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ARTICLES

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THE RELEVANCE OF CLIMATE CHANGE TO CONTRACT LAW

Gonzalo Vial Fourcade*

Abstract: *Climate change is a problem with an extremely wide scope, both in its consequences and in the solutions required to tackle it. In this context, this article reflects on whether climate change is a matter of legal significance to the field of contract law. As a conclusion, it is argued that the phenomenon is relevant for contract law for at least three reasons, namely: that such a legal field provides tools that are useful to address the climate problem; that the climate crisis raises several legal challenges for the field, and that climate change has altered the legal landscape of contract law and will continue to do so.*

Keywords: *Climate Change, Contract Law, Relevance.*

Resumen: *El cambio climático es un problema de alcance sumamente amplio, tanto en sus consecuencias como en las soluciones requeridas para enfrentarlo. En este contexto, este artículo analiza si la crisis climática es una materia de relevancia para el derecho de contratos, y concluyendo que dicho fenómeno reviste importancia para dicho campo por al menos tres razones, a saber: que el derecho de contratos proporciona herramientas que son de utilidad para enfrentar la emergencia climática; que la crisis climática implica diversos desafíos para el mencionado campo del derecho, y que el cambio climático ha modificado el paisaje del derecho de contratos y continuará haciéndolo.*

Palabras clave: *Cambio climático, derecho de contratos, relevancia.*

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I. Introduction

International public law and international environmental law are the legal fields that have been predominantly used to deal with the challenges arising from climate change.[1] However, the impacts from the phenomenon are extremely wide in scope, as it has the potential to affect nearly all human and natural systems on our planet.[2] As explained by Richardson, Steffen, and Liverman, the alterations that have been observed due to the climate tragedy "influence the conditions for all life on earth".[3]

In the context of such a wide-ranging problem, it should not come as a surprise that other legal fields, besides international public law, and international environmental law, have been considered relevant in the fight against the climate crisis. For instance, different authors have referred to the need of addressing the matter under the lens of human rights law, constitutional law, and administrative law, among other legal disciplines.[4] Therefore, it seems

[1] Daniel Bodansky, Jutta Brunnée & Lavanya Rajamani, International Climate Change Law 11 (2017).

[2] IPCC, 2014: Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (Core Writing Team, R. K. Pachauri, and L. A. Meyer eds., 2015); IPCC, *2022: Summary for Policymakers* in Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama eds., 2022) available at: *https://www.ipcc.ch/report/sixth-assessment-report-working-group-ii/*.

[3] Katherine Richardson, Will Steffen & Diana Liverman, Climate Change: Global Risks, Challenges and Decisions 101 (Cambridge University Press 2011).

[4] *See* Borja Sánchez Barroso, *Retos del Derecho Constitucional a la Luz del Cambio Climático*, *in* Setenta Años de Constitución Italiana y Cuarenta Años de Constitución Española (An-

that dealing with the climate emergency is a task for which all possible hands are needed.[5]

This article brings into the discussion a field that has been less associated with climate challenges, namely: the law of contracts.[6] Particularly, the work aims to develop an explanation of why climate change is a relevant issue for contract law. By illustrating the importance of the relationship between the former and the latter, this piece expects to justify the need to conduct research at the intersection between the climate emergency and the mentioned legal field. To achieve its objective, as is evident, the article starts with this introductory section, where its purpose and structure are expounded (Chapter I).

The work then describes the general context in which the analysis takes place (Chapter II). This is done by explaining the science behind the climate crisis and the most relevant global legal efforts that have been conducted to address the matter.[7] In this regard, it must be noted that there is no intention of bringing a new perspective to those topics or to treat them comprehensively, as they are already well-developed in the literature and that would go beyond the scope of this article. As mentioned, they are addressed just to provide the necessary background to properly understand the reflections of this work.[8]

Subsequently, the article proceeds to develop its core argument, that is, to explain why climate change is a matter of legal significance for contract law (Chapter III). This stance is based on three main reasons, namely: that said legal field provides tools that are useful to address the climate problem; that the mentioned crisis raises several legal challenges in the mentioned field, and that climate change has altered the legal landscape of contract law and will continue to do so.

Finally, the last section of the article exposes the conclusions reached by this work (Chapter IV).

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tonio Pérez Mira *et al*., 2020); Izaskun Linazasoro Espinoza, *La buena administración como regla de adaptabilidad ante el cambio climático,* 13 Revista de Derecho Ambiental 145 (2020); Julie Fraser & Laura Henderson, *The human rights turn in climate change litigation and responsibilities of legal professionals*, 40 (I) Netherlands Quarterly of Human Rights 3 (2022).

[5] Kim Bouwer, *The Unsexy Future of Climate Change Litigation*, 30 (3) Journal of Environmental Law 483, 485 (2018).

[6] With the expression "the law of contracts" this work refers to the different bodies of laws and customs related to the concept of contract, despite the differences that it presents in some jurisdictions. Regarding different definitions of the concept "contract", *see* Hernán Corral, *La Definición de Contrato en el Código Civil Chileno y su Recepción Doctrinal. Comparación con el Sistema Francés*, *in* Derecho de los Contratos: Estudios Sobre Temas de Actualidad (Hernán Corral & Guillerno Acuña eds., 2004).

[7] In other words, the background of this piece is provided by explaining what climate change is, and what has been done about it from a global legal perspective.

[8] Such background knowledge might be familiar to those with experience in climate issues, but not to all the readers that might be interested in this article, like contract lawyers or disputes resolution practitioners without previous knowledge on the subject.

II. Providing a Background for the Analysis

In order to provide the adequate context for an analysis that is focused on the relationship between climate change and a specific legal field, as it is the law of contracts, it seems appropriate to develop a general overview of two matters: (1) what the climate crisis is, and (2) what kind of global legal efforts have been conducted in order to tackle it.[9] This will offer to the reader lacking a background on climate issues a general understanding of climate change and its relationship with the legal arena (broadly conceived).[10]

Furthermore, as it will be observed below, the description of those circumstances illustrates two situations that are functional to the argument made in this article.[11] In the first place, that climate change involves challenges that are notoriously wide in scope, so it should come as no surprise that different legal fields, including the law of contracts, have a role to play in finding a solution to the problem, or can be affected by the situation. And secondly, that the paradigmatic work conducted under international frameworks in order to tackle the climate crisis currently recognizes the importance of private actors in that quest. This makes more credible, at least in principle, a statement that climate change is a relevant matter for the law of contracts: a legal field in which private agents usually take center stage.[12]

1. *The Science Behind Climate Change*

Climate change refers to "long-term shifts in temperatures and weather patterns".[13] These alterations can be caused by natural reasons,[14] but since the beginning of the 19th century, human activity has been their main driver, es-

[9] This was anticipated in the previous chapter of this article. *See* Chapter I.

[10] As explained before, such background might be familiar to those with experience in climate issues, but not to all the readers that might be interested in this article.

[11] That is that climate change is a relevant issue for the law of contracts.

[12] In this regard, it must be noted that this work will not deepen into those two situations that are functional its argument, as doing so would exceed the scope of this work. Those situations are just observations that are reached while providing the general background for the core argument of this article, and that help, in a way, to support it.

[13] United Nations, *Climate Action: What is Climate Change* available at: *https://www.un.org/en/climatechange/what-is-climate-change*. The Glossary of Annex II of the Synthesis Report, produced in the context of the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), states the following regarding climate change "Climate change refers to a change in the state of the climate that can be identified (e.g., by using statistical tests) by changes in the mean and/or the variability of its properties and that persists for an extended period, typically decades or longer". IPCC, 2014 Synthesis Report, *supra* note 2.

[14] For example, due to "variations in the solar cycle". United Nations, *supra* note 13.

pecially due to the emission of greenhouse gases from the combustion of fossil fuels.[15] Those gases trap the heat of the sun —more precisely the terrestrial radiation flowing from the earth's surface— producing a raise in temperatures: the famous greenhouse effect.[16]

The current concentration of greenhouse gas emissions is the highest in the last two million years.[17] Among the main gases that produce the greenhouse effect are carbon dioxide (CO_2), nitrous oxide and methane.[18] CO_2 has traditionally been the target of measures aiming to mitigate climate change because, once added to the atmosphere, it can stay around for a long period of time: between 300 and 1000 years.[19] Thus, the changes in the atmosphere produced by CO_2 emissions will remain there for generations.[20] Also, this gas has been an issue of concern due to the increase of its concentration during the last centuries, and because it is the main greenhouse gas emitted by human activities.[21] Other reasons also explain the worries about this element.[22]

Greenhouse emissions have an impact on the climate regardless of the jurisdiction where they are produced. In other words, the causes and effects of climate change are global.[23] That is why measures to mitigate the climate crisis

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15 IPCC, 2014 Synthesis Report, *supra* note 2; IPCC, *Summary for Policy Makers*, in Climate Change 2021: The Physical Science Basis (2021) available at: *https://www.ipcc.ch/report/sixth-assessment-report-working-group-i/*.

16 Margaret Rosso Grossman, *Climate Change and the Individual*, 66 The American Journal of Comparative Law (Issue suppl 1) 345, 346 (2018); United Nations, *supra* note 13.

17 United Nations, *supra* note 13.

18 CEPAL, *Acerca del Cambio Climático* available at: *https://www.cepal.org/es/temas/cambio-climatico/acerca-cambio-climatico*; Charles D. Keeling, *Climate Change and Carbon Dioxide: An Introduction*, 94 (16) Proc. Natl. Acad. Sci. 8273, 8275 (1997). Regarding the mentioned gases, the following was stated already in 1997: "Broadly speaking, climatic change is caused by… These processes are mainly natural, but some, at least, are susceptible to human influence. Processes that involve the so-called greenhouse gases are probably the most critical candidates. These greenhouse gases, mainly carbon dioxide but including others such as methane, nitrous oxide, and halocarbons, enter the air mainly as by-products of the combustion of coal, natural gas, and petroleum, and to a lesser degree through other industrial and agricultural activities… As they build up, these gases trap radiation upwelling from the Earth's surface. The expected consequence is rising temperature at the Earth's surface unless some compensating process cancels out this tendency".

19 Alan Buis, *The Atmosphere: Getting a Handle on Carbon Dioxide*, NASA. Global Climate Change (2019) available at: *https://climate.nasa.gov/news/2915/the-atmosphere-getting-a-handle-on-carbon-dioxide/*.

20 *Id.*

21 Keeling, *supra* note 18; Andrew Dessler, Introduction to Modern Climate Change, 67 (2nd ed., Cambridge University Press, 2017).

22 Those other reasons are not developed in this article because that would go beyond the scope of this work. This also explains why this article does not refer further to other greenhouse gases. As mentioned in the introductory chapter, this chapter, *A. The science behind climate change*, only aims to provide the necessary background to understand the argument that is developed in chapter III of this work (*Climate change: A relevant issue for contract law*).

23 Bodansky, *supra* note 1.

require a world-wide policy.[24] In this regard, Smil has stated that "[s]ubstantial decline of carbon emissions, even an instant decarbonization of energy supply in a major advanced economy, makes little difference as long as the greenhouse gas emissions from other sources and from other countries keep on rising".[25]

In 2017, the warming induced by human activity reached approximately 1 degree Celsius (ºC) above the preindustrial level,[26] and it is likely to reach 1.5ºC between 2030 and 2052 at the current increase rate.[27] In the meantime, relevant changes have been observed: the atmosphere and oceans are warmer, the sea level has risen, and lower amounts of ice and snow are present.[28] The year 2019 was the second hottest of all time, and the decade that started in 2010 was the hottest ever recorded.[29]

Climate change is a global problem that has the potential to affect nearly all systems of our planet,[30] both human and natural.[31] Indeed, besides involving changes to weather systems and temperatures, the climate crisis includes risks to health, livelihoods, food security, water supply, human security, economic growth, biodiversity, and ecosystems,[32] among other hazards.[33] So far,

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[24] As stated by an author, "Climate change is *par excellence* a global problem —the «common concern» of humanity, to use the language of the UNFCCC— potentially affecting all States, and for which global solutions are essential". Alan Boyle & Navraj Singh Ghaleigh, *Climate Change and International Law Beyond the UNFCCC*, *in* The Oxford Handbook of International Climate Change Law 27 (Cinnamon P. Carlarne, Kevin R. Gray & Richard G. Tarasofsky eds., 2016).

[25] Vaclav Smil, *What we need to know about the pace of decarbonization*, 3 (2) Substantia (Suppl. 2) 69, 73 (2019).

[26] The "Glossary" of the Special Report by the Intergovernmental Panel on Climate Change titled "Global Warming of 1.5°C" defines "Pre-industrial" in the following terms: "The multi-century period prior to the onset of largescale industrial activity around 1750. The reference period 1850-1900 is used to approximate pre-industrial global mean surface temperature (GMST)". IPCC, *Glossary*, in Global Warming of 1.5°C (2018) available at: *https://www.ipcc.ch/sr15/*.

[27] IPCC, *Summary for Policy Makers*, *in* Global Warming of 1.5°C, 8-9 (2018) available at: *https://www.ipcc.ch/sr15/*.

[28] IPCC, 2014 Synthesis Report, *supra* note 2.

[29] United Nations, *Objetivo 13: Adoptar Medidas Urgentes para Combatir el Cambio Climático y sus Efectos* (December 8, 2021) available at: *https://www.un.org/sustainabledevelopment/es/climate-change-2/*.

[30] IPCC, 2014 Synthesis Report, *supra* note 2; IPCC, 2022 Summary for Policy Makers, *supra* note 2.

[31] *Id.*

[32] IPCC, *Summary for Policy Makers*, *supra* note 27, at 8-9.

[33] The impacts flowing from the climate crisis have been categorized in different ways in the academic literature. In this regard, it is common to distinguish between the physical changes in the climate system and the ways in which those changes affect human and natural systems. The first group of impacts includes an increase in the average global temperature, changes in the amounts, forms, and patterns of precipitations, a rise in the sea level, the acidification of the oceans, and more extreme weather events. The second group of consequences encompasses the most varied effects. For instance, climate alterations have affected human health, food security, water availability, and several types of ecosystems. Even geopolitical consequences,

human-induced climate change has caused extensive negative impacts, losses and damages to nature and humans.[34] In this regard, Gardiner states that "[h]umanity stands on a precipice. Mainstream science tells us that climate change is real, accelerating, and might credibly result in global catastrophe".[35]

The higher the temperature increases, the greater the problems and challenges arising from climate change become.[36] That is why common efforts to tackle the problem have emphasized the need to restrain the increase of temperature. As explained by the Intergovernmental Panel on Climate Change (IPCC), perhaps the most relevant scientific body in charge of studying and explaining the climate crisis,[37] there is high confidence in that the risks derived from climate change are higher for global warming of 1.5°C than at present, but lower than if the increase of temperatures reaches 2°C.[38]

There is little contention on the scientific basis of the climate crisis.[39] This can be attributed substantially to the IPCC, the United Nations body in charge

like migrations due to changing climate conditions, have been attributed to the crisis. Another way of classifying the impacts of climate change is to distinguish between those effects that have already occurred from those that could potentially be observed in the future. Indeed, when the impacts derived from the climate crisis are mentioned, sometimes they are referred as a certainty, and in other occasions as a possibility, or as the degree of confidence about the occurrence of certain situations. As time goes by, more clarity exists regarding the effects of the mentioned phenomenon. Finally, as an example regarding the possibilities of classifying climate change impacts, it is also possible to distinguish between positive and negative impacts derived from the climate crisis, as the concept of impact does not necessarily have a negative connotation, and some regions could be favored by climate alterations. However, identifying certain positive effects is scarcely a reason for optimism. The increase of global temperatures at a rapid rate is necessarily and issue of concern. Indeed, tiny alterations in global temperatures are related to important changes in the climate of the planet. Moreover, it is unlikely that a different climate is going to be better, as human and natural systems are adapted to current conditions. Such a possibility has been compared to a tailor-made suit: later changes in our body are not going to improve how we fit into it. And there is also an issue with the increase rate of global temperatures. Emerging from the last ice age was a process that took more than 10,000 years, thus the possibility of fast warming in a relatively short period of time is truly concerning. The rate matters because it means less time to adapt to a changing planet: this is a challenge that has never been faced by modern society. Regarding the foregoing, *see* Richardson, *supra* note 3, at 108-123; Andrew E. Dessler, Introduction to Climate Change, 137-143 (Cambridge University Press, 2012); IPCC, 2022 Summary for Policy Makers, *supra* note 2.

[34] IPCC, 2022 Summary for Policy Makers, *supra* note 2, at 7.

[35] Stephen M. Gardiner, *Geoengineering and Moral Schizophrenia – What is the Question?*, *in* Climate Change Geoengineering: Philosophical Perspectives, Legal Issues, and Governance Frameworks, 11 (Wil C.G. Burns & Andrew L. Strauss eds., 2013).

[36] IPCC, *Summary for Policy Makers*, *supra* note 17, at 5.

[37] Regarding the importance of the Intergovernmental Panel on Climate Change and some factors that have contributed to it, *see* Navraj Singh Ghaleigh, *Science and Climate Change Law – The Role of the IPCC in International Decision-Making*, *in* The Oxford Handbook of International Climate Change Law 56 (Cinnamon P. Carlarne, Kevin R. Gray and Richard G. Tarasofsky eds., 2016).

[38] IPCC, *Summary for Policy Makers*, *supra* note 17, at 5.

[39] Navraj, *supra* note 37, at 56.

of assessing the science related to climate change.[40] The organization, formed by diverse and prominent members, produces reports related to the scientific grounds of climate change, its impacts, and the possible roads to handle it.[41] These reports have shaped the key milestones of the climate regime by articulating the scientific concerns regarding the climate crisis.[42] The science of climate change shows that the world is facing a severe problem, perhaps "the defining issue of our time".[43]

In sum, the science behind climate change illustrates the wide scope of the climate crisis. The phenomenon is an extensive problem because it has the potential to affect nearly all systems of our planet. Also, its wideness comes from the solutions that must be adopted to tackle it, as addressing the problem requires global and coordinated efforts.

2. *Global Efforts to Build a Legal Framework to the Crisis*

Several multinational forums address the climate crisis.[44] The United Nations Framework Convention on Climate Change (UNFCCC) is perhaps the most relevant.[45] It provides a governance structure for international laws on climate change and a platform to negotiate multilateral solutions to the problem.[46] The goal of the UNFCCC is to stabilize "greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system".[47]

Since 1994 the UNFCCC has led several global initiatives, among which the Kyoto Protocol (1997),[48] the Copenhagen Accord (2009) and the Paris

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[40] IPCC, *The Intergovernmental Panel on Climate Change,* available at: *https://www.ipcc.ch/*.

[41] As explained by Navraj, "[t]he core of the IPCC's work is its Assessment Reports, produced at the end of five-year (approximate) cycles of collation, drafting, and peer review, and divided into three working groups, dealing respectively with the «Physical Science Basis of Climate Change», «Climate Change Impact, Adaptation and Vulnerability», and «Mitigation of Climate Change». The volumes are substantial, technical reports, running to thousands of pages". Navraj, *supra* note 37, at 61-63.

[42] *Id* at 56.

[43] United Nations, *Climate Change* (Peace, Dignity and Equality on a Healthy Planet), available at: *https://www.un.org/en/global-issues/climate-change*.

[44] David Held & Charles Roger, *Three Models of Global Climate Governance: From Kyoto to Paris and Beyond,* 9 (4) Global Policy 527, 533 (2018).

[45] IPCC, 2014 Synthesis Report, *supra* note 2. The UNFCCC entered into force in 1994.

[46] Boyle & Singh, *supra* note 24, at 29; Bodansky, Brunnée & Rajamani, *supra* note 1, at 118.

[47] UNFCCC, adopted May 9, 1992, entered into force March 21, 1994, 1771 UNTS 107 (UNFCCC).

[48] Kyoto Protocol to the UNFCCC, adopted December 11, 1997, entered into force February 16, 2005, 2303 UNTS (Kyoto Protocol).

Agreement (2015)[49] are perhaps the most notable because they symbolize the evolution of international climate change law.[50] Indeed, the Kyoto Protocol has been considered "the thesis, the Copenhagen Accord the antithesis, and the Paris Agreement the syntheses".[51] They outline the three main models of global climate governance that have been applied.[52]

The Kyoto Protocol followed the traditional approach at the time: a mandatory top-down architecture, establishing an overall greenhouse gas reduction of 5% below 1990 during a first commitment period (2008-2012), for which targets, a timetable, and compliances rules were agreed upon. It followed a regulatory approach, according to which negotiated individual targets were mandatory.[53] However, it was criticized, among other reasons, for being ecologically ineffective and for including reduction targets that were not based on science.[54]

The Copenhagen Accord shifted global governance on climate change to a more voluntary approach, according to which each State would commit freely to adopt particular actions. Even though the accord was criticized for its lack of enforceability, it set a long-term target in order to limit the increase in global temperatures to 2ºC above pre-industrial levels with a more scientific background than the Kyoto Protocol.[55] Also, it made all major emitters of greenhouse gases to engage in negotiations related to climate change.[56] The Copenhagen Accord has been described as the complete opposite of the Kyoto Protocol, "a political agreement built around bottom-up pledges giving states tremendous flexibility".[57]

The Paris Agreement, which is an international treaty,[58] ratified the 2°C target established in the Copenhagen Accord, adding an aspirational goal of a

[49] Paris Agreement to the UNFCCC, adopted December 12, 2015, entered into force November 4, 2016, UNTS I-54113 (Paris Agreement).

[50] Bodansky, Brunnée & Rajamani, *supra* note 1, at 10.

[51] *Id.*

[52] Held & Roger, *supra* note 44, at 528.

[53] In this regard, it must be noted that, despite establishing an overall greenhouse reduction goal, individual targets were agreed for the purpose of reaching such goal. As explained by Held and Roger, "[a]n overall GHG reduction target was established (5 per cent below 1990 levels during the first commitment period of 2008–2012), individual reduction targets were negotiated, and once set, parties were legally obligated to meet their commitments". *Id* at 529.

[54] Also, it was criticized on the basis that its threat of enforcement was not credible, that it excluded states that were becoming major emitters, and that it only considered a small number of states. This last characteristic —only including a small number of signatories— would allow big polluting entities to escape from the troublesome of the treaty just by migrating to unregulated jurisdictions. *Id.*

[55] *Id* at 529-532.

[56] Boyle & Singh, *supra* note 25, at 35.

[57] Bodansky, Brunnée & Rajamani, *supra* note 1, at 351.

[58] And thus a "wholly different kind of instrument than the Copenhagen Accord". Held & Roger, *supra* note 44, at 532.

1.5°C limit in the rise of global temperatures.[59] This international treaty mixes voluntary and regulatory elements: States inform their *nationally determined contributions* (NDC),[60] which despite being voluntary targets regarding emission reductions come with procedural obligations, like updating them and publishing reports tracking emissions.[61] The Paris Agreement is a hybrid between the Kyoto Protocol and the Copenhagen Accord, "a legally binding instrument with some non-binding elements, and combines bottom-up, nationally determined contributions (NDCs) with internationally negotiated rules to promote ambition and accountability".[62]

It must be noted that the Paris Agreement highlights the importance of non-state and sub-state actors in the fight against climate change.[63] As explained by Streck, such a treaty encourages "sub-national governments, corporations and civil society to contribute to reaching ambitious climate goals".[64] This constitutes a transition from the design of the Kyoto Protocol,[65] in which private actors have gone from opponents to partners.[66] In other words, the evolution of global climate governance shows that private actors are expected to play a crucial role in dealing with the climate emergency.[67] Therefore, it is logical that the law of contracts has a role to play in such task, as agreements have been commonly used by private parties to regulate their conducts on certain matters.

That said, the following section of this work reflects on the relevance of climate change to the field of contract law, developing three reasons that allow

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[59] *Id.*

[60] In the lead up to the Paris Agreement, states developed their intended nationally determined contributions (INDC), which convert into a NDC when they formally join the mentioned international treaty.

[61] *Ibid.* at 532-33. Held and Roger, within the cited text, explain the hybrid structure of the Paris Agreement in the following words: "At the heart of the Paris Agreement are the nationally determined contributions (NDCs), which are the «pledges» that parties aim to achieve… they are not up for negotiation… The agreement does not obligate parties to meet their pledges… At the same time, however, the Paris Agreement… setting states' pledges within a legally binding framework that builds around them a range of important procedural obligations. For instance, each party must prepare, communicate and maintain an NDC that reflects their…".

[62] Bodansky, Brunnée & Rajamani, *supra* note 1, at 351.

[63] Held & Roger, *supra* note 44.

[64] Charlotte Streck, *Filling in for Governments? The Role of the Private Actors in the International Climate Regime*, 17 (1) Journal for European Environmental and Planning Law 5 (2020).

[65] *Id.*

[66] *Ibid.* at 16.

[67] It has been pointed out that during the negotiations of the Paris Agreement the private sector assumed a visible role. For instance, by organizing events in parallel to the negotiations of the treaty. In fact, it is a necessity that private actors play a role in the fight against climate change. That is in line with the importance and influence that they have gained in the global context within the last decades. By way of example, on many occasions, the access to technologies and investments needed to tackle the climate crisis will rest on private parties. Regarding the role of private actors in addressing climate change, *see* Streck, *supra* note 64.

to sustain, at the same time, that the climate crisis is an important issue for the law in general and specifically for the law of contracts.

III. Climate Change: A Relevant Legal Issue for Contract Law

Climate change is not only a scientific concern, but also a relevant matter for the law in general.[68] Indeed, the phenomenon can be considered an issue of legal significance for at least three reasons. First, because reaching a solution to the problem requires the use of legal tools. Second, because it raises several legal challenges. And finally, because it has altered the legal landscape and will continue to do so.

In this regard, it must be noted that contract law has something to say in each of the mentioned situations. In other words, the same reasons that explain why the climate crisis is a relevant concern for the law in general allow us to sustain that climate change is an important matter for the law of contracts.[69]

The foregoing argument is developed in this chapter under a suitable structure. Indeed, the chapter is divided into three subchapters, each of them devoted to one of the reasons mentioned above. Thus, the first subchapter refers to the law as a tool to address the climate crisis; the second analyses climate change as a source of legal challenges; and the third describes how the climate emergency has altered the legal landscape and will continue to do so.[70] The ideas exposed in those subchapters follow the same order. First, they refer to indistinct legal fields (different from the law of contracts) in order to illustrate how climate change interacts in a meaningful way with the law in general. Then, they give examples portraying how those relationships also occur specifically within the law of contracts. Finally, they subsume those contract

[68] That could partially explain the considerable number of legal works on the matter, the significant number of lawyers dedicated to the subject, and the large number of courses in this regard taught by law schools. Regarding some of the legal challenges that climate change involves, *see* Elizabeth Fisher, Eloise Scotford & Emily Barritt, *The Legally Disruptive Nature of Climate Change*, 80 (2) The Modern Law Review 173-201 (2017).

[69] Regarding the above, it must be noted that many people might consider as something rather natural for the legal field in general, to play a role in solving the climate crisis, and to be challenged and impacted by such phenomenon, in other words: to have a significant relationship with the climate emergency. Indeed, addressing climate change requires global and coordinated action, and legal systems have been traditionally used to regulate conducts. Also, the phenomenon has the potential to affect nearly all human and natural systems of our planet, so it is no wonder it has impacted several disciplines, including the legal science. However, it is less obvious that exactly the same can be said of the law of contracts in specific. In regard to the statement that legal systems have been used to regulate the conduct of individuals involved in them, *see* Yuval Shany, The Competing Jurisdictions of International Courts and Tribunals, 1-2 (Oxford University Press 2005).

[70] Accordingly, the chapter *The solution requires legal efforts*, chapter *Source of Legal Challenges*, and chapter *Changing the Legal Landscape*.

law examples within broader conceptual categories, that pretend to reflect the general ways in which such legal fields and climate change interact.[71]

Now, the reasons explaining why climate change is an issue of legal significance, for the law in general and specifically to the field of contract law, are developed below.

1. *The Solution Requires Legal Efforts*

A solution to the climate crisis requires global efforts,[72] but coordinating different states towards a same goal is not an easy task.[73] Moreover, addressing climate change faces additional complications, like divergent political agendas,[74] economic concerns,[75] or the temptation to leave the solution to others.[76] In this context, a solution demands a system to organize, bind, and enforce different responsibilities in a cooperative manner on a global scale.[77] This must be done, and has been done, using legal instruments.

In this regard, it has been stated that the problem of climate change "dictate[s] robust international cooperation within a structured framework",[78] and that international law delivers "a framework for structured cooperation among states on key global challenges".[79] Accordingly, climate change has been traditionally the subject of international public law and international environmental law.[80] This is logical considering that the solution requires global cooperation by different countries under a suitable framework,[81] and also, that the evolution of climate change law "stem[s] from the basic tenets of international environmental law".[82]

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[71] As a tool, as a challenge, and as an alteration. In other words, the idea is not to list all the particular situations that can portray an interaction between climate change and contract law (which could be countless), but to use some of them to identify categories that can illustrate such relationship in a broader way.

[72] Regarding the need of global and coordinated action to tackle climate change, *see* Francisca Aguayo, *El cambio climático como problema global: herramientas jurídicas para conciliar ambición y eficacia y el rol del Acuerdo de París*, 34 (1) Desafíos 1 (2022).

[73] Bodansky, Brunnée & Rajamani, *supra* note 1, at 2-4.

[74] Aguayo, *supra* note 72.

[75] *Ibid.* at 5.

[76] Bodansky, Brunnée & Rajamani, *supra* note 1, at 2-3.

[77] As stated by Bondi, "[t]he need for an effective international framework for cooperation was recognized quite early in the diplomatic discourse on responses to climate change". Dan Bondi, *Foreword*, *in* The Oxford Handbook of International Climate Change Law (Cinnamon P. Carlarne, Kevin R. Gray & Richard G. Tarasofsky eds., 2016).

[78] *Ibid.* at VI.

[79] *Id.*

[80] Bodansky, Brunnée & Rajamani, *supra* note 1.

[81] Bondi, *supra* note 77.

[82] Cinnamon Carlarne, Kevin R. Gray & Richard Tarasofsky, *International Climate Change Law: Mapping the Field*, *in* The Oxford Handbook of International Climate Change Law 13 (Cinnamon P. Carlarne, Kevin R. Gray & Richard G. Tarasofsky eds., 2016).

Examples of the legal field trying to address the issue of climate change by coordinating global efforts are varied. Perhaps the most paradigmatic are those briefly described before in this work, namely: the Kyoto Protocol, the Copenhagen Accord, and the Paris Agreement. They indeed portray how participants of a global community can intend, by the use of legal instruments, to coordinate the efforts to tackle the climate crisis on a global scale.[83]

However, climate change is not merely a challenge of international law, as it involves different aspects of domestic policies.[84] Even the implementation of norms agreed under international frameworks "remains a constant point of consternation for States, because the drivers of implementation operate firmly in the realm of national interests and realpolitik".[85] Globalized events usually operate on a sub-global level, expressing themselves locally despite their wide scope.[86] Thus, unsurprisingly, diverse areas of the law —besides international law— have a role to play in addressing the climate crisis. In this task, all hands are needed,[87] including the assistance from the law of contracts.

In this regard, some associations promote the fight against climate change using contractual instruments. This is the case of *The Chancery Lane Project*, which has developed climate-friendly clauses to be incorporated into contracts in a way that can help to reach net-zero goals.[88] By way of example, some clauses promote the cooperation between landlords and tenants regarding the environmental performance of buildings,[89] while others allow the incorporation of circular economy and sustainability principles into certain contractual relations,[90] or aim to enhance the possibility of transporting goods in the greenest possible way.[91]

More generally, it is possible to argue, following Howarth in examining the relationship between environmental and private law,[92] that contract law can

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83 *See* A Global Efforts to Build a Legal Framework to the Crisis.

84 Bodansky, Brunnée & Rajamani, *supra* note 1, at 3.

85 Carlarne, Gray & Tarasofsky, *supra* note 82, at 14.

86 Paul Babie, *Idea, Sovereignty, Eco-Colonialism and the Future - Four Reflections on Private Property and Climate Change*, 19 (3) Griffith Law Review 527, 528 (2010).

87 Bouwer, *supra* note 5.

88 The referred project made available "a net zero toolkit to provide lawyers and businesses with climate clauses so they can take action and achieve their net zero targets". The Law Society, *The Chancery Lane Project* (2021) available at: *https://www.lawsociety.org.uk/topics/climate-change/contracts-clauses-and-climate-change-the-net-zero-toolkit*.

89 The Law Society, *The Chancery Lane Project – Climate Clauses.* Available at: *https://chanceryla neproject.org/climate-clauses/green-lease-clauses-for-irish-commercial-leases-promoting-co-operation-between-landlords-and-tenants-concerning-the-environmental-performance-of-buildings/*.

90 The Law Society, *The Chancery Lane Project – Climate Clauses.* Available at: *https://chancery laneproject.org/climate-clauses/green-lease-clauses-for-irish-commercial-leases-incorporating-circular-economy-and-sustainability-principles-into-a-service-charge-regime-landlords-regulations-and-landlords-works/*.

91 The Law Society, *The Chancery Lane Project – Climate Clauses.* Available at: *https://chancery laneproject.org/climate-clauses/green-fuel-requirement-and-termination-for-greener-carrier-or-shipper-maritime/*.

92 *See* David Howarth, *Environmental Law and Private Law*, *in* The Oxford Handbook of Comparative Environmental Law (Emma Lees & Jorge E. Viñuales eds., 2019).

act as climate change law in two different ways: developing contracts or clauses in pursue of climate goals —as the examples given before—, and refusing to facilitate contracts that aggravate climate change.[93]

Regarding the foregoing, it is worth stating that the possibility of private actors driving climate action should not be surprising because civil society has been playing a key role in different aspects of that quest, shaping debates and strategies on the matter.[94] This was recognized in the Paris Agreement, which enhanced the role of non-state actors in solving climate challenges, like civil society groups, multinational corporations, cities, and others.[95] Furthermore, authors have reflected on the relationship between climate change and private law,[96] highlighting the role that corporations[97] and private litigation can play in the solution to the problem.[98] In fact, it seems that more research should be devoted to the relationship between climate change and private law, because the potential contributions of the field to solve the climate crisis have been overlooked.[99]

Finally, in relation to the role of the law in the solution to climate change, it must be noted that some suggest that the current legal structure is one of the causes of the climate crisis, therefore a solution to the problem will not result from reproducing the traditional legal doctrines.[100] However, even in that scenario, the law needs to be part of the solution to climate change because legal frameworks would still be essential to coordinate and enforce the global and domestic efforts required to tackle the issue. In other words, an eventual necessity to modify the legal landscape does not mean that a legal framework is not required to address the climate problem. Perhaps that explains why some scholars suggest that, when it comes to climate change and private law, it is important to "rethink and reassess private law concepts like private property, not to abolish them but to find new ways to conceive, think about, and invoke them".[101]

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93 This affirmation follows the reasons exposed by Howarth in the article mentioned in the previous footnote. *Id.*

94 *See* Hanna Reid et al., Executive Summary: Southern Voices on Climate Policy Choices: Analysis of and Lessons Learned from Civil Society Advocacy on Climate Change (2012) available at: *https://pubs.iied.org/g03360*; Melanie Murcott & Emily Webster, *Litigation and Regulatory Governance in the Age of the Anthropocene: the Case of Fracking in the Karoo*, 11 (1-2) Transnational Legal Theory 144, 145 (2020).

95 Held & Roger, *supra* note 44.

96 Babie, *supra* note 86, at 527; Myria W. Allen & Cristopher A. Craig, *Rethinking Corporate Social Responsibility in the Age of Climate Change: a communication perspective*, Int. J. of Corporate Soc. Responsibility, 1 (2016); Bouwer, *supra* note 5, at 483; Nicole Graham, *Teaching Private Law in a Climate Crisis*, 40 (3) University of Queensland Law Journal 403 (2021).

97 Allen & Craig, *supra* note 96.

98 Bouwer, *supra* note 5, at 499.

99 Bouwer, *supra* note 5, at 484.

100 Graham, *supra* note 96, at 407.

101 Babie, *supra* note 86, at 557.

In sum, one reason to consider climate change as an issue of legal significance for the law in general and specifically for the field of contract law is that reaching a solution to the problem requires and is assisted by the use of legal tools.

2. *Source of Legal Challenges*

Climate change is an abundant source of challenges in the most varied legal fields.[102] The crisis has forced societies to deal with complex questions of justice, especially in relation to intergenerational responsibility and social inequality, since the biggest costs of the problem are expected to fall on the poorest people of future generations.[103] In fact, even the chance of implementing new technologies to address the climate crisis —climate engineering— comes with legal questions, particularly about the responsibility and liability of those behind such solutions in case they turn out to be disastrous.[104]

Other legal challenges derived from climate change flow from the need to provide a legal framework to address the problem. This entails several practical concerns, such as deciding on the regulatory approach that is most suitable to attract the global commitments that are required to tackle the climate crisis,[105] establishing how climate laws should relate with norms of other legal fields,[106] or discussing whether climate change law should be even considered as a legal field by itself.[107]

Questions related to justice resurface at the time of crafting a legal framework to deal with the climate crisis, especially when it comes to the distribution between several countries of the burden of the measures that must be adopted.[108] As noted by Carlarne, "[a] particular point of normative controversy concerns the implementation of the principle of common but differentiated

[102] Boyle & Singh, *supra* note 24, at 53.

[103] Gardiner, *supra* note 35, at 16.

[104] *See* Jay Michaelson, *Geoengineering and Climate Management: From Marginality to Inevitability*, *in* Climate Change Geoengineering: Philosophical Perspectives, Legal Issues, and Governance Frameworks (Wil C.G. Burns & Andrew L. Strauss eds., 2013).

[105] A regulatory one, like the one of the Kyoto Protocol, one that trust more on voluntarily commitments, like the Copenhagen Accord, or another one with mixed characteristics, like the Paris Agreement.

[106] For instance, it is possible to raise legal questions on the relationship between climate change law and private law on issues like the possibility of invoking climate infractions as the basis for legal actions, or the chance to build a defense on having followed climate standards. *See* Howarth, *supra* note 92, at 1113.

[107] Carlarne, Gray & Tarasofsky, *supra* note 82, at 6.

[108] This is a matter of intra-generational equity, rather than inter-generational. *See* Catherine Redgwell, *Principles and Emerging Norms in International Law: Intra- and Inter-generational Equity*, *in* The Oxford Handbook of International Climate Change Law (Cinnamon P. Carlarne, Kevin R. Gray & Richard G. Tarasofsky eds., 2016).

responsibilities",[109] since the UNFCCC provides that the parties to the treaty are expected to protect the climate system for current and future generations "in accordance with their common but differentiated responsibilities and respective capabilities".[110]

Moreover, climate change is a source of legal challenges due to the physical and transitional risks that derive from the phenomenon.[111] Indeed, rains, draughts, floods, technological breakthroughs, policies, and other events related to the climate crisis will generate problems requiring responses from different legal fields.[112]

Regarding the foregoing, it must be stated that several cases submitted to the courts portray the climate crisis as a disruptive situation for the legal field and a constant source of legal dilemmas.[113] Indeed, courts have been forced to consider whether law can acknowledge the climate crisis as a legal problem and to develop responses accordingly. In this task, they have identified innumerable problems, including issues of procedure, state responsibility, statutory interpretation, or liability, among other matters.[114]

The law of contracts also faces challenges brought about by the climate crisis.[115] For instance, on some occasions, the risks derived from climate change will affect contractual relations and result in unexpected costs for one or more of the parties of an agreement. In those situations, the pertinent rules of contract law will have to determine how to allocate such risks between the parties. In fact, even if the parties decide to allocate those risks by an explicit reference in the agreement —for instance, by drafting a force majeure clause— that decision will present its own particular challenges, like how to define the climate crisis, or when it can be assumed that a certain event is a consequence of such phenomenon. Thus, one type of challenge that the climate emergency presents to the law of contracts is the need to understand how such a phenomenon interplays with the current legal rules.

Also, challenges to contract law arise from the need to answer questions like whether to facilitate or refuse contracts that aggravate the climate crisis.[116] In

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109 Carlarne, Gray & Tarasofsky, *supra* note 82, at 14.

110 Article 3 of UNFCCC.

111 Soledad Díaz Noriega et al., *La Gestión de Riesgos Asociados al Cambio Climático* (Management Solutions 2020) available at: *https://www.managementsolutions.com/sites/default/files/publicaciones/esp/gestion-riesgos-cambio-climatico.pdf*; Alexandra Farmer, Maddy Foote & Jennie Morawetz, *COVID-19 Offers Force Majeure Lessons for Climate Planning* (Kirkland & Ellis, Law 360, 2020) available at: *https://www.kirkland.com/publications/article/2020/07/covid19-force-majeure-lessons-climate-planning*.

112 These problems reach the field of private law, whose logic and operation will be challenged. Graham, *supra* note 96.

113 Fisher, Scotford and Barritt, *supra* note 68.

114 *Ibid.* at 188.

115 Díaz *et al.*, *supra* note 111; Farmer, Foote and Morawetz, *supra* note 111.

116 A similar question has been examined in an analysis regarding the relationship between environmental and private law. *See* Howarth, *supra* note 92.

those situations, the answers required seem to be related to the problem of how far contract law can go in dealing with climate concerns.

One last type of challenge in the context of contract law relates to the outcomes derived from the traditional understanding of how the pertinent doctrines should be applied. In this regard, it must be taken into account that normally those doctrines were not crafted with climate concerns in mind, so their traditional application can result in negative impacts on efforts to tackle the climate crisis.[117] For instance, it is possible to mention a situation that took place at the beginning of the century in the Chilean electricity system.[118] On that occasion, a generator of electricity was forced, according to the application of the pertinent contract law rules, to comply with a set of power purchase agreements that it had subscribed. This occurred even though the circumstances of the electricity market had changed dramatically, making the fulfillment of those agreements more expensive than expected and thus resulting in enormous losses for the mentioned firm. What is relevant to this article is that, in order to comply with the mentioned contracts, the energy producer had to resort to less green means for the generation of electricity. Particularly, it had to switch from natural gas, which was the original fuel, to diesel, a resource that has a bigger footprint than the gas. As it can be noted, the situation described was the result of the traditional application of contract law rules and had negative impacts on the efforts to tackle climate change.

In sum, the examples given illustrate that the phenomenon of climate change is an issue of legal relevance, among other reasons, because it is a source of varied legal challenges.

3. *Changing the Legal Landscape*

The climate change has modified the legal landscape in two different ways. Firstly, new laws have been enacted to deal with the climate crisis. Secondly, traditional legal fields have been affected by external factors related to the phenomenon (different from new legislation), like the needs imposed by the climate emergency or a better understanding of its consequences, among other situations.

The climate crisis has implied the crafting of novel norms that have evolved swiftly, being now possible to speak of *climate change law* as a particular legal field with its own principles.[119] Moreover, new regulations are expected to

[117] With regard to the mentioned situation that affected the Chilean electricity market, *see* Felipe Bahamóndez, *Fallo Gasatacama: El Cambio de Circunstancias en los Contratos. Quo Vadis?, in* Sentencias Destacadas 2008, 351 (Arturo Fermandois and Rodrigo Delaveau eds., Libertad y Desarrollo, 2009); Karl Conrads & Carlos Berner, *Una Mirada Contemporánea a la Revisión del Contrato de Suministro Eléctrico ante Eventos Imprevistos*, 34 Revista Chilena de Derecho Privado 9 (2020).

[118] More precisely, in what is currently the biggest and most important of the power systems that provide electricity in the Chilean electricity market.

[119] Raphael J. Heffron et al., *A Treatise for Energy Law*, 11 (1) Journal of World Energy Law and Business 34, 37 (2018). It must be pointed out that there is controversy on whether climate

appear in the future, because the current regime has not yet produced the changes required to "effectively address the contemporary challenges of climate change".[120] Indeed, the success of current laws to deal with the crisis has been described as "modest".[121] However, despite the humble results, the effects caused by the regulations created to address climate change have been categorized as legal disruptions.[122]

There are many examples of legal fields that have seen additions, restrictions, or modifications due to climate concerns. This is more evident in the international law arena, where well-known global treaties like the Kyoto Protocol or the Paris Agreement have been forged to address the issue of climate change.[123] At the domestic level, different laws in several countries have been enacted to deal with the climate crisis, like regimes promoting cleaner electricity or regulations seeking energy efficiency,[124] which is understandable considering that the problem involves almost every aspect of domestic policies.[125] According to the Grantham Research Institute on Climate Change and the Environment, it is possible to register 2 637 "Climate laws and policies".[126]

The field of contract law has also been impacted by climate change. For instance, it is possible to observe some restrictions, impositions and measures that affect the freedom of contract, a traditional principle of the mentioned field.[127] By way of example, in the Chilean electricity market a recently enacted legal mandate prescribes that a percentage of the electricity obtained from the grid by some energy traders must belong to non-conventional renewable energy sources.[128] It can force traders to contract with specific producers to achieve the required minimums, instead of contracting with who they want, and to the extent that they want.

Regarding the foregoing, it must be noted that new constraints on the freedom of contract will probably appear in the future, due to the serious consequences of climate change, on the one side, and the modest success that current laws have shown in dealing with that challenge, on the other side.

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change law can be considered as a field of law by itself. For instance, other authors consider it, at least in the case of international climate change law, to be imbedded within the fields of public international law and international environmental law. Bodansky, Brunnée & Rajamani, *supra* note 1, at 2.

120 Carlarne, Gray & Tarasofsky, *supra* note 82, at 4-5.

121 Bodansky, Brunnée & Rajamani, *supra* note 1, at 2.

122 Fisher, Scotford and Barritt, *supra* note 68, at 192.

123 Held & Roger, *supra* note 44.

124 *Ibid.* at 592.

125 Bodansky, Brunnée & Rajamani, *supra* note 1, at 3.

126 Grantham Research Institute on Climate Change and the Environment, *Climate Change Laws of the World*, available at: *https://climate-laws.org/*.

127 Notwithstanding the different critiques that have been made to such principle. Joaquín Emilio Acosta Rodríguez & José Manuel Gual Acosta, *La Delimitación de la Libertad Contractual en Virtud de Exigencias Sociales*, 55 Revista IUSTA (2021).

128 Conrads & Berner, *supra* note 117, at 23-25.

Modifications to the landscape of contract law can also flow from external factors related to climate change, they do not result from the enactment of new legislation. For example, it is possible to imagine a situation in which a specific consequence of the climate emergency appears as extremely profound, undisputed, worrying, evident, and well-known. A scenario like that could change the ways in which the parties are allowed to allocate the risks flowing from the mentioned situation, by impeding, for instance, a contractual clause to exclude such type of events from frustrating a contract due to considerations of public policy. In other words, matters that are subject to the possibility of being regulated in a contract by the parties could completely or partially lose that feature. That would amount to a modification in the current landscape of the field of contract law.[129]

Thus, in addition to the reasons given in the previous sections, it is possible to sustain that climate change is an issue of legal significance, for the law in general and specifically to the field of contract law, because it has modified the legal landscape and will continue to do so.[130]

IV. Conclusions

Climate change is a wide-reaching problem, both in its consequences and in the solutions required to tackle it. Indeed, the crisis has the potential to affect nearly all systems on our planet, and in order to be properly addressed, it requires an international framework for cooperation on a global scale, but also, all sorts of local measures, regulations, and initiatives from the public and private sectors. Thus, unsurprisingly, it is an issue with implications in many, if not most, academic fields.

The legal arena is not an exception. The climate crisis can be considered an issue of legal significance for at least three reasons. First, because reaching a solution to the problem requires the use of legal tools. Second, because it raises several legal challenges. And finally, because it has altered the legal landscape, and will continue to do so.

In this regard, contract law has something to say in each of the mentioned situations. In other words, the same reasons that explain why the climate crisis is a relevant concern for the law in general allow us to sustain that climate change is an important matter for the law of contracts.

Indeed, contract law provides tools that are useful to address the climate problem, like clauses that can be incorporated into agreements to achieve cli-

[129] The example is given considering the contracts law in England and Wales. For a better understanding of it, see what is explained regarding frustration of contract due to supervening illegality *see* Edwin Peel, Treitel on The Law of Contract (15th ed., Sweet & Maxwell Thomson Reuters 2020).

[130] The examples given do not intend to include every single way in which that has occurred or could occur, but just to support the mentioned statement.

mate goals. In overall terms, such legal field can be used to tackle the climate emergency in two different ways: developing contracts or clauses in pursue of climate goals, and refusing to facilitate contracts that aggravate climate change.

Also, the climate crisis poses different challenges for the law of contracts. Some of them are related to how climate events interplay with the current legal structures and doctrines, for instance, how to define climate change to incorporate related events into a force majeure clause. Other challenges refer to the limits of the mentioned legal field, *i.e.,* to the extent to which contracts can freely deal with circumstances with climate implications. A last set of new questions also requiring an answer emerges when the traditional understanding of how contract law rules should be applied results in negative impacts on efforts to tackle the climate crisis.

Finally, it is also true that the climate emergency has affected the contractual landscape, and that it will keep doing so. For instance, in certain contexts, laws enacted to target the crisis have reduced the freedom that the parties used to have to agree on the terms of an agreement. Also, alterations to the mentioned landscape can come from external factors, like needs or situations that can be caused by the phenomenon.

All the foregoing allows us to state that climate change is an issue of legal significance for the law of contracts.

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PATENTS IN MEDICINE AND HEALTH AS AN INTEGRAL HUMAN RIGHT

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Abstract: *This article focuses on the relationship between medical patents and the right to health as an integral human right. The divergent interests involved in this issue are evaluated from the perspective of international law, which seeks to reconcile conflict through treaties and agreements of international organizations to find the balance best suited to benefit humanity. This study highlights the tension between patent law covering medicines and vaccines and the health needs of vulnerable populations in areas affected by armed conflicts and pandemics. In today's globalized world, sometimes referred to as the knowledge society, conflicts between patent rights and the human right to health are best resolved using transparent international institutions designed to promote international cooperation.*

Keywords: *Patents, Medicines, Vaccines, Right to Health, Human Rights, Social Policies, COVID-19, TRIPS.*

Resumen: *El presente trabajo se centra en establecer el vínculo entre las patentes médicas y el derecho a la salud como un derecho humano integral. Se analizan las posiciones divergentes en la materia desde la perspectiva del derecho internacional, que busca conciliarlas a través de los tratados y los organismos internacionales, para encontrar un equilibrio que genere beneficios a la humanidad. En este estudio se destaca el choque entre las patentes de medicinas y vacunas contra la realidad de poblaciones vulnerables en conflictos armados y pandemias.*

Palabras clave: *Patentes, medicamentos, vacunas, derecho a la salud, derechos humanos, políticas sociales, COVID-19, ADPIC.*

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I. Introduction

In recent years, the number of inventions in the world has increased due to the competitiveness of global markets. However, this upswing has left developing countries behind as their current policies have not yet achieved a sufficient harmonization between government structures, scientific-technological structures, and production.[1] This lack of harmonization not only inhibits innovation but can also impede the importation of necessary technology or lead to the purchase of obsolete technology.

Competitiveness in technology implies the empowerment of industry, which ultimately generates a conflict between industrial property rights and the societal need for the development of national healthcare systems to protect the population. The protection of patent rights can be at odds with the demand of doctors and patients for certain medicines that, because of excessive costs, are effectively unattainable. Therefore, these two rights, patents rights and the right to health, are often in conflict.

This conflict directly impacts the quality of life of people whose right to health is officially protected by various international instruments. The Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights of 1966, and the Declaration on the Right to Development of 1986, all protect health as a human right and promote increasing access to health care.

The pharmaceutical industry, which conducts extensive research on its own, is understandably attracted by important discoveries in the field of science. It is also the focus of significant investment and innovation. This is a worldwide phenomenon, and Mexico is no exception. As one might expect, Mexico displays some characteristics resulting from the conflict identified above. The

[1] Jorge Sábato & Natalio Botana, *Science and Technology in the Future Development of Latin America*, 146 (575) Arbor 21 (Nov 1, 1993).

right to health as a human right is established in the Mexican Constitution.[2] Mexico is also part of one of the most dynamic commercial regions in the world through its membership in the United States-Mexico-Canada Agreement (USMCA). The USMCA superseded the North American Free Trade Agreement (NAFTA).[3] The new agreement strengthened patent protections and led to increased foreign investment in the health sector.[4]

According to the National Institute of Statistics and Geography (INEGI) and the National Chamber of the Pharmaceutical Industry (CANIFARMA),[5] Mexico is considered to be one of the main markets for health supplies in the world and is classified as a solid and highly competitive industry at the regional level. Their study indicates that in 2021, the pharmaceutical industry's gross domestic product (GDP) grew 8.4% compared to 2020, and that from 2003 to 2021, the number of pharmaceutical industry establishments had increased from 480 to 908. The numbers had increased due to the restructuring of international value chains.

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[2] Constitución Política de los Estados Unidos Mexicanos [CPEUM] [Political Constitution of the United Mexican States] Feb. 05, 1917, article 4 states: "Every person has the right to health protection. The Law will define the bases and modalities for access to health services".

[3] The United States-Mexico-Canada Agreement [USMCA] Jul. 01st, 2020, is an updated version of the North American Free Trade Agreement [NAFTA], that includes major changes in intellectual property protections. The Agreement extends the terms of copyright to 70 years beyond the life of the author (up from 50).

[4] In the NAFTA and the USMCA, the chapter on intellectual property recognizes the Geneva, Bern, and Paris Conventions signed on various dates, all aimed at the protection of rights derived from intellectual property, including producers of phonograms, literary, and artistic works, as well as industrial properties (patents, brands, models, industrial secrets, and industrial designs). Under the USMCA, parties may grant greater protection to intellectual property rights through domestic legislation, that is, more protection than is granted in the Treaty. National treatment is granted for protection and defense, except for the obligation to submit to the procedures established in the multilateral agreements issued by the World Intellectual Property Organization [WIPO] on the acquisition and conservation of intellectual property rights. On August 24, 1994, in the Official Journal of the Federation [D.O.F.], Mexico published a Decree to Reform, Add, and Repeal Provisions of the Law on the Promotion and Protection of Industrial Property. Its purpose was to improve the national industrial property system through greater protection of industrial property rights. It granted to the Mexican Institute of Industrial Property the powers necessary for the exercise of administrative authority in this area and the harmonized Mexican law with the provisions of international treaties to which Mexico is a party. Later, on January 1, 2020, Mexico published the new Federal Law for the Protection of Industrial Property, which repealed the previous law. The new law protects industrial property through the regulation and granting of invention patents (among other things) and, in the case of natural persons, grants them exclusive and temporary rights to exploit the patents for their own benefit or to allow others to do so with the consent of the patent holder. Ley Federal de Protección a la Propiedad Industrial [LFPPI] [Law for the Protection of Industrial Property] Jul. 07, 2020.

[5] Instituto Nacional de Estadística y Geografía, *Conociendo la Industria farmacéutica*, (Colección de estudios sectoriales y regionales, 2022), available at: *https://www.canifarma.org.mx/uploads/descargables/inegi.pdf.*

However, this has divided the markets in the search for new niches for producing medicines or promoting imports. Therefore, on the one hand, GDP growth is good, but not about the increase in imported medicines. They determined that 83.2% of all imports came from eight countries. The principal source of these imports was the United States, at 42.3%. In 2020, imports were at 81.4% and came from nine countries. The country with the highest percentage in that year was, again, the United States, at 30.7%, followed by China, with 14.2%.[6]

Regarding drug patents, there has historically been a tension between the pharmaceutical industry's desire to recover their investments and the government's need to control health costs. Moreover, the cost of developing new medicines will always be more expensive than merely reproducing those that already exist. Thus, the intellectual property regime encapsulates the ongoing struggle between protectionist and liberalizing forces on both a national and international scale.[7]

Thus, there is an antagonism between the empowerment of the pharmaceutical industry and the population's access to healthcare. One example of the empowerment of the pharmaceutical industry is the excessive protection granted to intellectual property rights in biomedical research, which has led Heller and Eisenberg to make use of the "tragedy of the commons"[8] phenomenon in their article on the subject. The tragedy of the commons problem results from the fact that a given limited resource quickly becomes overused when each of the owners is permitted to use it but is unable to exclude others from using it. The "tragedy of the anticommons", according to Heller and Eisenberg, results when a resource has many owners, each of which has the right to exclude all the others. This can result in a situation where no one, in fact, has use of it.[9]

In these types of cases, what usually occurs is that the government uses its regulatory powers to implement national policies that prioritize access to healthcare. The Mexican government, for example, promotes health as a human right. The National Health Program 2007-2012 promoted universal access to quality medical services through a functional and programmatic integration of the various public institutions under the Ministry of Health. The program contained the following five central concepts aimed at achieving this social policy: 1) improve the health conditions of the population; 2) provide efficient health services, with quality, coziness, and safety for the patient; 3) reduce health inequities through targeted interventions in marginalized commu-

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[6] *Ibid.* at 7.

[7] Karen van Rompaey, *Salud global y derechos humanos: propiedad intelectual, derecho a la salud y acceso a los medicamentos,* 15 Anuario de Derecho Constitucional Latinoamericano 497, at 500 (2009).

[8] Michael Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 (5364) Science 698, (1998).

[9] *Ibid.* at 698.

nities and vulnerable groups; 4) prevent impoverishment of the population due to health issues through universal medical insurance, and 5) to guarantee that health contributes to improving poverty alleviation and human development in Mexico.[10]

Additionally, on November 29, 2019, the Mexican government reformed the General Health Law by enacting the Health Sector Program 2020-2024, which implemented a new policy offering free health services and medicines designed to progressively expand access to health services to people not covered by the country's employment-related social security program. To achieve this, the government promoted improving and strengthening all systems involved in the production, purchasing, and supply of medicines as an integral part of the therapeutic process and not merely as merchandise to which universal access must be granted. The government recognized that the production of medicines, vaccines, and medical equipment derives from commercial interests, which often make pharmaceutical products more expensive. As a result, the government directed the Ministry of Economy to review the commercial and productive activities of the pharmaceutical sector. The government is laying the foundation for adequate, universal, and free access to health care, continuing improvement of the quality and capacity of the National Health System, and achieving a differentiated and culturally relevant, rights-based approach promoting both regular monitoring and epidemiological care to improve the health and well-being of the population.[11]

As we can see, the State is the ultimate guarantor of healthcare for the people. However, there is a contradiction in a liberal state. On the one hand, State is thinning on economy, while on the other, the State maintains paternalistic policies. The policy mentioned above was, in fact, the first time that a government in Mexico promoted a policy of universal access to quality health care through universal health insurance.

However, this exposed the contradiction inherent in a liberal state, that is, while the government promotes the reduction of its influence on the economy, it also maintains policies that do not sufficiently address true distributive justice to secure the right to health. Even though the government does seek to help the most vulnerable, the regulations only operate at the national level, leaving the economic interests of international pharmaceutical companies relatively unaffected. Thus, there appears to be an opposition between the protection of patent rights and the right of the population to adequate health services.

The COVID-19 pandemic of 2020-2022 highlighted the significant gap between developed and developing nations in managing public health crises. While developed countries possess the necessary financial resources and scien-

[10] Programa Nacional de Salud 2007-2012, [National Health Program 2007-2012], Jan. 17, 2008, D.O.F., (Mex.).

[11] Programa Sectorial de Bienestar 2020-2024, [Sector Welfare Program 2020-2024], Aug. 17, 2020, D.O.F. (Mex.).

tific expertise, as well as the robust pharmaceutical industry, necessary to combat the pandemic, developing countries faced severe difficulties in attempting to mitigate its effects. In addition, countries such as Ukraine, India, Iraq, Libya, Pakistan, the Philippines, Thailand, and Yemen,[12] were all simultaneously facing unprecedented humanitarian crises involving ongoing armed conflicts or other forms of violence, all of which exacerbates the already existing disparities in access to essential medical supplies and vaccines. National health policies in a globalized world must be able to respond more effectively to this novel global phenomenon. Moreover, there needs to be an international model for patent development that emphasizes cooperation.

In the situation described above, the premise of the theoretical model referred to as the "Sábato triangle"[13] has been broken. This model identifies the main actors as the government, the productive system, and the academy. The government oversees managing the scientific and technological community's ability to respond to the needs of industry. However, those needs are not sufficiently linked to the other actors involved. This results in benefits accruing to industry because of the exploitation of patents, but without any balancing of these benefits against the possible adverse impacts on the nation's healthcare system.

Undoubtedly, economic incentives promote research in science and technology in the private sector. If they were to be abolished, it would discourage research and lead to the deterioration in overall social health and compromise the effectiveness of the government as the guarantor of the right to health. In this regard, international organizations and institutions such as the World Intellectual Property Organization (WIPO) and the United Nations Development Program (UNDP) are working to create an international normative framework that focuses on both the rights of industrial property and people's standard of living.[14]

This paper will focus on the relationship between medical patents and the right to health as an integral human right. The divergent interests involved in this issue are evaluated from the perspective of international law, which seeks

[12] Tobias Ide, *COVID-19 and armed conflict*, 140 World Development (2021).

[13] In the field of science, technology and society, literature has existed since the 1960s, what we call today academic-scientific knowledge. Theoreticians such as Marcos Kaplan emerged in the development of a scientific policy, who in the 1980s would define this as a set of measures or decisions, interventions or activities carried out by different institutions of a specific society and whose main and ultimate objective is to encourage, stimulate or inhibit the progress of research, such as the application of products for socioeconomic, political, cultural or military purposes, delimiting what, who and for what. In this definition, Kaplan goes back to the ideas of J. Sábato and his theory of the "triangle of development" later baptized as a "triple helix" theory by Henry Etzkowitz, which precisely links government, universities, and industry through investment in this field. Specifically in scientific research and technological development, that are generators of grow and changes in diverse orders. Alvin Toffler would later establish in The Third Wave, in relation to the transfer of power and the knowledge society as is currently known through the value of the information that is possessed.

[14] This issue can be explored through the UNDP Human Development Index (HDI) study.

to reconcile conflict through treaties and agreements of international organizations in order to find the balance best suited to benefit humanity. This study will focus on how changes regarding the fundamental concepts of human rights and medical patents affect the lives of ordinary citizens. Considering the rapid evolution of scientific knowledge in the field of medicine, specifically regarding vaccines, nations need to create policies that promote the so-called knowledge society by using approaches that emphasize international cooperation.

Theoretical bases emerge from the conception that scientific knowledge is a strategic task in our modern society. Information and knowledge have become a vital instrument for economic growth and social development.[15] This is typical of contemporary society,[16] constituting a source of well-being and wealth for the majority of the most developed countries, that left behind the philosophical approach of ancient Greeks on the science as a contemplative way, towards an interpretation of value of the knowledge and its practical applications from the scientific innovation, in which the three main actors are the government, universities, and industry, which some authors considered the triangle of innovation.[17]

According to Hohfeld's theory,[18] the right to health may be deemed a human right due to the presence of "correlative concepts" that entail reciprocal notions, such that when asserting that X (a person with a disease) has a right over Y (the owner of the patent) with regard to a given action, it implies that Y has a duty towards X regarding that action; therefore, stating that X is competent vis-à-vis Y concerning a normative action denotes that Y is subject to X regarding that normative action. Conversely, utilizing Hohfeld's theory in relation to what he calls "opposite concepts" or contradictory concepts, such as maintaining that X has a right to and Y has a non-right concerning a given action, is tantamount to stating that X possesses a legal power over Y with respect to that normative action. In either case, the consistency of the legal systems must be ensured. Kelsen highlights the distinguishing features of legal norms to examine the functioning of legal systems understood as collections of norms with such characteristics. Hence, the classification of the right to health as a human right necessitates a review according to the distinct legal systems.

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15 *See* Manuel Castells and Pekka Himanen, The Information Society and The Welfare State. The Finnish Model (Oxford U. Press, 2011). Cite on the subject: "We live in a time characterized by the rise of the information society in its diverse reality. The foundation of this society is informational, which means that the defining activities in all realms of human practice are based on information technology, organized (globally) in information networks, and centered around information (symbol) processing".

16 Understood as post-World War II.

17 Antonio Pulido and Emilio Fontela, Innovación y política científica (Instituto LR Klein/Ceprede/IBM, 2008).

18 Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 (1) Yale Law Journal 16, 30 (1913).

II. International Provisions that Establish a Correlation between Industrial Property Rights and Human Rights

Under the Economic and Social Council (ECOSOC) authority, Intellectual Property and human rights are under discussion through various international mechanisms, whose considerations seek to raise awareness and eliminate actual or potential contradictions between scientific progress and economic, social, and cultural rights.

There are several important documents on this subject, such as the Venice Declaration on the right to enjoy the benefits of scientific progress and its applications, adopted in 2009, the Universal Declaration on Bioethics and Human Rights, adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 2005, the Recommendation on Science and scientific researchers, adopted by UNESCO in 2017, the report of the Special Rapporteur on cultural rights on the right to enjoy the benefits of scientific progress and its applications (A/HRC/20/26) and General Comment No. 17 (2005) of the Committee on the right of every person to benefit from the protection of the moral and material interests derived from any scientific, literary or artistic production of which he is the author. In addition, applications of scientific progress are under intellectual property regimes, which struggle between the economic benefit for the patent owner and the right to health. Even though in the World Trade Organization Doha Declaration on the TRIPS Agreement and Public Health (2001), the intellectual property regime should be interpreted and implemented in a manner supportive of the duty of States "to protect public health and, in particular, to promote access to medicines for all".[19]

The right to health is considered to be a human right and is characterized by: *a)* universality; this right is inherent to all men, is for the benefit of all, and cannot be restricted to a particular class of individuals; *b)* unconditionality; it is not subject to any condition beyond the guidelines and procedures that determine the limits of that right; *c)* inalienability; it cannot be abrogated or transferred because it is inherent to the idea of human dignity; *d)* internationalization; its expansion has had an impact on all countries, whether through their own efforts or as a result of pressure from the international community; and, *e)* progressiveness; the needs of both the individual and society must be taken into consideration while keeping in mind the dynamic and changing character of these needs.

Today, human rights are universal. It is widely accepted that there should be no limitations on these rights due to political boundaries, beliefs, or race. This universal validity is based on a general recognition of their fundamental

[19] UN CESCR, General comment No. 25 (2020) on science and economic, social, and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights), April 30, 2020, UN Doc. E/C.12/GC/25; World Trade Organization, Trade-Related Aspects of Intellectual Property Rights Jan. 01, 1995.

importance. Human rights limit the sovereignty of the state but are respected due to this belief that they are essential for the optimum and harmonious development of the individual in society.

In the international sphere, the universalization of human rights began with two specific events. The first was the "Four Freedoms" speech given by President Roosevelt before the US Congress in 1941, and the subsequent signing of the Atlantic Charter, which was an effort to codify into a single text those rights that all nations should protect. The second was the signing of the Universal Declaration of Human Rights in 1948, which occurred largely due to the combined efforts of non-governmental organizations and a number of smalls, primarily Latin American countries, that had fought to include a solid commitment to human rights in the United Nations Charter. At the Pan-American Conference held in Mexico in February and March 1945, Latin American countries expressed their determination to see those human rights included in the Charter of the United Nations. It was at this conference that the concept of human rights acquired its new international legal status, which would lead to its universalization. The UN Charter states in Article 1:

> The Purposes of the United Nations are… To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.

This idea of universal applicability, although often thought to have been inspired by the liberal revolutions of the eighteenth century, originates in the thought of one of the vital enlightenment writers on legal and political philosophy, Immanuel Kant. Kant places the idea of universality at the center of his moral philosophy, and he uses the term "categorical imperatives" for universal rules that everyone must follow. Thus, Kant points out that reason, through informant characteristics, reveals humankind's essential trait. Each person with a rational tendency can be considered a member of a great ideal family that manifests in sociability. Kant would further develop this thesis in his work, *Perpetual Peace*, where he advocates universal citizenship and cosmopolitan hospitality as necessary foundations for peace between men and nations.

Today we see that interdependence supposes the defense of these rights from a more radical conception of their own needs and interpretations, subjecting human rights to scenarios of such particularity that often fragment this sense of universality in defense of specific societal and community ideas, which refutes the abstract meaning of such universality. In the absence of a social economic framework that allows fully to satisfy all human rights in a universal or complete way and which underlies the international community by allowing the creation of international mechanisms for the peaceful coexistence of States, leaving aside cultural pluralism, or the recognition of a plural reality of political and cultural traditions and institutions.

In international law, the regulatory framework regarding the right to health is based primarily on the following international conventions: (1) The Universal Declaration of Human Rights (1948); (2) the International Covenant on Civil and Political Rights (1966), which expanded the rights set forth in the Universal Declaration; (3) the International Covenant on Economic, Social and Cultural Rights (1966); and (4) the Declaration on the Right to Development (1986), whose main purpose was to harmonize the civil, cultural, economic, political, and social rights identified in the previous three documents. The right to health is also referred to in Articles 10, 12 and 14 of the Committee on the Elimination of Discrimination Against Women (CEDAW), Article 24 of the Convention on the Rights of the Child, and the Alma-Ata Declaration on Primary Health Care of 1978.

The relationship between the right to health and industrial property rights also appears in the above-mentioned international instruments. Specifically, Article 17 of the Universal Declaration of Human Rights states, "Everyone has the right to own property alone as well as in association with others", and "No one shall be arbitrarily deprived of his property". Article 27 states:

> Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits… Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author.[20]

The International Covenant on Economic, Social and Cultural Rights follows the tone of the Universal Declaration of Human Rights. Article 15 of that document states:

> 1. The States Parties to the present Covenant recognize the right of everyone:
> (a) To take part in cultural life;
> (b) To enjoy the benefits of scientific progress and its applications;
> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author.
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
> 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
> 4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.[21]

[20] U. N., Universal Declaration of Human Rights, Dec. 10, 1948, available at: *https://www.un.org/en/about-us/universal-declaration-of-human-rights.*

[21] U. N., International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, available at: *https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights.*

In each of the above articles, a contradiction between the protection of a right to culture and the protection of the material interests of the producer is evident. The tension arises between the norms that guarantee the use of information and the norms that guarantee the diffusion of information. On the one hand, there is the right "freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits". On the other hand, we have regulations designed to protect the creators of information, that is, to protect "the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author".[22]

The Inter-American Court of Human Rights refers to the TRIPS Agreement and its relationship to the right to health, especially in Title 3.2 which addresses access to medicines and the right to health, and Article 3.3 which addresses amendments to the TRIPS Agreement. However, this instrument has rarely been invoked since it fails sufficiently to clarify the relationship between the protection of intellectual property rights and the right to health. The instruments emanating from organizations such as the WTO have all tended to prioritize intellectual property rights over the right to health.

III. The Framework of TRIPS and Reconciling Patent Law with the Right to Health

The TRIPS Agreement permits compulsory licensing. Compulsory licensing allows governments to use patents without the explicit authorization of the patent holder, albeit with conditions designed to protect the interests of the patent holder. These conditions are contained in Article 31, which states that granting of such licenses may only occur after an unsuccessful attempt has been made to acquire a voluntary license on reasonable terms and conditions within a reasonable period of time. There is also a requirement that adequate remuneration be paid based on the circumstances of each case and taking into account the economic value of the license. A requirement that decisions be subject to judicial or other independent review by a higher authority is included as well.

These conditions may be relaxed in situations where compulsory licenses have been employed in response to practices determined to have been anticompetitive following a legal process. All these conditions should be read together with the related provisions of Article 27.1, which require that patent rights shall be enjoyable without discrimination as to the field of technology or whether products are to be imported or locally produced.[23]

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[22] World Intellectual Property Organization [WIPO] & National Patent and Registration Office of Finland [NPRF], *Foro sobre Creatividad e Invenciones. Un mejor futuro para la humanidad en el siglo XXI,* OMPI/IP/HEL/00/17, oct. 5 to 7, 2000 (Finland).

[23] WTO, *Overview: the TRIPS Agreement*, available at: *https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm.*

The use of compulsory licenses and the use of a patent by a government without the patent holder's authorization is only allowed if the conditions established in Article 31 have been met, particularly the conditions which protect the legitimate interests of the patent holder. The person or company that requests such a license must have tried, unsuccessfully, to obtain the license voluntarily from the patent holder under reasonable terms and conditions (Article 31(b)). If the license is obtained, adequate compensation must be paid to the patent holder (Article 31(h)).

However, there are several exceptions related specifically to the topic of the right to health. Some of the phrases outlining the circumstances that permit these exceptions are: "in the case of a national emergency or other circumstances of extreme urgency"; "in the case of public non-commercial use… by or for the government"; and, "to correct anti-competitive practices". Under these circumstances, it is not necessary to make any effort to obtain a voluntary license under Article 31(b). The compulsory licensing permitted in these cases, in accordance with the TRIPS, is not an exclusive grant to the licensee, so the patent holder still retains the possibility of receiving benefits from it. It is generally understood that these compulsory licenses should only be granted to supply a country's internal market. Article 31 itself does not identify what specific circumstances qualify as "a national emergency", "other circumstances of extreme urgency", or "anti-competitive practices".

According to the Doha Declaration, the criteria are to be established by the state that invokes this provision in response to a particular situation.[24] This lack of specificity has generated uncertainty even though some states have implemented mechanisms for the granting of compulsory licensing, often due to pressure from pharmaceutical companies. The conflict between intellectual property rights and the protection of the right to health during a national emergency has not yet been resolved by any international agreement. The lack of agreed upon criteria can lead to a situation where the governments of different countries are required to negotiate directly with each other to resolve issues affecting the rights of patent holders when a conflict arises. Such a conflict arose between the United States and Brazil over the interpretation of Brazil's Industrial Property Law.

[24] The Doha Declaration, in paragraph 5, establishes the commitment of the TRIPS Agreement and recognizes existence of coercive economic measures, and the freedom of action that include the following: "(b) Each Member has the right to grant compulsory licenses and the freedom to determine the basis on which such licenses are granted. (c) Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those related to HIV/AIDS, tuberculosis, malaria and other epidemics may represent a national emergency or other circumstances of extreme urgency. (d) The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4". WTO, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/W/2, (2001).

Brazil's Industrial Property Law of 1996[25] established the requirements under which "local exploitation" of exclusive patent rights will be permitted. The United States stated that such "local exploitation" could only be met if Brazil produced the patented material itself and did not merely import the patented material from another country. The Brazilian position regarding "local exploitation" includes a provision making a patent subject to a compulsory license if the patented material has not been put to use in Brazilian territory. That is, Brazil defines "lack of exploitation" as "the non-production of the product or its incomplete production", but also, the "non-utilization of the patented procedure in a complete manner".

For the United States, this provision was incompatible with Brazil's obligations under Articles 27 and 28 of the TRIPS, and Article III of the GATT (1994). On July 5, 2001, following direct discussions between representatives of the governments of the two countries, the parties to the dispute notified the Dispute Settlement Body (DSB) that they had reached a mutually beneficial solution and that Brazil would grant the compulsory license regarding the patents held by United States companies. Nevertheless, in the agreement, the United States emphasized that Brazil had never used this provision to grant a compulsory license.[26]

Another provision that impacts the right to health is the "Bolar" provision,[27] which appears in Article 30 of the TRIPS. This provision is intended to promote scientific and technological advances by allowing researchers to use patented inventions in their research. Some countries, like Canada, allow producers of generic medicines to use the patented invention to obtain an authorization for commercialization of those products without having to obtain the permission of the patent holder, and before the protection period has expired. As a result, producers are able to market such medicines as soon as the patent expires.[28] Generic medicines are typically more affordable than patented medicines because their price is closer to the actual cost of production, especially when several generic versions of the same medicine are available as competition between producers will lower prices.[29] Unfortunately, the Bolar provision is very difficult for developing countries to take advantage of since they often do not

[25] Law No. 9.279 of 14 May 1996 (Bra.) (Regulating rights and obligations related to industrial property).

[26] Dispute Settlement by United States, *Brazil – Measures Affecting Patent Protection*, WTO Doc. WT/DS199/1 (May 30, 2000).

[27] Roche Products v. Bolar Pharmaceutical Co., 733 F.2d 858 (Fed. Cir. 1984) (inspiring in this case).

[28] WTO, *Obligations and exceptions. Under TRIPS, what are member governments' obligations on pharmaceutical patents?* (September 2006) available at: *https://www.wto.org/english/tratop_e/trips_e/factsheet_pharm02_e.htm#dohadecl5b.*

[29] Brigitte Tenni, et al., *What Is the Impact of Intellectual Property Rules on Access to Medicines? A Systematic Review*, 18 Globalization and Health, at 35 (2022).

have the resources or economic capacity to develop new patents derived from previously patented material as the Bolar provision presupposes.

A substantial change took place in 2017. In that year, an important modification was adopted that directly affects the right to health. Although problems regarding the economic issues that affect developing nations still remain, this modification expands the range of possible solutions regarding the right to health. This change was the Amendment to the Agreement on Trade-Related Aspects of Intellectual Property Rights, which became effective as of January 23, 2017. On December 6, 2005, WTO members approved changes to the WTO's intellectual property agreement (TRIPS), making permanent a prior decision on patents and public health that had originally been adopted in 2003.

In the Amendment, "WTO members assigned further work to the TRIPS Council to sort out how to provide extra flexibility, so that countries unable to produce pharmaceuticals domestically can obtain supplies of copies of patented drugs from other countries without the authorization of the patent holder".[30] Without this flexibility, countries lacking the productive capacity in this area would not have been able to take advantage of the compulsory licensing system. This is often referred to as the "Paragraph 6" issue because it appears in the sixth paragraph of the Doha Declaration on the TRIPS Agreement and Public Health.[31]

Further, article 31(f) of the TRIPS Agreement states that compulsory licensing must be "predominantly for the supply of the domestic market". This applies to countries that are able to manufacture drugs and limits the amount they can export even, when the manufacture of the drug has been permitted under a compulsory license. This also has an impact on countries that are unable to manufacture their own medicines and need to import generic medicines. For countries in this situation, finding third countries that are permitted to supply drugs produced pursuant to compulsory licensing rules can be difficult.[32] Specific qualifications were included, such as "reasonable measures within their means" and "proportionate to their administrative capacities" in order to prevent the conditions becoming overly burdensome or impractical for importing countries.

Developed country members are obliged to provide technical and financial cooperation on request, and on mutually agreed terms, to assist countries using the system in order to avoid trade diversion away from the intended beneficiaries.[33] All WTO members are eligible to export under this plan, but developed countries have committed themselves to not using this system to import medicines. Some members have pledged to only use the system to import medicines during a national emergency or other circumstances of extreme urgency.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

IV. The Differing Criteria Affecting Developed and Less Developed Countries

There is a contradiction within the capitalist system which seems to be consistent with the rules of free competition but opposing to the vision and need to extend human rights and medicine patents with respect to the right to health in the international arena. It is difficult to resolve this contradiction due to the secrecy inherent in the pharmaceutical sector and the patent system on which it relies, as well as other factors that hinder the availability of medicines. In this regard, the World Health Organization (WHO) points out that some of these barriers to "availability of medicines" are to be evaluated in terms of "(a) physical availability and (b) economic availability, or affordability. Moreover, physical availability assumes the supply of quality, effective and safe medicines to consumers. Affordability covers the State system to regulate pricing and the system that shapes demand for medicines".[34]

To deal with these barriers, the WHO suggests countries enact legislation specifically targeted towards:

— Improving the regulatory framework for the circulation of medicines (regulating the quality required of medicines placed on the market and preventing the use of counterfeit medicines).
— Improving coordination of the activities of all relevant ministries and agencies.
— Strengthening controls on the import of medicines.
— Strengthening the personal responsibility of distribution network staff.
— Mobilizing international cooperation on medicine quality control.
— Providing information on advances in medicines.
— Developing measures to support pharmaceutical manufacturers.[35]

The failure of the current system to satisfy the demand for medicines has led to the proliferation of so-called miracle products, which are, at best, merely generic products, and at worst, ineffective or even dangerous counterfeit drugs. These types of products are poorly regulated in many countries, and the scale of their proliferation has resulted in overwhelming damage to national health care systems.[36] Nevertheless, the indicated recommendations, despite the problems they face regarding their implementation, are oriented towards a

[34] SCP 19th Session, *Patents and Health: Comments Received from Members and Observers of the Standing Committee on the Law of Patents*, WIPO Doc. SCP/19/REF/SCP/18/INF/3 (April 11, 2012) available at: *http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=226050*.

[35] *Id.*

[36] It is not only regulation that has required them to avoid these practices, which constitute crimes in some jurisdictions, but harmonization with international legislation to effectively combat international proliferation and commercialization. Much of this activity is already in the hands of actual criminal organizations.

more equitable balance between the property rights of medical patent holders and the right to health.

In the knowledge society, such a balance may be achievable when we consider a country such as Switzerland, which, despite having limited natural resources, has achieved the highest standards in the areas of human rights and the delivery of health services due to its enormous scientific and technological potential. This demonstrates that the patent system could be an instrument that could contribute to the full realization of the human right to health.[37]

However, the debate between developing and developed countries, or poor and rich countries, reveals a conflict. While the interest of developing countries is to increase access to patented medicines, the interest of developed countries is to protect inventors and proceed cautiously. This conflict of interests and positions was on display during the sixteenth session of the Standing Committee on the Law of Patents (SCP),[38] where South Africa, the African Group, and the Development Agenda Group (DAG), presented a work program on the topic of patents and health (SCP/16/7) that stated:

> The proposed work program seeks to enhance the capacities of Member States, and particularly developing countries and least developed countries (LDCs), to adapt their patent regimes to make full use of the flexibilities available in the international patent system to promote public policy priorities related to public health. This work program is composed of three interlinked elements that are to be pursued simultaneously...
>
> These three elements are respectively: (i) the elaboration of studies to be commissioned by the WIPO Secretariat, following consultations with the Member States at the SCP, from renowned independent experts; (ii) information exchange among Member States and from leading experts in the field; and (iii) the provision of technical assistance to Member States, and particularly developing countries and least developed countries (LDCs), in relevant areas, and building upon work undertaken in the first two elements of the work program.[39]

The above position, which was laudable and would have operated to the benefit of a large part of the international community —particularly the least developed or less developed countries— was opposed by the United States. The proposal offered by the United States (SCP/17/11) claimed that the

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[37] The 2019 Human Development Report presents the 2018 HDI (values and ranks) for 189 countries and UN-recognized territories, along with the Human Development Index (HDI) for 150 countries, the Gender Development Index (GDI) for 166 countries, the Gender Inequality Index (GII) for 162 countries, and the Multidimensional Poverty Index (MPI) for 101 countries. Switzerland's HDI value for 2018 is 0.946 —which put the country in the very high human development category— positioning it at 2 out of 189 countries and territories. Between 1990 and 2018, Switzerland's HDI value increased from 0.832 to 0.946, an increase of 13.7 percent.

[38] *Supra* note 34.

[39] SCP 16th Session, *Proposal by the Delegation of South Africa on Behalf of the African Group and the Development Agenda Group*, WIPO Doc. SCP/16/7 (May 20, 2011) available at: *https://www.wipo.int/edocs/mdocs/scp/en/scp_16/scp_16_7.pdf.*

South African proposal would not only weaken patent protection but would result in little benefit since most essential medicines are not protected by patents and insufficient delivery of medicines is the result of factors not related to patents. The proposal by the United States stated:

> Weakening patent protection for innovative medicines is not a productive approach to improving availability of health care, because many other factors other than patents more directly affect the availability of medicines. It is known that patent protection has expired or was never sought for the vast majority of medicines on the WHO's List of Essential Medicines. As stated by the WHO,[40] in many countries, especially LDCs, there is no evidence of patent activity for medicines added to the EML, and for those countries where patents have been identified, the patents may not be valid, may be expired or may not be relevant. In fact, only about 4% of the medicines on the EML are presently protected by patents.
>
> Many of the medicines on the EML once were protected by patents and were originally developed in large part due to the protection afforded to their developers by the patent system. This fact further highlights the large volume of important medicines that were developed under intellectual property protections and that subsequently became available from other manufacturers upon the expiration of the relevant patents...
>
> By analyzing the reasons why unpatented, [*sic*] medicines do not reach the intended patients, it is possible to determine what are the factors not related to patents that impede their availability. These factors would naturally affect the availability of all medicines.[41]

The United States made three specific proposals directed at identifying all barriers, including non-patent barriers, to the availability of medicines in less developed countries. These proposals were:

a) Inviting the WHO to make a presentation to the SCP on the availability of generic medicines in DC/LDCs, on the non-patent barriers to the availability of safe and effective medicines that are encountered in many countries, and on the effect of falsified medicines, both generic and patented, on the availability of proper medicines. This presentation would help to put in context the potential effect of patents, as compared to the effect of other factors, on the availability of medicines.
b) Conducting a comprehensive study on the positive impact of patent systems on providing lifesaving medicines to developing countries. The study would evaluate the role of patent protection in providing incen-

[40] WHO/WTO/WIPO Technical Symposium, *The patent status of medicines on the WHO model list of essential medicines*, Comments by Richard Laing (February 2011) (this is the referenced article in cited material).

[41] SCP 17th Session, *Patents and Health: Proposal of the United States of America*, WIPO Doc. SCP/17/11 (December 7, 2011) available at: *https://www.wipo.int/edocs/mdocs/scp/en/scp_17/scp_17_11.pdf*.

tives for research and development leading to innovative medicines and in fostering the technology transfer necessary to make generic and patented medicines available in DC/LDCs.

c) Conducting a comprehensive study to examine the availability of life-saving medicines that are not protected by patents and the reasons for their lack of availability.[42]

The proposed goals included not only an assessment of the availability of medicines in the various markets, but also the detection of counterfeit medicines, which evade law enforcement and endanger the health of the population.

Organizations such as Knowledge Ecology International (KEI)[43] criticized the US proposal.[44] KEI highlighted the monopolistic nature of the patent system, which increases the prices of, and inhibits access to, medicines, both of which adversely affect the right to health.

Previous proposals presented at the SCP were framed within the context of public international law. These proposals had been written in such a way that they not only remained within the scope of international negotiations in general, but specifically adhered to the requirements of the various international treaties that confer obligations on the relevant states and organizations. One example, mentioned in this paper above, is TRIPS which established uniform legal standards for the protection of intellectual property.

In addition to these, in order to reach the right to health as an integral part of current public policies, there is in Doha Declaration, which not only reflects previous positions but also points out in the TRIPS Agreement its ambit for members of the WTO in matters of public health and access to medicines, as mentioned in the Global Strategy and Action Plan on Public Health, Innovation, and Intellectual Property Rights of the World Health Organization of 2008.[45]

The United States proposal reveals the profound differences between the interests of rich and poor countries. In fact, it is in everyone's interest to health find a just and equitable model that can protect patent holders, expand the list of vital medicines, and increase accessibility to health care services for those most in need.

War, internal armed conflicts, and pandemics, such as COVID-19, aggravate the situation for people living in environments already affected by humanitarian crises. Through international organizations such as the United Nations, the international community makes efforts to direct humanitarian aid to areas suffering from armed conflicts and other disasters. In the case of the

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[42] *Id.*

[43] Thiru, *KEI submission to WIPO patent committee commenting on the US proposal on patents and health*, Knowledge Ecology International (February 29, 2012), available at: *https://www.keionline.org/21803*.

[44] *Id.*

[45] *Supra* note 34.

COVID-19 pandemic, the United Nations, world health organizations, governments, businesses, scientists, the private sector, and civil society, all worked together to create a vaccine delivery mechanism called COVAX, which was designed to act as a "humanitarian buffer".[46] This initiative was implemented to help distribute COVID-19 vaccines after global leaders had called for a solution that would accelerate the development and manufacture of COVID-19 vaccines, diagnostics, and treatments, and would guarantee rapid and fair access for people in all countries. Implementation of COVAX was necessary to promote access to medicines and vaccines for people who were not protected against deadly diseases such as COVID-19 and to minimize the number of deaths resulting from that virus. Additionally, COVAX guaranteed that the inability to pay would not be a barrier for vulnerable populations that need access to treatment. Nevertheless, COVAX has faced numerous political, legal, and operational challenges.

V. Conclusions

As we approach the quarter of the 21st century, there is still a keen interest in expanding intellectual property rights, as it is a key component of the knowledge-based economy. Scientific and technological advances sometimes require legislative changes, but the ideal model would proceed by first establishing an international standard that national legislators could look to for guidance in adapting that standard to the local context. The same holds true for the international standardization of human rights, especially considering that these rights often depend on the protection of other related rights necessary for their full realization. Some of these other rights include the right to education, the right to technological advancement, and the right to food, medical care, and work, just to name a few. The goal should be to promote scientific and technological research, development, and innovation while simultaneously working to balance intellectual property rights with the people's right to health. Ensuring access to necessary medicines is a fundamental component of a genuine right to health.

In times characterized by economic interdependence and globalization, the international system cannot function without international organizations capable of fostering peaceful coexistence between nations. WIPO plays a key role in intellectual property law, finding ways to reconcile property rights with human interests and needs, such as was done with the TRIPS Agreement. However, WIPO could go beyond the changes adopted in the Amendment to the TRIPS Agreement that allow less developed countries to obtain patented drugs from third countries without the authorization of the patent holder.

[46] Security Council Resolution, February 26, 2021 U. N. Doc. S/RES/2565 (2021) available at: *https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/053/90/PDF/N2105390.pdf?OpenElement.*

WIPO could serve as a mediator between governments and patent holders to streamline access to patents for essential medicines, most importantly in emergency situations. This issue needs to be considered more in the Doha Declaration and the other instruments of international law. Special regimes could be designed allowing free access to medicine, a reduction of costs, and the temporary exploitation of medical patents, all of which would help the right to health attain its appropriate status as a genuine human right. This would be particularly important for developing countries.

The development and defense of both intellectual property rights and human rights depend on a solid educational system. Furthermore, the development of each individual's capacities depends on the genuine enforcement of human rights. The right to health, in fact, precedes all other human rights, since no one can achieve their optimal realization if they are not healthy. Intellectual property rights have their origins in traditional property rights. Intellectual property creates value, which invigorates the economy at the micro and macro levels, as well as at the national and international levels. The pharmaceutical industry demonstrates the ever-expanding reach of intellectual property. However, to the degree it does expand, access to life-saving medicines for the most vulnerable people living in less developed countries needs to expand as well.

Pharmaceutical companies should contribute to the realization of the right to health and help to generate conditions that permit access to essential medicines, especially in emergency situations. The pharmaceutical industry could also work with governments to fashion rules defining the circumstances under which a reduction of costs or the donation of certain essential medicines are warranted. This could include the donation of medical patents, in accordance with national and international laws, in a way that would not affect their cost or create unfair competition with regard to other companies.

Despite its importance, COVAX does not resolve the issue of monopoly control of knowledge related to medicines and vaccine patents. Currently, only compulsory licenses permit using patents for generic medicines. Alternatives to this system are only limited by the negotiating capacity of governments regarding the treaties they sign. One example might include creating "TRIPS-plus" clauses that mutually benefit all states parties in emergency situations.

The goal of international law should be to find ways to promote the recognition and enforcement of human rights in a globalized system that continues to privilege economic rights over human rights. Failure to do so will result in a continuation of the problematic circumstances in which we currently find ourselves, circumstances that led Stephen Hawking to sarcastically announce, "We think we have solved the mystery of creation. Maybe we should patent the universe and charge everyone royalties for their existence".[47]

[47] *Stephen Hawking: Questioning the Universe.* YouTube: TED (2008) (accessed Feb. 19th, 2023) available at: *https://www.youtube.com/watch?v=xjBIsp8mS-c.*

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REPORT ON ABUSIVE JUDICIAL REVIEW OF ELECTORAL MATTERS

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Abstract: *It is commonplace to state that the borderline courts are the last obstacle in the defense of fundamental rights, the rule of law, the division of powers, and hence, of constitutional democracy. Nevertheless, there are judgments of last resort which are very illustrative examples of argumentative practices used to conceal decisions that may be systematically politicized, and therefore can be detrimental to fundamental electoral rights, to the certainty and legality of electoral acts and resolutions, as well as to the holding of free, authentic, and periodical elections. The practice of using the democratic legitimacy of the judicial function to intentionally undermine the core of democracy is barely theorized. However, it is highly possible that in the future these types of attack will be part of the authoritarian tools used by groups of an anti-democratic nature. That is to say, the circumstance that the courts and not the political actors are the ones that implement undemocratic measures with the advantage of the difficulty for its identification, given the traditional role assigned to the judiciary in the democratic constitutional state of law, makes it essential to review the use of the weighting of the argumentative representation. This, in order to prevent democracy from being damaged by constitutional interpretation and to avoid the tolerance for the absence of a minimum social consensus on the arguments that it intends to sustain with relative temporary stability. Even more so, when it comes to those who make up the constitutional jurisdiction specialized in elections and democracy. In Mexico, the Superior Court of the Electoral Tribunal of the Federal Judiciary (TEPJF) is the highest electoral court. This body has issued controversial and transcendent decisions for electoral democracy which can be subject to critical legal analysis as an input for legislative activity. This is particularly related to issues concerning*

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citizen participation such as the revocation of mandate and the imposition of sanctions due to its diffusion by public servants, as well as cases of gender-based political violence (VPG, by its acronym in Spanish) and the deprivation of an honest way of living (MHV, by its acronym in Spanish) as a sanction. Another topic worth considering is the rulings on the modification or defective abandonment of the jurisprudence in matters such as the assumption of competence over parliamentary acts in the integration of the administrative or government bodies by the Congress of the Union, and the messages of the legislators, which are not protected by the principle of parliamentary immunity, as has been established.

KEYWORDS: *Constitucional Democracy, Human Rights, Abusive Judicial Review, Electoral Jurisdiction, Constitucional Interpretation.*

RESUMEN: *Es un lugar común señalar que los órganos jurisdiccionales límite son la última barrera de defensa de los derechos fundamentales, el estado de derecho, la división de poderes, y por lo mismo, de la democracia constitucional. No obstante, existen sentencias de última instancia que constituyen ejemplos muy ilustrativos de las prácticas argumentativas que se utilizan para disimular decisiones que pueden estar sistemáticamente politizadas, y por tanto, ser perjudiciales para los derechos electorales fundamentales, para la certeza y legalidad de los actos y resoluciones electorales, así como para la celebración de elecciones libres, auténticas y periódicas. La práctica de utilizar la legitimidad democrática de la función judicial para socavar intencionalmente el núcleo de la democracia está poco teorizada. No obstante, es muy posible que hacia el futuro estas formas de ataque se añadan al conjunto de herramientas autoritarias ejercidas por parte de grupos de talante antidemocrático. Esto es, la circunstancia de que sean los tribunales y no los actores políticos los que adopten una medida antidemocrática con la ventaja de la dificultad para su identificación, dada la tradición asignada al poder judicial en el estado constitucional democrático de derecho, hace indispensable revisar el uso de la ponderación propia de la representación argumentativa. Esto, para evitar que mediante la interpretación constitucional se erosione la democracia y se tolere la ausencia del consenso social mínimo sobre los argumentos que se propone sostener con relativa estabilidad temporal. Más todavía, cuando se trata de quienes integran la jurisdicción constitucional especializada en materia de elecciones y democracia. En México, el máximo órgano jurisdiccional electoral es el TEPJF. Dicho órgano ha emitido decisiones controversiales y trascendentes para la democracia electoral que permiten un análisis jurídico crítico, el cual sirva de insumo a la actividad legislativa, sobre todo en temas de participación ciudadana como la revocación de mandato y la imposición de sanciones por su difusión por parte de servidores públicos, así como en los casos de violencia política en razón de género (VPG) y la privación del modo honesto de vivir (MHV) como sanción. Asimismo, resulta notorio el tema de las sentencias sobre la modificación o abandono defectuoso de la jurisprudencia en tópicos como la asunción de competencia sobre actos parlamentarios en la integración de los órganos administrativos o de gobierno del Congreso de la Unión, y los mensajes de los legisladores sobre los cuales se ha determinado que no están protegidos por el principio de inviolabilidad parlamentaria.*

PALABRAS CLAVE: *Democracia constitucional, derechos humanos, revisión judicial abusiva, jurisdicción electoral, interpretación constitucional.*

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I. Introduction

This paper explores the apparent argumental legitimacy of judiciary discourse, specifically for the electoral democratic armor, because it represents the risk of granting advantages to the power groups involved in the appointment of the court directors of the final court heads on electoral matters.[1] This analysis

[1] This seems to be the case of the current configuration of the Superior Chamber of the TEPJF, whose activity has been critically reviewed in the following terms: "If, *from the beginning of the integration of the SSTEPJF, circumstantial political interests were obeyed, which generated a defect in the original integration of the body, it is inevitable that all its subsequent decisions are evaluated under this sieve*, in

is also applicable in the case of the members of the national administrative authority when it performs jurisdictional functions.

Furthermore, this also comes into play when the changes in the applicable criteria instead of being discarded by the highest electoral court, are presented as interpretative developments resulting from a stricter interpretation parameter. Nonetheless, those "developments" are coincidentally held when the ideology in power has changed. In such a context, the competent electoral court fails to justify why the criteria was not timely applied to those who are no longer heads of the powers or have turned into parliamentary minorities. And there is the particularity that those who have previously taken part in the appointment of the members of the court of last instance or of the constitutional autonomous body with electoral functions, constitute the opposing political group contrary to the party or force coalition that now preside over the executive federal, state or municipal power.

Or rather, the change in jurisprudence criteria comes about when there has been a modification in the integration of the parliamentary majorities that originally elected the members of the terminal bodies and whose interpretative activity has been detrimental to the free exercise of fundamental rights, and in particular, of the political-electoral ones.

The doctrine has called this practice *abusive judicial review*, which is characterized by the use of the legitimacy of the courts to decide the cases submitted to their authority with an ideological nuance and *ad hoc* to each matter. That is to say, the undue advantage that can be obtained from the judicial function, materialized through arguments with a democratic appearance, is evident, since it cannot be easily detected and inhibited at the national and even international level.

This essay aims to identify leading cases ruled by the TEPJF, in which this phenomenon might be observed, and, that being the case, the methodology that can help its timely detection and eradication, as it represents a risk to constitutional democracy in Mexico. Only the citizenry, by criticizing the rulings on transcendental issues for the effectiveness of political-electoral rights, can demand and achieve the institutional culture in the behavior of those who constitute the jurisdictional bodies.

In particular, three central issues essential for Mexican democracy are analyzed. First, the change in the criteria to consider appealable before the electoral jurisdiction the acts corresponding to administrative or government decisions of the Legislative Power. In this regard, the new interpretation considers it

order to then verify whether or not the guarantee of judicial independence of its members was violated and if they were left vulnerable to the interests of the bodies politicians of the Mexican State and if, therefore, the autonomy that should be the basis on which a supreme body of these characteristics must act was violated". Mejía Garza, Raúl Manuel y Rojas Zamudio, Laura Patricia, *El acto político de ampliación del periodo de duración de cuatro magistrados de la Sala Superior del Tribunal Electoral avalado por la Suprema Corte. Acción de inconstitucionalidad 99/2016 y su acumulada 104/2016.* Available at: *https://archivos.juridicas.unam.mx/www/bjv/libros/13/6499/27.pdf*.

sufficient, in order to update the competence of the TEPJF, to claim the violation of the right to passive suffrage or any other related fundamental electoral right. Consequently, the contested act may be subject to review in the electoral jurisdiction.

This perspective grants wide discretionary power to the electoral courts, which can result in ideological biases in the assumption of competence, with the risk of arbitrariness or abusive judicial review. That possibility of unjustified assumption in topics of material competence reveals the need to delimit, through clear constitutional guidelines, the powers of the terminal or last resort courts. This delimitation should be made in order to avoid authoritarian jurisdictional intervention in matters that should be decided exclusively by another power of the State, and to prevent a detriment to the checks and balances of constitutional democracy.

The second area analyzed relates to the fact that sanctions imposed to public officials due to the promotion of the mandate revocation and the declaration of loss of an Honest Way of Living, and the resulting ineligibility for positions of popular representation, entail an extremely wide range of extralegal faculties and competences. These bring about a serious threat to the democratic electoral system since they allow for the self-assignment of powers beyond the Constitution. Consequently, the possibility of issuing arbitrary decisions unnecessarily increases, due to the lack of clearly defined guidelines and boundaries that constrain the political participation of the citizens. Also, there is an increased possibility of limiting other fundamental electoral rights, through sanctions that do not have a constitutional basis, and whose regulatory provision, being regressive, corresponds to the legislator.

Certainly, decisions issued by the highest electoral court, when they are systematically politicized to the detriment of the impartiality of the judicial body can turn into an authoritarian device disguised as legality aimed at removing from the contest the political opponents who do not agree with the ideology or the dominant interests of the members of a judicial body, or those derived from the political interests generated during the procedure of appointing each judging person.

Also the third issue analyzed in this paper examines the judicial ways to prevent the abusive judicial review in cases of political violence based on gender (VPG, by its acronym in Spanish), in order to define if, constitutionally, the up-dating of violent political conducts against women, would, in every case and due to their seriousness, lead to the application of the ultimate electoral sanction, such as the annulment of an election or else, that the inclusion in a list of those sanctioned due to VPG, only in cases of conducts considered serious, result directly in the deprivation of the right to be voted because of the loss of MHV.

Based on the mentioned issues, the research aim at to shedding light on the possible existence of an abusive judicial review in the strong sense. The same abusive review that, even in a weak sense, if corroborated, would require a col-

lective effort to promote institutional culture, to eliminate those anti-democratic judicial biases, through the necessary constitutional and legal changes that grant legality, certainty, and legal security to the performance of the members of the electoral judiciary in Mexico.

II. How Does the Capture of the Terminal Bodies Affect Democracy?

The so called procedural or formal democracy is characterized by describing democracy

> …according solely to the forms and procedures that are ideal to legitimize the decisions which are the direct or indirect expression of the popular will. Therefore it is defined, in other words, in accordance with the *who* (the people or their representatives) and the *how* of the decisions (the universal vote and the rule of the majority), regardless of *what* is decided.[2]

Nevertheless, in order to achieve an effective protection of constitutional rights it is necessary to recognize, in the dimension of formal or procedural democracy, only one of the elements that must be limited or controlled by the institutions and procedural guarantees created to protect those rights, since formal or representative democracy, when assumed as the whole democracy, risks to promote the tyranny of the majorities or the political blackmail of the parliamentary minority, thus leaving the Constitution submitted to the will of the legislative, or the judiciary.

Thus, the autonomous right of the exercise of the political representation position is conditioned in two ways: by reviewing the appointment under the principle of constitutional legality and the compliance of the secondary laws of the electoral process; and by controlling the legality of the creation of the secondary law and the accordance of the contents with the Constitution.

Now, if formal democracy constitutes a necessary but partial aspect of democracy, in which legislative, judicial, and governmental powers are legally limited, then the complement should be found not only in the judicial legitimacy of their appointment, but also in what relates to the content or substance of their decisions.

The limits established by the constitutional rights can be identified, according to Ferrajoli, as the "*sphere of the undecidable*: the sphere of the *not decidable that*, integrated by the rights to freedom that ban as invalid the decisions that

[2] Ferrajoli, L., Poderes Salvajes. La crisis de la democracia constitucional, 27 (2011). Ferrajoli maintains that this thesis is shared by most democracy theorists, such as H. Kelsen, Essence and value of democracy; J. A. Shumpeter, Capitalism, Socialism, and Democracy; N. Bobbio, The future of democracy; G. Sartori, Democrazia e definizioni; R. Dahl, Democracy and its critics; and M. Bovero, A grammar of democracy: against the government of the worst.

contradict those rights, and the sphere of *not decidable that not*, formed by social rights, that impose as due to the decisions aimed at satisfying them".[3]

Stated otherwise, the minimal notion of democracy should include not only the procedural aspects of the democratic system but also a clear commitment to follow high standard of protection of fundamental liberties and rights, such as: "the freedom of expression, the right to assembly, and association, as well as the universality of both active and passive voting rights". After all, these rights are directly related to free and authentic elections, and also to institutions capable of organizing, qualifying, and legitimizing the results of the electoral process.

Especially attention must be paid to the threat that the outgoing members of the political bodies of the Mexican state decide to capture the autonomous constitutional bodies and the judiciary, as a protective measure of the political interests of the group leaving power. The affected bodies can be mostly the members of the courts of last resort in whose appointment the outgoing groups participated, since that practice has become part of the anti-democratic tools surreptitiously used to systematically obtain favorable interpretations and resolutions.

Indeed, the seizure or capture of the autonomous bodies and courts of last instance, particularly of members of the electoral bodies, as organs that can review and, if necessary, protect their political interests, seems to head the list of priorities of the leaders or factual powers having those intentions.

On the contrary, as long as autonomous bodies or courts of last resort, specially electoral ones are not captured, they are considered the last defense line of constitutional democracy. Thus, the judiciary and the deference towards the legislative power, particularly when it acts as permanent constituent are balanced since the legislators exercise the political representation resulting from the elections, and the confirmation of democratic legitimacy of the popular election of the members of the legislative by the court, in the exercise of its specific constitutional powers.

In sum, as described by Zagrebelsky: "the legislator must resign to seeing his laws as «parts» of the Law, and not as the whole Law. *But he can expect, both from the justices and from the Constitutional Court, that they keep open the possibilities of exercising his right to contribute politically to the creation of the legal system*".[4]

III. The Abusive Judicial Review of Terminal Organs and Electoral Justice

In democracies that are identified as defective,[5] there are factual powers and actors which promote the capture of State bodies in order to have valuable

[3] *Ibid.* at 29. The highlighting is my own.

[4] Zagrebelsky, G., El derecho dúctil. Ley, derechos, justicia, 153 (1995).

[5] According to the "Democracy Index 2021", EIU. It should be noted that by the year 2022, even Mexico has been classified as a hybrid regime.

allies within the three traditional powers as well as in the autonomous constitutional bodies. That can happen even if the actors do not formally hold public power, and at the expense of the democratic system. The foregoing practice, in the case of terminal jurisdictional bodies, results in the granting of undue judicial advantages for those who have the support or internal sympathy, since the interpretative activity and the legitimacy of the judicial function are used to issue sentences that systematically affect the liberties in a constitutional election.

A typology to identify an abusive judicial review is proposed by Rosalind Dixon and David Landau,[6] for whom the tasks undertaken by judges in their possibly abusive cases are classified into two main categories. The abusive judicial review, in a "weak" sense, happens when the courts of last resort uphold the legislation, the exercise of regulation powers by the autonomous constitutional bodies, or the decisions of the executive. Those decisions are characterized by undermining the democratic armor or the preserve of fundamental rights, legitimizing the harmful acts of the political actors.

As to the "strong" sense, this kind of abusive review is characterized by the court itself taking the initiative of removing or undermining the democratic protections established in the Constitution of a country. Coincidentally, this exacerbated judicial activism occurs whenever there is a change in the political regime, which is tried to limited or restrained through judicial decisions that are frequently justified as "protective of the Constitution".

However, said democratic protections should always favor and not constrain fundamental electoral rights, and even less should they foster meta-constitutional powers of the terminal jurisdictional bodies, since in expanding on their own initiative the range of action of the judiciary, the scope of decision reserved to the legislative power could be invaded, which leads us to the recurring question, not yet satisfactorily elucidated: In a constitutional democracy who watches over the custodian?[7] Therefore, the democratic legislator must continue to act as the check, counterweight, and balance of the judicial power.

Thus, for example, guidelines should be defined for the effectiveness of political-electoral rights, the respect for the division of powers, as well as the duty of administrative and jurisdictional authorities to adjust their actions to what is strictly established in the Constitution and the law. With these principles it is possible to prevent the monopolization of the interpretation of the Constitution from generating the "politicization of justice" instead of the "judicialization of politics", but also to put aside the interference in the peaceful transmission of public power.

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[6] *See* document visible in section III, *A Typology of Abusive Judicial Review: Weak and Strong Forms*, available at: *https://lawreview.law.ucdavis.edu/issues/53/3/53-3_Landau_Dixon.pdf.*

[7] *See* on the discussion between Schmitt and Kelsen on the guardian of the Constitution and the existence of a constitutional court, available at: *https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjy6YSrtev6AhW2j2oFHRnBAxgQFnoECCgQAQ&url=https%3A%2F%2Fdialnet.unirioja.es%2Fdescarga%2Farticulo%2F2730 1.pdf&usg=AOvVaw0PuMf8ooEa7JE4Y0dox26I.*

Indeed, the control of constitutionality as argumentation and interpretation of the Constitution cannot allow everything, it requires the exercise of reinforced argumentation to decide, because, as Alexy states: "not only it is necessary for the courts to hold that these arguments are arguments of the people, but also for a sufficient number of people to accept, at least in the long term, these arguments as reasons for correctness".[8]

As can be seen, the hardest or most intrusive ways of judicial review can be an anti-democratic resource with a great advantage for the actors who control *ex ante* the courts of last resort. That is so in spite of the limits established by the Constitution to the exercise of powers and the corresponding field of competence, since tools of judicial interpretation are frequently used to modify or confer a different meaning to those constitutional limits or restrictions. Hence, there is a need to clearly reinforce the guidelines that would exceptionally allow to overcome the limits of the interpretative activity.

Precisely, in relation to the possibility that in some cases the courts can abuse the weighting of principles, or the deficiency in giving the reinforced reasons to distinguish the precedents, professor José Juan Moreso takes up Guastini's approach, in which two consequences can be observed, expressed as follows:

> a) Weighting is the result of a radically subjective activity. This is so, according to Guastini, because the axiological hierarchy between principles in conflict is the result of a value judgment of the interpreter and, for Guastini, value judgments have a radically subjective nature. This should not be strange, if we remember Guastini's general conception of interpretation, since any interpretive statement is, according to Guastini, the result of a volition (and, in that sense, presupposes a value judgment) and not of an activity of a cognitive nature.
>
> b) The weighting results in a form of what we can call legal particularism. Particularism is a widely discussed doctrine in general philosophy, but less discussed in legal theory… This is precisely the conclusion that Guastini drew from the fact that the hierarchies between principles are mobile and they are valid just for the specific case.[9]

Now, in the specific case of electoral constitutional jurisdiction in Mexico, the limit court is the Superior Courtroom of the TEPJF, whose specialized competence is established in the article 99 of the Federal Constitution, a pro-

[8] R. Alexy, *Ponderación, Control of Constitutionality and Representation,* in: Cátedra Ernesto Garzón Valdés 2004, Theory of Discourse and Constitutional Rights, México, Fontamara, 2005, p. 103. With these reasons, Alexy considers that the answer to the question about the foundations and reasons for privileging representation based on arguments over representation based on elections is fully answered, but establishes for its update the existence of certain assumptions as he concludes: "Discursive constitutionalism, as a whole, is an enterprise to institutionalize reason and correctness. If there are correct and reasonable arguments, as well as rational people, reason and correctness will be better institutionalized through constitutional review than without such review".

[9] José Juan, Moreso. *Conflicts between constitutional principles*. In: Neoconstitutionalism(s), 2006, Trotta, 103-104.

vision that empowers the court in the fifth, sixth, and seventh paragraphs, to rule in a definitive and unassailable way the means of contestation in electoral matter, as well as to determine the criteria of mandatory jurisprudence.

In turn, the binding force of the jurisprudence upheld by the highest jurisdictional body in electoral matters is provided for in articles 214 and 215 of the Organic Law of the Federal Judiciary.[10] It should be noted that the system of precedents was not incorporated in the aforementioned ordinance for electoral matters.[11] Thus the jurisprudence is established only by reiteration of the criterion in three sentences of the Superior Courtroom, by ratification of the proposals submitted by the Regional Courtrooms, or else by contradiction criteria between the courtrooms of the TEPJF.

Therefore, even if a relevant criterion could be established in a single electoral sentence, approved by a qualified majority of five votes, it would still need to be sustained in three uninterrupted sentences, in order to form a binding jurisprudence both for jurisdictional electoral bodies federal and local, as well as for the administrative authorities of both spheres.

Consequently, any modification to a mandatory jurisprudence must be made in a specific section of the modifying resolution, with the respective reinforced argumentative load. That is to say, it must be justified with technical rigor, and expressly state the interruption of the previous jurisprudence, with the reasons on which the change of criterion is based by the qualified majority. The foregoing is the minimum necessary for the limiting court to be able to legitimately deviate from a mandatory criterion approved by reiteration in three cases, since

[10] "Article 214. The jurisprudence of the Electoral Tribunal will be established in the cases and in accordance with the following rules: I. When the Superior Chamber, in three sentences not interrupted by another to the contrary, sustains the same criteria of application, interpretation or integration of a norm; II. When the Regional Chambers, in five sentences not interrupted by another to the contrary, hold the same criterion of application, interpretation or integration of a norm and the Superior Chamber ratifies it, and III. When the Superior Chamber resolves in contradiction of criteria held between two or more Regional Chambers or between these and the Superior Chamber itself…".

"Article 215. The jurisprudence of the Electoral Tribunal will be obligatory in all cases for the Chambers and the National Electoral Institute… Likewise, it will be for the local electoral authorities, when jurisprudence is declared in matters related to electoral political rights of citizens or in those in which acts or resolutions of those authorities have been challenged, in the following terms: Terms provided by the Political Constitution of the United Mexican States and the respective laws".

[11] As the Reform with and for the Judiciary points out, "the Court's judgments are strengthened so that all parties to the lawsuit can demand their compliance and thus protect the rights of the citizens more efficiently and quickly. In addition, this also prevents ministers from having to discuss the same issue several times so they can focus on continuing to strengthen and specify their constitutional doctrine… 4. Interruption of Jurisprudence. In order to strengthen the precedents of the amparo courts, the duty of the bodies to follow their own jurisprudence is strengthened. Thus, it is clarified that, although the courts are not obliged to follow their own jurisprudence, in order for them to deviate from them they must provide sufficient arguments to justify the change of criteria". Available at: *https://www.scjn.gob.mx/sites/default/files/carrusel_usos_multiples/documento/2020-02/Proyecto%20de%20Reforma%20Judicial_1%20%283%29.pdf.*

only in this way it is possible to inhibit the arbitrariness in the decision to abandon the original jurisprudential interpretation.

Establishing these mandatory guidelines for the TEPJF in the Federal Constitution would prevent the highest electoral justice body from modifying or abandoning a jurisprudential line, without giving adequate, necessary, and sufficient reasons to interrupt the jurisprudence originated by reiteration. Hence, abusive judicial review practices would also be inhibited, since a regulated and transparent procedure is required to change criteria, without it being sufficient for the respective justification to defend it only based on the particularities or requirements of the specific case. In that way, fluctuations in judicial criteria or decisions on controversial issues would also be prevented, without considering the respective deference to the members of the other constitutional powers or autonomous organs.

Definitely, depending on the specific cases, this type of modifications or abandonment of the criteria, coming from the highest jurisdictional body in the matter, represent a risk, to the extent that, through a systematic judicial activism, with some legitimacy, the distinctive checks and balances of the division of powers can be evaded, as well as the constitutional limits established for the exercise of the functions and powers of the electoral jurisdiction, to the detriment of fundamental electoral rights (DEF), and in contravention of the elements that define the Democratic Constitutional State of Law. Hence, the need, as identified by Bovero, to strengthen controls and guarantees in order to prevent the concentration and confusion of powers, even in borderline jurisdictions.[12]

As an epilogue to this section, it is convenient to state that, although this document refers specifically to the TEPJF, the characteristics of unjustified activism in a "strong" sense also work in non-judicial bodies, but with electoral constitutional autonomy and competence to investigate violations of the electoral law or materially jurisdictional functions, as in the case of the National Electoral Institute (INE). The changes or abandonment of criteria sustained by the electoral administrative authorities, previously used, must also pass through

[12] Bovero relies on Ferrajoli to warn about the "(in)civil society" groups that concentrate factual power. One way would be precisely the control of those who exercise the electoral constitutional review. The Italian professor points it out in the following terms: "To improve the democratic quality of a complex decision-making process, it is necessary to make it, in any case, even more complex, adding corrective control mechanisms and guarantee, oriented above all to protect it against the assault of the «wild powers», as Luigi Ferrajoli calls them: those powers that grow in (in)civil society through the accumulation and concentration of «*means*» of different kinds, devoid of restraints and constitutional limits… *To the extent that there is a great concentration and confusion of powers at the apex, the ascending sequence of the rules of the democratic game will be completely emptied of meaning, because the voter, instead of choosing, will be chosen, created, shaped, by the chosen ones.* In other words, the election runs the risk of becoming a mere rite of external legitimation. The electing citizen is no longer the beginning of the decision-making process. This process actually has a different starting point, located in the power of whoever has the preponderant means to be elected and re-elected indefinitely, and consequently presents a first decisive downward trait, that is, autocratic". M. Bovero, Una gramática de la democracia. Contra el gobierno de los peores, 159 (2002). The highlighting is my own.

the sieve of a reinforced justification, with technical rigor and express motivation to support the change of interpretation. Along with the foregoing, and for greater clarity, a specific section should also be included among the considerations that support an electoral administrative determination.

IV. The Constitutional Interpretation of the TEPJF and Democratic Responsibility

Constitutional interpretation can be defined as the "activity that the judge undertake to establish through a reasoning based on law, the meaning of a constitutional rule that is understood differently by the parties in a litigation".[13]

This first notion refers of course to the submission of a controversy to the decision of the constitutional court. However, in addition to the litigious nature, the essence of constitutional interpretation is the development of this activity based on the values and principles included in all constitutional provisions.

Díaz Revorio points out that the authentic specialty of constitutional interpretation consists in "the political rooting of the evaluations inherent to constitutional doubts and interpretative options".[14]

So, the presence of values and principles will be constant in all constitutional interpretation, especially if the role of the constitutional jurisdiction in the adaptation of these values and principles to social reality is considered, and of course, the possibility of provoking a change of course in that reality through the implementation of the interpreted norm.

Among other guidelines of constitutional interpretation,[15] Rodolfo Vigo identifies that of "respecting the relative stability of the precedent", in which the constitutional interpreter takes the burden of justifying the reasons for the change of criteria in the decisions made when dealing with similar cases.

"But this does not entail the propensity to the immobility of the jurisprudence". The best option would rather be the intermediate position that implies the reinforced justification, in each case, of the reiteration of the criterion or, on the contrary, its abandonment or modification.

Also, decisions need "to be properly based", since the ones of the constitutional judge being final, it is essential that for the study of the arguments on constitutionality to be exhaustive, coherent, and consistent. In addition, "the written expression of the logical reasons for a decision guarantees social control over arbitrariness and contributes to the legitimacy, the knowledge, and the adherence, or else to the criticism of those decisions by the citizenry", as well as to the dissemination and understanding of the constitutional norm.

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[13] F. J. Díaz Revorio, Valores superiores y actividad interpretativa, Madrid, 40 (1997).

[14] *Ibid.* at 312.

[15] *See* Rodolfo L. Vigo, Interpretación Constitucional, Abeledo-Perrot, Buenos Aires (1993).

Then, as a necessary element for the due foundation and motivation, and for the same reason, for the use and respect of the precedent in all the sentences of the TEPJF, it is necessary to distinguish the divergence techniques from the reasons for the divergence. With respect to the first, the *distinguishing* technique serves to strictly interpret the norm that must be considered from the perspective of the precedent (it allows to differentiate the norm in order to make an exception). Whereas the technique of *overruling* consists of the rejection of the precedent. For both techniques, legal reasons are required to serve as a foundation. But the rejection of the precedent changes the core of the rule interpreted for the specific case, or for future cases.[16]

In addition to the justification for the abandonment of jurisprudence, it is necessary for the new interpretation proposed, in each sentence or precedent, to be also fully submitted to the pertinent verification, through the use of the three interpretative criteria in electoral matters, namely: grammatical, systematic, and functional, provided for by the federal adjective law (LGSMIME) applied by the TEPJF. Only in this way could the institutional and citizen demands to the country's highest electoral court be met, since a reinforced, contextual, and technically rigorous motivation is required to abandon the jurisprudence or precedents contained in previous administrative or jurisdictional determinations.

V. Fundamental Electoral Rights and their Effective Protection against Abusive Electoral Jurisdiction

The Establishment of a Specific Section in the Considerations of the Sentenced for the Reinforced Justification in Cases of Change of Criteria

The quality of the sentences issued by the limit or last instance courts is directly related to the consistency and the use of the best arguments to explain why a decision was reached and not another, since the legitimacy of the jurisdiction, according to Robert Alexy's idea, comes from argumentative representation, typical of deliberative democracies.[17]

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[16] *See* R. Alexy, Teoría de la argumentación jurídica, Center for Constitutional Studies of the Constitution, Madrid, 261-266 (1989). Other authors specify and add on the rejection of the precedent, that: "the overruling technique allows changing a precedent in its «normative core» by applying the new precedent, either to the case under analysis (retrospective effectiveness) or, in most of the assumptions, to cases of the future (prospective overruling). Precisely, the prospective overruling technique is used when a judge warns the population of the imminent change that he is going to make in his rulings".

[17] *See* R. Alexy, *Ponderación, Control de Constitucionalidad y Representación*. In: Cátedra Ernesto Garzón Valdés 2004, Teoría del Discurso y Derechos Constitucionales, 99 (2005).

Given the need to improve the clarity and quality of the decisions of the courts of last instance, so that the citizens can qualify and understand the reasons that support the judicial determinations in relevant or border cases, it is necessary to improve the design, structure, and accountability of the model of electoral sentences in which the modification or abandonment of a jurisprudence or precedent is noticed.

The foregoing is attained through the inclusion of a specific section, before the thorough study of the matter, where the reasons for a new interpretation of the main issue contained in a jurisprudence or precedent are justified in an exhaustive, pertinent, and consistent manner, and also clearly exceeding the quality of the argumentation and the validity of the abandoned criterion. Otherwise, the principle of legal certainty and security to which citizens are entitled would be affected, and for the same reason the citizens could demand that this type of decisions go through a reinforced scrutiny sieve that avoids the political use of electoral justice.

Indeed, the structure of the sentence is essential for a consistent, brief and exhaustive justification of the decision made by any court. Among other fundamental and ordinary elements of the judgments there are: the background or context of the case, the considerations that support it, along with the ordered effects and the operative points of the ruling.

However, a broader and more specific argumentative structure is required for cases in which the constitutional bodies of last instance deal with crucial issues, such as the modification or abandonment of jurisprudence, given the relevant and extraordinary nature of this type of decisions. For this, it is proposed to include an express section in the considerations that support the decision in order to explain —with technical rigor and a reinforced argumentation, in a coherent and consistent way, and through superior quality arguments compared to those it intends to surpass— the reasons that justify the change of criteria, and where appropriate, the interruption of the respective jurisprudence.

In said structure of the decision, it should at least be made explicit why the political, institutional, and social context is different from the one that was presented at the moment when the original criterion was supported, and also why the new interpretation better protects fundamental electoral rights, emphasizing the quality of the arguments used and those that it aims to adopt.

Last but not least, it should be expressly stated why it is considered that an abusive or arbitrary judicial criterion is not updated by varying the interpretation of the criterion previously applied to solve similar cases, about which the citizens already had relative certainty and knowledge, in addition to the commitment to apply the new criterion in all cases to be resolved in the future, without trying to differentiate them in a forced or artificial way from other matters with similar legal problems, in order to avoid judicial decisionism.

Briefly, in order to achieve the verification of interpretation methods and the use of all plausible arguments to solve the specific case, it would be con-

venient to establish a sentence model containing a specific section of the considerations part, with the reasons for the modification of the jurisprudence, or where appropriate, the interruption and express substitution of the original motivation, or the abandonment of the precedent, as well as the demonstration of the superior quality of the novel argumentation with respect to the one that is abandoned, and the *reciprocal verification* of the methods of interpretation in electoral matters.[18]

VI. Threats for the Constitutional Democracy Due to the Judicial Decisions Systematically Unfair for Free Elections

According to the definition proposed by Rosalind Dixon and David Landau, a judicial decision is an act of abusive judicial review if it has a significant negative impact on the minimum core of constitutional democracy. It should be noted that this impact implies a deeper questioning than the one that is limited to ask whether an electoral decision can be considered partisan, in the sense of favoring a contending political option. Surely, identifying a pattern of favoritism in the sentences can affect over time their legitimacy and exceed fairness in the contest, but they will be abusive judicial decisions only if they make the elections *systematically unfair*.

Thus, in electoral cases decided through sentences with a deep anti-democratic impact, judges can distort the constitutional meaning and can often take

[18] On the subject of reinforced motivation, this paper follows the same normative-practical analysis methodology for the study of sentences and the reciprocal verification of interpretation methods as a structural part of judicial decisions, which is contained in Justicia Electoral en México. Avances y retrocesos a 20 años de la reforma electoral de 1996, Vlex, Mexico (2020). In the same context, when resolving the constitutional controversy 209/2021, in the session of June 1, 2022, the First Courtroom of the Supreme Court of Justice of the Nation determined the invalidity of the budget assigned to the National Electoral Institute (INE), for the 2022 fiscal year, after noticing that the Chamber of Deputies "did not strongly motivate the modification it made to the preliminary project that said Institute presented; coupled with the fact that such an adjustment compromises the functions of that autonomous constitutional body, which could result in a violation of fundamental rights of a political-electoral nature". It concluded that the controversial act lacked a reasoning that demonstrated that the resources assigned to the INE were, in principle, sufficient to pay the expenses generated in compliance with the constitutional obligations of that Institute. Based on these considerations, the First Chamber declared the 2022 Budget invalid, in relation to the resources assigned to the INE, and instructed the Chamber of Deputies to analyze and determine in public session what corresponded with respect to the preliminary draft of the budget presented by that autonomous body. Likewise, if the authorization of additional resources was deemed appropriate, the essential measures for the effective transfer of the resources to that Institute had to be adopted, or, in the event of a negative decision, "reinforced motivation of its decision had to be presented with technical rigor".

advantage of, or conveniently use, concepts and doctrines designed to protect liberal democracy. But they do so in a way that reverses their essential meaning, and turns them into tools to systematically attack substantive democracy and fundamental rights.

In the specific case of electoral matters, the jurisdiction of last instance holds constitutional legitimacy, the legal instruments, and the technique to decide cases of high social and political impact. However, it can undermine constitutional democracy when it conveniently changes the interpretations of the fundamental text, by omitting the protection of the fundamental electoral rights directly or indirectly involved in the controversy, or by repeatedly trying to justify new points of view with the use of arguments that are not the best to explain the evolutions, modifications, or abandonments of the jurisprudence, or the previous criteria.

Said forms of undemocratic judicial review can occur, among others, in the following ways: 1) the proposed interpretation is superficial or it incorporates the form but not the substance of the constitutional norms (the protection of the Constitution is invoked as a mere formalism); 2) the result of the interpretation is extremely subjective, since it includes and opts for certain elements of constitutional democracy, but omits others; 3) it is not contextual, and hence, it ignores the differences in the social and political context with respect to the original criterion; and 4) the purpose of the democratic norms and ideas is inverted, and for this reason, they have an opposite effect to the one previously sustained (the progressive interpretation of the DEF, among which the one of voting and being voted stands out).

As can be observed, the borderline courts that practice forms of abusive judicial review in general, and in particular in the case of the TEPJF, can use different methodologies of analysis or interpretative techniques as ways to try to reconcile the requirement of respect for jurisprudence or precedents, as well as the compliance with the elements to formulate ordinary legal reasoning, with anti-democratic effects. In other words, instead of simply ignoring it, they repeatedly cite the doctrine in a decontextualized way to reverse the purpose of democratic ideas, or else, they ignore and fail to apply existing jurisprudence, through the use of figures or concepts found in other countries, in a context where the existence of a differentiated legal or social framework, or local political conditions, make its use problematic.

Also, international doctrine or treaties are used in an ostensibly selective way, for example, by echoing interpretations that favor the interests of the political forces that have promoted the appointment of the members of the court of last instance. Therefore, the methodological inconsistency, in varying the meaning of the doctrine or jurisprudence to support forced interpretations, thereby achieving the expansion of the powers of the jurisdiction, or to impose sanctions or restrictions not provided for in the Constitution, constitutes a form of interpretive simulation for malicious decision making.

Thus, following the work of Dixon and Landau as applicable, the most effective forms of abusive judicial review will seek to be well reasoned and be more true to the legal reasoning process, with the aim of making it more difficult to detect if there are abusive motives in the decision. That is, the border court will increase efforts to achieve legal justification whenever it anticipates criticism or political opposition. However, in the specific case of the electoral precedent, the argumentative effort will be insufficient and questionable, if the reasons put forward in the enforceable judgments that support the modified jurisprudential criterion are constantly left subsisting, and it turns out that they are not interrupted or expressly defeated in the new interpretation.

Consequently, when the TEPJF makes a fundamental change in long-standing jurisprudence, on controversial issues, such as the imposition of sanctions on public servants consisting of the loss of an honest way of living and the respective political and legal disqualification, basically it is playing a role of an interested party in the strategy of the faction(s) whose interests it protects. This same function becomes a threat to constitutional democracy because in the hands of anti-democratic groups it represents a rationalized tool that, taken to the limit due to its systematic nature, leads to the modification of the original meaning of fundamental electoral rights and of the principles of free elections provided for by the Federal Constitution.

In other words, the electoral court of last instance, through the creation of extra-legal procedures, such as the one concerning the possibility of judicially ordering the registration of offenders, as well as through the consent for the high discretion of the first instance judges to analyze specific cases, basically confers on itself the power to veto *ex ante* from electoral contest the politically relevant persons. Consequently, the rules of electoral democracy, where everyone votes and can be voted for, are undermined in a dangerous and authoritarian way, without it being valid to prevent the registration of candidates for popularly elected positions, or to revoke the registration previously granted, due to the imposition of a sanction and/or legal, ethical, or political disqualification, not provided for at the constitutional level. As much as the intention is, paradoxically, the protection of the constitutional text, but through meta-constitutional restrictions.[19]

[19] Thus, for example, in the Contradiction of criteria 228/2022, resolved on March 7, 2023, the top court in México (SCJN) determined the existence of the contradiction of criteria with the Superior Chamber of the TEPJF, since the maximum court in the country considered that having an "honest way of living" is an invalid legal requirement that, due to its high subjectivity, cannot be evaluated as a condition for holding public office, while the TEPJF, in a restrictive interpretation of the Fundamental Electoral Right to be voted, considered that the members of the local and federal electoral jurisdiction were obliged to analyze and, where appropriate, declare unfulfilled this requirement of eligibility for positions of popular election, provided for in article 34.II of the Federal Constitution. That, of course, opened up the possibility that the people sanctioned with the loss of that quality will be considered ineligible for that only reason.

1. *The Legal Weakening of the Division of Powers (Case of Integration of the Administrative and Government Parliamentary Bodies)*

The Supreme Court of Justice of the Nation (SCJN) has indicated that the justiciability of acts of a parliamentary nature is feasible in the case of violation of the fundamental rights of legislators, but provided that explicit constitutional powers of the Legislative Branch are not transgressed.[20] That is, there is the possibility that a constitutional body can review acts of a parliamentary nature, but always exceptionally, since the idea is to make the right to passive suffrage effective in the performance of the position, but without interfering with the substantive functions of the legislative body. Especially, since the electoral courts are also limited by the constitutional principle of legality, which guarantees that all authorities abide by the assignments and responsibilities established by the Magna Carta itself.

So, when the court of last instance decides to deviate from a criterion supported by the two previous integrations[21] of the highest electoral jurisdictional body, and even from precedents on the justiciability of legislative acts, established by the integration in turn,[22] then it would have to deal not only with giving the best arguments in a specific section of the sentence structure, but also with expressly justifying why the political, economic, and social context is different from the moments in which the previous decisions were made. Additionally, it would have to explain how the new interpretation better protects fundamental electoral rights and respects the constitutional powers of the electoral jurisdiction and the division of powers.

Undoubtedly, in the case of the abandonment of the jurisprudence regarding the fact that the electoral tribunals lack competence to hear acts of parliamentary functioning, the TEPJF has the institutional responsibility of interrupting the jurisprudence. And it also has the argumentative responsibility of expressing why it now considers that the electoral political right to be voted held by the popular representatives is directly involved at the time of the integration of the administrative or government commissions of the legislative

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[20] In A. I. 62/2022 (*interna corporis acta* doctrine) and (SCJN. ADR 27/2021) Amparo 27/2021, the SCJN has accepted the possibility of filing the amparo trial in the presence of intra-legislative acts that might violate human rights, such as fundamental electoral rights, with the clarification that parliamentary acts recognized in the Federal Constitution cannot be grounds for review to respect the balance of powers.

[21] Jurisprudence 34/2013, "Political-Electoral Right to Be Voteed. Its Guardianship Excludes Political Acts Corresponding to Parliamentary Law"; Jurisprudence 44/2014, "Legislative Committees. Its Integration Is Regulated by Parliamentary Law"; Thesis XIV/2007, "Trial for the Protection of the Political-Electoral Rights of the Citizen. The Removal of the Coordinator of a Parliamentary Faction Is Not Challenged (Campeche Legislation)".

[22] Criterion sustained in case file SUP-JDC-1212/2019.

body, for influencing the election, the proclamation or the access to the position of deputies or senators.

Likewise, the TEPJF must express in what way the integration of the internal commissions of the Legislative Power or its government bodies transcend the merely administrative parliamentary character, and why the acts of internal operation have a direct impact on the fundamental electoral right of performance of the individual legislators, since political-electoral rights belong to individuals and not to groups or collectivities.

Thus, for example, in the considering part of the TEPJF (judgment of January 26, 2022, issued in the file SUP-JDC-1453/2021, and cumulative), the justification is limited to indicating that the right to be voted is affected, "but the reasons for the decision contained in jurisprudences 34/2013 and 44/2014 are not expressly exceeded". Also, it is not justified why the rights exercised by individual senators are the same that correspond to parliamentary fractions, since it only maintains that they cannot exercise their right to vote or express their opinion in the appointment of officials, or express the reasons for the suspension of constitutional rights.[23]

Therefore, strictly speaking, if the express analysis of these aspects is omitted, the quality of the original arguments prevails, and what would actually be protected is the right of parliamentary groups to have representation in government bodies, more than the fundamental electoral right of legislators to be voted.

On this matter, if the jurisprudential line sustained by the TEPJF since its incorporation into the Federal Judiciary,[24] and at least until January 2021,[25] no longer considers parliamentary administrative matters as non-electoral, then the current integration of the judiciary of the Superior Chamber of the TEPJF should explain with the best arguments why the rejection of this criterion is alien to the mere political context of the current configuration of the legislative majorities in parliament. And it should also clarify why protecting

[23] In the following terms (TEPJF. SS, SUP-JDC-1453/2021 and accumulated): "Failing to consider the plaintiff in the formation of the Permanent Commission, without justified cause, beyond the fact that they are not part of a parliamentary group properly speaking, is to deny them the right to integrate that legislative body, which affects their right to be voted, in their exercise of office. *Preventing them from integrating that Commission, despite being a force within the Senate, means that they cannot exercise their right to vote, much less express their opinion individually or as a group*, in the appointments of officials, in the possibility of promoting constitutional controversies or expressing their reasons on the need or not to suspend constitutional rights". The highlighting is my own.

[24] Criterion sustained in case file SUP-JDC-1711/2006.

[25] Until January 2021, it has been considered by the Superior Chamber of TEPJF, that Parliamentary Law: "includes the set of rules that regulate the internal activities of the legislative bodies, the organization, operation, division of work, carrying out of tasks, exercise of attributions, duties and prerogatives of the members, as well as the relations between the parliamentary groups and the publication of their acts, agreements and determinations". Criterion sustained in case file SUP-JDC-10231/2020.

now, in the electoral court, the integration of administrative commissions or the parliamentary governing bodies "justifies the systematic suppression, at the local and federal level, of the due deference on the part of the electoral jurisdiction to the powers of the Legislative Power and to the Law of Congress itself", which characterizes constitutional democracies.[26]

On the other hand, it is evident that, if the quality of the arguments that support the original criterion is exceeded, which is perfectly feasible, legitimate, and reasonable for the electoral jurisdiction of last instance, as well as to meet the principles of legal certainty and security, it must be declared expressly the abandonment of TEPJF. SS, Jurisprudence 34/2013 and 44/2014, whose items are: "Political-Electoral Right to Be Voted. Its Guardianship Excludes Political Acts Corresponding to Parliamentary Law" and "Legislative Committees. Its Integration Is Regulated by Parliamentary Law". Because if the declaration of interruption of the jurisprudence is omitted, even when there is a pronouncement to the contrary by a majority of five votes, the consequence is contempt for them, and the implicit subsistence of the original arguments, given their argumentative solidity, to judge future cases.

Moreover, as was pointed out, a specific section of the considering part of the respective decision should include the best reasons for justifying the prevalence of the new interpretation, derived in turn from a different political context. Or else, to specify why, in specific cases, the criterion of the SCJN is set aside regarding the express powers conferred to the Legislative Power in articles 75 to 78 of the Constitution and in the Law of Congress, and which are the fundamental electoral rights that are restored individually to a legislator, to justify the repeated application of said novel interpretation until jurisprudence is established.

In short, the interference caused to the balance of powers by the abandonment of the criterion on the lack of express competence of the TEPJF to hear parliamentary administrative acts, without fully defeating the quality of the previous arguments, as well as the indifference regarding respect for the exercise of the express powers granted by the Constitution and the Law of Congress to the Legislative Power generates legal uncertainty not only for the citizens,

[26] In the public session of January 26, 2022 (minute 1.10.00 of the video), the Superior Chamber of TEPJF discussed the issues of change of criteria on the competence of the TEPJF to hear parliamentary acts (SUP-JDC-1453/2021 and SUP-JE-281/2021). In which essentially it was considered that "it was not necessary to interrupt the jurisprudence, since the *evolutionary analysis* of it allowed to distinguish the competence of the TEPJF to hear parliamentary legal acts that affect political rights ethical-electoral, from political or organizational acts". Likewise, on February 16, 2022 (minute 41.00.00 of the video of the session) in SUP-REC-49/2022, the same topic was addressed. These sentences originated TEPJF. SS, Jurisprudence 02/2022, under the heading: "Parliamentary Acts. They Are Reviewable at the Electoral Jurisdictional Headquarters, When They Violate the Human Right of a Political-Electoral Nature to Be Voted, in its Aspect of Effective Exercise of Position and Representation of the Citizenship". Available at: *https://www.te.gob.mx/IUSEapp/tesisjur.aspx?idtesis=2/2022&tpoBusqueda=S&sWord=44/2014*.

litigants, and other public powers, but also for the TEPJF regional courts and the electoral courts of first instance, since the jurisprudence in which the original incompetence criterion is contained remains in force. Therefore, the local and regional electoral jurisdictions may incur the undue judicial review of any legislative act by proceeding to the respective analysis with the mere mention in the lawsuit of the alleged violation of the right to perform the position.[27]

Said lack of interpretative clarity would be caused by the omission of establishing a certain, general and abstract criterion to judge on these complex issues in which the delimitation of the fundamental right to be voted and the constitutional faculties of the public powers are involved, and even those that correspond to autonomous constitutional bodies. It is the same lack of jurisprudential definition that is inexplicable and even questionable, in the performance of a specialized body on the matter, and therefore, generates the risk of updating a form of abusive judicial review by the top electoral court in an obviously undemocratic way.

2. *The Creation of Restrictions on Fundamental Electoral Rights in a Jurisdictional Area (Case Loss of Honest Way of Living by VPG)*

The first integration of the Superior Court of the TEPJF was characterized by the expansion of the DEF, even in borderline cases. Among other relevant issues, for example, the court determined that, in order to meet the eligibility requirements and be able to exercise the right to passive suffrage, it should be considered, when proving the honest way of living (MHV), that it is an *iuris tantum* requirement. That is, it is presumed fulfilled, unless proven otherwise.[28]

In the same sense, the country's highest electoral court, in jurisprudence 20/2002, essentially established that, in the case of someone who has committed a crime and has been sentenced for it, it is possible that, due to time

[27] This decision-making vocation of the current integration of the Superior Court of TEPJF can be expressly noted when it is argued that "the evolution of the jurisprudential line consists of analyzing whether in the controversy there is a right that is violated by a decision of the legislative bodies. That is, *to examine whether, in each specific case, there is the possibility that an act of a legislative body violates the right to be voted for whoever comes to this Electoral Tribunal*". *See* Judgment of SUP-JDC-1453/2021 and accumulated. The highlighting is my own.

[28] Additionally, the Superior Court of TEPJF considered that, in order to refute said legal presumption, a history of life and antisocial behavior must be reliably proven, added to the lack of means to subsist, derived from socially useful work, and without counting with sufficient economic solvency, since consuming satisfiers to live without acquiring them with the product of work, or with that which comes from goods of licit origin, suggests a dishonest life, since the law allows livelihoods that society considers decent and licit, disapproving those that do not fulfill such characteristics (SUP-JRC-440/2000 and SUP-JRC-445/2000, accumulated). This sentence would be one of the three that originated Jurisprudence 18/2001, under the heading "Honest Way of Living as a Requirement to Be a Mexican Citizen. Concept".

circumstances, mode and place of execution of illicit or administrative infractions, it could contribute in an important way to undermine that presumption of having an honest way of living. However,

> …when the penalties imposed have already been completed or extinguished and a considerable time has elapsed from the date of the conviction, the indication that tends to undermine the presumption pointed out is greatly reduced, because the offense committed by an individual in some time in his life does not define him or mark him forever, nor make his behavior questionable for the rest of his life.[29]

Nevertheless, the current composition of the Superior Court of TEPJF has modified those protective criteria of the right to passive suffrage by implementing de facto, in jurisdictional area, the cause of ineligibility due to the loss of an honest way of living in cases without that express constitutional restriction. And, on the contrary, they can unjustifiably affect fundamental electoral rights such as the freedom of expression of legislators under the constitutional principle of parliamentary inviolability and political participation, or even of the general public to express themselves on social networks.

Certainly, the regional courts of the TEPJF have considered, for example, that in the event of being penalized for VPG, since the offense is classified as ordinary or special, serious, it can directly result in the loss of an honest way of living, and therefore, the impossibility of being registered as a candidate in accordance with local law, or if one already has registration, the cancellation of the same.[30]

This stance has been taken up even for digital spaces, such as social networks, in order to review the conformity of the expressions of different citizens, some with the quality of public officials, with the constitutional limitations on discrimination and VPG. This consideration has resulted in protection measures and sanctions that have led to the loss of an honest way of living, and therefore, to the temporary ineligibility of the sanctioned person.

Nevertheless, these exclusive effects of the honest way of living are ordered discretionally, even when the infraction is proven, since the Superior Courtroom itself has considered that with the full updating of the VPG, "it is optional to deal with declaring the loss of the honest way of living". That is, said

[29] TEPJF. SS, Jurisprudence 20/2002, under the heading "Criminal Records. Its Existence Does Not Prove, by Itself, a Lack of Probity and an Honest Way of Living".

[30] In these terms, SUP-REC-911/2021 and accumulated was resolved by arguing that: "This Superior Courtroom considers that the defendant is not right because, contrary to what it affirms, the Xalapa regional courtroom did reason that the *questioned cause of ineligibility should not be applied automatically, but should be applied only for offenses classified as serious*. In this regard, the responsible authority considered that this ground of ineligibility must be interpreted in light of article 22 of the Constitution, to conclude that only in the case of infractions of gender-based political violence classified as serious —whether ordinary or special— it is proportionate that the person in question is ineligible". The highlighting is my own.

act makes it depend on other conditions such as non-compliance with the sentence itself, or the reiteration of the violent conduct denounced. Although, once again, not in all cases of recidivism the legal presumption of having an honest way of living has been considered overcome.[31] The drawback of this interpretative criterion is the margin of uncertainty that it generates, since it fails to establish, at the jurisprudential level, which are the parameters to consider the fully accredited conduct of VPG as mild or very mild, or which are the rules to follow to prove the recidivism of the behavior.

Here it is convenient to warn about the risk that the legitimate judicial discretion to interpret and apply the Constitution and the law to specific cases becomes an arbitrary or abusive review, when the elements that must be taken into account to consider the denounced conduct are serious or recidivist, and not just isolated, mild or very minor, since the opacity in the parameters prevents the formation of a solid jurisprudential line that gives confidence, coherence and consistency to the judicial criteria.[32] Especially since the deliberative legitimacy of judges is precisely based on compliance with the constitutional limits of their powers and democratic standards on the quality of the arguments or discursive elements used.

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[31] Cf. SUP-REC-185/2020. Zongolic Case, Veracruz. In the aforementioned file, the Superior Court held that "the concatenated analysis of the behaviors [*was accredited in three sentences of the Electoral Tribunal of Veracruz, that he was not systematically summoned to the council sessions and neither did they answer his requests related to the exercise of his position in the three years that he had held it*] assumed by the Municipal President to the detriment of the appellant, the statements of the plaintiff and that the defendant did not irrefutably disprove the non-existence of the facts that were the basis of the offense, allows us to conclude that the Municipal President does exercise political violence against the appellant. In this way, the constitutional and conventional principle of equality and non-discrimination is protected". In this case, it is noted that the Superior Court, despite the fact that the systematic conduct consisting of VPG was accredited, failed to rule on the loss of the honest way of living (MHV), so with this omission it left the aforementioned presumption intact (the highlighting is my own).

[32] An example of this inconsistency is the criteria of the Superior Court, in the file SUP-REC-165/2020 (Tuxpan Case), to nullify hearings ordered by one of the regional courtrooms of the TEPJF, in relation to accredited acts of Political Violence based on Gender (VPG), in which it determined that it is not the corresponding OPLE (local authority) that must rule on the eligibility of a candidate, but the local court at the time of issuing the corresponding sentence. Likewise, that the accredited acts of VPG were not such, but an obstruction to the exercise of the position, and therefore, they did not actualize the criminal conduct foreseen in the criminal law, and for the same reason, it should also be left without effect the hearing ordered to the Attorney General of the State. "Without taking into account, much less dismissing, that the Xalapa Regional Court had already considered in paragraphs 111 to 116 of the sentence issued in file SX-JDC-199/2020, the accreditation of the VPG and the corresponding determination had already been the subject of analysis in the local instance. Especially since this decision had not been questioned, and so it had acquired finality". Therefore, the highest jurisdictional body determined to revoke, without any analysis of the evidence submitted and assessed by the local and regional instances, that the VPG did not exist, thereby incurring in the excessive exercise of its powers of review as a limiting body, by disregarding the constitutional principle of finality of electoral acts and resolutions.

Thus, the decisiveness of the electoral jurisdiction to interpret the constitutional and legal norms leads to systematically justify exceptions in specific cases, in which the reasons are non-existent or weak to explain the qualification of mild or very mild applied to the accredited conducts of VPG. Consequently, the door is opened for the federal and local administrative and jurisdictional electoral authorities to determine subjectively, on a cause of extra-legal ineligibility, and therefore, with signs of arbitrariness or judicial abuse, when generating the recurring exclusion, in judicial area, of citizens to participate in fully democratic exercises, such as elections for positions of popular election.

It should be noted that in the specific case of administrative procedures in which the imposition of the loss of the MHV (honest way of living) has been decided legally viable, the SCJN in the contradiction of criteria 228/2022, established that it should not be considered as a sanction provided for at the constitutional level nor could that quality be reviewed in the decisions issued in such proceedings.

In other words, the country's highest court established the majority opinion that the requirement of having an honest way of living, due to its ambiguity, is discriminatory and contrary to legal certainty, both for the recipients of the individualized norm, and for those who apply it. For the same reason, this criterion cannot be used as a restriction of a constitutional nature to access public office since, in any case, under the principle of reserve of law it is the responsibility of the democratic legislator to regulate it.[33]

Even the creation of tools and records of offenders, such as the list of those sanctioned by VPG (which has been justified as a measure of reparation and diffusion), has been a matter of dissent by the members of the Superior Courtroom of TEPJF. Above all, the dissidents emphasize the opacity in the effects of the registration, to generate the automatic perception about the defeat of the presumption of the MHV (honest way of living), and as a consequence, that the sanctioned be declared ineligible, since in the corresponding individual vote the warning is made about generating a judicial policy that implies the creation of a cause of ineligibility, the same that must be reserved to the Legislative Power, and not to the jurisdictional courts.[34]

Therefore, to avoid the abusive exercise of judicial review in cases of VPG, it is necessary to define at the constitutional level if the updating of violent political behaviors against women, due to its intrinsic seriousness, in all cases, will lead to applying the maximum sanction in electoral matters, such as the annulment of an election,[35] or that the registration in the list of those sanctioned

[33] *See* Stenographic version of the session of March 7, 2023, regarding the Contradiction of criteria 228/2022. At 7-53.

[34] *See* Particular vote of two magistracies members of the TEPJF in the file SUP-REC-91/2020 and accumulated.

[35] The nullity of the election by VPG, provided for in the local electoral codes, has also been the subject of debatable interpretations. Given the ambiguity of the elements that the electoral jurisdiction can take into account to determine the nullity of an election, even though

by VPG would have as a direct consequence the deprivation of the right to be voted for the loss of MHV, only in cases where the conducts had been considered serious. Or at least, to establish clear rules and parameters in the general laws of the matter,[36] so that the electoral jurisdictional authorities, local and federal, can objectively define (without biases that generate uncertainty) the updating of conducts of such seriousness, that if updated, there would be no possibility of correcting them, and also the mitigating factors that could solve or fix up this defect of nullity or ineligibility, in order to timely incorporate them into the democratic rules of the contest.

In conclusion, for legal certainty and security, the electoral jurisdictional bodies should apply fully identifiable and predictable criteria for citizens, for the sake of transparency, independence, and impartiality in their decisions, since before similar legal facts there must be the same legal consequences. In accordance with the general principle of law that can be seen in the aphorism: *ubi eadem ratio, idem ius* (where there is the same reason, there must be the same provision). Of course, that principle is not fulfilled in cases with VPG, in which the Superior Court of TEPJF has systematically maintained that, despite being fully accredited, the court must decide, case by case, in freedom of jurisdiction, if it warrants the express declaration about the loss of the honest way of living.

In other words, it would be enough that the responsible body, even when it has accredited the VPG, omits to declare the respective loss, to consider saved the presumption of the honest way of living, which of course opens an undesirable door to subjectivity, by not requiring a strict justification of why it is omitted, in those cases of VPG with a serious qualification, to declare

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the requirements are met to consider this serious and determining conduct, in some cases it has been considered that the principle of conservation of validly held acts should prevail. Thus, for example, it was textually held in paragraph 134, of the judgment issued in case file TEV-RIN-24/2021 and accumulated, that: "derived from the resources SUP-REC-1388/2018 and SUP-REC-1861/2021, the Superior Courtroom of the Electoral Tribunal of the Federal Judiciary, established that it is not enough to update political violence based on Gender and the minor percentage difference to five percent between the first and second place, so that the nullity of an election is automatically declared" and further on, in paragraph 137, that: "although as the plaintiff argues, the stated expressions contain discriminatory language, they are not of sufficient entity to overcome or set aside the principle of conservation of validly executed acts, taking into consideration the circumstances of time, manner and place in which the acts of Political Violence Against Women in Reason of Gender occurred". That decision was confirmed by the Xalapa Regional Courtroom, as the acts of VPG were not decisive for the result of the election, November, 2021, in file SX-JRC-0532/2021.

[36] This was argued, for example, in case file SUP-RAP-138/2021 and accumulated, where it was established that: "in order to have defeated the presumption of showing an honest way of living in cases related to VPG, the administrative authority requires that a jurisdictional authority *previously not only declare the existence or commission of VPG, but also, in the same sentence, establish that the conduct merits the loss of the presumption of an honest way of living*" (the highlighting is my own). That is to say, it is enough that the respective loss is not declared expressly, to consider saved the presumption of the honest way of living.

the drastic legal consequence of the so-called "civil death". And with this, it contributes to the perception of arbitrariness by generating differentiated legal consequences for situations that must follow the same jurisprudential line regarding the seriousness of the conduct and the corresponding sanction.

3. *The Meta-Constitutional Expansion of the Jurisdictional Powers of the TEPJF (Sanctions to Public Servants for the Diffusion of the Revocation of Mandate and Creation of Causes for Ineligibility)*

In relation to citizen participation and the diffusion of the revocation of mandate, and in accordance with the provisions of articles 1 and 35, section IX, numeral 7, as well as 134, eighth paragraph, of the General Constitution of the Mexican Republic, it is noted that the rules relating to fundamental electoral rights must be interpreted to guarantee people their broadest protection at all times.

Moreover, all authorities, within the scope of their powers, have the obligation to promote, respect, protect, and guarantee human rights, among which are political-electoral rights related to voting in citizen participation processes. Also, within this framework of broad protection, and during the time that includes the process of revocation of mandate, from the call and until the conclusion of the conference, the dissemination in the media of all government propaganda of any kind must be canceled, as well as that which implies personalized promotion.

In this context, article 134, eighth paragraph of the General Constitution of the Republic, provides as an "express limitation for public servants", the use of public resources and institutional propaganda that implies their personalized promotion, "but not the possibility of disseminating the processes as that of revocation of mandate, nor the restriction to promote the participation of the citizenry in these exercises of direct democracy", as long as they do not carry out political proselytism.

The foregoing, because if we agree that the Mexican State is a democratic regime, then said acts must be understood within the activities that a public servant can validly carry out, since their purpose is to ensure the respect and integral exercise of that human right of political participation for the citizens.

Therefore, contrary to what has been resolved by the TEPJF,[37] by disseminating the process of revocation of mandate, through acts and demonstrations

[37] *See* SUP-REP-362/2022, judgment that: "B) confirms the contested decision, in accordance with the following: 1. they are existing violations of diffusion of government propaganda in prohibited period, during the mandate revocation process; personalized promotion and violation of the principle of neutrality, attributable to the indicated persons who act as holders of the Executive in different States of the Republic, as well as the hearings ordered to the Legislative Power of such federative entities; and *2. it binds the jurisdictional authorities in electoral matters, as of the notification of this executory, so that, in the commission of subsequent events, before the accreditation for the commission of illicit constitutional acts, should analyze the possible suspension of the presumption of the hon-*

related to inviting the vote and its diffusion to encourage the participation of the citizenry, it must be concluded that public servants do not incur any irregularity or violation of electoral regulations, nor of the principles that govern all electoral contests, since it is not about the use of public resources or political proselytism.

Certainly, article 1 of the Political Constitution of the Mexican United States establishes, among other protective aspects, that the norms related to human rights will be interpreted in accordance with the Constitution itself and with the international treaties on the matter, favoring in all the broadest protection to people, and in accordance with the principles of universality, interdependence, indivisibility and progressivity. Consequently, the State must prevent, investigate, punish, and repair violations of human rights, in the terms established by law. But it also has the obligation to restrictively interpret prohibitions or unjustified limitations on fundamental rights.

In relation to the aforementioned article 1, articles 6 and 7 of the constitutional text recognize freedom of expression and the press as fundamental rights. Therefore, in principle, the manifestation of ideas cannot be the subject of any judicial or administrative inquisition, unless morality is attacked, the rights of third parties are affected, a crime is provoked, or public order is disturbed.

Similarly, article 61 of the Federal Constitution guarantees the freedom of expression to the members of the Legislative Power, due to their function, considering as inviolable the opinions that they manifest in the performance of their positions, and even regarding possible sanctions, said article indicates that they can never be reprimanded for them.

Thus, in general, freedom of expression finds its limits in the rights of other people or other legal rights that affect society, including democratic principles and values, given that the restriction is justified as an exceptional measure that cannot be ignored or nullified in its core or legal nature.

Therefore, it is clear that as in the case of the other fundamental rights provided for in the Magna Carta, "the restrictions, duties, or limitations on the exercise of the right to free expression must be expressly provided" for in the Political Constitution. For this reason, this human right must be guaranteed by legal instruments to "avoid abusive or arbitrary impairment to the detriment of the possibility of expressing one's own ideas or thoughts". Under this protective perspective, the right of everyone to receive any information and to know the expression of the thoughts of others is better guaranteed, which is associated with the collective or social dimension of the exercise of this fundamental right.

In this matter, among other express constitutional restrictions on fundamental electoral rights, are those provided for in article 134, eighth paragraph, of the General Constitution of the Mexican Republic, which establishes that:

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est way of living with respect to public servants whose responsibility is accredited, for the purposes of the requirement of eligibility" (the emphasis is mine).

> …propaganda, under any form of social communication, that is disseminated as such by public authorities, autonomous bodies, public administration agencies and entities, and any other entity of the three levels of government, must be institutional in nature and for informational, educational, or socially oriented purposes. In no case will this propaganda include names, images, voices or symbols that imply personalized promotion of any public servant.

Likewise, regarding the dissemination of the revocation of mandate, article 35, section IX, numeral 7 of the Magna Carta provides that the National Electoral Institute (INE) and local public bodies, as appropriate, will promote citizen participation and will be the only instance in charge of their diffusion. Also, it establishes that the promotion will be objective, impartial and for informational purposes, "without there being an express constitutional restriction so that citizens, even with the character of public servants, are prevented from disseminating and inviting to vote in the aforementioned revocation process".

Now, regarding the promotion of voting in federal electoral processes, articles 6 and 30 of the General Law of Electoral Institutions and Procedures (LGIPE) determine:

- The promotion of citizen participation in the exercise of the right to vote in federal processes corresponds to the National Electoral Institute.
- The Institute itself will issue the rules to which vote promotion campaigns carried out by other organizations will be subject.
- It is the obligation of the National Electoral Institute, among others, to ensure the authenticity and effectiveness of the vote, as well as to carry out the promotion of the vote and contribute to the dissemination of civic education and democratic culture.

In line with the normative framework invoked, it is observed that the Federal Constitution and the general electoral law establish that the promotion of citizen participation for the exercise of the right to vote in the process of revocation of mandate corresponds to the National Electoral Institute, but as it will be seen, such activity can also be carried out by other citizens, such as public servants. However, there are certain limits, since they cannot disseminate the exercise of citizen participation with public resources, nor carry out acts of proselytism or political propaganda.

Thus, in accordance with articles 1, 35, section IX, numeral 7, 61 and 134, paragraph VIII of the General Constitution of the Republic and also articles 6 and 30 of the General Law of Electoral Institutions and Procedures, and given that norms relating to human rights should be interpreted progressively (that is to say, without regressing on the benefits), it is possible to maintain that citizens in general, and public officials in particular, can carry out acts or demonstrations tending to disseminate and encourage citizen participation in the process of revocation of mandate.

This is so because public officials, among which are the members of the Legislative, Executive, and Judicial Powers, as well as the members of the autonomous constitutional organs, also enjoy the fundamental rights recognized by the General Constitution of the Republic for all citizens, with the restrictions established by the Constitution itself and the laws applicable to the specific case of the diffusion of the mandate revocation process and even the invitation to vote in it.

Therefore, it is feasible to conclude that, concerning the revocation of mandate, public officials are expressly restricted by the General Constitution of the Republic from proselytizing in favor of or against the head of the federal or local executive, as well as from disseminating the revocation of mandate with public resources, or through institutional propaganda that represents personalized promotion of the same.

Consequently, it is legally possible to maintain that, within the process of mandate revocation, federal and local public officials do not have the prohibition to carry out acts that disseminate it, with the aim to promote citizen participation in electoral processes, as long as said acts are in accordance with the principles of neutrality and impartiality, and the others that are governing the electoral processes, and in the event that any constitutional and legal violation occurs, the competent authority must take the appropriate legal measures to repress and penalize conducts that violate electoral regulations.[38]

Unconstitutionality of the Sanctions for Diffusion of the Revocation of Mandate

As has been seen, abusive judicial review, in the "strong" sense, is actualized when the limiting jurisdictional bodies make decisions to systematically remove or undermine democratic protections.

On this basis, if we agree that there is no fundamental right in favor of the exclusivity of the INE for the dissemination of the mandate revocation process, then it would have to be accepted that there is no constitutional basis to sanction citizens, who also have the quality of being public officials, for disseminating said exercise of citizen participation in use of their freedom of expression. About this topic, the SCJN has determined, in the contradiction of criteria 228/2022, that the legal requirements to access a position of popular election such as having an "honest way of living" cannot be considered an

[38] Similar considerations were supported by the Superior Court of the TEPJF, on the restriction of fundamental electoral rights such as freedom of expression in electoral matters, in the files SUP-JRC-342/2016 and accumulated. Essentially, it held the following: "it is not legally valid to restrict a fundamental right, such as freedom of expression, under the presumption that its exercise would violate constitutional or legal principles and norms, but, in any case, should *such exercise be privileged, and in the event that any constitutional and legal violation is incurred, the competent authority must take the appropriate legal measures to repress and punish conduct that transgresses electoral regulations*" (the highlighting is my own).

eligibility requirement, or a sanction, to suspend access to the position, given the great ambiguity to objectively determine its scope.[39] Especially since there is not, expressly, the jurisdictional competence of the TEPJF to determine or create a catalog of *ad hoc sanctions* to impose them on those who have been considered disseminators of the revocation of mandate.

Even more, in the case of legislators, there is also the principle of parliamentary inviolability. The same fundamental right must be understood progressively, to allow its exercise within the reinforced freedom of expression that the Magna Carta guarantees for popular representatives. That is, they can invite the population in general, and their representatives in particular, to participate in said process of revocation of mandate, since the involvement of citizens in the affairs of the Republic strengthens the links of popular representatives with their represented, as well as the exercises of transparency and accountability that characterize constitutional democracies.

In this context, imposing sanctions that are not expressly provided for in the Constitution or in the law implies an exercise of repression of democratic liberties and, for the same reason, the abusive exercise of the judicial function, since they expressly generate consequences of law tending to limit the fundamental rights of citizens, without the coercive exercise being duly founded and motivated.

Definitely, it is paradoxical that the limit constitutional body in electoral matters decides to bind all the jurisdictional authorities, so that they analyze and discretionally decide on the suspension of the eligibility requirement related to having a MHV for the commission of a "constitutional illicit", without specifying the scope, parameters, and limits, at least at the jurisprudential level, to have them accredited. With this effect of the sentence, political participation can be undermined discretionally, by preventing registration and the permanence of registered candidacies, under the sole argument of protection of the constitutional text and the democratic system.

By systematically sustaining this position, sight is lost of the fact that the main function of the electoral jurisdiction is, precisely, the effective, progressive, and comprehensive protection and guardianship of the fundamental rights of citizens with deeply democratic roots, such as the right to vote and be voted for, the primary objective that characterizes a democratic constitutional state of law, and not its restrictive interpretation.

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[39] That reasoning, *mutatis mutandis*, invalidates the criteria of the TEPJF on the imposition of the sanction consisting of the "declaration of ineligibility, and the consequent refusal or loss of registration due to non-compliance with the requirement of having an honest manner of living, which, excessively, was granted as a meta-constitutional and discretionary power in charge of the local electoral courts or the federal electoral courts of the TEPJF in last instance", in cases in which the repeated contempt of a sentence is updated (SUP-JE-281/2021), for conducts of political violence based on gender that are considered to be of ordinary or special gravity by the respective jurisdictional body (SUP-REC-911/2021 and accumulated), or else, due to the dissemination of the mandate revocation process (SUP-REP-362/2022).

Additionally, with the unilateral expansion of the sanctioning competence by a terminal body such as the TEPJF, the principle of division of powers is also infringed, and the permanent search for power to control power, because by going beyond what is expressly authorized by the Federal Constitution, underlies the teleology that the end justifies the means, which of course cannot be legally sustainable, let alone democratic.[40]

VII. Concluding remarks

a) The outstanding moment of electoral justice is the protection of Fundamental Electoral Rights, which cannot be restricted for the sake of a supposed protection of the constitutional text, democracy and the guiding principles of the electoral process. Hence, it is up to the citizens to demand the full effectiveness of their rights, through the strengthening of the institutional culture and the critical review of the decisions of the terminal electoral court, as well as the request to the Legislative Power to modify the respective general electoral laws, in order to establish interpretative guidelines or constitutional and legal parameters that avoid abusive judicial review.

b) Out of respect for the principle of legality, electoral judicial activism must have limits, parameters, and guidelines. Therefore, when changing criteria, the terminal body must expressly state that the jurisprudence or precedent, as appropriate, is erroneous and, if necessary, declare its interruption, as well as expressly attend to the quality of the argumentation that is intended to be overcome with the new criterion, in order to avoid judicial decisionism for each specific case. Nothing is above the Constitution; no one is above the Constitution, not even the electoral constitutional judges.

[40] As noted in the case of the record of those sanctioned by VPG, with the creation of tools and records of offenders such as the Catalog of Sanctioned Subjects (CASS), the perception is generated automatically about the defeat of the presumption of the honest way of living, and as a consequence, that the sanctioned person can be declared ineligible, and for the same reason, a judicial policy implying the creation of a cause of ineligibility is also generated. The same should be reserved to the Legislative Power, and not to the jurisdictional bodies. Notwithstanding, the highest jurisdictional body with respect to sanctioned public servants has maintained this restrictive position of the DEF, arguing, in the judgment of June 8, 2022, issued in case file SUP-REP-362/2022 and accumulated, that: "As part of *a judicial policy aimed at complying with and enforcing the Constitution, this Court, as the limiting body and of the total legal order, deems it necessary to link all jurisdictional electoral authorities of the federal level and local, as of the notification of this determination; so that, at the moment of resolving the sanctioning procedures, said authorities analyze and, where appropriate, declare the suspension of the eligibility requirement consisting of having an honest way of living, based on electoral constitutional offenses committed by public servants*, when their responsibility for this type of constitutional violations is proven. In order to analyze and resolve such determination, they must consider the repeated and serious transgression of the principles of the Federal Constitution, the recidivism and fraud in the commission of the offense by the person public servant" (the highlighting is my own).

c) Abusive judicial review affects the democratic armor of Fundamental Electoral Rights, and therefore represents an internal risk to the democratic constitutional state of law. Tolerating judicial activism without limits, parameters, and/or democratic guidelines is the lure to allow the rule of judges, as well as the possibility of using the discursive legitimacy of the jurisdiction to decide what is constitutional in an arbitrary manner, and therefore, the patent that allows jurisdictional operators to act contrary to the general will agreed upon and consigned in the Constitution.

d) The *ad hoc reasons* for simulating motivation are basically fulfilling a role as an interested party in the strategy of the faction whose interests are being protected. That same function becomes a threat for constitutional democracy, because it represents a rationalized tool in the hands of anti-democratic groups, and taken to the limit, it leads to the alteration of the original meaning of fundamental electoral rights and the principles of free elections provided for by the Constitution.

e) When the TEPJF makes a fundamental change in long-standing jurisprudence on controversial issues, it is not feasible to consider it an evolution, but rather a rejection of the previous criterion and a possible case of abusive judicial review, when there is no argumentative exercise to overcome the quality of the previous argumentation or when the argumentative exercise carried out is insufficient to consider the new interpretation correct, and at the same time, the possibility of applying both criteria at the level of jurisprudence is left open, due to the omission of interrupting the previous one.

f) In this context, it is necessary to include an express section in the considerations that support the decision, in order to explain with technical rigor and with a reinforced argument, why the previous criterion is considered erroneous, as well as in a coherent and consistent manner, the reasons that exceed the quality or argumentative intensity of the previous criterion, and consequently, justify the change. In said structure of the decision, it should at least be made explicit why the political, institutional, and social context is different from the one that was presented at the moment in which the original criterion was supported. Likewise, why the new interpretation better protects fundamental electoral rights, and why it is considered that an abusive or arbitrary judicial criterion is not updated by varying the interpretation on which the state organs, citizens, and litigants had already certainty about the previously applied criterion to resolve analogous cases. In addition, the commitment to apply it must be assumed in accordance with the principle of universality of the argumentation rules. That is, the commitment to keep it in the future to resolve all cases, and only in a truly exceptional manner, distinguishing cases with similar issues, and assume the burden of expressly justifying the abandonment or the failure to apply the binding precedent.

g) The interference caused to the balance of powers by the abandonment of the criterion on the lack of express competence of the TEPJF to hear parliamentary administrative acts, without fully defeating the quality of the previ-

ous arguments, as well as the indifference regarding the respect for the exercise of express powers granted by the Constitution and the Law of Congress to the Legislative Power, generate legal uncertainty not only for the citizenry, litigants, and other public powers, but also for the regional courts of the TEPJF, and the electoral courts of first instance, since the jurisprudence in which the original criterion of incompetence is contained is still valid. Therefore, the local and regional electoral jurisdictions may result in the undue judicial review of any legislative act, by making the respective analysis with the mere mention in the lawsuit of the alleged violation of the right to perform the position.

h) Said lack of interpretative clarity regarding the justiciability of parliamentary acts at the electoral area would be caused, in turn, by the failure to establish a certain, general and abstract criterion to judge these complex issues, which involve the delimitation of the fundamental right to be voted on and the constitutional attributions of public powers or those of the autonomous constitutional organs. This lack of jurisprudential definition is inexplicable and even questionable in the performance of a specialized body on the matter, and therefore, it brings about the risk of updating a form of abusive judicial review by the terminal electoral body in an obviously undemocratic way.

i) In order to avoid the abusive exercise of judicial review in cases of VPG, it is necessary to define, at the constitutional level, if the updating of violent political behaviors towards women due to its intrinsic seriousness, in all cases, will lead to apply the maximum sanction in electoral matters, such as the annulment of an election. Or, if the registration on the list of those sanctioned by VPG, only in cases where the conduct has been considered serious, would have as a direct consequence the deprivation of the right to vote due to the loss of MHV. Or at least, clear rules and parameters should be established in the general laws of the matter, so that the electoral jurisdictional authorities, local and federal, can objectively define (without biases that cause uncertainty), the update of conducts of such seriousness, that if updated, there would be no possibility of correcting them, and the mitigating factors that could solve or correct this defect of nullity or ineligibility, so that the democratic legislator could timely incorporate them into the democratic rules of the elections.

j) For legal certainty and security, electoral jurisdictional bodies should apply criteria that are fully identifiable and predictable by state organs, citizens, for the sake of transparency, independence, and impartiality in their decisions, since in the face of similar legal events there must be the same legal consequence. This general principle of law can be verified in the aphorism: *ubi eadem ratio, idem ius* (where the same reason exists, the same disposition must exist). Of course that principle is not fulfilled in cases with VPG, in which the Superior Court of TEPJF has systematically maintained that, despite being fully accredited, the court must decide, case by case, in freedom of jurisdiction, if it warrants the express declaration about the loss of the honest way of living. Especially, since the SCJN has already determined the legal infeasibility of the MHV as an eligibility requirement or as an applicable sanction in administrative sanctioning procedures.

k) It can be stated that, in principle, any entity, organization, and physical or legal person could carry out the diffusion of the process of revocation of mandate and the promotion of the vote, as long as it is subject to the guiding principles of electoral matters, particularly those of neutrality and impartiality. The foregoing because it is not legally valid to restrict a fundamental right, such as freedom of expression, under the premise of exclusivity of the diffusion for the INE, but, in any case, such exercise must be privileged for all citizens, including those who serve as public officials, and, in the event that any constitutional and legal violation is incurred, the competent authority must take the appropriate legal measures to repress and punish any conduct that violates electoral regulations.

l) Based on the three main issues raised in this document, in which the current integration of the TEPJF looks like it moves away from the principles of electoral integrity, and so, the systematic action characteristic of "abusive judicial review" can be updated, it is necessary to warn that it is not enough to raise the discourse of the defense of the constitutional text to maintain legitimacy, trust, and credibility before society. Because you cannot protect the Constitution or democracy by violating them. As a result, regardless of the questioning of the exercise of meta-constitutional powers by the electoral magistracies of last instance, it is necessary to reform the Federal Constitution and the general laws of the matter, in order to establish guidelines, rules, and parameters that allow inhibiting judicial decisionism, which promotes the weakness of discursive constitutionalism and the argumentative representation of electoral judges, and even the politicization of justice. On this basis, to preserve democracy in Mexico, citizens must demand a greater institutional culture from the members of the electoral jurisdiction, as well as effective protection, through progressive interpretation, of fundamental electoral rights, guaranteed in turn through the coherence, certainty and predictability of judicial criteria.

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NARRATIVES AND PRACTICES IN PRE-TRIAL HEARINGS: A LEGAL ANTHROPOLOGICAL APPROACH TO JUDICIAL EFFICIENCY

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Abstract: *This article aims to shed light on the practical organization of judicial operators in the pre-trial hearings of local Mexico City courts. Firstly, the aim is to describe cognitive, social, and objective formations, both conscious and volitional, linked to achieving the goals of the judicial bureaucracy in the practice of preliminary hearings in the justice system (the distribution, organization, and interpretation of the work) that take place and shape the social-judicial domain. Ethnographic observation and the narratives of agents in this field yield a theoretical framework formed by the actor-network theory, anthropological concepts from Garfinkel's ethnomethodology and Bourdieu's ideas of social field to provide a better description of agent practices in the field that produce a judicial "efficiency" that sustains, maintains, and drives the bureaucracy of the justice system, specifically during pre-trial hearings.*

Keywords: *Pre-trial Hearings, Justice Efficiency, Narratives, Practices, Ethnography.*

Resumen: *Este trabajo tiene como objetivo comprender la organización práctica de los actores judiciales en las audiencias iniciales de los juzgados locales de la Ciudad de México. En primer lugar, se busca describir formaciones cognitivas, sociales y objetuales, conscientes y volitivas, vinculadas a la realización de objetivos de la burocracia de justicia en la práctica de las audiencias preliminares de justicia (distribución, organización e interpretación del trabajo) que se dan y forman una justicia y un campo social, a partir de la observación etnográfica y las narrativas de los agentes que componen este campo. Esto a través de un marco teórico nutrido por la teoría actor-red, las nociones antropológicas de la etnometodología de Garfinkel y la noción de campo social de Bourdieu. Lo anterior con*

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el propósito de describir las prácticas de los agentes de su ámbito que construyen una "eficiencia" de justicia que sustenta, mantiene e impulsa la burocracia del sistema de justicia, específicamente en las audiencias preliminares.

Palabras clave: *Audiencias iniciales, justicia, eficiencia, narrativas, prácticas, etnografía.*

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I. Introduction

What is efficiency in the judicial system? Traditionally, efficiency denotes the ability to achieve the desired results with the least number of resources possible. This implies understanding the economics of judicial work, which consists of the goals usually established in regulatory frameworks or policies, on the one hand, and the limited number of resources available to reach said goals, on the other. Therefore, this economic understanding implies working within a framework of legal possibility. Every time resources are used, they must be presupposed, planned, and executed based on a legal category, a strategic plan, or a legal provision. Thus, common judicial analyses create lines of compliance between ideals and the use of resources.[1]

[1] Raúl Ojeda Núñez *et al.*, *Compatibilidad entre debido proceso y eficiencia: su aplicación al régimen de apelación en el proceso civil chileno,* 31 (2) Revista de derecho (Valdivia) 211, (2018); Claudio Gonzáles Guarda, *La eficiencia en el sistema penal español: con especial referencia al modelo de conformidades*, 7 (3) Fundamentos de Direito Processual Penal 2061, (2021).

In this case, the answer is not a quantitative index, much less an operational procedure to arrive at an ideal. Our answer probes the everyday, constant, and uninterrupted practices underpinning work practices to solve work-related problems. Thus, the question centers on unspoken practices that form the basis of interactions in judicial work. Attention is thereby paid not to legal premises but to the agents' own insights and interactions mediated by objects, thus creating a perception of efficacy as the workings inherent to the area that are maintained, endorsed, driven, thought out and decided upon by agents, whether adhering to legal frameworks or, more commonly, infringing legal provisions.

This paper aims to contribute to legal anthropology by examining hidden and discrete practices in judicial procedures, specifically in the pre-trial hearings, without lapsing into a merely legal-economic evaluation. The descriptive-analytical intention of our study consists of an in-depth socio-legal description of Initial Hearings at Mexico City courts to better understand the efficiency of the operations, that is, all practices that allow the continued existence of the system itself. Simply put, this paper gives a detailed description of judicial operators' various everyday work-related activities that comprise judicial efficiency, i.e., achieving institutional goals (whether it is complying with a certain number of hearings or simply finishing the court journal, the goal is to complete the necessary tasks efficiently), in order to present the material nature, along with the normative structure, of judicial work, but set out as it actually takes place within the framework of daily judicial activities. This research is part of the National Problems program of the National Council of Science and Technology as research on "Judicial Oversight of Police Detentions and Informal Rules".

Thus, the structure of the paper is following: II. Practices and Techno Cognition: Meta Text (a theoretical section); III. Trials and Practices: Context (a section presenting preliminary information on the issue in question); IV. Statistical Functions: Back Text (a methodological section with statistical functions); V. Events and Interactions: Text (an ethnographic section), which is divided into subsections: 1. Police Action; 2. Programs and Statistics; 3. Evidence; 4. Police Report; 5. Repeated Accounts/Narratives; 6. Institutional and External Agents; 7. Judges and Knowledge; and 8. Arrest. To end with section VI. Conclusions: Post Text.

II. Practice and Techno Cognition: Meta Text

In the sociological field of criminal procedural law, research has traditionally reduced analysis to its teleological dimension, to meeting goals in the form of specific products (files, documents, sentences, statistics, reports, etc.) tailored

to the social or political interests marked by its general social field.[2] A second socio-legal convention reduces judicial practices to mere instruments of power relations and ways of establishing legal truths.[3] Yet a third position emerges from the analysis of knowledge and skill, seeing ethnographically to investigate the ways in which subjective, objective, technical, and cognitive agents interact to produce certain specialized forms of creating a continuous practice that ensures the existence of what we will call the juridical social field. Unlike the analysis of power relations brokered by schemes external to judicial processes or institutional subjectivity training mechanisms, an anthropological position defends the establishment of roles and relationships that forge and imprint everyday life on bureaucratic processes as a result of agents deliberate and conscious effort. These are practices, positions, observations, and interactions that cannot be analyzed or studied without an ethnographic look at the daily working life within the judicial system. Thus, this third position goes beyond both the sociological perspective and the legal one by placing the legal system not to restrict possibilities but as an agent at the same level as other agents. Hence, it is imperative to modify the theoretical-methodological procedure for analyzing the events that comprise daily life within judicial spaces.

However, anthropological positioning assumes a dialectical understanding of the above positions. On the one hand, judicial events are understood as symmetrically built dynamics between discourses, interactions, intermediation and interrelationships among different agents that make up a field of action[4] and that at the same time are influenced and immersed in social, political, economic and historical contexts that can also be analyzed from an ethnographic perspective.[5] According to Geertz,[6] ethnography aims at the dense description of "a stratified hierarchy of meaningful structures in terms of which twitches, winks, fake-winks, parody, rehearsals of parodies are produced, perceived and interpreted", i.e., "sorting out the structures of signification… and determining their social ground and import". The meaning of interactions emerges from a specific field, imbuing events with contextual differences. Thus, the work lies in discovering the code and understanding the interpretation process used for said code. However, symmetrical anthropology uses flat ontology to closely observe the interactions between agents that produce the conditions for possibilities arising from particular codes.

By adopting symmetrical anthropology, the symbolic ethnographic vision, which contemplates only a deep understanding of the code in its linguistic dimension, is overtaken upon focusing on the ontological interactions condi-

[2] Leticia Barrera, *Más allá de los fines del derecho: expedientes, burocracia y conocimiento legal*, 41 Revista de Ciencias Sociales 57 (2011).

[3] Michel Foucault, Vigilar y Castigar (Siglo XXI, 2nd ed., 2009).

[4] Bruno Latour, Nunca fuimos Modernos (Siglo XXI, 2007).

[5] Galeano Gasca & Irene Juárez Ortiz, *Antropología jurídica: reflexiones sobre justicias locales y derechos universales*, 32 (53) Boletín de Antropología Universidad de Antioquia (2017).

[6] Clifford Geertz, The Interpretation of Cultures (Gedisa, 2006).

tioning, building, mobilizing, operating, organizing and administering practices that produce signifiers, symbols, values, customs, goals, organizations and codes.[7] Another difference with the sociological approach is found in the voluntary, direct, active, and incomparable participation of the agents shaping this daily reality. Garfinkel[8] calls this common and shared construct "reflexivity", perceiving agents as creators and updaters, of this everyday life, while building cognizance of order, organization, structure, and normality. Thus, these processes, acts, practices, discourses, interactions, and intercommunications prove to be the intrinsic dynamics of the field, as well as the conditions for an environment of comfort, trust, and well-being in the workplace.

In the case of institutional judicial spaces, practices are moderated by the professionalized acumen of specialized knowledge and techniques, such as procedural law and criminal law. The symmetrical and symbolic construction of codes in institutional spaces is similar to that of any other community building social practices,[9] but to understand the particular rational in these spaces, consideration should be given to the concept of "techno cognition", which stems from the anthropology of knowledge and technique and centers on its cognitive-instrumental activity: "orally-transmitted knowledge and techniques transmitted by gestures". The concept of techno cognition also implies blurring the boundary between human and non-human by paying attention to the non-subjective agents with which agents interact in their everyday activities, as well as to the objectual interactions that take place without human mediation affecting everyday life.[10]

In short, this dense description is provided to be acquainted with the practical field arising from objective and subjective interactions that give meaning to the practices upholding agents' everyday life that allow their continuous production/reproduction. These technocognitions categorize all the particular expressions that build rituals, the recurrent behaviors in the dynamics of practices, which at the same time correspond to the set of interactions between human agents and object agents that form part of the judicial field and its dynamics.

In the specific case of the pre-trial hearings, the human agents involved in the bureaucratic activities in the penal system will be referred to as operators: public prosecutors, judges, victim counselors, and public defenders; while the object agents (judgments, technical knowledge, evidence, technology, etc.) will be referred to as agents. The subjective, human facet lies in the analysis of the

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[7] Ricardo Vázquez, *Antropología Simétrica y ciberetnografía orientada a los objetos: reflexiones en torno a un ensamblaje teórico-metodológico*, 56 (1) Anales de Antropología (2022).

[8] Harold Garfinkel, Estudios en Etnometodología (Anthropos, Hugo Antonio Pérez Hernáiz *trans.*, 2006).

[9] Bruno Latour, Laboratory life (Sage Publications, 1979).

[10] Morales Navarro, Antonio Arellano & Mina Kleiche, Prácticas curativas en las "Huertas de Malinalco": los saberes integrados sobre plantas, padecimientos y curación tradicionales (ENGOV Working Paper No. 3.4) 58 (2013).

"expert" operators of the law who possess different types of knowledge —judges, public prosecutors, public defenders, in the Mexican case— that generate certain practices regarding the institutional execution of their work, a "legal field" that operates according to a logic of its own and gives rise to a series of conventions, roles, and hierarchies for its agents.[11] These practices answer to diverse techno cognitions arising from subjective techniques (orality, legal language, knowledge of the facts), legal knowledge and systems (rules, provisions, plans, strategies, laws), and technological and material instruments (files, evidence, mobile devices). Hence, the judicial field differs from other fields due to the influx of legal technocognitions shaping its dynamics.

Hence, the importance of this ethnography is found in the descriptions of these interactions, in an effort to recover that everyday "efficacy" fashioned in the performance of judicial work. Based on the above, "efficacy" is the collective continuity of certain practices in a process with an autopoietic continuous-infinite goal. In other words, it depends not on external agents to uphold it, but on the active participation of its agents. Meanwhile, "everydayness" refers to the unquestioned, unstated, and discrete reflexive practices exercised on a daily basis that are known, communicated, imitated, and repeated among the agents with knowledge of the judicial field. This implies the opposite of "effectiveness", understood herein as incorporating practices into ideal structures of action, i.e., the capacity of actors to adapt their actions to externally established precepts (laws, judicial proceedings, written ethical guidelines, operating manuals).

This dichotomy should not be understood as a simple comparison or classification in which every action must be attributed to one or the other, but rather, as proposed by Derrida in *Différance*,[12] actions stem from a pursuit for effectiveness that, when contrasted with institutional practices, routine problems, objectual technologies, human reflexivity, and the practical constraints of bureaucratic work, it leans toward efficacy, seeking to return to effectiveness, which establishes a discussion on effectiveness and efficacy, understood here as "institutional everydayness". In other words, agents strive to fulfill the legal requests of their work, but they resort to practices devised by agents that do not necessarily observe the techniques and methods established by law.

III. Trials and Practices: Context

This text focuses on the emerging ethnography from the initial hearings of the Mexico City judicial system, specifically the stage of judicial control of police detentions from August to December 2019, with more than eight hundred systematic observations on pre-trial hearings in CDMX criminal courts. The

[11] Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 Hastings Law Review 805-53 (1987).

[12] Jacques Derrida, Márgenes de la filosofía (Cátedra, 1989).

information obtained from direct observation is complemented and enhanced by interviews with arraignment judges, public defenders and public prosecutors involved in such hearings, within the framework of the Initial Hearings of the Mexico City Criminal Justice System research project (the CONACYT National Problems program) coordinated by Dr. Carlos Silva Forné. Due to the closed and discreet nature of these institutions as well as the need to protect the identities of the interviewees, the anonymity of the participants was preserved in both the ethnographic observations and the interviews.

The project revealed a network of field agents' daily interactions in the performance of their duties, which were ethnographically recorded and then cross-referenced with the different responses gathered from interviews with judicial agents. In other words, the practices included in the ethnographic analysis were contrasted with recurrent accounts of said practices. Most practices relate to their immediate context, but some extent well beyond it.

It is possible to identify a higher prevalence of certain offenses as well as collective agreements regarding the practice of such offenses, including consistent accounts that prevent those actions from being carried out and repeated requests or processes to include or exclude certain arguments. However, an examination of these practical regularities corresponds to a close analysis of such factors and the establishment of particularities linked to bureaucratic reflexivity on specific issues that arise when tied in with the distribution of judicial capital. This study provides a general review of the objective-subjective interactions that shape everyday life and efficacy, i.e., a snapshot of the interactions-practices underpinning the existence and continuity of initial hearings, as well as the fulfillment of their goals, mandates, and objectives.

IV. Statistical Functions: Back Text

The empirical data for this article was collected through a systematic ethnographic observation of pre-trial hearings. This work was carried out by an interdisciplinary group composed of social scientists in the fields of law, anthropology, and sociology over a period of just over 6 months. These observations were accompanied by an observation guide and an audience-data capture format with information on the length of each hearing, each specific procedure in each hearing (control of the arrest, etc.), the various interactions between agents and the parties involved, etc.

The team members visited different Judicial Management Units in Mexico City (Reclusorio Norte, Reclusorio Sur, Reclusorio Oriente, Reclusorio Santa Martha and Dr. Lavista), making ethnographical arguments and observations while collecting the specific information on the forms. Weekly meetings were also held to discuss the personal experiences of the interviewees and particular ethnographic findings, as well as to give presentations on topics of common interest. After completing the observations, all the data in the forms were tran-

scribed and organized in a SPSS database. Additionally, more than 15 interviews were conducted with various judicial agents, public prosecutors, public defenders, and arraignment judges. Semi-structured interviews were carried out, with a script containing questions about interviewees' views on the judicial system, their judicial career, the working environment in the court, the other bailiffs, the underlying causes of crimes and the court's role in solving national problems. These interviews were recorded in audio format, transcribed, and later coded with the MAXQDA program.

The author participated in each stage of this process: daily observation of initial hearings, filling out of the forms, transcribing the data, conducting interviews with judicial agents, transcribing the recordings of said interviews and coding these transcriptions. This empirical and documentary work advanced all the topics covered in this text. This text emerges from the findings obtained in the field and the interviews. The information was compared in the weekly group meetings and with the empirical data. However, the enormous amount of systematized data requires detailed study, which is currently being done by the participants in this project.

Thus, the topic discussed in this article is part of a broader analysis. Therefore, this article does not seek to explain the full scope of the social facts embodied by pre-trial hearings, but rather, to present a series of phenomena that together shape the daily judicial activities in pre-trial hearings. In this way, this ethnographic journey stems from an anthropological perspective, which will be enhanced with upcoming articles to be published by the rest of the research team. Although this might seem like a selective sample, the qualitative nature of the work centers on continuous research in the field, using the team's shared data to reinforce the findings presented.

Moreover, this subject is unquestionably innovative, since the array of available data and statistics only corresponds to cases closed by judicial institutions. In other words, statistics from the INEGI and the TSJCDMX,[13] as well as from other empirical research, are limited to the number of sentences issued, the types of crimes, and other bureaucratic aspects that, while providing the background of the hearings, do not represent a detailed study of everyday court practices. Furthermore, specific data requests were made on the national transparency platform to obtain information about the duration of hearings and corresponding details, such as whether the accused participated, the defense arguments, or number of guards-to cite a few examples. However, the only information obtained was the number of judges at each Judicial Management Unit and the number of hearings held annually. Besides, according to the response of the transparency agency, the court is not obligated to maintain data on these aspects.

[13] Instituto Nacional de Estadística y Geografía [INEGI] [National Institute of Statistics and Geography] and Tribunal Superior de Justicia de la Ciudad de México [TSJCDMX] [Superior Tribunal of Justice of Mexico City].

V. Events and Interactions: Text

Pre-trial hearings are supposed to be, at least as stated in the law, an autonomous place where decisions are made based on the elements brought before the court. However, actual practices go beyond the legality and formality of the hearings and are inspired and motivated by agent dynamics in their institutional, group, cultural, and labor relations.

Judicial logic establishes the scope of action of the various agents involved in criminal proceedings, delimiting it within judicial regulations, which in this case are found in the Political Constitution of the United Mexican States, the National Code of Criminal Procedure, and the Mexico City Criminal Code, as well as the various particular regulations of judicial institutions. From an institutional point of view, these regulations define how agents should ideally act. Categorizing the types and bureaucratic actions would imply the principle of legality, from a socio-legal perspective, and the essential efficacy in our language. However, from the knowledge gained from the ethnography and narratives from agent interviews, actions are bound by a series of considerations related to the availability and intentionality of the objectives of the various agents in judicial spaces and of the bureaucratic processes because of the specific particularities of agents' rationale, along with complete obliviousness towards the legal provisions that define the ideal legal institution.

Such actions are always based on the different working conditions described below with greater weight placed on decision-making and establishing bureaucratic interrelationships in the judicial area as part of an effort to do their work with "efficacy". This efficacy is a perceptual condition of agents to maintain order and a sense of ease at the workplace, which is already bogged down by an excessive workload, stress of working on issues related to the criminal world and the diverse vicissitudes associated with the job.

The different practices are described in chronological order from the possible perpetration of a crime to the initial hearing. The first will discuss building up a written account of the police action and preparing the Public Prosecutor's case file.

1. *Police Action*

Chronologically, the first justice event relevant to the ponderation carried out at pre-trial hearings is the merging of police work with that of the Public Prosecutor's Office. The interviews with judicial operators, particularly with members of the Public Prosecutor's Office, constantly mention the lack of efficacy in police work, i.e., the lack of lawfulness surrounding police actions. More specifically, this implies discrepancies in police work, in terms of the detention of alleged offenders with irregularities in its execution, such as human rights violations, the lack of bureaucratic elements in the proceedings, lapses in

the intervention or the prosecution of offenses that do not entail certain types of punishment.

These failings are ignored by the police, who proceed with the bureaucratic process linked to standards on detention, i.e., being taken to the Public Prosecutor's Office. Such actions lead to a daily routine of excessive use of force, police abuse, and the use of torture whenever related to meeting material and symbolic goals, which have been analyzed before in various texts.[14] Due to the ineffectiveness of the police, legal bureaucratic processes require suspending the detention or its subsequent revocation and the removal of the Public Prosecutor from the proceedings, which results in the detainee being released, the possibility of an alternative way out of the process or a summons to a pretrial hearing while the subject under investigation is at liberty. All these options are at odds with the goals of the Public Prosecutor's Office.

2. *Programs and Statistics*

Although not entirely in line with the legal precepts established by law, these goals come from the Public Prosecutor's Office approach and imply the "advancement" of the detainees, i.e., the judges' acceptance to move forward with the criminal proceeding. This is closely tied to fulfilling certain statistics and goals imposed on Public Prosecutor's Office agents by institutional authorities. In most cases, according to judicial operators' interviews, the decision of Public Prosecutor's Offices is to continue with the proceedings of detainees regardless of deficiencies in police action, either covering them up or disregarding them, hoping that the judge's lack of attention will allow the proceedings to continue. From the interviews (particularly with public defenders and judges, as this does not happen in all Public Prosecutor's Offices),[15] it is mentioned that the police institution itself is influenced by political programs that exert pressure on its operators, who must comply with a minimum number of detentions within certain periods of time, thus leading to the establishment of effective practices.

[14] Carlos Silva Forné, *The excessive use of force by Mexico City law enforcement agencies: corruption, normal abuse, and other motives*, 9 (1) Mexican Law Review 3 (2016).

[15] It should be noted that in interviews with public prosecutors, some mentioned the pressure exerted by their superiors to meet certain goals of "indicted detainees" influencing their official actions, since decisions are made under this pressure to send cases lacking formal elements to be heard, expecting judges to act accordingly. In their words, judges' diverse decision-making styles could open a window of opportunity. Consequently, the lack of consistency in judges' decisions may result in allowing a detainee to be indicted even if the investigation does contain the elements to back such a decision. Similarly, the work of defense attorneys indirectly influences this decision because defense attorneys are expected not to notice certain irregularities, either by waiting for a private defense attorney (who, according to the operators, lack experience, expertise and knowledge to keep the case from being sent to trial) or private defense attorney's lack of attention due to overwork. Most public prosecutor's testimonies do not mention this because they can be reprimanded or dismissed from their position if it were known there is an outside influence on them when making certain judicial decisions.

Thus, compliance with political campaign promises that turn into programs, plans, strategies, and institutional goals handed down through the chains of command becomes the driving force behind agents' legal "acrobatics", in addition to the constant threat and risk of losing their jobs for not following institutional orders. Thus, the instructions of their superiors supersede the orders of agents' actual operations.

This results in a greater impulse insofar as the certainty of agents keeping their job is entirely dependent on obeying orders rather than complying with legal provisions; any disobedience would mean their dismissal. This efficacy is not driven by police operators but by production conditions, i.e., the circumstances surrounding them, ranging from authorities' orders to the availability of different technologies, techniques, materials, and legal objects, as well as the silenced consent of the other judicial operators, thus creating a complicity that sustains and upholds certain production requirements. There is a constant complaint in public prosecutors' accounts regarding the excessive workload and the persistent threat of dismissal on grounds of inefficiency for not having enough hearings with binding sentences in a given period.

3. *Evidence*

As regards production conditions, aligned police activity can be found in its situational object field. The criminal system does not only have human operators, but also several technological systems that can imbue discursive criminal assumptions with certainty, i.e., they serve as material and probative evidence that helps recreate the conditions in which the facts took place as procedural requirements and as a means to clarify and build certainty for the judge to pronounce judgment. This regulatory notion appears in agents' narratives and practices as judges' requirements to verify the facts that will serve to back the agents' petitions. These structures manifest themselves in hearings as evidence. Thus, police decisions must be conditioned by the discovery, inspection, analysis or even the appearance, introduction or fabrication of evidence. Operators' testimonies show it is possible to extract the modalities of police action and the different behaviors to fulfill their tasks. Should there be a video contradicting the facts laid out by the Public Prosecutor's Office, its mission would be to overturn the evidential validity of said video. Thus, agents' decisions concerning evidence are not geared towards the search for evidence as proof of a given fact, but as a way to back up the arguments conducive to obtaining petitions.

In preparation for the hearing, evidence is scarce and is only needed to determine the legality of the arrest. Therefore, any type of evidence —like C5[16] camera footage, ballistic expert opinions or other circumstantial evidence

[16] Centro de Comando, Control, Cómputo, Comunicaciones y Contacto Ciudadano de la Ciudad de México [C5] [Mexico City's Command, Control, Computing, Communications and Citizen Contact Center].

relevant to a specific case— is discarded. Only in specific cases dealing with remarkable crimes, evidence takes on paramount importance.

Two particular cases stand out from the ethnographic observations. The first one involved an initial hearing on the crimes of extortion, carrying a weapon, crimes against health in the form of drug dealing, and resistance between individuals. According to the official police report, expressed in the public prosecutor's statement of the facts: a police officer who was patrolling noticed that there were several subjects armed with assault rifles inside a moving car, so he launched a chase and asked for back-up. When police back-up arrived, they stopped the two cars with the subjects, who then fired several shots at the police officers attempting to arrest said subjects. The hearing was divided into two phases because the defense attorney had invoked the 144-hour constitutional term to determine the detainee's legal standing.

Once the time elapsed, the defense attorney presented various expert reports during the second part of the hearing. A ballistic expert report demonstrated that the shell casings found at the scene did not match the weapons and that there were no traces or fingerprints on the weapons matching any of the detainees. Other expert reports cast doubt on the times of the arrest and the pursuit. Even then, the judge ruled that the hearing was not intended to cast doubt on the detainees' participation in the crime but to establish that a crime took place and that the detainees might have participated. Thus, a nexus was established, and the proceedings continued while the detainees remained in custody.

The consistency of the hearings showed a lack of interest from the judges about evidence, since it belonged to a different stage of the proceedings. Even in their interviews, judges stated that the proper moment to present, weigh and evaluate evidence was during the trial preliminary hearing. Institutional agents (judges, public prosecutors, and public defenders) even saw private defense attorneys attempts to be involved in obtaining evidentiary material as a mistake by the institutional agents.

However, a second example that contradicts this position is found in hearings for crimes of violent robbery. According to the public prosecutor's statement of the facts, a cab driver conveying a prostitute (according to the testimony of the cab driver, who was also the complainant), was assaulted by his passenger. The driver requested police support and the accused was arrested moments later. After the constitutional term expired, the defense attorney presented video footage showing inconsistencies surrounding arrest times, consequently placing the legality of the detention in question and leading the judge to rule on the termination of the process. It should be noted that this particular hearing was influenced by the protocol for judging with a gender perspective. Thus, the very consistency of agents' practices makes this hearing more indifferent to the evidence than it would be in extraordinary cases.

4. *Police Report*

The information that can be misrepresented by a video is referred in the official police report, which, according to the operators, is the main source of information for the pre-trial hearings. Thus, most of the information in the preliminary investigation carried out by the Public Prosecutor's Office is drawn from this report. However, operators generally agree that police officers are not trained to fill out such reports. Efficacy implies filing such reports *in situ* to ensure the greatest possible objectivity. However, in view of this, efficacy becomes instead the subsequent filling out of the forms, in aid, complicity, and agreement with the public prosecutor as the person with the alleged knowledge to properly organize the information as needed for the proceedings. Public prosecutors do not establish this as a mechanism for modifying procedures, but rather as a search for an effective way to put together the case files in a way that provides these operators with more opportunities to prosecute a detainee. Thus, the official police report holds substantial value in preparing the case file, playing a paramount role in the decisions made by public prosecutors and the police in the pursuit of a written statement that holds up to a review carried out by the defense.

A third object appears as a target of operators' decisions: the case file. However, at the time the police and public prosecutor put together the case file, it was possible to find fabrications, intervention, additions, or enhancements of certain evidence reinforcing the allegations by linking facts with legal precepts. This means that the elements in the case files are the result of a surreptitious collaboration among these judicial agents. Thus, police officers are required to act accordingly.

Currently, the investigating police play a predominant role, being responsible for carrying out the formality of obtaining evidence to support public prosecutors' statements. The efficacy of this work lies in selecting and obtaining certain elements that tie into the work, and within the period given to do so. At the initial hearing proceedings, where the main opposition is present, the content of the arguments between the public prosecutor and the defense primarily relies on the information provided in the case file. In most cases, this lends itself to the technical establishment of standard peculiarities that allow operators to be efficient in their work.

For example, drug dealing crimes are established through a series of statements, accounts, and evidence that are constantly repeated and known to the public defender, who finds similar features in the course of their routine activities. In doing so, both operators involved in the arguments know the exact points of possible controversy, so they fix their attention exclusively on them. Even with an agreement between the parties with both knowing the judge's possible decision based on the loopholes in the case file, the operators create a pre-trial arrangement in which they mutually agree on the requests each will make to expedite the hearing. If the evidentiary, narrative, and statutory pro-

visions allow the public prosecutor to continue with the proceedings beyond the hearing, the defense generally accepts it; otherwise, the public prosecutor generally accepts the limitations of its investigation, allowing the defense to press their requests.

5. *Repeated Accounts/Narratives*

Identical accounts for the various crimes were consistently found in the ethnographic hearings. In the aforementioned drug dealing case, for instance, the elements repeated in each individual hearing all show remarkable similarities in the narration of the circumstances. The accounts always mentioned a police officer in an unmarked patrol car some 5 to 15 meters away from where he could see one or several subjects (depending on the number of detainees) handing over objects that look like plastic bags filled with marijuana or cocaine and receiving money from the other person. The same bag(s) with something like drugs and the money from the exchange would be found during the arrest and subsequent search. However, the geographic location, the number of detainees, and the number of drugs or money would simply change at each hearing.

Another common crime with similar statements is self-service store robberies, where a security guard would see someone with merchandise hidden in their clothes, follow them and stop them exactly two meters away from the exit. The guard would then ask to see the merchandise or a receipt for it. The subject would then admit to the crime and voluntarily hand over the merchandise.

During the pre-trial hearing, the case file is subjected to a series of practices that constitute and are constituted by tendencies towards efficacy. One of the most recurrent practices takes place between the public prosecutor and the judge in presenting and filing the information regarding the detention. At this stage, the public prosecutor presents the facts of an alleged criminal act, as well as of the detainee's probable participation in the crime. In presenting the case, oral skill is required, since the entire argument must be rendered without written references or preestablished scripts. In other words, the public prosecutor must do this without reading from or looking at the case file.

Based on public prosecutors' narratives, this tends to pose certain difficulties, primarily due to their excessive workload, making it inconvenient to quickly memorize the elements that pertain to each alleged crime. To counteract this, short sentences are used like flashcards with keywords to stimulate their memory. However, this strategy has led some judges to show certain misgivings arising from an interpretation of orality as not including reading of any kind. Therefore, this type of strategy tends to make judges call them out and ask them not to do it, leading to reprimands or possible sanctions like being expelled from the hearing.

For public prosecutors, the growing wave of sanctions for ineffectiveness in orality results from insufficient —and sometimes nonexistent— training. Therefore, without training to effectively help judicial operators, a series of formulas are established so that operators can fulfill this requirement. The example par excellence of these formulas is found in the statement of facts related to crimes against public health, mainly drug-related ones. These narrations provide very regular and similar details of the actions and activities of police agents who notice very similar, almost identical, behaviors of subjects involved in a possibly criminal incident and that lead to an arrest. The statements are simply adjusted to spatial and temporal elements, the number of subjects involved, and the drugs being sold.

Given such obstacles, we find other tactics of efficacy used by public prosecutors when faced with such events. Although these tactics are put into practice and displayed directly during the hearing, they are planned, orchestrated, and often implemented in different places and times, thus establishing the official police report as discussed above. This seamless flow between the report and the case file connects them so closely that intervention in one means intervention in the other.

A good example is found in the vastly similar drug-dealing statements, which serve to facilitate memorization, recitation, and communication. Thus, these uniform accounts fulfill the purpose of efficacy in communication as the similarities are established in the consistency found in the of the main elements contained in the police report, which had been collaboratively agreed upon by public prosecutors and police officers. However, this procedure is used in various types of crimes, producing shared and repeated narratives that constitute patterns of reporting the crime in a way that will be accepted by judges so that the proceedings can continue.

From the accounts of public defenders, they are clearly aware of these practices, but they agree that this practice responds to a demand for efficacy in the prosecutors' work as well as a way to ease the public prosecutors' excessive workload. Judges are also aware of this situation, as it generally results in the judges' acceptance to continue with the legal proceedings that end in a sentence, whether suspended or not, which means meeting the public prosecutors' goals. Another approach to this fact is Sudnow's[17] as seen in his analysis of Normal Crimes.

6. *Institutional and External Agents*

In this conflict, there is an essential difference between the work of a private defender and a public defender, which arises from the expert ability to detect such outstanding elements and to establish preliminary agreements with pub-

[17] David Sudnow, *Normal crimes: Sociological features of the penal code in a public defender office*, 12 (3) Social Problems 255 (1965).

lic prosecutors. Private defenders happen to be less experienced in discovering these features by paying attention to less important elements. According to the information obtained in the interviews with defenders, judges, and prosecutors, private attorneys' inefficiency is the result of a lack of preparation, training, and understanding of the regulations and the rules of efficiency inside the institution. To a certain extent, this points to an informal complicity between agents to attain efficacy so as to fulfill the internal institutional goals of which private defenders are not part, thus excluding certain agents who are not affiliated with the public justice apparatus.

Thus, it is possible to assume the existence of a judicial field that requires inside knowledge of the existing rules within these groups in order to belong. Separation between these groups manifests itself not only in consistent failures during hearings but also in the dismissal of the agents themselves. As mentioned above, hearings follow the rules of participation established, produced, and reproduced by institutional agents, as also occurs when presenting evidence. Despite the law requiring that each legal action be grounded in law and fact, the rules in the field pose obstacles to these actions, creating certain patterns and daily routines that cannot be avoided, a fact supported by ethnomethodological studies and conversational analysis, specifically regarding membership categorization analysis.[18]

7. *Judges and Knowledge*

Efficacy-oriented attitudes are not exclusively related to the agents on the opposite sides of the proceedings (public prosecutors and defenders) but are also found in the court itself. Technology in the form of smartphones and an internal chat group is used in each courtroom as a way for the agents involved and judges to coordinate their actions. Such devices are the means that determine the forms of integration between agents.

According to some public prosecutors and public defenders, judges sometimes base their decisions on case law unknown to them at the time but uncovered and shared by assistants outside the courtroom via the chat group. Thus, the legal intellectual capital in the judge's argument for a ruling comes from external agents who use these devices (internet, chat groups, smartphones) to promptly provide the judge with legal knowledge. This, however, is not permitted to other agents, as they are forbidden to read from the case files, as mentioned above. It can therefore be noted that access to legal knowledge is in turn limited by the subjective position of the agents in terms of legal capital. Judges therefore have tools, tactics, and practices that facilitate their work but hinder and create further challenges for other agents.

The allocation of legal capital also determines the distribution of the availability of objects. However, it is impossible to think of legal capital in a tran-

[18] Stephen Hester & Peter Eglin, Culture in Action (Int. Inst. for Ethnomethodology and Conversation Analysis & U. Press of America, 1997).

scendental sense as it is built up in the practices themselves and legitimized in the layers of everyday practices. Some cases may be noted in the agents' adopting practices aligned with institutionalized procedural schemes. Some judges, for example, consent to allowing some legal agents to leaf through the case file when orally informing them of the developments in the proceedings. Another noteworthy point in the interviews is that there seems to be a differentiation and hierarchical bias among judicial operators in terms of how other agents perceive the amount of their legal capital.

8. *Arrest*

From the above, the absence of the detainees in the operative social framework of pre-trial hearing practices becomes clear. The role of the detainees is objective insofar as they are not part of the legal practices, that exclude the detainees from the operations and are simply viewed as being on the receiving end of judges' decisions. Their participation in the hearings is minimal, since in their rare appearances it is only to present a version of the facts rarely put in context. Judges reach a decision based on the statements made by defenders and prosecutors, without considering the accounts of the detainees. There does not seem to be any relationship between agents' practices and goals and the "administration of justice", which agents claim is the essential goal of their work.

The agents' main objective is to fulfill their duty by closing proceedings and following the orders of the authorities. This, in turn, arises from a daily problem faced by various public servants, who, regardless of their particular role in the process: detainees and their family members or friends want to be treated individually, while public servants must act according to the universalities of their practice.[19] In the actual process, it turns out to be inoperable to establish even a few particularities of each fact. Therefore, agents, in an attempt to streamline the entire process, choose to resort to familiar strategies and tactics.

These examples demonstrate the inner workings of the notions of "efficacy" and "effectiveness" in shaping the proceedings and are intimately linked to having to solve everyday problems along the process in keeping with the agents' subjective position in the allotment of legal capital. However, within all the agents' accounts, a decisive factor stands out when establishing the various practices: their workload. Understaffing and a growing number of probable crimes lead to a more cases that need to be investigated, more hearings to be attended, more arguments to be prepared and more specific facts to be learned. Therefore, the imperative need to expedite proceedings that lead to the dismissal of detainees from judicial practices and disregarding rules are the effects of an excessive workload.

[19] Arturo Díaz, *Burócratas frente a la inseguridad: miedos y (des)protección desde el Estado*, 32 (63) Alteridades 39 (2022).

In addition, the need for discretion regarding agents' accounts in the interviews stems from a fear of punishment. Failure to comply with orders and revealing inside information about what happens inside institutions usually results in dismissal or punishment. For this reason, agents prefer to look for alternative ways out, regardless of whether they are legally compliant or not, rather than face problems at their workplaces.

VI. Conclusions: Post Text

One might conclude that the concept of "efficacy" renders corruption invisible. However, efficacy should be considered as a result-oriented, as a way of shaping practices that may or may not constitute corruption. Corruption is understood as a crime directly related to the abuse of power for the purpose of obtaining benefits linked to immediate socio-spatial contexts, in terms of motivation and effects.[20] Confusion may arise from the similarity between the two behaviors. In conceptual terms, corruption seems to involve aiming to obtain a particular benefit unconnected to institutional motives.

Efficacy refers to an abuse and departure from legal practices to attain institutional benefits. Although these two concepts may overlap at different times, there is a fine line differentiating them. Efficacy comes into play when different bureaucratic and institutional conditions surrounding the agents, such as the working environment, authorities' orders, and workloads, hinder them from fulfilling their goals, from the most personal ones —like finishing work, so they can go home— to the most institutional ones —like directives, plans, programs, and socio-political statistics—. The difference lies in the fact that while corruption puts personal benefit first, efficacy places completing the work first.

Efficacy appears to be what greases the cogs of legal institutions, which could be further analyzed to eradicate the gaps that might encourage corruption. Rather than analyzing a perfect setting for institutional dynamics aligned with ideal regulations, it is necessary to address the dialectical model that arises from the technocognitive and reflexive relationships of institutional dynamics, thus permitting us to have a better understanding of their strategies of administration, organization, and internal productivity. This could be a starting point to formally and structurally reorganize judicial institutions, as well as the legal systems. Taking into account their real dynamics could improve internal results, as well as those proposed by the immediate policy-related constraints.

[20] Rosalía Lastra & Suhail Montaño, *Corrupción: delito o condición humana*, 61 Revista Gestión y Estrategia 63 (2022).

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NOTE

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ARRAIGO IN MEXICO: VIOLATION OF INTERNATIONAL LAW

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Abstract: *For the development of this note, I will begin by exposing the different components, giving a brief introduction to the doctrines that make up public international law, its application in Mexico, general conception of human rights, international human rights framework, and human rights in Mexico, description of arraigo, its constitutional and legal basis, practices, and results for the achievement of justice. The intention is to establish if the practice of arraigo in Mexico constitutes a violation of the state's international obligations.*

Keywords: *Human Rights, International Law, Arraigo, Constitutional Regularity Parameter.*

Resumen: *Para el desarrollo de la presente nota iniciaré por exponer los distintos componentes, dando una ligera introducción a las doctrinas que integran el derecho internacional público, su aplicación en México; concepción general de derechos humanos, marco internacional de derechos humanos, y derechos humanos en México; descripción del arraigo, su fundamentación constitucional y legal, prácticas y resultados para la consecución de justicia. La intención es determinar si la práctica del arraigo en México constituye una violación de las obligaciones internacionales del Estado.*

Palabras clave: *Derechos humanos, derecho internacional, arraigo, parámetro de regularidad constitucional.*

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I. Introduction

In this note, we will address a current issue with the hope of adding, as modestly as it may be, to the current legal discourse. Public international law is responsible for regulating the relations between states and, at certain points, the actions of states within their own territory. One of the manifest functions of the international legal framework is the protection and promotion of human rights, recognized as the minimum standard for the development of a dignified life. This framework is achieved through different instruments and entities endowed with the power to investigate and make recommendations, or, where appropriate, allow international tribunals to review cases and dictate binding sentences or advisory opinions.[1]

The international human rights legal framework includes, within the right to liberty, the prohibition of arbitrary deprivation of liberty. In Mexico, as part of the state's criminal policy, the arraigo figure is incorporated in the constitutional and legal framework, allowing the prosecutorial authority, without a judicial decision, to restrict a person's freedom by the mere accusation of having committed certain crimes, such as organized crime or drug trafficking, even before starting criminal proceedings or a formal indictment.[2]

In this context, I hypothesize that the current practice of arraigo constitutes a violation of Mexico's international violations by breaching international law prohibitions on arbitrary detentions. Thus, I will begin by exposing the different components, giving a brief introduction to the doctrines, that make up public international law, and its application in Mexico; general conception of human rights, international human rights framework, and human rights in Mexico; description of arraigo, its constitutional and legal basis, practices

[1] Research handbook on international human rights law (Sarah Joseph, Adam McBeth eds., 2010).

[2] Porfirio Andrés Hernández, *Restricciones constitucionales y arraigo. Un tema pendiente para el Estado mexicano*, Centro de Estudios Constitucionales (Oct. 07, 2021), available at: *https://www.sitios.scjn.gob.mx/cec/blog-cec/restricciones-constitucionales-y-arraigo-un-tema-pendiente-para-el-estado-mexicano*.

and results for the achievement of justice. The aim is to establish whether the practice of arraigo in Mexico entails a violation of the State's international obligations.

II. Public International Law

Public international law regulates the relations between states, which, by subsuming their national laws, are bound by an international framework composed of different treaties, and organizations.[3] This law evolved through the following stages: Spanish scholastics, a theory developed by Tomás de Aquino on natural law as valid for all beings endowed with reason. Even if this theory did not develop into a true international law, it serves as a historical precedent; the first theorist to develop a conception of law as a universal right free from any religious canon was the Dutch Hugo Grotius in 1625. Giving way to European *ius publicum* (1648-1815),[4] which took place in the period between the culmination of the Thirty Years' War and the Congress of Vienna.

As a result, the seas were regulated and European territorial boundaries resized in order to achieve power balances and peace.[5] In the twentieth century, due to political and social changes generated by the world wars, states organized as international entities with the goal of regulating their relationships and preventing tragedies similar to those that made their creation necessary. The usefulness of these supranational organizations lies in their role as regulators of interstate relations, seeking to prevent and mitigate international armed conflicts. Thus, the aim was to create a legal system with rights and obligations, generating a framework of checks and balances as well as accountability from member states and their military and civil commands.

The ordinary subjects of public international law are states, understood to address four issues: permanent population, territory with well-defined geographical limits, government (a concept related with the self-determination of peoples), and the capacity to establish relations and treaties with other states and international entities. There is a limited relationship between a certain state's elements and their recognition by other states. Said recognition responds mostly to political matters, and it is possible for an emergent state with a weak government, or a territory in the process of consolidation, to receive limited de facto recognition.

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[3] *See generally* Matthias Herdegen, Derecho internacional público (Marcela Anzola trans., 2005).

[4] Steiger, Heinhard, *Ius publicum Europaeum (European public law)*, *in* Encyclopedia of Early Modern History Online (Graeme Dunphy & Andrew Gow eds., 2015), (Oct. 28, 2022), available at: *http://dx.doi.org/10.1163/2352-0272_emho_COM_021554*.

[5] Peter N. Stearns, The Encyclopedia of World History, 440 (6th ed., 2001), (last visited Oct. 27, 2022).

The extraordinary subjects of public international law are entities that fail to fulfill one or more of the above-mentioned elements but nevertheless have the capacity to establish relations and treaties as well as to interact with other organizations or international subjects. The global community has recognized them as important actors in international political life, their roles as observers and advisors are widely accepted, allowing them to interact with diverse subjects within public international law.

In addition to civil organizations, natural persons are subject to international law when they breach their duties and obligations (crimes against humanity, war crimes, genocide) or when they suffer persecution related to their ethnic origin, gender, religion, sexual orientation, or when their human rights are violated within a given territory, thus requiring international protection.

The sources of international law are set out, as references, in the International Court of Justice Statute.[6] Article 38.1 lists them from subsections "a" to "d", with the first three subsections being primary sources (international conventions, international custom, general principles of law), while the fourth subsection represents auxiliary sources (judicial decisions and internal law doctrines of the various nations). One way for states to establish legal bonds is through unilateral declarations, which are understood as public manifestations of their will to be subject to certain conducts or policies based on good faith and the dependence of other actors upon these declarations. In a broader sense, unilateral declarations are all external behaviors by a state that may bring about legal obligations on the international stage.

Article 2(a) of the Vienna Convention on the Law of Treaties[7] defines treaties as international agreements entered into in writing and governed by international law. Article 38.1(a) of the ICJ Statute, on the court's jurisdiction, establishes that the court shall base its decisions in accordance with international law, applying international conventions to which the states in dispute are parties, and it shall determine rules expressly recognized by them. In this sense, the ICJ Statute complements the Vienna Convention by recognizing treaties, as defined by the latter, as binding for the court's decisions on the disputes that may emerge between states and are brought before its jurisdiction. Self-executing treaties do not require the implementation of internal legislation to become enforceable; non-self-executing treaties become enforceable only through the enactment of internal legislation —rules, decrees, laws— that allows for the correct execution of the instrument and the fulfillment of the acquired obligations.[8]

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[6] Statute of the Court, U.N., (Apr. 18, 1946), (last visited Sep 5, 2022), available at: *https://www.icj-cij.org/statute*.

[7] Vienna Convention on the Law of Treaties, U. N., *Treaty Series* 1155, (May 23, 1969), (Entered into force on January 27, 1980), available at: *https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf*.

[8] *See generally* Arturo Santiago Pagliari, *El Derecho Internacional Público. Funciones, Fuentes, Cumplimiento y la Voluntad de los Estados*, IV Anuario Mexicano de Derecho Internacional 457-473 (2004).

The principle of *pacta sunt servanda* refers to state parties being bound to treaties they are part of and to their obligations to perform them in good faith, as referred in the preamble of the Vienna Convention as universally recognized and expanded upon in article 26. This means that states cannot excuse their breach or non-enforcement of previously recognized international instruments by claiming contrary internal statutes related to non-self-executing treaties, given that by adhering to a covenant state are bound to enact the necessary legislations and policies to fulfill their acquired obligations. According to article 31 of the Vienna Convention, treaties shall be interpreted in good faith, taking the ordinary customary meaning of the terms used, unless a special meaning has been given in the treaty or its instruments and accepted by the parties.

Similarly, account shall be taken of the context in which the treaty originated, the object and purpose for which it was created being part of such context, as well as all agreements, instruments, and practices that arise in connection with the treaty previously or subsequently, as well as the relevant practices of international law. Treaties must be agreed upon by a representative of the State that has full powers in accordance with article 7 of the Vienna Convention —the minister of foreign affairs, ambassadors and diplomatic representatives, heads of state, *i.e.*— and there are limits as to the reservations that can be made according to the treaty that is being entered into.

Protocols are the amendments made by state parties, whether in their entirety or not, to the conventions entered, and they create obligations only for those that are parties to the protocol. That is, if in a convention of 80 states, 10 states make a protocol amending part of said convention as regards the relations between those 10 states, the protocol generates obligations only for those states. Conventions are formal agreements between states, either treaties or some other instrument created and adopted by states, to establish or regulate their obligations and rights.

The term convention could refer to the fact that they are agreements of a more legislative nature and follow a similar process of discussion and approval. Charters or statutes are instruments that establish organizations, as is the case of the UN, and have an operational and organizational role in relation to treaties, acting as the instrument that grants authority and recognition to some institution as well as the rules under which it will be governed, an example being the ICJ Statute.

Reservations are unilateral declarations by states, when signing or ratifying —generally accepting and adhering to— a treaty, with the objective of modifying or excluding the legal effects of certain provisions in the treaty, thus canceling, or modifying the application, in the reserving state, of a particular part of the treaty. Reservations are invalid when the treaty in question does not accept them or rejects the type of reservation made, when they do not receive the approval of the rest of the state parties, or when the reservation is incompatible with the object and purpose of the treaty. Interpretative declarations

are instruments or agreements reached by the state parties or formulated by one of the states and accepted by the others, with the purpose of clarifying or guiding the interpretation of the treaty, giving clarity to ambiguous or overly broad concepts, in accordance with the object and purpose of the treaty.

Security Council resolutions take precedence over international treaties or conventions when the obligations and rights of the latter conflict with the determinations of the former. This is because the UN Charter,[9] Article 25, states that "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter" while Article 103 declares that "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

International customs are the general practices that have been accepted as law, creating legal bonds to be adhered to. International practice is identified as the set of general, widespread, and representative behaviors carried out by a state in the exercise of its executive, legislative, or judicial functions on some particular subject and which contribute to the formation or expression of common law.[10] Besides, *opinio iuris* is distinguished from simple usage or simple habit by the acceptance of the general practice with the conviction of the existence of a legal obligation or a right. Acceptance can be proven by official governmental communications, diplomatic or public statements on behalf of the states, etc. Within international custom, there are persistent objectors to whom the doctrine in question does not apply. These are the States that have objected, from the early formation of any international custom to the general practice in a continuous manner, clearly expressed and communicated to the other States; the customary law rule will not be applied to the persistent objector as long as it maintains the objection.

The internationally wrongful acts of the state[11] may be of action or omission, and their elements are that they are attributable to the state under international law and that they constitute a breach of an international obligation of the state, according to the Draft Articles on Responsibility of States for Internationally Illegal Acts. Exceptions to responsibility are: the consent of the state that suffers the repercussions of the action of another state; self-defense according to the premises of the UN Charter; countermeasures in relation to the serious breach of obligations by another state; *force majeure*, unless it is the product of the state's action or a risk assumed by it; extreme danger, unless it is the product of the state's action or generates a greater or similar danger to that which is sought to be avoided; the situation of necessity; compliance

[9] U.N. Charter, U. N., (Jun. 26, 1945), (came into force on Oct. 24, 1945), available at: *https://www.un.org/en/about-us/un-charter*.

[10] James Crawford, Brownlie's Principles of Public International Law, at Part VI (9th ed., 2019).

[11] *Ibid*. at part IX-X.

with peremptory norms. The foregoing is in accordance with Chapter V Part One of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.[12]

Mexico and Public International Law

The systems for the reception of international law are the monist and dualist schools of thought. The former proposes international law and domestic law as manifestations of a single legal order, in which one or the other expression may be given supremacy, and all treaties become self-executing in nature. The latter recognizes them as two distinct legal orders of equal value and independent from each other, although interconnected. The ranges of value afforded to international instruments can be characterized, in general terms, as follows:

— *Supra-constitutional*: International instruments are above the constitution and the latter must be adapted to them when they are subscribed.
— *Constitutional*: International instruments must be in accordance with and complementary to the principles and contents of constitutional norms, having the same supplementary level of supremacy before the rest of the legal framework of a given state.
— *Supra-legal*: International instruments are below the constitution and above all other legal instruments of the State's legal order.
— *Legal*: International instruments are placed on a par with federal rules and norms, complementary to them and subordinate to the constitution, and their observance may be less strict.

The Political Constitution of the United Mexican States adopts the vision of the dualist school and grants a supra-constitutional value to international human rights instruments, with a supra-legal value for the rest of the treaties. According to the isolated thesis P. LXXVII/99 with digital record 192867,[13] issued by the SCJN plenary in the ninth era, international treaties are hierarchically placed above federal laws and in second place with respect to the federal constitution. Derived from its interpretation of article 133 of the Mexican charter, regarding the international commitments assumed by the state as binding for all authorities before the international community, the above SCJN opinion was made in 1999, after the constitutional reforms concerning human rights in 2011. Thus, it is understood, based on the first article, that

[12] Draft articles on Responsibility of States for Internationally Wrongful Acts, U.N. Int. Law Comm'n., Report, *II Yearbook of the Int. Law Comm'n., Part Two* (2001), available at: *https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf*.

[13] Tratados Internacionales, Tesis P. LXXVII/99, Semanario Judicial de la Federación Tomo X, at 46 (Sup. Courtroom, Nov. 1999), available at: *https://sjf2.scjn.gob.mx/detalle/tesis/192867*.

the treaties on human rights are at a level of supremacy above the constitution. In other words, human rights are above any hierarchy, since, in the event of a contradiction between the constitution and international human rights instruments, preference shall be given to the amplest protection, regardless of whether that is part of a treaty or the constitution.[14]

Thus, Mexican judicial authorities are obliged to apply a diffuse control of conventionality, seeking to grant the best available protection to human rights, as put by Víctor Manuel Collí:

> …the IACtHR stated three things. First, diffuse control applies to all Mexican judges, regardless of jurisdiction (federal or state). Second, they must apply control of conventionality, which means that every judge, in any case at bar, is obliged to defend human rights found not only in the Mexican Constitution but also in international treaties. Third, the judge may, at will, analyze and decide a human rights violation, in any case under his or her study (*ex officio*). That is the meaning of diffuse control of conventionality *ex officio*.[15]

III. Human Rights

According to Marie-Bénédicte Dembour there are four different schools of thought regarding Human Rights. The natural school observes the thought of human rights as inherent to persons and as entitlements of a negative and absolute character. The deliberative school conceives them as political values chosen to be observed by liberal societies, taking a critical approach to human rights as a possible tool to help better govern societies, but not necessarily universal, as it considers that this characteristic can only be achieved in time through a global consensus, noting its limitations in praxis.

The protest school takes a practical approach to human rights as a means to fight injustice in a never-ending labor, being skeptical of legislation since they view it as a routinization process that tends to favor the elite. The discourse school is distinguished by its lack of reverence for human rights, positing that their existence is limited to cultural discourse, where certain hegemonies are favored, thus considering them an ineffective tool.[16]

Our conception of Human rights tends toward the natural and deliberative schools, and even if we were to accept the conception of human rights as natural and inherent to the human person, in praxis they are only as functional as politically recognized. Thus, Human Rights are a set of norms that regulate

[14] José Luis Soberanes Fernández, Constitución Política de los Estados Unidos Mexicanos. Comentada, 1075-77 (I.I.J., 21st ed., 2021).

[15] Víctor Manuel Collí Ek, *Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges*, 20 The Human Rights Brief 7, at 12 (2012), available at: *https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1850&context=hrbrief.*

[16] Marie-Bénédicte Dembour, *What Are Human Rights? Four Schools of Thought*, 32 Human Rights Quarterly 1, 1-20 (2010).

the treatment of the human person and of recognized groups in a position of vulnerability, protecting them from the actions of the state and certain non-state entities. They operate based on ethical principles that are considered by society as the minimum standard for a dignified life. These rights are recognized and incorporated into the internal normative bodies of nations and, at the same time, form the foundation of public international law, being, according to the UN Universal Declaration of Human Rights, the base standard of objectives for the development of communities and nations.

1. *International Human Rights Regime, Arbitrary Detention*

As mentioned above, human rights, their recognition and protection, are the main objectives of the United Nations, to achieve collective progress and guarantee global peace. Its operation is regulated by the international Bill of Rights (as it is known in the doctrine), which is a set of conventions (UDHR, ICCPR, ICESCR).[17]

Regarding the subject addressed in this paper, we are interested in the instruments that protect human rights, specifically the right to personal freedom. The first and most relevant one, as it marks a historical milestone in the recognition of human rights at a global level, is the Universal Declaration of Human Rights. The declaration is supplemented by the International Convention on Civil and Political Rights, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the Standard Minimum Rules for the Treatment of Prisoners, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, the United Nations Basic Principles and Guidelines on Remedies and Procedures relating to the Right of Persons Deprived of their Liberty to a Remedy before a Court of Law.

One of the ways in which people's freedom is violated is through arbitrary detention, which consists of deprivation of liberty before, during, and after trial, as well as administrative detention. The question of deprivation of liberty is one of fact if the persons cannot leave the place of his own free will. And it becomes arbitrary, according to Resolution 1997/50 of the former UN Commission on Human Rights, when it does not result from a final decision taken by a domestic judicial instance in accordance with domestic law, and when it is not in accordance with the international standards of the international Bill of Rights.

The UN Working Group on Arbitrary Detention has been mandated by the United Nations Human Rights Council to investigate cases of arbitrary detention or deprivation of liberty inconsistent with international standards.

[17] U.N. OHCHR, Fact Sheet No.2 (Rev.1), The International Bill of Human Rights (Jun. 1st, 1997), available at: *https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-02-rev-1-international-bill-human-rights-archive*.

This working group is able to request and receive information from governments and NGOs, as well as to get information from individuals concerned with the deprivation of liberty, either the person directly affected or their family and representatives. It has the authority to act on information submitted to it on alleged cases of arbitrary detention, sending urgent requests and communications to the governments concerned to clarify and bring attention to the cases. The working group is the only mechanism whose mandate expressly allows it to consider individual complaints aimed at qualifying a detention as arbitrary or not.

That means that its actions are based on the right of petition of individuals anywhere in the world. Being a special procedure of the Human Rights Council, it can interact with any UN member state regardless of which treaties the state is a party to or has ratified. The Working Group's criteria for defining arbitrary detention are:[18]

— *Category I*: When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (such as, for example, when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee). The instances of detention falling under this category may also concern cases when an individual has been deprived of liberty in absence of any legislative provision that would authorize such detention. It also often involves the failure of the national authorities to invoke a legal basis for an arrest: it is not sufficient that there is a national law authorizing the arrest in question, the authorities must invoke that national law, usually through the notice of the reasons for arrest and charges, the presentation of a duly issued arrest warrant and the regular judicial review, to justify the particular instance of detention.
— *Category II*: When the deprivation of liberty results from the exercise of the rights or freedom guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as states parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights. The cases falling under this category are those in which detention is used in response to the legitimate exercise of human rights, such as arresting peaceful protesters for the mere exercise of their rights to freedom of opinion and expression, freedom of assembly, and freedom of association, or detaining refugees for exercising their right to seek asylum and/or freedom to leave their own country.
— *Category III*: When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Uni-

[18] U.N. OHCHR, Fact Sheet No. 26, The Working Group on Arbitrary Detention (May 2000), available at: *https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/FactSheet26en.pdf*.

versal Declaration of Human Rights and in the relevant international instruments accepted by the states concerned, is of such gravity as to give the deprivation of liberty an arbitrary character. In order to evaluate the arbitrary character or otherwise of cases of deprivation of liberty under category III, the Working Group considers, in addition to the general principles set out in the Universal Declaration of Human Rights, several fair trial and due process criteria drawn from the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and, for the states parties to the International Covenant on Civil and Political Rights, the criteria laid down particularly in articles 9 and 14 thereof. If the Working Group arrives at a finding that there have been violations of such due process rights, it then considers if these violations, taken together, are of such gravity as to give the deprivation of liberty an arbitrary character, thus falling under category III.

— *Category IV*: When asylum seekers, immigrants, or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy. When considering cases under this category, the Working Group notes the basic principle of international law that detention during migration proceedings must be the last resort and permissible only for the shortest period of time in each individual case, with the grounds for detention clearly and exhaustively defined in national legislation. The Working Group further examines if the legality of detention is open for challenge before a court within fixed time limits. The immigrants in irregular situations should not be qualified or treated as criminals.

— *Category V*: When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic, or social origin; language; religion; economic condition; political or other opinions; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights.

The United Nations Basic Principles and Guidelines on Remedies and Procedures relating to the Right of Persons Deprived of their Liberty to a Remedy before a Court,[19] establish that the absence of effective mechanisms for judicial review of the legality of detention constitutes a violation of human rights. This right is a judicial remedy designed to protect personal liberty and integrity against arbitrary arrest, detention, enforced disappearance, prevent torture, degrading treatment or punishment. Such judicial remedy is essential

[19] U.N. Human Rts. Council, Report of the Working Group on Arbitrary Detention: United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, A/HRC/30/37, (Jul. 6, 2015), available at: *https://www.ohchr.org/en/calls-for-input/report-basic-principles-and-guidelines-remedies-and-procedures-right-anyone*.

to preserve the constitutional rule of law in democratic societies. Principles two and three establish that domestic regulatory systems must guarantee this right, even at the constitutional level, to challenge the legality and arbitrariness of detention, to receive accessible and prompt remedies, and to constitute effective control over detention. The terms used are very important since the time lapse between detention and judicial review cannot exceed a certain limit without losing effectiveness in the protection of the right.

The Working Group, in its report on arbitrary detentions related to drug policies (A/HRC/47/40, 2021),[20] "has found that people who use drugs are particularly at risk of arbitrary detention and has noted with concern «increasing instances of arbitrary detention as a consequence of drug control laws and policies»". The report also points out that the war on drugs has resulted in a disproportionate increase in detention and incarceration for drug-related offenses. The impetus of some states to comply with policies to combat drugs and organized crime has generated an atmosphere in which human rights violations are widespread and arbitrary detentions are on the rise. The participation, or invasion, of military commanders and troops in public and citizen security labor aggravates the situation, causing more and worse human rights violations with punitive results that have not proven effective in the fight against crime. The war on drugs has also generated a culture of corruption within police forces, particularly "regarding payments made to avoid arrest or to affect the outcome of judicial proceedings".

2. *Human Rights in Mexico*

The purpose of every state is to maintain order and give a semblance of legal security to its inhabitants; the Constitutional Rule of Law represents this objective with the fundamental rights and dignities of the human person at the forefront of its entire operation and as its greatest foundation. It does so through its democratic composition and the separation and balances for the exercise of the supreme power conferred by the people to the state. Its objective is the construction of a more just society, in which all human beings can develop their potential freely and with the basic promise of a dignified existence.[21]

According to the introduction to the Universal Declaration of Human Rights issued by the UN[22] human rights are those inherent and inalienable dignities

[20] U.N. Human Rts. Council, Arbitrary detention relating to drug policies, A/HRC/47/40, (May 18, 2021), available at: *https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/109/65/PDF/G2110965.pdf?OpenElement*.

[21] Raymundo Gil Rendón, *El estado constitucional de derecho y los derechos humanos,* III (6) Praxis de la j. fiscal y admin. 243 (2011), available at: *https://www.tfja.gob.mx/investigaciones/historico/pdf/estadoconstitucionaldederechoylosderechoshumanos.pdf*.

[22] U.N., Universal Declaration of Human Rights (Dec. 10, 1948), available at: *https://www.un.org/en/about-us/universal-declaration-of-human-rights*.

of the human being, the recognition of which is the foundation of freedom, justice, and peace. They have been recognized in Mexico's founding charter, to varying degrees, since 1824. The current national constitution,[23] since its reform in 2011, seeks to give the highest possible standard of protection and recognition to human rights. Having the *pro personae* principle as its guiding light and obliging public servants to follow the principles of universality, interdependence, indivisibility, and progressiveness, and to prevent, investigate, punish, and redress human rights violations.

The above-mentioned reform has been characterized as birthing a new constitutional paradigm in which human rights are omnipresent.[24] The *pro personae* principle

> …has been defined as "the hermeneutic criterion that informs the whole human rights legal system". According to this, human rights norms should be interpreted as extensively as possible when recognizing individuals' rights and, by contrast, as restrictively as possible when the norm imposes limits on the enjoyment of human rights. At the same time, the principle commands that in case of conflicts between human rights norms, the norm that better protects the individual's rights should prevail.[25]

From this optic, we can clearly recognize what is stated above regarding the precedence of international law when related to human rights before any constitutional norm, as long as the international norm grants a better protection or allows for a less restrictive interpretation.

IV. Arraigo

Arraigo is a measure that seeks to prevent persons accused of organized crime from escaping criminal prosecution and interfering with the investigation process, thus depriving them of their freedom based on mere suspicions and without proper judicial control, endangering human rights.[26] Since the introduction of this figure at the constitutional level in 2008, no data can support its efficacy to mitigate organized crime or lessen the impunity rate.[27]

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[23] Constitución Política de los Estados Unidos Mexicanos [CPEUM], Feb. 05, 1917, available at: *https://www.diputados.gob.mx/LeyesBiblio/ref/cpeum.htm*.

[24] Soberanes, *supra* note 14, at 4.

[25] Hayde Rodarte Berbera, *The pro personae principle and its application by Mexican courts*, 4 (1) Queen Mary human rights l. rev., 9 (2017).

[26] Soberanes, *supra* note 14, at 138.

[27] *La PGR arraigó a más de 12 mil personas; pero 1 de cada 10 eran inocentes*, Mucd (Feb. 2, 2019), (Oct. 28, 2022), available at: *https://www.mucd.org.mx/2019/02/la-pgr-arraigo-a-mas-de-12-mil-personas-pero-1-de-cada-10-eran-inocentes/*. From 2004 to 2018 a total of 12 071 people were kept under arraigo. 39% under 40 days, 47.2% over 40 days and 13.8% for 90 days; 73% of them

In Mexican domestic law, arraigo is a constitutional, valid, current and effective law: "It is important to point out that arraigo is a precautionary and not a procedural measure, since it is prior to the initiation of criminal proceedings, and is even used to continue with the investigation".[28] It's justified by Article 16 of the Federal Charter, which empowers the judicial authority to decree the arraigo for up to eighty days at the request of the Public Prosecutor's Office (*Fiscalía General de la República*) and whenever "it is necessary for the success of the investigation, the protection of persons or legal assets, or when there is a well-founded risk that the accused will evade justice".

As a first consideration, it could be said that we are faced with a provision contrary to article one of the Constitution itself. Contradiction of thesis 293/2011[29] establishes that, although in matters of human rights international treaties are at the rank of the Constitution as supreme law, the restrictions to such rights made within the Constitution will take precedence. In a related decision, the SCJN established the constitutionality of arraigo, as, even if contrary to international law, by being in the constitutional text, it could not be declared as unconstitutional. Voting against the plenary decision, justice Arturo Zaldívar Lelo de Larrea argues the interpretation of the 293/2011 decision is faulty. Since the constitutional text must be interpreted in accordance with the *pro personae* principle (as argued above), in order for the arraigo figure to be considered in a decision, the first step is to make the most favorable interpretation possible, as related to a person's human rights.

The cited justice argues that, due to the nature of the figure as completely restrictive to personal liberty, it is not possible to interpret it through the *pro personae* lens; thus, the principle of constitutional precedence over international law when human rights are concerned, cannot be adequately applied since the cited interpretation establishes a case-by-case basis for this rule. Another reason for Justice Zaldívar's dissent is based on his interpretation of article 7 of the American Human Rights Convention, regarding personal liberty. Article 7 introduces the obligation of states to inform detainees, without delay, of the reasons for their detention and any charges brought against them; and the right of detainees to be brought before a competent judicial authority, without delay, for their detention to be qualified or for other preventive mea-

under suspicion of organized crime. 100% of the people kept under arraigo were jailed at the *Centro de Investigaciones Federales*, acting as a de facto penitentiary facility for people who had not received a sentence; INEGI, Estadísticas judiciales en el marco del nuevo sistema de justicia penal en México (2017), available at: *https://www.cdeunodc.inegi.org.mx/unodc/articulos/doc/20.pdf*.

[28] Porfirio Andrés Hernández, *Restricciones constitucionales y arraigo. Un tema pendiente para el Estado mexicano*, Centro de Estudios Constitucionales (Oct. 7, 2021), available at: *https://www.sitios.scjn.gob.mx/cec/blog-cec/restricciones-constitucionales-y-arraigo-un-tema-pendiente-para-el-estado-mexicano*.

[29] SCJN determina que las normas sobre derechos humanos contenidas en Tratados Internacionales tienen rango constitucional, Contradicción de Tesis 293/2011, Sup. Courtroom (2013), available at: *https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2020-12/CT%20293-2011.pdf*.

sures to be taken instead. In this context, Justice Zaldívar's argues that since persons subject to arraigo have not received a formal accusation and a criminal process has not been started against them, their juridical status cannot be properly subjected to an adequate judicial control.[30]

In this respect, we share the view expressed by the *Observatorio Ciudadano del Sistema de Justicia* on the arraigo figure as a state policy created and maintained by the three branches of power (judicial, legislative, and executive) in their different spheres of influence. Thus, said figure was created and elevated to constitutional level, and has been exploited through the prosecutorial authority, maintaining its legality and constitutionality through court decisions.[31]

Arraigo as an investigation tool has been characterized as existing in a procedural dichotomy wherein certain persons are subject to a differentiated legal process.[32] This creates an environment aligned with Günther Jakobs' theory on the law of the enemy, meaning that certain persons perceived to be a threat to society are neutralized through a differentiated legal system where they are stripped of their fundamental rights and penalties mostly consist of secret confinement (incommunicado).[33] A shred of darkness covers the practice of arraigo since the modality in which it takes place is not specified by law and is, instead, left to the will of the prosecutorial authority, creating an environment in which human rights cannot be properly guaranteed and detainees' communication with their lawyers faces a series of complications.

Therefore, we need to examine the Federal Law Against Organized Crime, which constitutes differentiated processes and penalties for persons accused, prosecuted, and sentenced for organized crime as described by the abovementioned law. The arraigo figure and its requirements are mentioned starting in article 12:[34]

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[30] Eduardo Ferrer Mac-Gregor & Rogelio Flores Pantoja, La Constitución y sus garantías. A 100 años de la Constitución de Querétaro de 1917. Memoria del XI Encuentro Iberoamericano y VIII Congreso Mexicano de Derecho Procesal Constitucional, 957-967 (2017).

[31] Observatorio Ciudadano del Sistema de Justicia, El arraigo penal como crimen de lesa humanidad 6, at 6-46 (2019), available at: *https://www.cmdpdh.org/publicaciones-pdf/cmdpdh-arraigo-2019.pdf*.

[32] Roberto Andrés Ochoa Romero, *Antecedentes legislativos de la regulación actual sobre arraigo y colaboración con la justicia*, *in* Desafíos del sistema penal acusatorio, 110 (Patricia Lucita González Rodríguez & Jorge Alberto Witker Velázquez eds., 2019).

[33] Matteo Tondini, *Beyond the Law of the Enemy. Recovering from the Failures of the Global War on Terrorism through Law, in* Jura Gentium: Rivista di filosofia del diritto internazionale e della politica globale (2007), (Nov 16, 2022), available at: *https://www.juragentium.org/topics/wlgo/cortona/en/tondini.htm*. *See* Nigel S. Rodley & Matt Pollard, The treatment of prisoners under international law, 334 (3rd ed. 2009). An incommunicado detention happens when the detainees are not permitted to contact anyone besides their captors, violating the rights of detainees to legal assistance and judicial review of their detention.

[34] Ley Federal Contra la Delincuencia Organizada [LFCDO], Diario Oficial de la Federación [DOF] 07-11-1996 (last reform May 20, 2021) (Mex.), available at: *https://www.diputados.gob.mx/LeyesBiblio/ref/lfcdo.htm*.

— The judicial authority responsible for the decree is the control judge upon the request from the public prosecutor. There is no rigorous standard or base probationary requirements for the decree. It is enough for the public prosecutor to justify it as necessary for the investigation's success, the protection of people or legally protected assets, or when there is a justified risk for the accused to subtract themselves from justice. Of these requirements, only the latter establishes a certain rigor by making it necessary for the public prosecutor to justify their petition. All the former requirements lack a minimum probationary standard.[35]
— The judicial authority must immediately reply to arraigo requests with a maximum answer time of six hours, and the decision can be made through any means "which guarantee its authenticity" or in private audience with the sole presence of the public prosecutor, who will name the modalities of place, time, and form as well as executing authorities. This gives the public prosecutor extremely broad power to decide how a person's personal liberty will be restricted, making it arbitrary.
— The judicial warrant that authorizes arraigo must contain, at least, the name, and post of the authorizing control judge, the identification data of the person subject to arraigo, the illegal facts for which the investigation is taking place, a specification of the reason for the arraigo, daytime and place for the execution of the arraigo. It is important to note that there is no requirement to further justify the measure, with the judge's obligation being only nominative of the reasons for which the arraigo has been approved without requiring them to argue or explain their reasoning.

From these elements, it would be a stretch to say that the law fulfills the requirements for exceptionality needed to consider the measure as appropriate.[36]

Based on the foregoing, it is evident that arraigo can be classified as category III of the UN Working Group's criteria for defining arbitrary detentions, since it represents a violation of due process, and constitutes a punitive penalty before a judicial decision. For the declaration of arraigo it is sufficient for the

[35] Sebastián Reyes, *El juicio como herramienta epistemológica: el rol de la verdad en el proceso*, 30 Anuario de Filosofía Jurídica y Social 236 (2012). A probationary standard can be defined as a legal tool which contains the criteria necessary to determine when sufficient proof of a fact has been obtained in order for a judge to justifiably make a decision.

[36] Luis González Placencia & Ricardo Ortega Soriano, *Excepciones constitucionales a un sistema de derecho penal de orientación democrática: delincuencia organizada y arraigo*, *in* Derechos Humanos en la Constitución II, at 1476 (Eduardo Ferrer Mac-Gregor Poisot *et al.*, eds., 2013). Mentioning the Chaparro Álvarez vs. Ecuador case, as decided by the Interamerican Human Rights Court, the standard to determine a deprivation of liberty as proportionate is: For the object of the measure to be compatible with the American Convention on Human Rights; for the measure to be appropriate and there is not a less prejudicial option; for the benefits of the detention to be proportionate to the detriment of a person's human rights.

Public Prosecutor to state to the judicial authority that the defendant will be or is being investigated for organized crime and that, in order to protect the investigation, it is necessary to deprive them of their liberty; this is arbitrary since there is neither a justification that complies with international standards, nor a suitable means of proof that would allow the judicial authority to carry out a true control of legality, thus vitiating the decision taken.

Mexico is committed to the international community through the diverse instruments already mentioned and must adapt its legislation and internal policies to harmonize and guarantee the protection of human rights. While it is dangerous for any nation to see its sovereignty violated in favor of external instruments, it is less dangerous and even desirable for the progress of humanity when these adjustments are made in order to protect the basic requirements for human dignity. Currently, the UN Working Group on Arbitrary Detention and the Inter-American Commission on Human Rights are involved in a different review, recommendation, and judicial processes to hold the Mexican State accountable for its practices that violate the right to personal liberty, and to force it to make the necessary adjustments to its internal regime in order to comply with its international human rights commitments. Consequently, the Mexican nation can fulfill its international obligations by derogating the arraigo figure, since there exist other less restrictive tools that can help the prosecutorial authority in the investigations.

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