 12, 2021, https://mexico.justia.com/federales/leyes/ley-del-impuesto-sobre-la-renta/titulo-ii/

6 *See* García Espinar, *Aspectos Fiscales de Internet: hacia una tributación transfronteriza*, *in* Principios de Derecho de Internet, 485-545 (Pablo García Mexia coord., Tirant Lo Blanch, 2005).

7 Teresa Maria Da Cunha Lopes, *et al., Economía del Conocimiento y su impacto en las estructuras laborales,* II 3 Rev. Intl. Cs. Jur., (2014) https://revistainternacionalcienciasjuridicas.org/2013/08/27/economia-del-conocimiento-y-su-impacto-en-las-estructuras-laborales-teresa-da-cunha-lopes-victor-acevedo-valerio-y-miguel-medina-romero/.

8 The new economy focuses on technological and organizational transformation. Cities play an important role in this relationship and in the relationship - problematic - that is established between it and the social and institutional processes that are at the basis of our

demographic penetration, one of these being Spanish; 7)The growing concentration of virtual services in transnational companies such as Amazon or Google that monopolize huge shares of the online market; 8) The paradox of the globalization of the economy that allows local adaptations to world-scale markets; 9) The mass use of smartphones and their new possibilities for e-commerce activities.

Secondly, the problems posed by the effective application of these taxes, as well as possible solutions, will be analyzed. It must be considered that certain characteristics of electronic commerce affect the traditional principles of taxation, such as:[9]

1) Dematerialization of products that can be digitized. These products, which have traditionally required a physical support for their commercialization, can now be sold over the Internet without the need for the material component that went with them, which had no value for the consumer.
2) Marketing of online services. The use of new technologies makes it possible to provide services entirely through the Internet and, therefore, remotely. For example: consulting services, legal, financial, insurance contracting, organization of auctions, auctions, travel agencies, and so on.
3) Internationalization of services. The market for the supply of services provided online and telecommunications does not only include national operators, but also non-established operators who wish to compete in it, as it is not necessary for them to have a physical location inside.
4) Relocation of the actors. Internet and direct electronic commerce favor that the agents involved do not know each other's location. The buyer only needs to know the electronic address of the website (the IP) where the seller is exposed, as well as to have a device with an Internet connection and with the capacity to store the computer bits that he is going to acquire. As for the seller, the point of sale rests on a material basis, the server. However, basically it is nothing more than a memory space of an electronic equipment occupied by software and data, ultimately bits, which can be transferred to another server located in a different State electronically. Even the server could be a portable electronic equipment and likewise, the modification of the content of the website could be done electronically. In short, the Internet enables the immediate relocation of the point of sale of virtual companies, without costs or transfers.
5) Anonymity. Knowing who the interlocutor is becomes complex, since few traces remain, if the parties do not use secure authentication mechanisms based on cryptographic techniques, such as digital certificates

coexistence and our lives. An important reference *see* Manuel Castells, *La Ciudad de la Nueva Economía,* 7 27 Pap. Poblac., (2001), https://www.scielo.org.mx/scielo.php?pid=S1405-74252001000100009&script=sci_arttext.

9 *See* Da Cunha Lopes, *supra* note 7.

and, especially, advanced electronic signatures. Although anonymity is defended by those who consider it an incentive for the development of this type of commerce, others reject it because they demand greater security and transparency in these transactions to avoid the risk of online fraud. In addition, from the perspective of taxation, it is necessary for the taxpayer of the consumption tax levied on the operation to know the nature of the buyer, the final consumer, the entrepreneur or professional, and his State of residence or where he is established.

Due to the importance, they are achieving in today's globalized society, the taxation of payment by electronic means deserves special attention. The last section of this chapter will be devoted to commenting on the possibilities for the Tax Administration to control electronic commerce.

III. Taxes on E-Commerce in Mexican Law

The taxes levied on electronic commerce are the same as those currently applied to traditional trade: Personal Income Tax (PIT, refers to Natural Person), Non-Resident Income Tax (NRIT), Corporation Tax (CT, refers to Corporative Person), and Value Added Tax (VAT), these three taxes that fall on income and the one on consumption, are the ones that most directly affect trade, but they also affect contracting other taxes such as Special Taxes on Production and Services (STPS),[10] the Tax on Patrimonial Transmissions, and Customs Taxes.

Next, we will analyze the characteristics of these taxes and the assumptions on which they apply, which will allow us to understand the problems that may arise when they fall on electronic commerce.

1. *Personal Income Tax*

The taxable event for Personal Income Tax is the obtaining of income by the taxpayer, who must be a natural person with permanent residence in Mexico.[11] The criteria to consider that a person has his habitual residence in Mexico are the following:

1) When the person has his home established in Mexico.
2) When the main core of the person's economic interests is in the national territory, even if his home is in another country.
3) When the person holds the Mexican nationality and is a state official or workers, even if his center of vital interests is abroad.

[10] LISR, Title IV, ISR NP, 2021.

[11] Código Fiscal de la Federación [CFF], art. 9, Nov. 12, 2021.

The tax base consists of income in cash, credit, goods, services, or any other type. Logically, the income comes from economic activities that are directly related to the taxation of electronic commerce. In addition, article 130 of the Income Tax Law (LISR) and article 16 of the Federal Tax Code (CFF) include a list of activities that should be considered income from economic activities, and among them is the trade or provision of services.

Taking the foregoing into account, it would seem clear that when the person carrying out economic activities through the network is a natural person residing in Mexico, the income obtained will be subject to this tax.

None of the articles in the Federal Tax Code leads us to think that because commerce can be considered electronic, it will escape taxation by this tax.[12] However, there is still the problem of locating income in cyber space.

2. *Non-Resident Income Tax*

The Income Tax for Residents Abroad with Income from a source of wealth located inside Mexican borders taxes the different income that can be obtained by individuals and non-resident entities. Title V of the Income Tax Law establishes what income should be considered obtained in Mexican territory. The incomes mentioned include the ones related to economic activities or operations, with the difference that in one of them the activity or operation is carried out through a permanent establishment located in Mexican territory and in another one without its mediation. In the latter case, for the income obtained to be taxed in Mexico, one of the following circumstances must be present:

1) The economic activities or operations should be carried out in Mexican territory.
2) They should involve services provided in Mexican territory, particularly those related to carrying out studies, projects, technical assistance, or management support.
3) Also in this case, income derived from electronic commerce must be included among the income subject to taxation, provided that the aforementioned requirements are met.

3. *Corporate Income Tax*

In Mexico, Title II of the Corporate Income Tax Law taxes the income earned by companies and other legal entities. The taxable event is set up pre-

[12] In Mexico there is no law equivalent to the Spanish LSSI (Law of Services of the Information Society and Electronic Commerce) that regulates Electronic Commerce with more precision.

cisely by obtaining this income, its source or origin being indifferent. Thus, as was the case with the previous taxes, there is no reason to exclude those obtained in electronic commerce. This is why, as of the 2020 reform of this LISR, in Title IV Individuals Chapter II Of Income from Business and Professional Activities, Section III Of Income from the sale of goods or benefits is added. Of services through the Internet, through technological platforms, computer applications and the like, will be effective as of June 1, 2020.[13]

For this tax, entities resident in Mexico are those that comply with any of the following requirements:

1) That their incorporation has been carried out in accordance with Mexican laws and the free trade agreements signed by Mexico.
2) That their registered office is in Mexican territory.
3) That they have their effective corporate address in said territory. If it is a question of operations of legal entities residing abroad, those operations. In case of several operations, the premises of the main administration of the business is located in the country, or failing that, the one designated.

4. *Value Added Tax*

The VAT[14] is an indirect tax that is levied on consumption, on deliveries and services made by businessmen or professionals (internal operations), intra-community acquisitions of goods and imports of goods. Deliveries of goods and services must be made by businessmen or professionals for consideration, on a regular or occasional basis, in the development of their business or professional activity. Electronic contracting can be included in any of the three cases, so that electronic commerce cannot be considered excluded from the application of this tax.

5. *Special Taxes*

In Mexico[15] Special Taxes on Production and Services, also indirect taxes, are levied on specific consumption: alcohol and alcoholic beverages, hydrocarbons, tobacco products, electricity, and certain means of transport. They are taxed on their manufacture, importation and, where appropriate, introduction into the internal territorial scope, and registration.

[13] Tit. IV, Chap. II, Sec. III, LISR 2020.

[14] LISR, Tit. IV, Chap. II, Sec. III.

[15] Ley del Impuesto Especial sobre Producción y Servicios (Special Tax Law on Production and Services) [IEPS] [STLPS], Nov. 12, 2021.

6. *Tax on Property Transfers and Documented Legal Acts*

In Mexico special taxes are included within the Title IV of the Income Tax Law in its chapters IV and V[16] contemplated in Patrimonial Transmissions and Documented Legal Acts. We are interested in the first category: patrimonial transmissions. In this case, the tax is imposed on onerous patrimonial transfers of assets and rights, regardless of their nature, that were located, could be exercised or had to be fulfilled in Mexican territory or in foreign territory, when, in the latter case, the obliged to payment of the tax has residence in Mexico.

7. *Customs Taxes*

By Customs Taxes we must understand all those that have as object the international traffic of merchandise.[17] The most important tax included in this category are import duties, which are required for the entry of goods into the customs territory.[18] But they also include the following: suspensive customs regimes, agricultural regulatory levies and other import levies required under the free trade agreements in force, anti-dumping and anti-subsidy duties as well as other minor duties.

IV. Tax Problems Raised by Electronic Commerce

1. *Some External Comparative References to Mexico*

Once the different taxes levied on electronic commerce in Mexico have been analyzed, it is necessary to delve into the particularities of taxing that businesses have through the Internet, emphasizing that these problems are not exclusive to the taxation of electronic commerce in Mexico, but that they "are of the nature of this, and are general to all tax administrations."[19]

Quoting Guillermo Alegre,[20] "The Internet does not generate wealth by itself, but it is of fiscal interest insofar as it can generate income in favor of its operators (which concerns direct taxation), and/or it reveals the economic capacity of its users (which affects the indirect taxation)."

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16 LISR 2021, Tit IV chap. IV and V.

17 In this regard, *see* Jorge Witker, Las Reglas de Orígen en el Comercio Internacional Contemporáneo, (IIJ-UNAM, 2005).

18 As established by the Customs Law in force in Mexico.

19 García, *supra* note 6.

20 Guillermo Alegre, *La Fiscalidad del Comercio Electrónico*, Guillermo Alegre (Aug. 15, 2021) http://www.guillermoalegre.es/la-fiscalidad-del-comercio-electronico/.

The fact that electronic commerce is not tax-exempt, as we have proven for the Mexican case, does not mean that there are no problems that make it difficult to put the exposed theory into practice.

The most important problems that can arise are:

1) On the one hand, the qualification of the income obtained, and the operations carried out.
2) On the other, the determination of the place where electronic commercial activities should be understood to be carried out.

2. *Income Tax Problems*

In income taxation, it is necessary to distinguish the problems that occur depending on whether the object of the contract are on-line or off-line supplies. As we know, the difference between one and the other is that, in the first case the goods or services that are acquired through the network circulate through it. Thus, while offline supplies are usually material goods that are transported by traditional means or professional services contracted through the network, online supplies are always goods or rights derived from intellectual property. Obviously, this does not mean that goods derived from intellectual property cannot be transmitted offline, let us think, for example, of the purchase of a book or a compact disc on a Web page that will reach us by traditional means of transport.

Of course, off-line hiring presents the least complications, since it is only necessary to apply general regulations to the income obtained. This will be considered income from economic activities, taxation by the ISR of non-residents, or it will be integrated into the accounting profit in the case of the ISR of the CP. In short, the use of electronic means has no impact on this type of contract.

Regarding online contracting, the main question is whether the acquisition of the digitized product implies only obtaining a right for its use or, on the contrary, the product is acquired on computer support in the same way as it could be done on any other type of support.

To advance on this issue, it is convenient to clarify the legal difference between assignment for use and assignment for sale. With the transfer of the mere use, a product consisting of the support and the right to use it is purchased with the limitations imposed by the Law (in the case of the comparative reference model of the European corporii iura in the matter, such will have to be searched in directives and regulations and in the case law of the EU courts).[21]

[21] *See* Press Release 49/12 on Case C-128/11, Axel W. Bierbach (bankruptcy trustee of UsedSoft GmbH) v. Oracle International Corp, http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-04/cp120049es.pdf.

Thus, the sale also involves the transfer of intellectual property rights. Let us review the comparative case of the regulations in force in the European Union. In Directive 2001/29 / EC, "On the harmonization of certain aspects of copyright and related rights in the information society" and, in Directive 91/250 / EEC, "On the legal protection of computer programs," "Patent rights" are expressly regulated (art. 9 of the latter). These directives also provide for the "transfer of the right to use" software, as well as the "transfer of exploitation rights". In this sense, it will also be necessary to look in the jurisprudence for the criteria of the "license agreements by virtue of which the client acquires a right to use the software for an indefinite time, not transferable and limited to internal professional use".

In principle, the use of a computer medium does not imply, a priori, that the income obtained should be classified as a transfer of use.[22] Hence, it will be essential to study each contract to distinguish when the use of the program is transferred and when the intellectual property rights over it are transferred. For this purpose, according to the Advocate General, "the principle of exhaustion applies when the copyright owner who has authorized the download from the Internet of a copy of a computer program on a data carrier also confers a right for consideration of use of said copy without time limit."[23]

The commercialization of the programs (software) in the domestic sphere does not pose too many problems from the fiscal standpoint, but it does from the perspective of defining the scope of application of the "transfer of rights" clauses, briefly referenced above. If the income obtained by the author is a consequence of the sale of the program, it will be considered performance of economic activity.[24]

The same will happen when the benefits come from the transfer of its use.[25] If the exploitation is carried out by a person other than the author, the income will also be regarded as income from economic activities. Finally, if the person other than the author only assigns the rights to exploit the program, the income obtained will be considered income from movable capital.[26] Individual taxpayers with business activities that sell goods or provide services through the Internet, through technological platforms, computer

[22] European Parliament and the Council of the European Union, *Directive 2009/24 / EC*, 111 Official Journal of the European Union 16, (2009) (on the legal protection of computer programs); which codifies *Council Directive 91/250 / EEC*, 122 Official Journal of the European Union 42, (1991) (on the legal protection of computer programs).

[23] *Supra* note 21.

[24] Considered as a business activity in the LISR, TIT. IV.

[25] In the previous Law (LISR TIT. IV) it would have been classified as income from professional activities.

[26] LISR, Title IV, art. 113-A. Individual taxpayers with business activities that sell goods or provide services through the Internet, through technological platforms, computer applications and the like that provide the services referred to in section II of article, are obliged to pay the tax established in this Section. 18-B of the Value Added Tax Law, for the income generated

applications and the like that provide services. The tax referred to in this section will be paid through a withholding made by legal entities residing in Mexico or residing abroad with or without permanent establishment in the country, as well as foreign legal entities or figures that provide, directly or indirectly, the use of technological platforms, computer applications and the like.[27]

3. *Transfer Pricing and Electronic Contracting*

Transfer prices, from a historical-doctrinal point of view, are defined as the amounts charged by one part of an organization for products or services that it provides to another part of the organization. But the term is sometimes used in a pejorative sense, to refer to "the transfer of taxable income from a company belonging to a multinational company —located in a tax jurisdiction with high taxation— to another company belonging to the same group —located in a jurisdiction of reduced taxation— through the use of incorrect transfer prices, in order to reduce the group's global tax debt." [28]

In order to try to lessen the losses that the use of transfer prices as a mechanism to reduce taxation may entail for the tax administrations, they usually apply the principle called arm's length.[29] According to this principle, for tax purposes, the prices agreed for transactions between entities of the same group should be deducted from the prices that would have been applied by other independent entities under similar conditions, in an open market. Most countries have provisions that allow tax authorities to adjust transfer prices that deviate from this principle.

But determining the market price to use as a reference can sometimes be difficult, because analogous situations may not exist. And in our object of study there are growing problems. It is common in large multinational companies to create private Intranet networks, which allow information exchanges between their staff at very low costs. How can you determine the price that these exchanges would have if an independent entity intervened? Clearly, it is almost impossible.

The most obvious solution is through the so-called "advanced price agreements" or prior agreements on related-party transactions. Returning to our comparative normative context, in Mexico as in the European Union, this possibility is foreseen.

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through the aforementioned means for carrying out the aforementioned activities, including those payments received for any additional concept through them.

27 LISR, 2021.

28 Hubertt Hamaekers, *Precios de transferencia. Historia, Evolución y Perspectiva*, 3 Revista Euroamericana de Estudios Tributarios (1999), at 13.

29 Da Cunha, *supra* note 7, and the applicable Guidelines on Transfer Pricing to multinational companies and tax administrations of the OECD.

4. *Problems of Locating E-Commerce Activities in Income Taxes*

In electronic contracting, these conflicts are relevant when the parties involved have different tax residences. The greatest doubts arise in relation to the determination of the residence of the supplier or suppliers. The most used criterion is that of the "effective management site," but with new technologies, defining which one it can be difficult.

For example, the place indicated on the website can be easily manipulated. But also, knowing who is behind a web page and where it is located is not an easy task, because the domain names owned by Internet providers do not necessarily correspond to a known physical location.[30] And if it is difficult to determine the residence of the seller, it will not be easier to locate the purchaser of the goods or services.

The impact that electronic contracting may have on the concept of permanent establishment deserves special attention. The Models of International Double Taxation Agreements on Income and Assets[31] define it as "a fixed place of business in which a company carries out all or part of its activity." Examples are cited such as headquarters, branches, offices, factories, workshops and mines, oil or gas wells, quarries, or any place of extraction of natural resources, as well as construction or assembly works whose duration exceeds twelve months.

From these models, which are the ones that serve as a reference in most of the agreements to avoid double taxation, it does not seem possible to deduce that the installation of computers or electronic equipment, without a physical presence that by itself can constitute a fixed place of businesses, is a permanent establishment, since they are excluded, as the 2010 OECD Model Convention states in its art. 5, paragraph 4:

> 4. Notwithstanding the previous provisions of this article, it is considered that the expression "permanent establishment" does not include: a) the use of facilities for the sole purpose of storing, displaying or delivering goods or merchandise belonging to the company; b) the maintenance of a warehouse of goods or merchandise belonging to the company with the sole purpose of storing, displaying or delivering them; c) the maintenance of a warehouse of goods or merchandise belonging to the company with the sole purpose of being transformed by another company; d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information for the enterprise; e) the maintenance of a fixed place of business

[30] Philippe Vlaemminck & Pieter De Wael, *The European Union Regulatory Approach of Online Gambling and its Impact on the Global Gaming Industry*, 7 Gaming Law Review, (2003), at 177-184, http://doi.org/10.1089/109218803766651467.

[31] *See* OECD Committee on Fiscal Affairs, Model Tax Agreement on Income and on Assets, (2010), https://www.oecd.org/tax/treaties/47213736.pdf/.

> solely for the purpose of carrying out any other auxiliary or preparatory activity for the company; f) the maintenance of a fixed place of business for the sole purpose of carrying out any combination of the activities mentioned in sub-sections a) to e), provided that the whole of the activity of the fixed place of business resulting from such combination retain its auxiliary or preparatory character.

As we will see, the existence of a "loophole" remains, namely, the question of whether a server or a web page incorporated in a server located in the buyer's country or in a third country can be considered a permanent establishment for tax purposes.

In the first case, it seems difficult to sustain the existence of a permanent establishment[32] if we consider the concept adopted by the Mexican legislation. A server cannot be considered a facility or a workplace. Perhaps it could be if there were also company personnel working on the task of attracting clients that would connect through said access, but this is not going to be the most common case.

It should not be forgotten that, on the Internet, contracts are concluded between the company and the client electronically, so in principle there are no authorized agents to act on their behalf. Furthermore, the OECD Model Convention cited above, when defining the agent, uses the expression "person," which makes it clear, if strictly interpreted, that computer equipment cannot be considered as such.

In the second case, the server is only enabling a company to establish a connection to the Internet, and it performs this service for the seller's company without later controlling the transactions that it carries out through the server.

Ultimately, neither a web page nor a server can be considered a permanent establishment of a company in a state, and the source state will not be able to tax the income generated by them.

Regarding income derived from professional activities, Article 11 of the OECD Convention establishes that the income that a resident from a Contracting State obtains from the provision of professional services or other activities of an independent nature can only be taxed in that State, unless this resident has a regular fixed base in the other Contracting State for the practice of his activities. Sending works (documents, reports, etc.) does not seem to be included within the framework of the permanent establishment, so the State receiving the benefit cannot tax the income obtained by the professional.

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[32] LISR 2021, Article 2, first paragraph: "For the purposes of this Law, a permanent establishment is any place of business in which business activities are carried out, partially or totally, or independent personal services are provided. It will be understood as permanent establishment, among others, branches, agencies, offices, factories, workshops, facilities, mines, quarries or any place of exploration, extraction, or exploitation of natural resources."

Another historical comparative reference to consider, in order to understand the evolution of Tax Law on electronic commerce, will be Directive 2002/38 / EC of May 7, 2002,[33] "amending and temporarily modifying Directive 77/388 / EEC regarding the value added tax regime applicable to broadcasting and television services and some services provided electronically," which has the explicit objective of Recital 2:

> (2) In order to ensure the proper functioning of the internal market, such distortions must be eliminated and new harmonized rules must be introduced for this type of activity. Measures must be taken to ensure, in particular, that those services, when they are carried out on a cost basis and consumed by customers established in the Community, are taxed in the Community and not if they are consumed outside the Community.

5. *Value Added Tax Problems*

The application of the Value Added Tax, as occurs in the income tax, does not pose special problems when those contracted are material goods that do not circulate on the network. When goods or services circulate on the network, it is essential, as in the previous section, to classify the operations as assignments of use or as sales.

In this tax,[34] assignments of use are considered provision of services, while sales are acquisitions of goods, whether they should be classified as internal operations, intra-community acquisitions, distance sales or imports. And regarding the concept of assignment of use, the considerations made when dealing with this same issue in relation to income tax are applicable.

In the Mexican legal system, the concept of provision of services is included in the LIVA[35] from a negative point of view: any transaction subject to tax that does not have the consideration of delivery of goods, intra-community acquisition or importation of goods is considered as such. And the deliveries of goods are defined as the transmission of the power of disposition over tangible goods, considering as such: heat, cold, electrical energy, and other forms of energy.[36]

Therefore, depending on whether or not the object of electronic contracting is the transmission of the power to dispose of a tangible asset, it may be classified as the delivery of goods or the provision of services. And logically, in assignments of use[37] the power of disposition is not transmitted; hence we

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[33] *Directive 2002/38/EC*, (2002), http://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:32002L0038&from=ES/.

[34] LIVA, art. 1, chapter II y III.

[35] LIVA, art. 17 to 18-A.

[36] Da Cunha, *supra* note 7.

[37] *See supra* note 21.

affirm that the cessions of use must be considered services provision. But, in addition, the digitization of goods or services can raise doubts regarding the existence of an authentic delivery of goods.

6. *Problems with Other Indirect Taxes*

A. *Special Taxes on Production and Services*

In relation to these taxes, there are no problems in qualifying the operations because the products subject to these taxes cannot circulate on the network. Let us remember that these taxes are levied on the manufacture, import, and, where appropriate, introduction into the domestic territory of products such as alcohol and alcoholic beverages, energy and flavored beverages, hydrocarbons, tobacco, and electricity, as well as certain means of transport. The use of the telematic means to contract this type of products does not show any differences compared with the use of any other contracting medium.

B. *Tax on Patrimonial Transmissions*

As was the case with VAT, the digitization of the products subject to tax may cause problems of qualifying the operation as a true acquisition of goods. And if there is no transfer of the asset, the taxable event of the tax is not carried out.

But even if goods or rights not circulating online are transmitted telematically, there may be problems that do not arise in traditional commerce. Perhaps the most important one is to determine when the encumbered act or contract is understood to have been carried out: At the moment in which the acceptance comes to the knowledge of the offeror or at the moment in which the acceptor issues the declaration?

C. *Customs Taxes*

Once again, if the goods subject to these taxes do not circulate on the network, the electronic nature of the contract is irrelevant. But when it comes to online supplies, difficulties arise, especially since these goods will not physically pass through customs. The solution that has been advocated involves the exemption of Customs Tax on digitized goods.

In this regard, it should be noted that the World Trade Organization favors the practice of not applying customs duties to electronic commerce operations. This can be deduced from the Declaration on Global Electronic Commerce, of May 20, 1998, issued in Geneva at the WTO Ministerial Confer-

ence. Likewise, the US Government proposed the complete elimination of customs duties on goods and services delivered over the Internet. Both community institutions and member countries share this idea.

V. Electronic Payment Means and Tax Administrations

Electronic means of payment can cause significant problems for tax administrations because they facilitate the use of banks established in tax havens. A few years ago, evading money to these places was, in addition to being complicated, expensive. Today, they can be accessed with a simple electronic transaction. In relation to the tax aspects of the virtual banking system that uses tax havens to capture deposits through the Internet, the regulations for operations carried out with or by persons residing in tax havens apply.[38]

Focusing on the question that interests us, there is no inconvenience to tax computer documents. If all the necessary circumstances exist to prove the authenticity of the electronic files or the content of the disks of the computers or processors, and the veracity of the documentation and the authorship of the signature are guaranteed, with the necessary expert evidence, electronically used, the commercial document in computer support, with a remittance function, must enjoy, as established in article 17-D third paragraph of the Federal Fiscal Code.[39]

The electronic signature is one that a signer places in digital form on some data, adding it or logically associating it to them, and uses it to indicate his approval of the content of that data. In general, it meets the following requirements:

— Linked only to the signer.
— Able to identify the signer.
— Created using a technical means that is under the control of the signer.
— Linked to the data to which it refers.

A particular class of electronic signature that offers greater security to users is the asymmetric public key digital signature. This type of signature consists of a cryptosystem based on the use of a pair of associated keys: a private key that is held by its owner and a public key that is freely distributed so that it can be known by anyone. Basically, the procedure for the asymmetric key digital signature is as follows:

[38] In regulations of Spain, LSISEC, article 17.2, is of special importance: "The Tax Administration may value the operations carried out with or by entities resident in countries or territories classified by regulation as tax havens at their normal market value, when the agreed valuation would have determined a taxation in Spain lower than that which may have corresponded by application of the normal market value or a deferral of said taxation."

[39] CFF, art. 17-D.

— The sender of a message encrypts it digitally using his private key.
— The recipient of the message can decrypt it using the sender's public key.

As the application of asymmetric cryptography on the entire message is very expensive, in long messages a summary algorithm is usually applied that transforms a sequence of bits into a smaller one, called a hash function in italics. By applying this function, a summary of the message called fingerprint is obtained, whose main characteristics are its irreversibility (the complete message cannot be obtained from the hash) and the impossibility of getting a second message that produces the same summary, so that any change in the message would produce a different hash.

Once the hash function has been applied to the main message, the resulting summary is encrypted with the signer's private key, and is sent together with the original message, in such a way that the receiver, to verify that the message has been signed by the sender, must perform two operations: decrypt the hash applying the sender's public key, and apply the hash function on the complete message obtained. If the hash received and decrypted and the hash obtained match, you will have verified that the message has been sent by the person who said it was sent, and that its content has not been altered.

These asymmetric cryptography systems allow confidential messages to be sent, providing authenticity, integrity, and non-repudiation by the recipient and, according to the current state of the art, they achieve the level of security necessary to assimilate them to the signature written on paper.

Although so far most of the regulations issued on the matter are based on this type of signature, I consider that the best legislative criterion will be the one that takes an open position that allows the development of new techniques and does not limit itself to enthroning this system at the expense of better future techniques.

In the specific case of the Mexican legal system, the Decree on Electronic Signature, of August 29, 2003 regulates this field.

VI. The Tax on Documented Legal Acts and the Electronic Document

In Mexico this tax is levied on the formalization of certain notarial, commercial, and administrative documents. As regards commercial documents, which are the ones that interest us, these are subject to:

— Bill of Exchange.
— Documents that perform a draft function or substitute for the bill of exchange. It is understood as such when the document certifies remittan-

ce of funds or equivalent sign from one place to another, it implies a payment order, or it includes the clause "to the order of".
— The receipts or certificates of transferable deposits.
— Promissory notes, bonds, obligations, and other securities issued in series, for a term not exceeding eighteen months, in which the consideration is set at the difference between the issuance and reimbursement amounts.

The taxpayer is, in the case of the bill of exchange, the drawer, except if it has been issued abroad, in which case the first holder in Mexico will be obliged to pay. In the rest of the aforesaid documents, the taxpayers are the persons or entities that issue them.

Focusing on the issue that interests us according to the provisions of article 17-D third paragraph of the Federal Tax Code, the legal validity of electronic documents for tax purposes is recognized: "For the purposes of the aforementioned, a document will be understood as any written support, including computerized ones, by which something is proven, accredited or recorded."[40] Therefore, there is no downside to taxing computer documents as well.

VII. Conclusion

Considering everything we have seen in the previous sections; for the taxation of e-commerce constitutes a great challenge. For example, the methods used so far are ineffective in the fight against fraud related to this matter, a perspective that is beyond the scope of this article but deserves this brief mention.

From the parallel study of Mexican tax law and EU regulations, which we have been conducting every five years, tax law is evolving to meet the challenges of new technologies. Electronic commerce, as it has developed in its beginnings, is almost at the margin of tax law, especially regarding intangible goods that can circulate without the possibility of apprehension by the public authorities. The potential losses for governments are enormous.

The two fundamental characteristics of e-commerce, namely the virtuality of sites and the immateriality of transactions passing through them, are shaking up the rules on which the taxation of traditional commerce is based.

The novelty is such that the question arises as to whether this new activity should be subject to taxation. Realistically, one can answer that taxation has never let a lucrative activity escape, but the arguments put forward in this debate are nonetheless interesting in terms of the directions that could be taken in the future and the way in which, over time, e-commerce activities could be regulated for tax purposes.

[40] CFF, art. 17-D, third.

The subject of e-commerce is still young, and one wonders whether normal taxation might not hinder its development when great wealth is expected from it. A first approach was to look for a specific taxation principle for this new activity. However, we were rather inclined towards tax neutrality, as it is the most operational approach.

Be that as it may, the absence of an official global position, both in terms of corporate income tax and excise taxes, allows Mexican companies to plan their transactions and revise their business strategy to be optimal now and for the future. If they comply with the principles and rules of the two regions with which they have the most important trade agreements with Mexico: Canada, the United States and, of course, the European Union.

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