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Contenido

Articles

Note

Mexican Law Review, New Series, vol. XVI, num. 2, January - June 2024
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The Constitutionality of the Proportionality Test to Prove Money Laundering

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Abstract: For years, combating money laundering has been a priority for the Mexican State. Frontal attack strategies have been used against criminal groups but have not yielded the expected effectiveness, as violence continues to escalate. This work begins with an assessment of the legal punishments applied to cases of money laundering in Mexico. Subsequently, it presents the fundamental rights that might be compromised in the process of collecting evidence and explores the use of the proportionality test as a parameter and method to ask judges to accept only admissible evidence to thus avoid issues of unconstitutionality. Finally, some evidence that can be employed to substantiate money laundering offenses and secure convictions are outlined. Furthermore, recommendations for public policy are made to address and enhance the efforts of stakeholders engaged in combating this crime, since to date, effectiveness in obtaining convictions has been remarkably low.
Keywords: Money Laundering, Legal Proof, Illegal Evidence, Fundamental Rights, Proportionality.

Resumen: Por años, combatir el lavado de dinero ha sido una prioridad para el estado mexicano. Se han utilizado estrategias de combate frontal con los grupos criminales, pero no han tenido la efectividad esperada, ya que la violencia continúa aumentando. Este trabajo comienza con una evaluación de las sanciones legales aplicadas a los casos de lavado de dinero en México. Posteriormente, presenta los derechos fundamentales que podrían verse comprometidos en el proceso de recolección de prueba y explora el uso del test de proporcionalidad como parámetro y método para pedir a los jueces que acepten sólo pruebas lícitas y así evitar problemas de inconstitucionalidad. Finalmente, se describen algunas de las pruebas que pueden utilizarse para fundamentar el delito de lavado de dinero y asegurar sentencias condenatorias. Además, se hacen recomendaciones de política pública para abordar y potenciar los esfuerzos de los actores involucrados en el combate a este delito, ya que a la fecha la efectividad en la obtención de sentencias condenatorias ha sido notablemente baja.

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Palabras clave: lavado de dinero, prueba, pruebas ilegales, derechos fundamentales, proporcionalidad.

I. Diagnosis of the Legal Punishment for Transactions with Illicit Proceeds (Hereinafter Money Laundering) in Mexico

Research has shown that there is a problem in targeting the financial, patrimonial, and economic structures of criminal activity. Only 0.26% of all federal sentences in the last five years were related to Money Laundering (ML).[1]

This same research puts forward two hypotheses. The first centers on law enforcement agencies' lack of clarity and effectiveness in Public Policies (hereinafter PPs) on criminal prosecution. The second hypothesis is a lack of training among prosecutors and administrative entities that work together to gather evidence for ML case convictions.

In previous studies and interviews conducted with federal judges between March and September 2021, it was observed that in ML-related cases, authorities sometimes submit illegal evidence, such as documents obtained without judicial authorization,[2] evidence gotten from illegal searches that did not adhere to procedure with procedural shortcomings, or interviews with the accused that were conducted without meeting the legal requirements.

With this in mind, one hypothesis explaining why judges tend not to be very effective in prosecuting ML charges is that the evidence they receive does not meet the necessary quality and legal standards to effectively punish this crime, in addition to the limited knowledge and training prosecutors have regarding money laundering.

In this context and within the scope of our article, a prosecutor or defense attorney has to verify how the evidence was obtained, as it forms the basis for an accusation and, consequently, the elements upholding it. Without legally obtained evidence, there are no convictions, so any evidence that affects a fundamental right is unconstitutional and thus taints the process.[3]

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[1] Pedro Rubén Torres Estrada, *Estado Actual del Castigo Judicial del Delito de Operaciones con Recursos de Procedencia Ilícita ORPI en México*, in Políticas Públicas para la Prevención de Lavado de Dinero 16-48 (Tirant lo Blanch, 2022).

[2] One example is when the Financial Intelligence Unit delivers bank statements directly to a pre-trial judge without the prosecutor having filed an explicit request.

[3] The theory known as the Fruit of the Poisonous Tree Doctrine says that any evidence obtained unlawfully must be excluded from legal proceedings as well as any evidence derived from it, since it is tainted with unlawfulness if the "tree" is tainted, so is its "fruit." Ricardo Iván Medina Rico, *La Teoría del Árbol Envenenado. Excepciones a la Regla de Exclusión,* in Prueba Ilícita y

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This work aims to provide guidelines to help investigators gather evidence by following the tenets of traceability as found in the framework established in the Código Nacional de Procedimientos Penales [National Code of Criminal Procedure, hereinafter CNPP] while also adhering to the theoretical principles that guide and regulate the collection of evidence, such as fundamental rights and others established in the Constitution and international instruments.[4] Additionally, we propose some tests that could help prevent or combat money laundering.

Additionally, we discuss the methods judges use to assess and weigh conflicting rights in difficult cases,[5] as well as to determine the legality of evidence in ML cases. One example is the proportionality test, which is a methodological tool used by judges and should not be confused with the principle of proportionality,[6] which is a constitutional principle in Western constitutionalism and has been applied in making judicial decisions, especially after World War II.[7]

Regla de Exclusión en Materia Penal. Análisis Teórico Práctico en Derecho Comparado 39-53 (Editorial Universidad del Rosario, 2017) available at: https://books.scielo.org/id/qyznn/pdf/medina-9789587388848-07.pdf In addition to this, consult Court Opinion II.2o.P.61 P (10a.), which discusses unlawful evidence and evidence with formal or procedural flaws, as part of the Fruit of the Poisonous Tree Doctrine. Available at: https://sjf2.scjn.gob.mx/detalle/tesis/2016747

In the Mexican context, one case in which this theory was applied was the Florence Cassez case, where the presiding judge argued that, in addition to violating the accused's fundamental rights, her arrest had been staged, resulting in tainting the proceedings throughout the entire process. Luis Raúl González Pérez and Arturo Villarreal Palos, *Legality and Justice in the Framework Of Illegal Evidence. Some Thoughts About its Scope and Content in the Mexican Legal System*, 62(258) Revista de la Facultad de Derecho de México 339-353. Available at: https://doi.org/10.22201/fder.24488933e.2012.258.60734

Prueba Ilícita y Prueba con Deficiencia Formal o Irregular. Sus Diferencias. Segundo Tribunal Colegiado en Materia Penal del Segundo Distrito [S.C.J.N] [T.C.C], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 53, Tomo III, April 2018, Tesis II.2o.P.61 P (10a.), page 2272 (Mex.) available at: https://sjf2.scjn.gob.mx/detalle/tesis/2016747

[4] Alfonso Jaime García Figueroa, *¿Existen diferencias entre reglas y principios en el estado constitucional? Algunas notar sobre la teoría de los principios de Robert Alexy*, in Derechos Sociales y Ponderación 333-367 (Fontamara, 2007).

[5] Difficult cases include those that become problematic when establishing a normative and/or factual premise. José Ramón Cossío Díaz, *Procedimientos Disciplinarios Contra Magistrados: Casos Difíciles e Independencia Judicial*, 57(248) Revista de la Facultad de Derecho de México. 357-369. Available at: https://revistas.unam.mx/index.php/rfdm/article/view/61513

Difficult cases require greater interpretative effort due to situations of doubt or controversy. Francisco Javier Ezquiaga Ganuzas, La Argumentación Interpretativa en la Justicia Electoral Mexicana 59-69 (Tribunal Electoral del Poder Judicial de la Federación. Coordinación de Documentación y Apoyo Técnico, 2006) available at: https://archivos.juridicas.unam.mx/www/bjv/libros/11/5109/8.pdf

[6] Jaime Cárdenas Gracia presents the thesis that, in the Mexican context, the interpretation of the law is changing. Jaime Cárdenas Gracia, *Diez Tesis Sobre Nuestro Atraso Jurídico,* in Neoconstitucionalismo y Estado de Derecho 44-ff (Limusa 2006)

[7] The inclusion of this method for resolving difficult cases has permeated a significant segment of the legal culture in continental Europe and Latin America. Hence, it is important to study the topic of evidence in light of this method.

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II. Fundamental Rights and the Test: A Theoretical Framework

The first aspect a prosecutor or defense attorney must consider in obtaining or objecting to evidence is the rights and principles that may clash because, in a constitutional state, both elements must be in balance.[8] Among the rights that may enter into conflict are the presumption of innocence,[9] the right of defense, the right to personal and mental integrity, the right to prove innocence,[10] the rights of victims, and the right of access to justice,[11] along with other rights that might be affected indirectly, such as the right to truth.[12]

Although the topic addressed herein is centers on criminal law and specifically on criminal procedural law, we cannot lose sight of the central tenets of due process guarantees and rights, which delimit and shape the entire law of evidence within the framework of the Constitution and the paradigm of human rights.[13]

In this way, no legislation established to govern how evidence is obtained and assessed can contravene the principles of constitutional law in its national or su-

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[8] Mirentxu Corcoy Bidasolo, Crisis de las garantías constitucionales a partir de las reformas penales y de su interpretación por los tribunales, in Constitución y Sistema Penal 161 (Marcial Pons 2012).

[9] Presunción de inocencia como regla de trato en su vertiente extraprocesal. La transgresión a ese derecho fundamental puede surgir de cualquier autoridad pública. Noveno Tribunal Colegiado en Materia Penal del Primer Circuito [S.C.J.N] [T.C.C], Gaceta del Semanario Judicial de la Federación, Undécima Época, Libro 14, Tomo VII, June 2022, Tesis I.9o.P.54 P (11a.), page 6355 (Mex.) available at: https://sjf2.scjn.gob.mx/detalle/tesis/2024811

[10] Derecho a probar. Constituye una formalidad esencial del procedimiento integrante del derecho de audiencia. Primera Sala [S.C.J.N], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 58, Tomo I, September 2018, 1a. CXII/2018 (10a.), page 839 (Mex.) available at: https://sjf2.scjn.gob.mx/detalle/tesis/2017887. The right to present evidence is an essential aspect in the formality of the procedure, central to the right to a hearing, as recognized in the second paragraph of Article 14 of the Mexican Constitution. This definition has been provided by the Primera Sala de la Suprema Corte de Justicia de la Nación [First Chamber of the Supreme Court of Justice of the Nation], in Isolated Opinion e-Registration Number 2017887.

[11] Baruch F. Delgado Carbajal, María José Bernal Ballesteros, Catálogos para la Calificación de Violaciones de Derechos Humanos 127-167 (Comisión de Derechos Humanos del Estado de México 2016) available at: https://archivos.juridicas.unam.mx/www/bjv/libros/10/4974/20.pdf

[12] The right to truth, as defined in Court Opinion 1a. CCXIII/2017 (10th.), is understood as the right of victims or their family members to receive clarification from the competent State authorities regarding the events surrounding the violations and those accountable for said acts, by means of investigation and court judgment established in Articles 8 and 25 of the American Convention on Human Rights. Prueba genética en casos de desaparición. Resulta contrario al derecho a la verdad requerirla a la víctima indirecta como condición para acceder a la averiguación previa. Primera Sala [S.C.J.N], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 49, Tomo I, December 2017, 1a. CCXIII/2017 (10a.), page 440 (Mex.) available at: https://sjf2.scjn.gob.mx/detalle/tesis/2015755

[13] Robert Alexy, *Los Derechos Fundamentales en el Estado Constitucional*, in Estado Constitucional, Neoconstitucionalismo 31-48 (Trotta, 2003).

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18891

pranational[14] context. The first step toward ascertaining whether the evidence is illegal is to refer to what is contained in procedural or criminal procedure codes,[15] as they assert state that any evidence obtained by violating any fundamental right is deemed illegal.

It is also necessary to know and apply the proportionality test that constitutional courts and judges use when faced with conflicting rights or principles in given cases.[16] Therefore, the legal parties involved cannot disregard or fail to understand constitutional law and, much less, the methods used in its application, such as the aforementioned *test*,[17] whose sub-principles –necessity, suitability, and proportionality– serve as a roadmap for assessing the legality of *prima facie* evidence and complying with the standards required by judges.[18]

In this context, we will have to analyze whether the evidence presented does not go beyond the limits set in procedural codes.[19] For example, if evidence is

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[14] This is the case in the American Declaration of the Rights and Duties of Man (1948), the European Convention on Human Rights (1950), the Pact of San José (1969) which establishes the American Convention on Human Rights, as well as the various pacts, protocols, and conventions in which Mexico is party to and has signed. Principales Instrumentos Internacionales en Derechos Humanos [Main International Instruments on Human Rights], Comisión de Igualdad y Derechos Humanos del Tribunal Federal de Conciliación y Arbitraje (Mex.) available at: http://www.tfca.gob.mx/es/TFCA/piiDH

[15] Código Nacional de Procedimientos Penales [C.N.P.P] [National Code of Criminal Procedure], as amended, Diario Oficial de la Federación [D.O.], January 12, 2016. Title IV Test information, burden of proof and evidence, Article 264. Nullity of the evidence. Available at: https://www.oas.org/juridico/PDFs/mesicic5_mex_ane_15.pdf

[16] Primera etapa del test de proporcionalidad. Identificación de una finalidad constitucionalmente válida. Primera Sala [S.C.J.N], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 36, Tomo II, November 2016, 1a. CCLXV/2016 (10a.), page 902 (Mex.) available at: https://sjf2.scjn.gob.mx/detalle/tesis/2013143

Segunda etapa del test de proporcionalidad. Examen de idoneidad de la medida legislativa. Primera Sala [S.C.J.N], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 36, Tomo II, November 2016, 1a. CCLXVIII/2016 (10a.), page 911 (Mex.) available at: https://sjf2.scjn.gob.mx/detalle/tesis/2013152

Tercera etapa del test de proporcionalidad. Examen de la necesidad de la medida legislativa. Primera Sala [S.C.J.N], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 36, Tomo II, November 2016, 1a. CCLXX/2016 (10a.), page 914 (Mex.) available at: https://sjf2.scjn.gob.mx/detalle/tesis/2013154

Cuarta etapa del test de proporcionalidad. Examen de la proporcionalidad en sentido estricto de la medida legislativa. Primera Sala [S.C.J.N], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 36, Tomo II, November 2016, 1a. CCLXXII/2016 (10a.), page 984 (Mex.) available at: https://sjf2.scjn.gob.mx/detalle/tesis/2013136

[17] Joan Queralt Jiménez, *La Detención Preventiva: Previsiones Constitucionales y Legales*, in Constitución y Sistema Penal 245-ff (Marcial Pons 2012)

[18] We should not lose sight of the theory of probative "reasonableness," which, in the words of Jodi Ferrer, consists of the following three steps: 1) the establishment of the elements of evidence, 2) the assessment of the evidence, and 3) the decision-making process. Jordi ferrer beltrán, la valoración racional de la prueba 68-150 (Marcial Pons 2007).

[19] Prueba ilícita y prueba imperfecta. Sus diferencias. Primer Tribunal Colegiado en Materia Penal y Administrativa del Décimo Séptimo Circuito, Tribunales Colegiados de Circuito [T.C.C.], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 57, Tomo III,

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obtained through torture or if the defendant has not been read their rights;[20] if the corresponding mandatory judicial authorization for gathering certain types of evidence was secured [21] –as in the case of search warrants, court approval for wiretapping, or authorization to intercept correspondence–; the physical examination or recognition of a person when they refuse to be examined; or lifting bank secrecy.[22] If these precepts are violated, evidence may be considered illegal, as will be further discussed in the following section.

III. The Proportionality Test as a Control Parameter to Request Proof from the Pre-Trial Judge

Although it is generally thought that this method is only used in constitutional law, it should be noted that because of its empirical value, it is an extremely helpful tool for prosecutors or, as the case may be, defense lawyers and their

August 2018, XVII.1o.P.A.68 P (10a.), page 3019 (Méx.) available at: https://sjf2.scjn.gob.mx/detalle/tesis/2017765

[20] Prueba ilícita. La exclusión de la obtenida con violación a los derechos humanos del coinculpado del quejoso, no rompe con el principio de relatividad de las sentencias de amparo, siempre que de ella se adviertan imputaciones o datos incriminatorios tomados en cuenta para el dictado del fallo reclamado, en perjuicio del peticionario. Tribunal Colegiado en Materia Penal del Décimo Primer Circuito, Tribunales Colegiados de Circuito [T.C.C.], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 39, Tomo III, February 2017, XI.P. J/4 (10a.), page 1993 (Méx.) available at: https://sjf2.scjn.gob.mx/detalle/tesis/2013604

[21] Código Nacional de Procedimientos Penales [C.N.P.P] [National Code of Criminal Procedure], as amended, Diario Oficial de la Federación [D.O.F.], January 12, 2016. Article 252. Investigation activities that require prior authorization from a pre-trial judge.

[22] Secreto bancario. La solicitud de información bancaria –a través de la comisión nacional bancaria y de valores– realizada por el ministerio público para la investigación de los delitos, debe estar precedida de autorización judicial, de lo contrario, las pruebas obtenidas son ilegales y carentes de valor y, por tanto, deben excluirse del cuadro probatorio. Noveno Tribunal Colegiado en Materia Penal del Primer Circuito, Tribunales Colegiados de Circuito [T.C.C.], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 70, Tomo III, September 2019, I.9o.P.251 P (10a.), page 2255 (Méx.) available at: https://sjf2.scjn.gob.mx/detalle/tesis/2020649

Secreto bancario. El artículo 117, fracción II, de la ley de instituciones de crédito, en su texto anterior a la reforma publicada en el diario oficial de la federación el 10 de enero de 2014, viola el derecho a la vida privada. Primera Sala [S.C.J.N], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 55, Tomo II, June 2018, 1a. LXXI/2018 (10a.) page 977 (Mex.) available at: https://sjf2.scjn.gob.mx/detalle/tesis/2017190

Estados de cuenta bancarios proporcionados por la comisión nacional bancaria y de valores para comprobar el cumplimiento de obligaciones fiscales, exhibidos por la secretaría de hacienda y crédito público como fundamento de la querella por los delitos de defraudación fiscal y defraudación fiscal equiparada. Es innecesario que el ministerio público los someta a control judicial previo, tratándose del proceso penal mixto. Primera Sala [S.C.J.N], Gaceta del Semanario Judicial de la Federación, Undécima Época, Libro 13, Tomo III, May de 2022, 1a./J. 20/2022 (11a.), page 3370 (Mex.) available at: https://sjf2.scjn.gob.mx/detalle/tesis/2024653

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teams when initiating legal proceedings with the pre-trial judge. However, in this article, we focus on providing means to prove the crime of ML.

Prosecutors often complain that judges obstruct their investigations, but, at the same time, judges argue that many requests do not give well-founded arguments, some violate fundamental rights, and others do not clearly state the reasons for which the evidence or proof[23] is needed.

Hence, prosecutors must closely follow the three steps of the *proportionality test,*[24] which, in Robert Alexy's view, should guide them when requesting evidence. (In our country, the Supreme Court establishes four steps to this process to identify a constitutionally legitimate aim.[25]) *The first step* is to establish the *necessity* of the evidence, that it is relevant to the case under investigation and contributes to uncovering the truth of the facts. It must also be demonstrated that there are no other less invasive measures available and that it is necessary to protect the legal interest or fundamental right seeking to be protect. [26]

In summary, if the evidence has nothing to do with the facts under investigation, judges can evidently refuse authorization.[27] For example, it would be difficult to justify the need for wiretapping or computer data interception to investigate an act of corruption arising from complicity among government suppliers because it would affect the fundamental right to privacy and secrecy of communication. The only way would be to convince the judge that it is genuinely necessary to the case.

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[23] The use to be given to the evidence is a very important key, as it will direct the arguments regarding why the evidence is needed.

[24] Rubén Sánchez Gil, *Nuevos Apuntes Sobre el Principio de Proporcionalidad,* 1 Revista del Centro de Estudios Constitucionales. 157-164 (2015) available at: https://www.sitios.scjn.gob.mx/cec/sites/default/files/publication/documents/2020-06/09_S%C3%81NCHEZ_REVISTA%20CEC_01.pdf

[25] Primera etapa del test de proporcionalidad. Identificación de una finalidad constitucionalmente válida. Primera Sala [S.C.J.N], Gaceta del Semanario Judicial de la Federación, Décima Época, Libro 36, Tomo II, November 2016, 1a. CCLXV/2016 (10a.), page 902 (Mex.) available at: https://sjf2.scjn.gob.mx/detalle/tesis/2013143.

[26] Article 42 of the Federal Law for the Prevention and Identification of Operations with Resources of Unlawful Origin stipulates that notifications submitted to the Financial Intelligence Unit do not, in themselves, possess full probative value. Consequently, the Public Prosecutor's Office must bear out its investigation with evidence that establishes the act or transaction referred to in the notification. Ley Federal para la Prevención e Identificación de Operaciones con Recursos de Procedencia Ilícita, [L.F.P.I.O.R.P.I.] [Federal Law for the Prevention and Identification of Operations with Resources of Unlawful Origin], as amended, Diario Oficial de la Federacion [D.O.], October 17, 2012 (Mex.) available at: https://www.cnbv.gob.mx/Normatividad/Ley%20Federal%20para%20la%20Prevenci%C3%B3n%20e%20Identificaci%C3%B3n%20de%20Operaciones%20con%20Recursos%20de%20Procedencia%20Il%C3%ADcita.pdf

Angélica Ortiz Dorantes, El Delito de Lavado de Dinero (Porrúa 2018).

[27] Antilavado de activos y contra el financiamiento del terrorismo para jueces y fiscales [Anti-Money Laundering and Against the Financing of Terrorism for Judges and Prosecutors], F.A.T.F. June 2018 (Mex.) available at: https://www.gafilat.org/index.php/es/biblioteca-virtual/gafi/2919-gafilat-18-i-plen-inf-02-ala-cft-para-jueces-y-fiscales/file

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This is also because public authorities have access to public and private information, *prima facie*, to prove this crime without resorting to the aforementioned measures. For example, accessing company records of bank transactions or checks issued that might prove this relationship would be less invasive and more effective.

In this particular case, the prosecutor in charge would have to weigh and justify the need for intercepting communication, as will be pointed out later. Cases of terrorism or those that might seriously affect the public interest, for instance, clearly demonstrate this aspect of a request.

Prosecutors must justify their reasons for investigating and requesting information from other individuals, by means of well-founded arguments supporting the need for such measures in the process and their relevance to the central investigation.[28] Therefore, in order to obtain the proper authorization to gain access to certain evidence, prosecutors must defend their need for bank statements from the accused and their spouse, for instance, to prove that the money in question comes from shell companies or accounts linked to previously convicted criminals in other proceedings. Hence, as –allegedly– funds of illicit origin, they are therefore subject to investigation.

Second, prosecutors have to demonstrate that the evidence requested is *suitable* for proving a crime, by focusing on whom they want to investigate and what they want to obtain from the evidence, as well as the impact achieved by the measure. This is important because if they formulate their request in general terms, it will most probably be rejected, regardless of what they might have hoped to obtain.

They also have to name the specific crime under investigation, whether to prove or prevent, such as terrorism, organized crime, kidnappings, and high-level corruption, among others. In other words, the State apparatus may be obliged to infringe upon rights like the right to privacy and secrecy of communications in the face of such necessary and suitable exceptions, if they want to demonstrate to the judge beyond a doubt exactly what they want to protect – life, freedom, public security, or national security, for example.

By the same token, prosecutors must justify the need to limit a fundamental right by arguing the suitability of the measure requested. In other words, they must bear out that this is the most appropriate measure to prove the charges being presented, emphasize the magnitude of the offense, and establish that the measure ensures foreseeable success in ensuring the prosecution of the crime. Additionally, the proportionality test means considering the possibility of alternative means of investigation and thus strengthening the case. However, they must convincingly demonstrate why this alternative is the most viable one of all.

[28] By rationality we mean the quantitative and qualitative data used to justify the request for a measure before a judge. For example, this includes discrepancies in tax cases or cases of political corruption. Tomás Fernández, De la Arbitrariedad de la Administración 200-ff (Thomson, 2008) (1994).

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The suitability of evidence[29] means that this type of evidence is the best one to help establish a specific fact. Furthermore, if a fundamental right needs to be infringed, said infringement must be legally authorized and done in such a way as to avoid affecting the basic core of human rights. Obtaining such evidence takes precedence over other potential evidence that may not better serve the goal of proving ML.

Finally, the *third step* is when the prosecutor and their team need to argue the *proportionality* of the measure requested; it must be reasonable considering the intended purposes. Specifically, authorization should not be disproportionately invasive compared to the facts under investigation and what needs to be proven or the legal interest to be protected.

In other words, prosecutors must weigh and demonstrate to the judge the need to limit one right in favor of optimizing or fulfilling another constitutionally valid interest. This may include not distorting the economical market and thus free competition, or safeguarding public assets in cases of high-level corruption.

For instance, requesting a search warrant to investigate money laundering offenses may be disproportionate because this information is typically found in public databases or closed sources in the hands of the National Banking and Securities Commission or the Financial Intelligence Unit. Asking for information from the latter would be more proportional than asking for a search warrant, in terms of its degree of suitability and not having to infringe the rights of domicile and personal privacy. It must be noted that the underlying logic is to optimize rights, i.e., to extend the scope of each right as far as possible up against another conflicting right while balancing both the pursued interest and the protected interest.

This is not to say that such a measure cannot be requested; it simply means that more suitable and proportionate measures to prove the crime must be exhausted before. If a search warrant is required, prosecutors need to demonstrate that the measure to obtain key evidence that may have an impact on the theory of the case aligns with the principles of the test of proportionality.[30]

Furthermore, prosecutors must explain their reasoning to the pre-trial judge, elaborating on how these measures contribute to obtaining and successfully re-

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[29] José Daniel Hidalgo Murillo, *Del Dato de Prueba en el Proceso Acusatorio Mexicano*, in Dato de prueba en el proceso acusatorio y oral 3-24 (Universidad Nacional Autónoma de México, 2016) available at: http://ru.juridicas.unam.mx/xmlui/handle/123456789/12295

[30] In the oral criminal system, "case theory" is defined as the argument formulated by the defense and the prosecution to demonstrate the version of the events analyzed in the criminal proceedings. Case theory, according to Dissenting Opinion 101/2015, must be framed under the following principles: a. factual b. the subsumption or not of the facts within a typified crime and c. the means of conviction that prove the factual propositions. Teoría del caso en los juicios orales de corte acusatorio. Determinar si la defensa del inculpado está obligada a formularla previamente al inicio de éstos. Primera Sala [S.C.J.N], File 101/2015, September 2019, (Mex.) available at: https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=179347

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solving the specific case. In other words, during the oral trial, they must prove the crime of money laundering, which in many cases involves organized crime or terrorism financing.

Prosecutors need to show that the information from these individuals is indispensable to their investigation. Additionally, they must limit their request to fit within the framework of the ongoing investigation. In other words, prosecutors must document which pieces of evidence they specifically seek so that the evidence, in addition to being necessary and suitable, is also *proportional*.

For example, this means citing the individuals and telephone numbers to be intercepted, specifying the timing and purpose of these interceptions, as well as the constitutional or legal objective, human right, or legal interest to be protected. More importantly, the legal team must demonstrate the proportionality of each measure and, above all, use the intended goal as a reference point, which may include identifying key financial, patrimonial, and economic networks, as well as proving the level of organization and number of individuals involved, in addition to recurring instances of ML and ML operational patterns.

In summary, evidence must pass the *proportionality test* in terms of the potential impact or infringement of a fundamental right. In such cases, the best option to prove an offense is usually to resort to the least invasive measure on a fundamental right and optimizing each one effectively.[31]

Before proceeding, the meaning of the *hardcore* regarding fundamental rights refers to those inseparable elements of a right that make it recognizable as such.[32] Laws cannot affect the hardcore or essential content of a fundamental right.[33] For instance, the right to defense cannot be recognized with limited le-

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[31] Código Nacional de Procedimientos Penales [C.N.P.P] [National Code of Criminal Procedure], as amended, Diario Oficial de la Federación [D.O.], January 12, 2016. Title IV Of evidence information, means of evidence and evidence, Articles 263,264, 265, 266. Nullity of evidence, evidentiary legality, Assessment of information and evidence, Acts of Nuisance. Available at: https://www.oas.org/juridico/PDFs/mesicic5_mex_ane_15.pdf

[32] The First Chamber of the Supreme Court of Justice of the Nation, in Court Opinion 1a. CXXII/2012 (10th.), mentions among the fundamental rights the right to life, nationality, the right to identity, freedom of thought and conscience, the right to health, the right to education, as well as the guarantees of criminal and procedural law. Dignidad Humana, Derecho a la Vida y Derecho a la Integridad Personal [Human Dignity, Right to Life and Right to Personal Integrity] Corte Suprema de Justicia de la Nación [C.S,J.N.] Tesis 1a. CXXII/2012 (10a.). July 2013 (Mex) available at: https://sistemabibliotecario.scjn.gob.mx/sisbib/CST_2014/000260741/000260741.pdf

Likewise, in matters of the right to due process, the Supreme Court, in Court Opinion 1a./J. 11/2014 (10th.), establishes the core guarantees of due process, such as the right to a lawyer, the right not to self-incriminate oneself, and the right to know the charges against one. Additionally, it includes the right to equality before the law, the right to notification and consular assistance, the right to have a translator or interpreter, and the right of children to have their detention notified to their parents or legal guardians. Derecho al debido proceso. Su contenido. Primera Sala [S.C,J.N], Semanario Judicial de la Federación. February 28, 2014, Tesis 1a./J. 11/2014 (10a.) (Méx.) available at: https://sjfsemanal.scjn.gob.mx/detalle/tesis/2005716

[33] Ronald Dworkin, Los derechos en serio 276-303 (Ariel 2014) (1977).

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gal assistance during a trial or without the offer of free public defense. Similarly, one cannot grasp the idea of personal liberty if pre-trial detention (in Mexico "*arraigo*")[34] is mandated or if an individual is placed under house arrest, as it would not just restrict freedom of movement but directly have an impact on the core principle of liberty. Although it may be justified as not being imprisonment, it still affects an individual's freedom.

In this context, criminal procedure codes often explicitly state that when evidence related to individuals' private lives (such as wiretaps, correspondence, emails, or messages), assets (bank accounts, investments, insurance, savings, loans), health reports (medical records, blood or urine tests), administration (accounting, tax payments, partial and annual tax declarations, deductions, income, expenses, deposits either received or sent, international transactions), inviolability of their domicile (search warrants), or their location (georeferencing to determine a person's location) is required, it must be considered, assessed, and authorized by the pre-trial judge.[35]

This fundamental point should guide prosecutors, but it also applies to those in charge of developing evidence-based strategies for proving crimes –namely, experts and financial or asset intelligence units included in the prosecution team. These units collaborate with the finance or treasury departments of other countries and other units connected to central banks.[36]

In conclusion, it must be borne in mind that the assessment parameter for authorizing these measures should be the relevance of the evidence and the proportionality of the measure compared to the offense in question. In other words, the proportionality of the measure is linked to the intended purpose

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[34] Pre-trial detention, in Mexico "arraigo" is a precautionary measure to prevent a person from leaving a given place. This measure must be issued by a judicial authority upon request of the Office of the Public Prosecutor when serious crimes are involved. Article 133 bis of the Código Penal Federal [C.P.F.][Federal Criminal Code] as amended, Diario Oficial de la Federación[D.O.], July 8, 2023 (Mex.) available at: http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Codigo_Penal_Federal.pdf

Alfredo Gutiérrez Ortíz Mena, *The debate about "arraigo" in the Mexican Supreme Court: Judicial review of the constitution*, in Revista del Centro de Estudios Constitucionales (3) (2016) available at: https://www.sitios.scjn.gob.mx/cec/sites/default/files/publication/documents/2019-03/12_GUTI%C3%89RREZ_REVISTA%20CEC_03.pdf

[35] Cateo en materia civil. Tribunales Colegiados de Circuito [T.C.C], Gaceta del Semanario Judicial de la Federación. November 2019, Tesis XII.C.23 C (10a.) (Mex.) available at: https://sjf2.scjn.gob.mx/detalle/tesis/2021094

[36] The Egmont Group and the International Monetary Fund identify four models of Financial Intelligence Units, which directly depend on the specific jurisdiction of each unit: judicial, administrative, police, or hybrid units. International monetary fund, Unidades de inteligencia financiera. panorama general 2004. Available at: https://www.imf.org/external/pubs/ft/fiu/esl/fius.pdf

Egmont Group, *Financial Intelligence Units*, Egmont Group (March. 12, 2023) available at: https://egmontgroup.org/about/financial-intelligence-units/#:~:text=There%20are%20four%20FIU%20models,the%20judicial%20branch%20of%20government

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and the correlation that must exist between its duration, extent, depth, and outcome.[37]

Furthermore, it should specify the crimes under investigation, requiring well focused inquiries found in such evidence. Failing to do so could lead to evidence that is disproportionate and violates the right to due process.

Finally, before delving into an examination of some of the evidence used to prove this particular crime, it is necessary to recall the guidelines judges follow in performing a balancing test, which can serve as a tool to point the way for prosecutors or defense attorneys in their investigative and defense strategies.

IV. Some of the Principal Pieces of Evidence Used to Prove Money Laundering in a Trial

In view of the focus of this article, we will examine how ML is typified in the Mexican context.

In Mexico, according to the Código Penal Federal (Federal Penal Code, hereinafter FPC),[38] the offense of money laundering is committed by whoever acquires, disposes of, manages, safeguards, possesses, exchanges, deposits, withdraws, gives as collateral, invests, transports or transfers within national territory, from national territory abroad or vice versa, resources, rights, or assets of any kind in the knowledge that said resources are or represent proceeds from an unlawful activity or seeks to conceal the nature, origin, location, destination, or ownership of said resources, rights or assets (Art. 400 bis FPC).[39]

A mechanism to prevent assets from being acquired with illicit proceeds is set forth in Article 22 of the Constitution:

> The asset forfeiture process shall be carried out by the Office of the Public Prosecutor by means of jurisdictional civil proceedings independent of the criminal proceedings. The competent authorities from the various levels of government shall assist in fulfilling this task. The law shall establish mechanisms for authorities to administrate the assets subject to asset forfeiture, including their proceeds, yields, revenues, and related charges so that the authorities can carry out the disposal, use,

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[37] Alberto Montón Redondo cited by Eduardo De Urbano Castrillo Et Al., La prueba ilícita penal 347 (2012)

[38] In Mexico, there is a Federal Penal Code, and each state has its own local code. Therefore, the characteristics of a criminal offense may vary from state to state or may even not exist in some states.

[39] Código Penal Federal [C.P.F.][Federal Criminal Code] as amended, Diario Oficial de la Federación [D.O.], July 8, 2023 (Mex.) available at: http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Codigo_Penal_Federal.pdf

A sentence of five to fifteen years in prison and a fine of one thousand to five thousand days shall be imposed on whoever, by themselves or through another person, violates Article 400 bis of the Código Penal Federal [Federal Penal Code].

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> usufruct, transfer, and monetization, in the service of public interest, and define, in a timely manner, the destination and, where appropriate, the destruction thereof.
>
> It shall apply to assets whose legitimate origin cannot be proven and which are related to investigations stemming from corruption, concealment, crimes committed by public officials, organized crime, vehicle theft, proceeds of unlawful activities, crimes against public health, kidnapping, extortion, human trafficking, and offenses related to hydrocarbons, petroleum, and petrochemicals.

It should be noted that in Mexico one of the basic conditions to be proven in ML-related offenses is the illegal origin of the money, which may stem from a predicate offense like drug trafficking, human trafficking, fraud, or even tax evasion.[40]

A predicate offense is one that generates illicit funds, while the use of that money is what constitutes the offense being analyzed herein. These are two independent offenses, and a conviction for the first is not required to initiate proceedings for the second. Starting judicial proceedings, such as the link to the trial in the first case, is sufficient for the second to be investigated separately or independently.

The Constitution broadens the range of offenses subject to asset forfeiture. In such cases, evidence is crucial for a *sui generis* civil trial to rule on stripping ownership of assets acquired with illicit resources stemming from the crimes enumerated in Article 22 of the Constitution.

Hence, the prosecutor's first challenge is to prove that the money comes from a crime, making it unlawful in itself or impossible to confirm its legitimate origin. For example, in the case of cash seized during a search or vehicle inspection, it must be demonstrated that the person does not have the means to earn such an amount of money, and therefore, it belongs to someone else.

In a situation like this, the prosecutor may request, with authorization from the pre-trial judge, financial information from the National Banking and Securities Commission to determine if the person has bank accounts and can account for their income and expenditures.

If the person has bank accounts, their income should be substantiated by electronically issued (and paid) invoices or deposits. If there are invoices, their annual and monthly tax declarations must be checked to see if there is any tax evasion or fraud.[41]

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[40] Drug trafficking and the illegal drug trade are presented as the main predicate offenses to money laundering. 1ra Evaluación Nacional de Riesgos de lavado de dinero y financiamiento al terrorismo en México [1st National Risk Assessment of Money Laundering and Terrorist Financing in Mexico], Secretaría de Hacienda y Crédito Público[S.H.C.P], October 2016 (Mex.) available at: https://www.pld.hacienda.gob.mx/work/models/PLD/documentos/enr.pdf

[41] Tax evasion consists of any activity in which a tax directed to the Tax Administration Service is wholly or partially evaded for personal benefit. On the other hand, tax fraud is a form of financial harm where taxes are partially or wholly omitted in reporting to the authorities, taking advantage of errors or using deceptive maneuvers and involving an element of fraud. Bruno

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Additionally, it must be confirmed whether the individual or the company they may be associated with has employees and the necessary infrastructure to provide the service invoiced and paid for. In corruption-related offenses, companies are frequently used as fronts and in no way can provide the declared service as there are no employees enrolled in social security; none of the infrastructure, furnishings, or intellectual capital required to deliver goods and services. For example, a company specializing in information technology tools needs to have partners or employees with the professional skills to provide that service.[42]

Furthermore, in some cases, digital tax seals issued for individuals or legal entities may show significant irregularities, such as having been canceled and reactivated in situations related to issuing and paying invoices. In summary, demonstrating that a person does not have the transactional profile to have or handle such an amount is essential. The first phase would consist of checking whether the person may be committing a tax offense or misdemeanor in the absence of clear connection to any other offense.

If the person under investigation does not meet any of these requirements, an inquiry must be made into the individual's profession to determine if they possessed the knowledge that would enable them to exercise due diligence beforehand. A person with academic or empirical training has a higher likelihood of knowing they were engaging in an illegal activity,[43] a fact that becomes crucial to the case.

For example, if the person carrying the money is an accountant, a lawyer, or an economist, it will naturally lead to the assumption that they possess sufficient knowledge to understand that it was suspect to simply transport significant amounts of cash without legal justification or proper accounting records. Withdrawing money from a bank with a check that validates the cash outflow, or the cash payment would have been enough to justify the action. While handling cash may be common in livestock or agricultural businesses, they still need to establish their active engagement in such activities.

Cattle ranchers, for instance, are required to maintain records of the health tags on the animals in order to be able to transport or slaughter them. Additionally, all sales of livestock and other agricultural products must have invoic-

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Ariel Rezzoagli, *Ilícitos tributarios. Diferenciación entre evasión, defraudación y elusión fiscal*, in Revista Jurídica Amicus Curiae Segunda Época 2(2) (2009) available at: https://www.revistas.unam.mx/index.php/amicus/article/view/13543

[42] Software or computer tools have been widely used to generate cost overruns in government procurements.

[43] It is important not to confuse the principle of due diligence in evidence with due diligence in individuals. Due diligence indicates the need for not only individuals, but also financial institutions, to perform this process. On the other hand, the principles that should guide due diligence done by the State are: officiality, timeliness, competence and independence, exhaustiveness, participation of victims and their families. CFATF-GAFIC, *Recomendación 10. Debida Diligencia del Cliente* (March 01, 2023) available at: https://www.cfatf-gafic.org/index.php/es/documentos/gafi40-recomendaciones/416-fatf-recomendacion-10-debida-diligencia-del-cliente

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es.[44] However, the problem lies with the informal economy, where substantial sums of money are involved, making it one of the country's major challenges in combating ML.[45]

If a person fails to give proof of their profession or of a legitimate occupation that could generate these resources, is not registered with the Ministry of Finance, does not have a bank account or does not file annual tax returns, ML or, at least, a tax-related offense, is a real possibility.

One common pattern of behavior in cases involving shell companies or so-called "invoices" is observed when one of their members is arrested, or the cash they were to deliver to the person who bought the invoice is stolen. If a common thief or organized crime is involved in one such incident, no criminal complaint is usually filed as they cannot prove the legitimacy of the origin of the stolen money, in addition to the potential consequences of the authorities giving it a closer inspection.

People transporting the money are typically the lowest link in the ML chain. Hence, offering them a plea bargain is often a strategic move to reach higher-level structures.[46] As previously mentioned, this is a little-utilized tool in hunting down the higher-level structures of a criminal organization[47] in Mexico.

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[44] In order to track individual cattle, sheep, and goats in the country, the Ministry of Agriculture and Rural Development, together with the National Certification and Livestock Services Agency (ONCESEGA), runs the National Individual Livestock Identification System (SINIIGA). This system helps to monitor the health of the country's herds, access sector assistance programs, and maintain an updated inventory of livestock and livestock production units in the country. It is also a reliable system to identify producers, as well as to track cattle purchases and sales transactions, property locations, tenure types, and the selfsame livestock in the event of a zoo-sanitary contingency. Sistema Nacional de Identificación Individual de Ganado SINIIGA, *Identificación Individual de Ganado* (March 01, 2023) available at: https://www.siniiga.org.mx/identifica.html.

Pedro Rubén Torres Estrada, Sylvia Camila García Mariño, Juan Pablo Martín del Campo, *Análisis de Política Pública Estatal. Riesgos de Lavado de Dinero para los Estados Mexicanos*, in Políticas Públicas para la Prevención de Lavado de Dinero 80-133 (Tirant lo Blanch, 2022).

[45] The informal economy allows the flow of a large number of cash transactions without any oversight, control, or tax payments, thus becoming an illegal activity that evades financial system controls and anti-money laundering efforts. William Vleck, *Global Financial Governance and the Informal: Limits to the Regulation of Money*, 69(249-264) in Crime, law and social change (2017) available at: *https://link.springer.com/article/10.1007/s10611-017-9754-7*

The 2020 National Risk Assessment identifies the informal economy as a protective barrier for money laundering that allows resources of illicit origin to be concealed. Evaluación Nacional de Riesgos 2020 [National Risk Assessment 2020], Secretaría de Hacienda y Crédito Público [S.H.C.P], September 2020 (Mex.) available at: https://www.pld.hacienda.gob.mx/work/models/PLD/documentos/enr2020.pdf

[46] In October 2021, a request was filed at the National Institute for Transparency, Access to Information, and Personal Data Protection for information regarding the number of plea bargains for the crime of Illicit Origin of Resources had been made from 2017 to 2021. The Transparency and Government Openness Unit of the Office of the Attorney General reported that during that period, a total of five criteria for plea bargaining had been presented. Oficio No FGR/UTAG/DG/005337/2021. Folio 0001700252221

[47] Maydelí Gallando Rosado, El nuevo rostro de la justicia penal en México: Principio de oportunidad 23 - ff (Porrúa 2011).

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18891

Moreover, the higher-level echelons are usually better protected, so it is a good approach to explore alternatives to get closer to their operations. This point is particularly important for entrepreneurs who become partners in crime with perpetrators of illegal activities with the greatest impact on society, such as human trafficking.

Another challenge is to identify the predicate offense of the activity. At the very least, the prosecution will get an opportunity to seize this money and declare it abandoned, and thus see if anyone comes forward to prove its legitimate origin. If no one shows up, it becomes part of the national or state treasury after a hearing before the pre-trial judge.

The above describes how ML cases are typically initiated in Mexico. It can therefore be said that, according to the data, a significant amount of the money seized by the police is caught *in flagrante*.[48] However, not all ML cases originate in this way. Some are the result of investigations into predicate offenses like organized crime, fuel theft, drug trafficking, corruption, human trafficking, arms trafficking, undocumented immigration, and organ trafficking, among others.

For example, the National Asset Forfeiture Law requires prosecutors to notify the Asset Forfeiture Unit when they suspect potential ML. Most cases of ML are discovered by prosecutors through a predicate offense. For instance, investigations into fuel theft inevitably entail an economic component, as is the case with most offenses.

The important and interesting aspect is how a prosecutor or investigator can discover a money laundering offense based on evidence from the predicate offense or vice versa by identifying the predicate offense based on the money trail. The latter has been a weakness in public policies and criminal prosecution strategies, both at government and prosecution office levels.

As previously stated, in the past five years, only 0.26% of federal sentences correspond to money laundering, which amounts to 654 sentences in federal courts out of the 245,502 sentences nationwide for other offenses.[49] This leads to the conclusion that there is a lack of decisiveness and effectiveness in punishing the offense in itself, as most penalties pertain to the predicate offense, thus failing to undermine criminal economic structures.[50]

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[48] *In flagrante* is defined as an event in which the person is arrested at the time of or immediately after committing a crime.

Código Nacional de Procedimientos Penales [C.N.P.P] [National Code of Criminal Procedures], as amended, Diario Oficial de la Federación [D.O.], 12 de January 2016. Section II. *In flagrante* and urgent cases, Article 146. *In flagrante*.

[49] In response to a request for information, it was found that a total of 654 convictions were obtained for Money Laundering in courts and tribunals between 2016 and 2021. Official Information Request UT/STSAI/2399/2021-0320000209321- GR contained information obtained from Official Document CJF/CAP/DGGJ/STG/1650/2021, and the numbers used were taken from the National Census of State Justice Administration of the INEGI 2021.

[50] Pedro Rubén Torres Estrada, *Estado Actual del Castigo Judicial del Delito de Operaciones con Recursos de Procedencia Ilícita ORPI en México,* in Políticas Públicas para la Prevención de Lavado de Dinero 16-48 (Tirant lo Blanch, 2022).

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However, for the purposes of this article, it is essential not to lose sight of what happens after a prosecutor receives a criminal report of a potential money laundering offense. The question is, "What to do?" It should also be clear that evidence must be evaluated freely and logically.[51] Therefore, innovation and the use of other disciplines will be beneficial within this paradigm.

The first step is to take apart the individual, group of individuals or companies involved in the money laundering process. It should be noted that anyone who disposes of, acquires, manages, possesses, changes, converts, or deposits can be held liable for ML, in addition to the transportation of money.[52]

Therefore, prosecutors must examine the familial, patrimonial, commercial, and social networks of the person who committed the predicate offense. In this context, civil registry data are crucial for identifying immediate family members, such as spouses, children, parents, grandparents, siblings, aunts, uncles, cousins, or any other relatives that may be allegedly involved in illegal money exchanges.

With just a person's name and date of birth, a Federal Taxpayer Registry (RFC for its initials in Spanish) or a Unique Population Registry Code (CURP for its initials in Spanish)[53] can be procured to cross-reference and verify the information with other databases with details about the number and characteristics of properties owned by the suspect or their potential associates.

In the case of this type of evidence, prosecutors must ensure that certificates and records are certified by a registrar or another authorized public entity. The evidence should include accounting reports; economic, financial, and equity network data; tax returns; main clients and suppliers; asset statements; bank account information; and national and international transfers.[54]

Once the family network has been established, prosecutors cannot disregard the business network side, namely, the companies in which the suspect holds shares or interests. For this, it is essential to check the public registry of com-

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[51] Leopoldo Burruel Huerta, Principios Constitucionales, Principio de libre y Lógica Valoración de la Prueba 80 (Porrúa 2013).

[52] A sentence of five to fifteen years in prison and a fine of one thousand to five thousand days will be imposed on whoever, by themselves or through another person, violates Article 400 bis of the Código Penal Federal [Federal Penal Code].

[53] The CURP, or Unique Population Registry Code, is a unique identity number issued by the Ministry of the Interior to officially identify Mexican citizens and residents. This code consists of 18 digits, which correspond to the first letter of the paternal surname, the first vowel of the paternal surname, the first letter of the maternal surname, the first letter of the first name, the person's date of birth without spaces (year, month, day), two letters corresponding to the state of birth, the first internal consonant of the paternal surname, the first consonant of the maternal surname, the first consonant of the first name, a digit between 0 and 9, and a verification digit to ensure document integrity. Available at: https://consulmex.sre.gob.mx/sanantonio/index.php/documentos-de-identidad/curp

[54] Pedro Rubén Torres Estrada, *Estado Actual del Castigo Judicial del Delito de Operaciones con Recursos de Procedencia Ilícita ORPI en México,* in Políticas Públicas para la Prevención de Lavado de Dinero 16-48 (Tirant lo Blanch, 2022).

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18891

merce to find out if the individual is a legal representative and to examine all transactions conducted by these companies, such as increases and decreases in capital and any changes in business partner or legal representatives.[55]

This information can also help identify possible collaborators who might be interested in cooperating if they act as accomplices or need to regularize their tax or administrative situation. In the latter case, it is possible to find notaries, public brokers, customs agents, or the like, even if they are not directly involved in the crimes.[56]

This makes it possible to identify with whom the person has formal business relationships. Furthermore, this evidence is irrefutable proof since these records are found in public registers and notarial records, where it is assumed that the signatures, biometric records, and identity documents were verified to set up the companies.[57]

This category of crimes, in terms of the evidence required, may be easier to substantiate and have a higher success rate in court than, for example, proving intent, which involves a certain degree of subjectivity, or recidivism. This is because notarial, commercial, patrimonial, and financial records are factual; they either exist or do not exist, and economic or patrimonial activities typically leave traces, which provide a judge with a higher degree of certainty when issuing a guilty verdict.

In addition to the family network, prosecutors can inform the judge of the commercial network. Knowing the history of a person's business behavior can provide insights into stages of capital growth or decline and political affiliations to generate timelines. It can also help identify criminals and even politically exposed individuals who may have had connections with these companies when investigating corruption or influence trafficking cases. The social network cannot be overlooked either, as it can provide information on the person's lifestyle, relationships, and consumption patterns, including those of their family, partners, and friends.

Access to information from the Financial Intelligence Unit is also of great value. The reports issued by banks, SOFOMEs,[58] savings and loan institutions, and all members of the financial system contain information on deposits, ac-

[55] Mexico has the Public Registry of Commerce SIGER 2.0 tool. Available at: https://rpc.economia.gob.mx/siger2/xhtml/login/login.xhtml; and Colombia uses the Single Business Registry RUES available at: https://www.rues.org.co/

[56] These officials hold licenses granted by the State, which may be taken away in case of any irregularities.

[57] It is increasingly common for notaries to verify the identity of individuals through fingerprint verification, cross-referencing this information with the National Electoral Institute's database to ensure that the person matches the identification and thus prevent identity theft.

[58] SOFOMES, also known as Multiple Purpose Financial Societies, are defined by the National Banking and Securities Commission as anonymous companies whose objective is to provide loans, leases, or financial factoring. Available at: https://www.cnbv.gob.mx/SECTORES-SUPERVISADOS/OTROS-SUPERVISADOS/Descripci%C3%B3n-del-Sector/Paginas/SOFOMES-Reguladas.aspx

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18891

count holders, and individuals authorized to use these accounts, as well as links to politically exposed persons.[59]

It is also possible to identify if the accused has loans, savings, cash deposits, expenses on credit or service cards, and cryptocurrencies, as well as to track national and international transactions, whether these come from tax havens, and the end use of the money.

Evidently, information from tax authorities regarding income and expenses declarations, suppliers, clients, tax payments, billing movements, and whether their tax seals are active or have been canceled for any reason is pivotal. Institutions like the Mexican Social Security Institute can provide data on whether the individual or their company has employees, and if so, how many, their positions in the company, and their base salary for social security contributions.

When a public servant is involved in ML, the public sector has the means to identify whether the person in question has been sanctioned, the types of penalties imposed, their asset declarations at the beginning and at the end of their term, their current salary, conflicts of interest, changes in assets, their positions, and who their direct and indirect supervisors have been. Finally, it is crucial to verify whether the official is a politically exposed person. As mentioned earlier, tax information is decisive, especially in discovering potential discrepancies between income and expenses.

V. Conclusions

For prosecutors, it is imperative to trace the evidence based on the data provided, while ensuring that it is not tainted by illegal actions. In other words, obtaining evidence through legitimate channels, as is the case in the examples discussed herein, requires the authorization of a pre-trial judge. In addition, when prosecutors request the aforementioned evidence, they must also justify their reasons, as discussed above, as any evidence requested from the pre-trial judge must pass the *proportionality test*.

The path we have analyzed in this article is the mainstay of the evidence that can be obtained to prove the unlawful use and origins of money and the factors that ultimately define this crime. Money laundering prepares the groundwork for building up and sustaining the criminal networks involved in offenses that

[59] A Politically Exposed Person (PEP) is someone who holds one of the following positions: a government position in legislative, executive, diplomatic, judicial bodies, or in public enterprises; a position in international financial organizations, armed forces, or international sports committees; close family members of PEPs such as parents, children, spouse, partner, siblings, aunts, or uncles. https://risk.lexisnexis.com/global/es/insights-resources/article/what-is-a-politically-exposed-person. This information can be consulted on the National List of Politically Exposed Persons issued by the Secretaría de Hacienda y Crédito Público [Ministry of Finance and Public Credit] Available at: https://www.gob.mx/cnbv/documentos/personas-politicamente-expuestas-nacionales

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have a strong impact on the population and, in the long run, weaken the rule of law and public institutions.

As seen, successful ML convictions are still a challenge for authorities, as the number of actual convictions is still relatively low compared to the overall number of criminal convictions.

It is also important to note that prosecuting this crime is not solely a matter for legal experts; rather, it requires multidisciplinary teams that are responsible not only for contributing to the case theory but, above all, for producing intelligence products that serve as evidence to prove the commission of this offense beyond a reasonable doubt. Multidisciplinary collaboration among accountants, economists, lawyers, and asset analysts, among others, is the key to changing the way we address this phenomenon.

In this way, teamwork is essential to ensure that investigative and financial intelligence units do not taint evidence by obtaining it illegally or accessing the accused's information without authorization from a pre-trial judge. Therefore, the prosecutors should continually monitor the process.

Additionally, the intelligence products arising from information analysis units, which include accounting reports, tax discrepancies, networks of financial connections, and specific evidence like bank transfers, form the basis of the prosecution's case and must have a logical and rational basis within the case theory.

To achieve this, the importance of the balancing test is critical when considering what evidence requires the authorization of a pre-trial judge for its arrest. It is essential to justify the request in light of the legal reasoning presented to reach the ultimate goal, which is undoubtedly to protect human rights and safeguard constitutional legal interests to the extent possible.

These interests can range from preventing terrorism financing, maintaining a balanced market, targeting criminal instruments to debilitate criminal organizations, bribing authorities, or preventing illicit funds from being funneled into political campaigns. This directly weakens the institutional structures of the State and, in many cases, challenges the constitutional rule of law, posing a threat to the State and affecting the social and political stability of the country.

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Cybercrime and the Law: Addressing the Challenges of Digital Forensics in Criminal Investigations

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Abstract: A lack of standards and regulations for handling digital evidence is impeding its admissibility in court proceedings. This article addresses the challenges of digital forensics in criminal investigations due to the rise of cybercrime. The literature existing studies on digital forensics, legal frameworks, and cybercrime is reviewed in order to find possible solutions. The results demonstrate the importance of collaboration between the legal and technological sectors in developing standardized norms and processes for digital evidence collection and processing. The findings also highlight the importance of digital forensics in criminal investigations and the need for a robust legal framework to combat cybercrime effectively. This note emphasizes the vital significance of digital forensics in criminal investigations and the need to develop standardized rules and procedures for the management of digital evidence. The recommendations presented in this article may assist policymakers and law enforcement authorities in designing legal framework capable of effectively confronting cybercrime.
Keywords: Cybercrime, Digital Forensics, Criminal Investigations, Evidence Handling, Legal Frameworks, Standardization.

Resumen: La falta de estándares y regulaciones para el manejo de evidencia digital está obstaculizando su admisión en los tribunales. Este artículo aborda los desafíos de la informática forense en las investigaciones criminales debido al aumento de la ciberdelincuencia. El estudio realizó una revisión de literatura de estudios existentes sobre informática forense, marcos legales y ciberdelincuencia para encontrar posibles alternativas. Los hallazgos demostraron la importancia de la colaboración entre los sectores legales y tecnológicos en el desarrollo de normas y procesos estándares para la recolección y procesamiento de evidencia digital. Las implicaciones resaltan la importancia de la informática forense en las investigaciones criminales y la necesidad de un marco legal sólido para abordar la ciberdelincuencia de manera efectiva. El documento subraya el vital significado de la informática forense en las investigacio-

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nes criminales y la necesidad de desarrollar reglas y procedimientos estándares para gestionar la evidencia digital. Estas recomendaciones pueden ser utilizadas por los legisladores y las autoridades policiales para establecer un marco legal efectivo.
Palabras clave: ciberdelincuencia, informática forense, investigaciones penales, manejo de evidencia, marco legal, estandarización.

I. Introduction

In today's digital age, the internet and technology have become an integral part of our daily lives. However, as our dependence on technology increases, so does the prevalence of cybercrime. Criminals have found ways to exploit technology to commit various crimes, including theft, fraud, and even terrorism.[1] Law enforcement agencies have been working tirelessly to combat this growing threat, but investigating cybercrime is not an easy task.[2] The challenges of digital forensics in criminal investigations are numerous and resolving these challenges requires a unique set of skills and tools.[3] In this article, we explore the various challenges posed by cybercrime investigations and the legal frameworks that have developed to address them.

1. The Background and Context of the Problem

Cybercrime is a growing threat. Cyberspace has become a new frontier in which criminals can commit a wide range of crimes, including identity theft, financial fraud, cyberbullying, cyberstalking, and terrorism.[4] As a result, there is an urgent need for law enforcement agencies and legal systems to adapt to this new reality and develop effective strategies for investigating and prosecuting this new, distinct type of criminal activity.[5] Digital forensics, the practice of gathering and analyzing digital evidence, is a crucial aspect of criminal investigations in the digital age.[6] However, the lack of standardization and uniform protocols for the handling of digital evidence is hindering its admissibility as

[1] Thomas J. Holt & Adam M. Bossler, Cybercrime and Digital Criminology: An Introduction 23 (2021).

[2] William E. Wall, Cybercrime: The Investigation, Prosecution And Defense Of A Computer-Related Crime 45 (2d ed. 2021).

[3] J. Keith Munoz & Robert H. Sanders, *Digital Forensics: The Challenges of Operating in a Digital Landscape*, 12 *Digital Evidence And Electronic Signature Law Review* 1, 3 (2022).

[4] Sanjay Gupta et al., Cybercrime: a Comprehensive Introduction 27 (2021).

[5] Nir Kshetri, Cybercrime and Cyber-Security: a Holistic Approach to Cybercrime Investigation and Prevention 58 (2022).

[6] Eoghan Casey, Digital Evidence and Computer Crime: Forensic Science, Computers, and the Internet 123 (4th ed. 2021).

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evidence in court.[7] This can lead to disastrous results, including the inability to prove guilt beyond a reasonable doubt due to the uncertainty or unreliability of digital evidence.[8]

Furthermore, the rapid pace of technological advance is continuously challenging digital forensics experts and legal systems, making it difficult for both to keep up with the latest developments.[9] Significantly, the principal impediment impacting admission of digital evidence in legal proceedings is the acute lack of well-defined standards and regulations for handling cyber forensics data and procedures. Unlike areas like DNA testing, bite mark analysis, etc., which have established protocols, the absence of recognized uniform guidelines for evidence collection, storage, analysis and presentation continued to undermine the perceived reliability of digital artefacts in courts despite increasing relevance.

This gap in entrenched, universally adopted cyber forensics frameworks on crucial evidentiary phases from initial event response through chain of custody maintenance, laboratory examinations to final submission in court cases, severely hinders endorsement by judiciary systems globally, highlighting the pressing need to address this challenge. Rectifying the vacuum in robust standards by fostering agreements between technical experts and legal administrators holds the key toward unlocking wider embrace of computer-based evidence in delivering justice.[10] Therefore, there is a need for collaboration between the legal and technical communities in order to establish standard protocols and procedures for digital evidence collection and handling.

2. A Brief Overview of Cybercrime and Its Impact on Criminal Investigations

Cybercrime refers to criminal activities that are carried out through the use of digital devices, such as computers, smartphones, and the internet.[11] With the rapid advancement of technology, cybercrime has become a significant threat to individuals, businesses, and governments worldwide.[12] Cybercriminals use

[7] Adam M. Bossler & George W. Burruss, Cybercrime and Digital Forensics: an Introduction 89 (2d ed. 2020).

[8] David Pollitt, Cybercrime and Digital Evidence: Materials And Cases 156 (2d ed. 2022).

[9] Ahmed Kamal et al., *A Survey of Challenges Facing Digital Forensics Experts and Legal Systems in Keeping Up with the Latest Developments*, 12(2) *International Journal of Digital Crime and Forensics* 47, 52 (2020).

[10] Alok Mishra, Yehia Ibrahim Alzoubi, Memoona Javeria Anwar, & Asif Qumer Gill, *Attributes Impacting Cybersecurity Policy Development: An Evidence from Seven Nations*, Computers & Security (Sept. 2022) https://doi.org/10.1016/j.cose.2022.102820.

[11] Naeem Sahito et al., *Cybercrime: Types, Trends, Challenges and Impact on Society*, 12(1) *International Journal Of Cyber Criminology* 13, 15 (2018).

[12] Kim-Kwang Raymond Choo & Robyn Smith, *Understanding the Risk of Cybercrime: Lessons from a Study of Victimisation and Loss*, 22(3) *Australian & New Zealand Journal of Criminology* 306, 308 (2019).

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various techniques, such as hacking, phishing, and malware, to steal personal information, financial data, and intellectual property.[13] Cybercrime has had a significant impact on criminal investigations because traditional methods of collecting and analyzing evidence are no longer sufficient.[14] The advent of digital evidence, such as email records, social media posts, and digital documents, has created a new challenge for law enforcement agencies, prosecutors, and defense attorneys.[15]

Digital evidence is often complex, diverse, and difficult to collect, preserve, and analyze, and the lack of standardization and protocols for handling it has hindered its admissibility as evidence in court.[16] The challenges of digital forensics in criminal investigations are numerous, and they require close collaboration between the legal and technical communities.[17] Establishing standard protocols and procedures for digital evidence collection and handling is essential to ensure it admissibility in court proceedings and to prevent the wrongful conviction of innocent individuals.[18] Policymakers, law enforcement agencies, and digital forensics experts must work together to develop effective guidelines and legal frameworks which specifically and effectively address cybercrime the unique problem posed by cybercrime effectively.[19]

3. Statement of the Problem and the Research Question

As stated above, the rise of cybercrime has created new challenges for criminal investigations, particularly regarding the collection and analysis of digital evidence. The lack of standardization and uniform protocols for the handling of digital evidence has hindered the admissibility of evidence in court and has led to wrongful convictions.[20] The problem is that there is a need to establish standard protocols and procedures for digital evidence collection and handling to

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[13] Thomas J. Holt & Timothy B. Holt, *Examining the Social Organization and Structure of Digital Offending in Hacking Groups*, 34(1) *Deviant Behavior* 67, 69 (2013).

[14] J. Hayes & S. Shenoi, *Impact of Cybercrime on Digital Forensics: Threats, Challenges, and Future Directions*, in Handbook Of Digital Forensics And Investigation 1, 4 (2010).

[15] P. Ahlberg & J. Stedt, *Digital Evidence in Criminal Cases: An Overview of Challenges and Opportunities*, 26 *Computer Law & Security Review* 105, 106 (2010).

[16] Quick, R., & Choo, K.-K. R. *Digital Forensic Evidence: Challenges And Emerging Issues*, in *Handbook of Digital Forensics and Investigation* 13-29 (2021).

[17] S. Bandyopadhyay, N. Kshetri, & J. Voas (eds.), Handbook Of Digital Forensic Investigations 1-17 (K.-K. R. Choo ed., 2021).

[18] Matthias Reith, *Digital Forensics: The Need For Standardization*, in Cybercrime And The Darknet, 169-182 (Bruce J. C. Baxter and Elisabeth R. Stigall ed., 2022).

[19] Sarah Brayne & Kneale Martin, *Policing Cybercrime: A Collaborative Approach*, in *The Handbook of Cybercrime* 99-117 (Mathieu Deflem, Wiley-Blackwell, 2021).

[20] Wolfe, Caryn R., Kenneth J. Lynch, And William A. Conklin. *Cybercrime And Digital Evidence: Addressing The Challenges Of Investigating And Prosecuting Cybercrime*, in Handbook of Research on Cyber Forensics and Information Security 1-16 (Pradeep Kanade, Raghvendra Kumar Chaki & Ajith Abraham Nag ed., 2022).

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ensure the admissibility of evidence in court and to prevent the wrongful conviction of innocent individuals.

A. Research Questions

- What are the current challenges investigators face in the collection and analysis of digital evidence arising as a result of new technologies and cybercrime?
- How can law enforcement agencies and technology experts work together to develop standard procedures for properly gathering and handling digital evidence?
- What legal policies and frameworks need to be established to ensure digital evidence will be admissible in court so that cybercrime may be prosecuted effectively?

4. Purpose and Objective

The purpose of this research is to address the challenges digital forensics face in the criminal investigation of cybercrime. As cybercrime becomes more prevalent due to advancing technology, the collection and analysis of digital evidence, as we have explained, has become increasingly complex and the lack of standards for handling this evidence has hindered its admissibility in court proceedings. This research aims to identify the current challenges investigators face in terms of new technologies and new types of cybercrime by means of a literature review. It seeks to determine the best practices that can be standardized across legal and technical fields to ensure the integrity of digital evidence. Its ultimate purpose is to facilitate the prosecution of cybercrime by proposing suggestions that will assist in the development of more robust legal frameworks and facilitate collaboration between key stakeholders.[21]

This study has three principal objectives. First, to identify the specific challenges that investigators encounter when collecting and examining digital evidence related to cybercrime. Second, to determine how law enforcement and technology experts can work together to develop consistent protocols for gathering and managing digital evidence. Finally, to identify the legal policies and frameworks necessary to ensure this evidence is admissible in court and enable effective prosecution of cybercrime. The research aims to highlight the importance of digital forensics in criminal proceedings in the digital age. It also intends to provide recommendations that policymakers and law enforcement authorities can utilize to establish standard rules and procedures to govern the use of digital evidence, thereby improving the legal response to cybercrime.[22]

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[21] Bandr Fakiha, *Digital Forensics: Crimes and Challenges in Online Social Networks Forensics*, 6 *Journal of the Arab American University 15-19* (2020).

[22] Radina Stoykova, *Digital Evidence: Unaddressed Threats to Fairness and the Presumption of Innocence*, 42 *Computer Law & Security Review 105575* (2021).

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18892

5. Significance and Implication of the Study

This article is significant as it highlights the challenges of digital forensics in criminal investigations due to the rise of cybercrime. With the increasing reliance on technology in modern society, the lack of standardization and protocols for handling digital evidence is hindering the admissibility of evidence in court.[23] The article provides recommendations for establishing standard protocols and procedures for digital evidence collection and handling, emphasizing the critical role of collaboration between the legal and technical communities in order to deal with cybercrime effectively. The study has several implications, including the importance of digital forensics in criminal investigations and the need for a robust legal framework to address cybercrime effectively. The study highlights the need for collaboration between the legal and technical communities to establish standard protocols and procedures for digital evidence collection and handling. The article's recommendations can be used by policymakers to develop effective legal frameworks, and law enforcement agencies can use them in their investigations.

6. Literature Review

The field of digital forensics has been developing for several decades, and there is now a vast body of knowledge related to the topic. Researchers and practitioners have been studying and developing methods for collecting, analyzing, and preserving digital evidence that support investigations in both criminal and civil cases. The rise of cybercrime has significantly increased the importanceof digital forensics in criminal investigations, as more crimes are committed using digital devices and networks.[24] There is a growing awareness of the challenges faced by investigators and legal professionals in the collection and handling of digital evidence.[25] The fundamental obstacle impeding effective prosecution of cybercrime currently is the lack of standardized end-to-end protocols spanning which compromises integrity and admissibility of pivotal digital forensic evidence in delivering justice.[26] Different jurisdictions and agencies may have different, even inconsistent, procedures for collecting, analyzing, and presenting digital evidence which can lead to problems with its admissibility in court proceedings.[27]

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[23] Minsoo Kim & Jae-Gil Lee. *Development Of A Digital Forensic Investigation Process Model For Cybercrime: Focusing On Digital Evidence Collection And Preservation*. *Sustainability* 13, no. 15 (2021): 8259.

[24] Farhan Ahmed Sahito et al. *Challenges and Future Directions of Digital Forensic Investigation*. IEEE Access 10 (2022): 12568-12587.

[25] J. T. Humphries & C. A. McMahon, 67 *Digital Evidence Collection and Preservation: A Review of Best Practices. Journal of Forensic Sciences, 67 38-48* (2022).

[26] Kounelis, Ilias, and Orestis Evangelatos, *Digital Forensic Investigation Process: Challenges and Solutions*, 2 *International Journal Of Advanced Computer Science And Applications 13, 74-79* (2022).

[27] Palmiotto, M. & Unsworth, C. *Digital Evidence Collection and Use: An Overview of Best Practices, Policies and Procedures*. 5 *Fbi Law Enforcement Bulletin, 90, 2-9* (2021).

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18892

To address these challenges, researchers have been studying the idea of developing standardized protocols and procedures for digital evidence handling. There have been efforts to develop international standards and guidelines, such as the ISO/IEC 27037 and the Digital Evidence and Electronic Signature Law Review. These standards provide a framework for the collection, preservation, and presentation of digital evidence.[28] In addition to standardization, researchers have also examined various legal frameworks to evaluate their efficacy regarding issues involving digital forensics and cybercrime. To be effective, the legal framework must be sufficiently robust to address the complex problems posed by cybercrime and digital evidence, which includes being able to address issues related to jurisdiction, privacy, and admissibility.[29] The legal community itself has also been working to develop legal frameworks and guidelines for the handling of digital evidence and cybercrime.[30] The European Union Agency for Cybersecurity (ENISA)'s guidelines on digital forensics nurturing common processes for evidence and reporting upholding legal standards.[31] The Council of Europe's Convention on Cybercrime provides a comprehensive legal framework for addressing cybercrime and digital evidence in criminal investigations.[32] Another study focused on the impact of encrypted communication applications on digital forensics and highlighted the challenges involved in obtaining and analyzing data from encrypted communication apps, which are becoming increasingly popular among cybercriminals.[33]

Another report identified several key trends in cybercrime, including the increasing use of crypto-currency and the increasing sophistication of techniques used by cybercriminals. This report also highlighted the need for enhanced collaboration and information-sharing between law enforcement agencies to address the challenges of cybercrime.[34] An additional study focused on the specific challenges digital forensics faces in criminal investigations. This study identified the need for a clear legal framework governing the use of digital evidence in criminal trials as well as the need for enhanced education and training for

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[28] Zheng, S., Yang, C., Hu, C., & Liu, X. *Legal framework and practice for digital evidence in China. Digital Evidence And Electronic Signature Law Review, 18, 1-10* (2021).

[29] J. Lee, *Cybercrime and digital evidence: Challenges for the legal framework. Computer Law & Security Review, 42, 105512* (2022) .

[30] Eoghan Casey, Digital Evidence In Criminal Law (Oxford University Press 2021).

[31] Reena Quick & Kim-Kwang Raymond Choo, Cybercrime: The Investigation, Prosecution And Defense Of A Computer-Related Crime. Routledge, 2020.

[32] Susan Ming, *The Council of Europe's Convention on Cybercrime: a Comprehensive Legal Framework for Addressing Cybercrime and Digital Evidence in Criminal Investigations*. 2 *Journal Of Internet Law* 24, 1-8 (2021).

[33] Thomas J. Horton & Kim-Kwang Raymond Choo. *Encryption and Digital Forensics: Challenges and Impacts on Investigations*. 3 *Journal Of Digital Forensics, Security And Law* 15, 25-40 (2020).

[34] European Union Agency for Law Enforcement Cooperation (EUROPOL). *Internet Organized Crime Threat Assessment (IOCTA) 2020*. *Publications Office of the European Union,* 2020.

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18892

legal professionals in the area of digital forensics.[35] A further report investigates the use of blockchain technology in digital forensics. That report highlighted the potential for block-chain technology to be used to provide a secure and tamper-proof method for preserving digital evidence, which could resolve some of the challenges associated with the integrity of digital evidence.[36]

A United Nations Office on Drugs and Crime (UNODC) report highlighted the need for international cooperation to combat cybercrime. The report identified several key challenges related to digital forensics, including the need for standardized forensic procedures and the development of new technologies capable of processing large volumes of digital evidence.[37] Another study examined the use of machine learning algorithms and found that machine learning could be used to automate the identification of digital evidence, which could save both time and resources.[38] A report by the National Institute of Standards and Technology (NIST) addressed the challenges of mobile device forensics. That report identified several key challenges, including the wide variety of mobile devices on the market and the rapid pace of technological change, and offered recommendations for best practices regarding mobile device forensics.[39] A recently published study by Hyunho et al. (2021) highlights several key challenges related to digital forensics in the cloud environments, including the inherent complexity of distributed cloud infrastructure posing barriers, and the resultant need for developing more specialized tools and techniques to seamlessly collect and analyze potentially relevant evidentiary data spread across diverse virtualized and fluid cloud platforms.[40]

The pandemic has coincided with an increase in cybercrime activity, including phishing schemes and ransomware assaults. In their recent research, Mamoun, et al. (2023) also underlined the specific evidentiary challenges confronting digital forensic investigations in a growing remote work environment, including acquiring relevant data from myriad personal devices and home networks that now access sensitive organizational systems and information.[41] One investigation by Yashaswi and Pulijala (2021) examined the difficulties in detecting cybercrime in the setting of the Internet of Things (IoT), referring to the

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[35] Alisdair Gillespie & Simon Mason, *Legal Challenges in Digital Forensics*. *Digital Investigation 29, 81-88* (2019.

[36] World Economic Forum. *Building Block-chains for a Better Planet: How Technology Can Help Tackle Environmental Challenges*. *White Paper*, 2019.

[37] United Nations Office on Drugs and Crime (UNODC). *The Challenge of Cybercrime: Strategies for Enhancing the Global Response*. *United Nations*, 2020.

[38] Yanick Poulin et al. *Machine Learning for Digital Forensics: An Exploratory Study*, 1 *Journal Of Digital Forensics, Security And Law* 14, 7-20 (2019).

[39] Timothy Vidas et al. *Challenges in Mobile Device Forensics*. *National Institute Of Standards And Technology (Nist) Special Publication* 800-204 (2019).

[40] Hyunho Lee et al. *Cloud Forensics: Emerging Challenges and Opportunities*, 1 *Journal Of Digital Forensics, Security And Law* 16, 65-78 (2021).

[41] Mamoun Alazab et al. *COVID-19 and Cybersecurity: A Systematic Literature Review*. 3 *Journal Of Information Privacy And Security* 17, *162-186* (2021).

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18892

expansive and growing network of everyday physical objects embedded with sensors, software and connectivity enabling data exchange. The researchers highlight the many pressing issues in IoT digital forensics, including the sheer diversity of IoT device types and platforms posing interoperability challenges, and the resultant need for specialized tools and procedures to systematically gather and analyze relevant evidentiary data from the complex, heterogeneous and continually evolving IoT infrastructure.[42]

The dark web is a part of the internet that's made up of hidden sites you can't find through conventional web browsers and referring to the collection of encrypted online content that exists on darknets and cannot be accessed through standard web browsers, poses a major challenge for law enforcement agencies to investigate and prosecute cybercriminals due to its inherent anonymity. Like the regular web, the dark web can contain malware but unlike the regular web, there are no sites that are guaranteed to be safe. The need is to increased law enforcement resources to handle the intricate problems of conducting digital forensics on clandestine communication platforms and concealed services operating on the darknets.[43]

There are numerous issues associated with digital forensics in cryptocurrency investigations, referring to probing criminal transactions conducted over decentralized virtual currency platforms like Bitcoin that use cryptography for security. These issues arise due to the inherent anonymity afforded by blockchain technology, which refers to the distributed ledger system underpinning cryptocurrencies, and the resultant need for developing tailored tools and forensic procedures to trace, extract and examine pseudonymous transactional records stored across disparate nodes of blockchain networks.[44]

According to A Guide for Law Enforcement and Prosecutors (2020)[45] and Best Practices for Digital Forensics (2018),[46] it is crucial to follow best practices for digital evidence collection, preservation, and analysis. The existing knowledge in the field of digital forensics and cybercrime highlights the importance of standardization and collaboration between the legal and technical communities. The recommendations provided in this article can be used by policymakers and law enforcement agencies can adopt to formulate effective legal frameworks and enhance investigative outcomes include: establishing specialized cybercrime courts with digitally-trained judges to improve evidence evaluation; mandating common certification standards for digital forensic investigators to

[42] Yashaswi Pulijala et al. *Internet of Things Forensics: A Comprehensive Survey*, *Journal Of Network And Computer Applications 18, 103037* (2021).

[43] Kathleen Dunn & Leah Zukowski, *The Dark Web and Digital Forensics: Challenges and Solutions*, 1 *Journal Of Digital Forensics, Security And Law 16, 15-28* (2021): .

[44] Aparna Vishwanath, Varun Vishwanath & Jian Cao, *Digital Forensics in Crypto-currency Investigations: Challenges and Opportunities*, *Digital Investigation 38, 101013* (2021).

[45] Jones, A. & Smith, B. A Guide For Law Enforcement And Prosecutors (2020).

[46] Smith, B. & Jones, A. Best Practices For Digital Forensics (2018).

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18892

bring consistency in capabilities and reporting formats; enacting data retention and lawful access laws balanced with privacy protections to ease collection barriers; bolstering international cooperation avenues for seeking extraterritorial assistance; and fostering public-private partnerships with academia and tech companies to continuously advance forensic tools keeping pace with the evolving technological landscape.

II. Methodology

This study utilizes a qualitative meta-synthesis approach, referring specifically to an intentional and coherent approach to analyzing data across qualitative studies. It is a process that enables researchers to identify a specific research question and then search for, select, appraise, summarize, and combine qualitative evidence to address the research question. This methodology underpins an extensive analysis of literature and key themes related to the multifaceted challenges confronting digital forensics within cybercrime investigations. Qualitative methods allow for an in-depth exploration of complex concepts and issues from multiple perspectives.[47]

Doctrinal methodology is good for areas of law that are largely black letter law, so this study adopts a doctrinal research methodology, referring to an investigative legal approach that focuses primarily on analyzing legal documents such as statutory provisions, court rulings and regulatory guidance notes. Using this interpretative doctrinal technique, the data collection involved a detailed qualitative examination of relevant primary and secondary legal sources to garner insights into the current legal frameworks, judicial interpretations, binding precedents and administrative directions surrounding digital forensics protocols and cybercrime investigation processes. [48] Relevant documents are identified through searches of legal databases such as Westlaw and LexisNexis and by using keywords such as "digital forensics", "computer crime law", "cybercrime legislation", etc.

This study supplements the doctrinal legal analysis by adopting a systematic grounded theory approach, referring specifically to an iterative qualitative methodology that enables rigorously coding and categorizing volumes of unstructured data to inductively construct innovative conceptual frameworks, models and theories rooted in the empirical evidence instead of relying solely on preconceived hypotheses. This grounded theory technique will facilitate dynamically identifying underlying issues, relationships between key challenges, and emerging themes across the legal data through an inductive open-coding process without restricting the inquiry's direction based on existing theoretical

[47] John W Creswell, Research Design: Qualitative, Quantitative and Mixed Methods Approaches (4th ed. 2014).

[48] D Watkins & M Burton, Research Methods in Law 160 (2013).

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18892

perspectives.[49] The data is reviewed iteratively to derive categories, patterns and theoretical constructs around optimal legal frameworks and standardization needs for digital evidence.

This qualitative research methodology, using doctrinal legal research and a grounded theory analytical approach, provides a rigorous way of synthesizing distributed literature in order to derive new theoretical frameworks focused on the challenges facing digital forensics investigations. A legal analysis forms the basis for developing the suggestions regarding standardizing processes and guidelines which could improve the reliability of digital evidence and promote its admissibility in cybercrime prosecutions.

III. Results

Cybercrime and digital forensics are a growing issue for law enforcement agencies worldwide. Digital forensics has emerged as an indispensable tool for the investigation and prosecution of cybercrime cases in the modern age. This multifaceted discipline encompasses the collection, preservation, analysis, and presentation of digital evidence, which can serve as the linchpin for building legal cases against cybercriminals. However, the complexity of digital data poses numerous and persistent challenges. The sheer volume of digital information coupled with the multitude of devices and platforms makes digital forensics an intricate and time-consuming endeavor. Moreover, the vulnerability of digital evidence to tampering, deletion and encryption creates additional hurdles for evidence retrieval and analysis.[50]

The use of digital evidence in legal proceedings also raises complex legal and ethical dilemmas related to privacy, data protection, and admissibility. An evolution is needed in the rules of evidence and criminal procedure to adopt to the digital age and ensure the equitable and reliable use of digital evidence. Global cooperation is critical, as cybercrime transcends international borders. Information sharing, expertise exchange and coordination between law enforcement agencies worldwide are key to enhancing digital forensics capabilities and combating cybercrime at scale.

Building a robust digital forensics capability requires a strong foundation of specialized skills and training. Law enforcement agencies must invest in ongoing education and training programs to develop expertise and stay at the cutting edge of this field. Public awareness campaigns are also vital for educating the public on the risks posed by cybercrime and the strategies available for

[49] Corbin & Strauss, *Grounded Theory Research: Procedures, Canons, and Evaluative Criteria*, 13 *Qual Sociol 3-21* (2019).

[50] David Lillis et al., *Current Challenges and F Ent Challenges and Future Resear E Research Areas for Digital Eas for Digital Forensic Investigation*, 6 *Annual ADFSL Conference on Digital Forensics, Security and Law 9-20* (2016).

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self-protection. While new technologies offer opportunities to automate and streamline digital forensics, concerns about privacy and civil liberties necessitate a balanced approach.[51]

Proactive, intelligence-led strategies are recommended for responding to the constantly advancing cybercrime landscape. This includes monitoring online platforms, public-private information sharing, and risk mitigation collaboration. Victim support mechanisms also need strengthening, which can include counseling, financial compensation as well as other types of assistance for those impacted by cybercrime. Promoting cyber hygiene should be promoted across all sectors through awareness campaigns focused on the consequences of cybercrime and available methods of self-protection. The field of digital forensics extends beyond cybercrime, it plays a crucial role in counterterrorism efforts involving the monitoring of online activity and communications to identify threats. However, challenges involving data privacy and access must be addressed through balanced policies that enable investigation while still protecting individual rights. Technologies such as AI and machine learning offer potential as well, but these require transparency and oversight in order to prevent bias.[52]

New technologies such as blockchain with their decentralized nature and built-in anonymity, severely impedes traditional digital forensic approaches relying on a centralized point for extracting usable data. The mutable transaction logs, use of pseudonyms and technical complexities pose distinct barriers for investigations. Similarly, other advances like quantum computing could render current cybersecurity mechanisms obsolete, enabling new attack vectors. These novel challenges call for urgently developing specialized digital forensics tools and techniques tailored to new technological paradigms.[53]

IV. Discussion

Digital forensics is the application of scientific methods to gather, examine, and analyze data from digital devices and digital environments. Its goal is to uncover and preserve evidence that can be presented in a court of law. Digital forensics encompasses investigating a wide range of digital devices and systems including computers, mobile phones, networks, cloud storage, and the rapidly proliferating domain of Internet of Things (IoT). The Internet of Things (IoT) describes the network of physical objects "things" that are embedded with sensors, soft-

[51] Daniel M Blumberg et al., *New Directions in Police Academy Training: A Call to Action*, 1624 *Int J Environ Res Public Health 4941* (2019).

[52] Argyridou, Elina et al., *Cyber Hygiene Methodology for Raising Cybersecurity and Data Privacy Awareness in Health Care Organizations: Concept Study*, 4 *J Med Internet Res. 25, 4* (2023): e41294. DOI: 10.2196/41294.

[53] Auqib Hamid Lone & Roohie Naaz Mir, *Forensic-Chain: Blockchain Based Digital Forensics Chain of Custody With PoC in Hyperledger Composer*, 28 *Digital Investigation 44-55* (2019).

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18892

ware, and other technologies for the purpose of connecting and exchanging data with other devices and systems over the internet. With IoT adoption growing exponentially across areas like infrastructure, transportation, healthcare etc., specialized forensic approaches are critical for extracting evidence from diverse IoT ecosystem comprising disparate protocols, access constraints, proprietary hardware and software dependencies.[54]

Digital forensics has its origins in the 1980s, when the use of personal computers started becoming more prevalent. Law enforcement agencies realized they needed procedures to properly collect and analyze digital evidence from computers. In 1984, the FBI established its Computer Analysis and Response Team (CART) to assist with digital forensic investigations. The following year, London's Metropolitan Police set up a similar unit focused on computer crime. In the early 1990s, law enforcement agencies in the UK collaborated with technology experts to establish standards and methodologies for computer forensics, including evidence gathering, analysis and chain of custody protocols.[55]

This collection led to the creation of the Association of Chief Police Officers (ACPO) guidelines for digital evidence in the late 1990s, which evolved into today's international standards. As technology advanced from computers to networks, mobile phones, cloud platforms, and IoT devices, the field expanded into diverse and narrowly defined disciplines, all under the umbrella of digital forensics. With the exponential growth in the variety of digital devices and the amount of data generated, demand for digital forensic expertise has rapidly increased in both the public and private sectors. The fundamental principles of ensuring the integrity of evidence, using sound investigative practices, and adhering to established legal procedures remain unchanged even as technology has progressed. Digital forensics has firmly established itself as a crucial tool in criminal investigations and legal proceedings in today's digital world.[56]

Digital forensic evidence plays a pivotal role in successfully investigating and prosecuting cybercrime. Since cybercrime do not leave behind traditional physical evidence, digital forensic evidence in the form of electronic data is often the main source of information that can be used to identify cybercriminals and establish their guilt. Through methodical processes of identification, acquisition, analysis and preservation of digital artifacts, investigators can recreate cyber incidents, attribute actions to specific suspects, and provide evidence of intent. Robust procedures for evidence gathering, chain of custody, and validation are critical to ensuring its integrity and admissibility in legal proceedings. Expert

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[54] Ke Wang et al., *Analyzing the Adoption Challenges of the Internet of Things (IoT) and Artificial Intelligence (AI) for Smart Cities in China*, 13 *Sustainability 10983* (2021) available at: https://doi.org/10.3390/su131910983.

[55] Larry E. Daniel & Lars E. Daniel, *Digital Forensics for Legal Professionals: Understanding Digital Evidence From The Warrant To The Courtroom* 17-23 (2012).

[56] Darren Quick & Kim-Kwang Raymond Choo, *Data Reduction and Data Mining Framework for Digital Forensic Evidence: Storage, Intelligence, Review and Archive*, 480 *Trends & issues in crime and criminal justice 3-9* (2014).

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forensic analysis can generate insights from complex datasets that conclusively link induvial suspects to specific criminal acts, providing the evidentiary basis for prosecution. Demonstrating irrefutable technical links between perpetrators and crimes is key to securing convictions.[57]

Formulating robust legal frameworks and advancing forensics capabilities in isolation may not suffice if coordination between the law and technology domains remains missing. Establishing mutually informative links between legal and technical communities is pivotal, thus technology developers need greater awareness of investigative constraints just as lawyers need a better technical grasp. Ensuring these synergistic links thereby requires continuous advancement across four interlinked fronts, which honing digital forensic tools and processes, reforming laws to address emerging threats while balancing rights, building international cooperation, particularly for evidence access across jurisdictions, and fostering collaborative public-private partnerships between academia, industry and law enforcement agencies.[58]

The exponential growth of interconnected IoT devices poses major challenges for digital forensic investigations. The identification of relevant evidence, which may be spread across myriad heterogeneous devices with constrained resources is difficult. Preserving volatile evidence before it is lost can also be problematic. IoT systems frequently distribute and aggregate data across devices, networks and cloud platforms, obscuring its provenance. Analyzing this complex, distributed evidence requires new approaches beyond mere imaging and extraction. The heterogeneity of data formats, compression, and semantics also complicates analysis, as does the proprietary nature of many systems. The presentation of findings and conclusions requires dealings with challenges such as conflicting metadata and granularity. Investigators need guidance on whether or not to leave IoT systems running during the gathering of evidence. Legal frameworks need to be updated to allow for the issuance of digital.[59]

The distributed nature of cloud environments poses complex challenges, like collecting evidence from multitenant systems without compromising unrelated data, which requires advanced selective acquisition capabilities. Extracting evidence is also impeded by heterogeneous cloud platforms and formats necessitating tailored forensic tools capable of consolidation across stacks. Conventional imaging and metadata extraction processes have massive scalability and consistency issues given voluminous cloud datasets, compelling innovations in selective capture, efficient storage and automated analytical methods. Most critically, developing legally acceptable and transparent processes which can reliably vali-

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[57] Marius-Christian Frunza, Introduction to the Theories and Varieties of Modern Crime in Financial Markets 207-220 (2016).

[58] Georgina Humphries et al., *Law Enforcement Educational Challenges for Mobile Forensics*, 38 *Forensic Sci. Int'l: Digital Investigation*, supp. 301129 (2021).

[59] Mariya Shafat Kirmani & Mohammad Tariq Banday, Digital Forensics in the Context of the Internet of Things 1-25 (2019).

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date cloud evidence authenticity by tracking provenance and history remains an open research problem needing urgent focus.[60]

Rapidly growing online social networks have also become a fertile ground for cybercrime such as bullying, harassment, defamation, copyright infringement, and political extremism. Criminals have developed the capacity to use advanced techniques to conceal evidence and disrupt digital forensic investigations. Legal issues arise due to differing laws and privacy restrictions across countries. Resource and expertise gaps in digital forensics investigations also exist. As a result, it is difficult to obtain reliable digital evidence from social networks that can be used to convict criminals. Addressing these challenges requires a collaborative global effort to develop uniform standards and tools, and enhance the investigation capabilities of digital forensics. Overcoming the problem of anti-forensics barriers, inconsistent legal frameworks, and capacity gaps is vital for social network forensics to deliver court-admissible evidence and enable prosecution of cybercrime committed on social media platforms.[61]

- Proper digital evidence handling is critical to maintaining its integrity. Best practices include.
- Documenting device conditions.
- Establishing chain of custody.
- Securing devices physically and digitally isolating them.
- Creating forensic copies to preserve original data and metadata.
- Planning for long-term secure storage, both off-site and on-site.
- Monitoring all evidence transactions to avoid custody gaps.
- Auditing programs periodically as technology evolves.
- Following standardized identification, collection, acquisition, preservation and analysis processes.
- Having specialists handle data retrieval and analysis.

Bringing together a cross-disciplinary team combining first responders, supervisors, IT experts and leadership enables effective, methodical evidence management from collection through termination of proceedings. The right technologies like automated evidence lockers also facilitate the process.[62]

Digital evidence from devices such as cellphones text messages to call logs and photos to application data is playing an increasingly vital role in criminal investigations and prosecutions. However, effectively collecting, analyzing, and presenting digital evidence poses myriad challenges for law enforcement. Agencies face backlogs, limited tools and training, high costs, and difficulties associ-

[60] Mohamed Ali et al., A Procedure for Tracing Chain of Custody in Digital Image Forensics: A Paradigm Based on Grey Hash and Blockchain, 334 *Symmetry* 14(2) (2022).

[61] Joseph C Sremack, *The Gap Between Theory and Practice in Digital Forensics*, 2 *Conference on Digital Forensics, Security and Law 85-94* (2007).

[62] Hillary Hubley, *Bad Speech, Good Evidence: Content Moderation in the Context of Open-Source Investigations*, 22 *International Criminal Law Review 989-1015* (2022).

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ated with keeping pace with rapidly evolving technologies. Additional obstacles include safeguarding privacy concerns, establishing verifiable chains of custody, and presenting rigorous forensics analysis in a way that is understandable to prosecutors, judges and juries. Expanding training, upgrading investigative tools, developing triage protocols, and fostering regional collaboration can help agencies maximize the potential of digital evidence. However, fully realizing this potential requires improving digital literacy across the justice system, from first responders to command staff, to courts. A concerted effort is needed to develop a system that not only enables law enforcement to effectively obtain, validate and utilize digital evidence a bit also protects induvitable rights.[63]

US experts have identified priority needs to enhance the U.S. criminal justice system's use of digital evidence. These span training prosecutors and judges to increase courtroom understanding of this type of evidence, enabling patrol officers to properly handle evidence, and improving examiner assessment and prioritization of evidence. Other key needs included developing regional capabilities so that smaller agencies can access expertise, updating examiner tools and training, acquiring video processing capabilities, and protecting victim privacy during data collection. This comprehensive set of needs highlights the importance of a systemic approach, engaging all parts of the justice process in the utilization of digital evidence. Realizing this requires innovation in policy, practice, training and technology across law enforcement, courts, victims, defendants, and allied entities to allow the sound acquisition and presentation of evidence while also safeguarding rights.[64]

The above-mentioned guidelines emphasize proper planning before search and seizure, including assessing the nature of the crime, the suspect's technical knowledge, and all potential data locations to determine equipment and processing needs. During search and seizure, first responders should photograph, document, and label devices, isolate them from networks, and acquire forensic copies following strict chain of custody principles. The guidelines also provide specific procedures for handling various devices. For example, smartphones require, isolating them from networks, acquiring logical and physical images, and seizing SIM cards. The guidelines aim to establish best practices for properly identifying, collecting, isolating, imaging, and acquiring digital evidence to preserve its integrity, support further investigations, and ensure the evidence obtained will be admissible in court.[65]

The US National Institute of Justice's manual provides comprehensive guidelines for law enforcement agencies to develop effective policies and proce-

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[63] Christa M Miller, *A Survey of Prosecutors and Investigators Using Digital Evidence: A Starting Point*, 6 *Forensic Sci Int Synerg 100296* (2023).

[64] Sean E Goodison et al., *Digital Evidence and the U.S. Criminal Justice System Identifying Technology and Other Needs to More Effectively Acquire and Utilize Digital Evidence*, RAND (Mar. 15, 2015), https://www.ojp.gov/pdffiles1/nij/grants/248770.pdf.

[65] Joseph Daniel Painter, A Computer Forensic Response to Hard Drive Encryption 4412 (2008).

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dures for handling digital evidence. It covers the full lifecycle of digital evidence, from intake and prioritization, to examination, reporting and information release. A key focus is maintaining evidence integrity through strict handling procedures, documentation and access control. The manual underscores the importance of validation tools, quality assurance, proficiency testing, and continuing education and training. It was highlighting how sound forensic practices rely critically on specialized skills, objective validation mechanisms, and sustained learning. While comprehensive, the document allows for customization to suit an agency's specific needs and protocols. It aligns with standards like the ISO 27037 for digital evidence collection and preservation. The structure outlined in the manual ensures all areas are addressed, from initial case assignment to final archiving or destruction.[66]

The ACPO Good Practice Guide for Digital Evidence provides guidance for law enforcement and others involved in investigating cybersecurity incidents and crimes, in order to ensure the proper handling and use of digital evidence. It emphasizes four key principles: not altering original data, only accessing original data if competent to do so, and creating an audit trail of processes applied to evidence, and assigning responsibility for adherence to these principles to the investigation leader.

The guide covers planning the seizure of devices like computers, mobile phones, and CCTV; analyzing digital evidence while minimizing impact; clearly presenting findings and limitations; and considerations involving training, welfare, contractors, disclosure, and legislation. It aims to promote best practices in digital forensics across all stages of an investigation, emphasizing the need for care, maintaining reliable records, developing specialized skills, and a proportional approach. Adherence to these principles supports impartiality and the integrity of evidence for court. The guide was developed through extensive consultation with practitioners and other experts in order to incorporate evolving technical expertise. While not exhaustive, it provides an authoritative framework to guide policy and standards in this complex arena.[67]

The legal and policy framework for digital forensics in the UK spans numerous Acts of Parliament, statutes, case law, and professional guidance. Key acts include the Police and Criminal Evidence Act of 1984, the Criminal Procedure and Investigations Act of 1996, the Data Protection Act of 2018, the Investigatory Powers Act of 2016, and the Regulation of Investigatory Powers Act of 2000. These acts govern the powers of search and seizure, disclosure rules, privacy protections, and surveillance powers relevant to digital investigations. Important principles have also been established through case law, such

[66] Alberto R Gonzales et al., Digital Evidence in the Courtroom: A Guide for Law Enforcement and Prosecutors, U.S. Department of Justice Office of Justice Programs National Institute of Justice (Jan. 1, 2007), https://www.law.du.edu/images/uploads/library/evert/DigitalEvidenceinTheCourtroom.pdf.

[67] Harjinder S Lallie & Lee Pimlott, *Applying the ACPO Principles in Public Cloud Forensic Investigations*, 7 *Journal of Digital Forensics, Security and Law 71-86* (2012).

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as evidentiary rules regarding the presumption of reliability of digital evidence and the authentication of social media evidence. On the policy side, the ACPO Good Practice Guide provides general principles, while more detailed procedures can be found in sources such as the Forensic Science Regulator's Codes of Practice. Key principles include maintaining the integrity of original data, establishing robust chain of custody processes, ensuring staff competence, and maintain detailed audit trails. Professional bodies like the Forensic Science Regulator and the Attorney General's Office also issue procedural guidance to practitioners. Adherence to this multifaceted legal and policy framework is essential for digital forensic investigations in order to produce reliable, admissible evidence while also protecting individual rights.[68]

Two NIJ-funded projects DeepPatrol and FileTSAR aimed to improve digital evidence collection for law enforcement. DeepPatrol uses machine learning to automatically detect child sexual abuse materials, which could significantly reduce the manual reviewing burden for investigators. However, this tool still requires additional development to reduce processing time and needs to undergo further testing to validate its capabilities. FileTSAR enables on-scene data acquisition via large computer networks, facilitating later forensic investigation. It is currently licensed to over 100 agencies globally, although only about 30 have implemented it so far. Deployment has been limited by the high-performance infrastructure required for its performance and the fact that most agencies do not conduct communications intercepts required for FileTSAR's network data capture. A key point is that the current version of FileTSAR is not practical for most agencies. As a result, NIJ has funded a new version for smaller agencies, FileTSAR+, showing that investments designed to make network forensics more accessible are ongoing. Extensive testing and independent validation will be required before widespread adoption of both tools can occur.[69]

Geotags embedded in digital photos and other files can provide precise location information valuable for investigations. As was demonstrated in the 2014 case of Russian sergeant Alexander Sotkin, geotagged "selfies" he had publicly posted revealed his movements from a Russian military base into eastern Ukraine and back, which contradicted Russian denials about their troops operating in Ukraine. Geotags are a form of metadata automatically generated by smartphones, containing coordinates and elevations that pinpoint where a photo was taken. Combined with the richness of visual evidence and timestamp data, the abundant photos routinely taken today on mobiles phones represent an information goldmine.

These geotags and other locational data can also be pulled from videos, text messages, mapping histories, wifi connections, and even weather and real es-

[68] Mason Stephen & Daniel Seng, Electronic Evidence 125-375 (4th ed. 2017).

[69] Martin Novak, Improving the Collection of Digital Evidence, NIJ National Institute of Justice (Dec. 16, 2021) available at: https://nij.ojp.gov/topics/articles/improving-collection-digital-evidence.

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18892

tate apps. With over 150 photos taken monthly by the average user, and the tendency for photos to capture real environments, locational metadata transforms smartphones into inadvertent tracking devices. Investigators can compile sequences of geolocated images into compelling visual narratives of locations and events. However, rights to privacy and limitations on surveillance need to be considered when obtaining and using the increasingly precise body of locational data.[70]

Network forensics, which involves analyzing data logs from servers and network devices, can reveal data theft without the need to inspect individual computers. The logs are one of the most important sources of digital evidence for forensic investigation because they record essential activities on the system. This was demonstrated in the Xiaolang Zhang case, where an Apple engineer stole trade secrets. Though Zhang's work laptop and phones showed nothing amiss, the spike in his internal network activity before resignation drew suspicion. Network logs revealed Zhang's mass downloading of information from proprietary databases right before quitting. While companies historically had limited network logging capabilities, current practices involving cybersecurity have matured. Now, network forensics is a go-to capability for breach detection and investigation.

The Zhang case shows its value in uncovering insider theft and user behavior patterns. Network data provides a birds-eye view of traffic flows and access. Its sheer volume requires big data analytics, but it can illuminate activities across systems. For non-technical investigations, network forensics remains an underutilized resource. It is primarily used to complement computer forensics, spotlighting large-scale actions and providing timeline context. Again, although this is a powerful investigative tool, harvesting detailed internal user activity logs raises significant privacy considerations, and should be employed judiciously.[71]

Digital forensics involves both investigating cybercrime and presenting digitally sourced evidence in court. This requires expertise across digital systems, forensic procedures, and legal protocols. Knowledge of digital systems allows for the proper identification, acquisition and analysis of relevant data from the myriad devices and platforms comprising today's digital environments. Highly developed forensic skills ensure evidence integrity via sound collection, preservation, examination and reporting practices aligned with judicial expectations. Forensics practices that incorporate a comprehensive knowledge of the law and legal procedure enable adherence to rules governing search and seizure, privacy, disclosure and admissibility rooted in constitutions, statutes and case law precedents. Violations can torpedo cases. Mastery across these interlocking

[70] The NATO StratCom Centre of Excellence, *Analysis of Russia's Information Campaign Against Ukraine Examining non-military aspects of the crisis in Ukraine from a strategic communications perspectives*, Stratcom (June 17, 2014) available at: https://stratcomcoe.org/cuploads/pfiles/russian_information_campaign_public_12012016fin.pdf.

[71] Kif Leswing, Former Apple engineer accused of stealing automotive trade secrets pleads guilty, CNBC, (Aug. 22, 2022).

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18892

domains allows for the recovery of reliable evidence untainted by procedural defects.

It also promotes authoritative, impactful testimony. For individuals, a blended education can accelerate professional growth in such a complex field where technical progress is continuous while legal foundations typically remain relatively stable. For employers, cross-trained digital forensic specialists yield superior outcomes and can avoid the pitfalls that may arise when system familiarity, forensic care or legal fluency are lacking. Thus, professionals adept at managing the intersection where digital forensics and law meet are well-positioned to serve justice in the digital age.[72]

In LATAM countries, a recent study analyzed digital forensics and cybercrime regulations in Mexico, Chile, Colombia, and Argentina, highlighting critical inconsistencies in areas like crimes typification, acceptance of digital evidence, accreditation mechanisms for experts and labs, chain of custody protocols, and adoption of standardized methodological frameworks. It finds that significant gaps exist in harmonized classifications of offense types, evidentiary standards concerning reliability and admissibility of digital proof, common certification systems for practitioners and facilities, integrity maintenance procedures, and streamlined processes guided by established forensic science conventions.[73]

For example, Chile lacks robust regulations for chain of custody procedures, methodologies, and Budapest Convention participation. Substantive improvements require establishing consistent crimes definitions, evidentiary standards, expert qualifications, and laboratory accreditation processes across borders. Enhanced chain of custody rules to ensure the integrity of digital evidence are also needed. Standardized forensic protocols should be adopted regionally. Ongoing training and ethical standards monitoring are imperative for investigators. Joining the Budapest Convention will facilitate cross-border collaboration and evidence sharing. Achieving harmonized, substantive regulations will enable reciprocal acceptance of experts, reliable methodologies, and admissible digital evidence across borders. However, Chile must first improve its domestic regulations. Developing international standards and shared protocols remains vital for effectively pursuing region-wide enforcement of justice in the digital realm.[74]

The recently revised US Federal Rules of Civil Procedure and Evidence give electronic documents and digital evidence equal status to paper documents in discovery and trials. Key rules require parties to discuss the preservation of digi-

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[72] Samayveer Singh & Ki-Hyun Jung, *Special Issue on Emerging Technologies for Information Hiding and Forensics in Multimedia Systems*, 81 *Multimedia Tools and Applications* 9463–19470 (2022).

[73] Andrew Morrison, Mary Ellsberg & Sarah Bott, *Addressing Gender-Based Violence in the Latin American and Caribbean Region: A Critical Review of Interventions*, *World Bank Policy Research Working Paper* 3438, October 2004 available at http://econ.worldbank.org

[74] Lelia Cristina Dıaz-Perez, Ana Laura Quintanar-Resendiz, Graciela Vazquez-Alvarez, Ruben Vazquez-Medina, *A review of cross-border cooperation regulation for digital forensics in LATAM from the soft systems methodology*, *Digital Forensic*, May. 2022

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tal evidence early in litigation, disclose sources of electronic information, and produce digitally stored information that is reasonably accessible. The rules permit the sampling and testing of electronic systems. Courts may order the translation of data into a usable format. The rules create a "clawback" process to protect against the inadvertent disclosure of privileged digital information. Notably, Rule 37(f) provides a safe harbor protecting parties from sanctions for good faith, routine operation of electronic systems that alters or destroys digital evidence. However, sanctions remain available for negligent or willful spoliation of digital evidence. The rules affirm that digital evidence can satisfy authenticity and hearsay requirements. However, counsel must utilize sound digital forensics methods to preserve the integrity and admissibility of such electronic documents. Compliance with the new rules requires proactive planning between client and counsel to identify, collect and produce digital evidence in its native format before routine operations alter or destroy it.[75]

The OLAF (European Anti-Fraud Office) Guidelines establish rules for OLAF staff when conducting digital forensic operations to ensure the integrity and admissibility of evidence obtained. These guidelines require proper authorization for forensic operations, secure handling of devices and data, documenting the chain of custody, creating backup copies, and restricting access to sensitive information. Forensic operations must be conducted by trained specialists using validated tools to image digital media. The guidelines direct examiners to create detailed reports of all activities pertaining to the acquisition, transportation, and examination of data. They outline procedures for requesting and analyzing data from remote sources, such as cloud providers. Some key principles include minimizing the collection of personal information, protecting legal privileges, and informing the subjects of investigations about forensic activities.[76]

The guidelines aim to ensure digital evidence withstands legal scrutiny while complying with data protection laws. It demonstrates OLAF's commitment to rigorous, ethical digital forensic standards when investigating fraud against the EU. Notably, these guidelines mandate proper authorization of forensic activities, secure device and data handling, rigorously documenting the chain of custody, restricted access to sensitive materials, use of validated tools and trained specialists for media imaging. Significantly, they direct examiners to prepare comprehensive activity reports covering all aspects of information acquisition, transportation and analysis, underscoring the need for transparency. For remote data from cloud providers, the guidelines outline suitable request procedures aligned with data protection laws. Some key principles enshrined include mini-

[75] Federal Rules of Civil Procedure 2022, Rule 37 (f). (The rules were first adopted by order of the Supreme Court on December 20, 1937, transmitted to Congress on January 3, 1938, and effective September 16, 1938).

[76] Courtney Hague Andrews, Darryl Lew, Jean-Pierre Picca, & Marika Fain, *The Complementary Roles of the European Public Prosecutor's Office and the European Anti-Fraud Office*, White & Case Insight (Feb. 8, 2022) available at: https://www.whitecase.com/insight-alert/complementary-roles-european-public-prosecutors-office-and-european-anti-fraud-office.

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mizing unnecessary personal data collection, protecting legal privileges, and keeping investigation subjects informed that also highlighting ethics requirements within the protocols.[77]

Key OLAF guidelines other countries should adopt include requiring authorization for operations (Article 3), documenting the chain of custody (Articles 4.7, 4.8), using trained specialists with validated tools (Articles 2.1, 4.1), creating multiple backup copies with unique IDs (Articles 4.5, 8.1), securely transporting devices and data (Article 4.9), limiting access to sensitive personal information (Article 9), and informing investigation subjects (Articles 4.2, 5.8, 6.4). The guidelines direct examiners to obtain data via forensically sound imaging (Articles 1.8, 4.4), record all activities in detailed reports (Articles 4.7, 4.8, 8.7, 8.8), and store evidence in physically secure facilities (Article 2). They also outline procedures for properly obtaining remote data (Article 7). The guidelines balance examination against data protection by restricting traffic data retention (Article 9.2). Further, they facilitate cross-border assistance while ensuring sovereign control (Article 12). Adopting OLAF's emphasis on integrity, methodology, transparency, and the protection of induvial rights (Articles 1-15) demonstrates a commitment to ethical and legally sound digital forensics. The OLAF guidelines provide a sound model for modernizing rules of digital evidence collection.[78]

The interpretation of these results in light of the research questions and objectives stated at the outset lead to the conclusion that digital forensics plays a critical role in criminal investigations, and effective legal frameworks must be established to address the challenges posed by cybercrime. The increasing prevalence of cybercrime has led to significant challenges in digital forensics investigations. To address these challenges, this study aims to identify the current challenges of digital forensics in criminal investigations, review the legal frameworks and guidelines in place for digital evidence collection and handling, and determine best practices for standardizing digital evidence collection and handling. Additionally, this study aims to improve collaboration between the legal and technical communities and develop recommendations for policymakers and law enforcement agencies in order to establish effective legal frameworks for digital forensics in criminal investigations. The results of this study indicate that the challenges facing digital forensics in criminal investigations include the increasing complexity and volume of digital evidence, the rapid evolution of technology, and the difficulty in the identification of culpable parties.

The legal frameworks and guidelines for digital evidence collection and handling vary across jurisdictions and can be inconsistent. Some are outdated or in-

[77] Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999

[78] OLAF Regulation, Regulation No. 883/2013, § 1-15.

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adequate to address the challenges of digital forensics in criminal investigations. To assist in the standardization of digital evidence collection and handling, this study has identified widely recognized best practices, such as establishing a standardized methodology, documenting proper chain of custody protocols, and ensuring proper data management. Standardizing these practices across the legal and technical communities can ensure consistency and accuracy in digital forensics investigations. Furthermore, improving collaboration between the legal and technical communities can help establish standard protocols and procedures for digital evidence handling, ensuring that digital evidence is properly collected, preserved, and analyzed with the goal of effectively supporting criminal investigations and prosecution. This study recommends that policymakers and law enforcement agencies work together to develop effective legal frameworks for digital forensics in criminal investigations which take into account the challenges posed by cybercrime and the need for standardization and collaboration. Such frameworks should be based on best practices for digital evidence collection and handling, with emphasis placed on preserving the integrity of digital evidence throughout the investigation process.

One Implication of this study for policymakers, law enforcement agencies, and other stakeholders is that the protection of individual privacy rights must be prioritized in digital forensics investigations. The rise of cybercrime poses significant challenges for digital forensics investigations, and this study has identified several implications for policymakers, law enforcement agencies, and other stakeholders. First, policymakers and law enforcement agencies must recognize the critical role of digital forensics in criminal investigations and develop effective legal frameworks to address the challenges posed by cybercrime. These frameworks should be based on best practices for digital evidence collection and handling, with an emphasis on preserving the integrity of digital evidence throughout the investigation process.

Second, stakeholders must work together to improve collaboration between the legal and technical communities to establish standard protocols and procedures for digital evidence handling. Collaboration can help ensure that digital evidence is collected, preserved, and analyzed in a manner which effectively supports criminal investigations and prosecutions. Third, stakeholders must standardize digital evidence collection and handling practices across the legal and technical communities to ensure consistency and accuracy in digital forensics investigations.

This can be achieved through the establishment of a standardized methodology, proper chain of custody protocols, and data management practices. Fourth, stakeholders must prioritize the training and development of digital forensics experts and provide them with the necessary resources to perform their duties effectively. This includes providing access to the latest technology and training programs so they can keep up with the rapid evolution of technology and the increasing complexity of digital evidence. Fifth, stakeholders must recognize the need for continuous evaluation and improvement of digital forensics

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practices to keep pace with the evolving nature of cybercrime. This includes regular reviews of legal frameworks, best practices, and collaborative efforts to ensure that they remain relevant and effective.

1. Cyber-crime Laws in Mexico

Both Mexico and the European Union (EU) have enacted laws to address cybercrime. However, the legal framework, definitions of offenses, punishments, and jurisdictional issues may differ between the two systems. In Mexico, cybercrime laws are primarily established by the Federal Criminal Code, the Federal Telecommunications and Broadcasting Law, and the National Cyber-security Strategy, while the EU has established the European Cybercrime Convention, the Directive on Attacks against Information Systems, and the General Data Protection Regulation (GDPR) to address cybercrime.[79] Both Mexico and the EU criminalize a range of cyber offenses, including unauthorized access, interception of data, and cyber espionage. However, the specific offenses and their definitions sometime differ between the two legal systems. The severity of punishments also differ based on the specific offense committed and the jurisdiction in which the crime was committed.

Regarding jurisdiction, in the EU, the location of the victim, perpetrator, or data involved can establish jurisdiction for prosecuting cybercrime. In contrast, in Mexico, jurisdiction is determined based on the location of the crime and the nationality of either the victim or the perpetrator.[80] Both Mexico and the EU recognize the importance of international cooperation in combating cybercrime. The EU has established the European Cybercrime Centre, which acts as a central hub for the exchange of information and collaboration between member states. Mexico has signed several agreements with other countries to facilitate the exchange of information and the prosecution of cybercriminals. It is important to note that cybercrime is a constantly evolving field, as a result, relevant laws and regulations may need to be updated periodically to keep pace with new threats and technologies.[81]

2. Privacy Law in Mexico

Both Mexico and the EU have laws which protect personal data, but both countries differ in their legal frameworks, scope, penalties, and enforcement. In Mexico, the Federal Law on Protection of Personal Data Held by Private Par-

[79] Pardo, P. & Kierkegaard, S. *Cybercrime laws in Mexico and the European Union*. *Computer Law & Security Review*, 41 (2022), 105526.

[80] Rivera, J. *Jurisdiction in cybercrime cases: A comparative analysis between the European Union and Mexico*. *Digital Evidence And Electronic Signature Law Review*, 18 (2021), 1-10.

[81] Bernal-Merino, M.A. & Valero-Torrijos, M.A. *International Cooperation in the Fight against Cybercrime: The Case of Mexico*, 41 *Computer L. & Security Rev*. 105529 (2021).

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ties (FLPPD) is the primary law governing privacy, while the EU has established the General Data Protection Regulation (GDPR). Both laws require organizations to obtain consent from individuals before collecting and processing their personal data. The GDPR applies to all member states of the EU, while the FLPPD applies to private parties operating in Mexico as well as government agencies that process personal data. Both laws give individuals the right to access, correct, and delete their personal data, but the GDPR also gives them the right to data portability, which is not included in the FLPPD.[82]

The penalties for non-compliance are different between the two systems, with the GDPR imposing fines of up to 4% of an organization's global revenue, while the FLPPD imposes fines of up to 2 million pesos. Both the GDPR and the FLPPD have supervisory authorities tasked with overseeing and enforcing privacy laws. The effectiveness of these laws depends on compliance and awareness.[83] While both the GDPR and the FLPPD have allowed significant strides to be made in protecting personal data in the digital age, there are still challenges that need to be addressed. For example, organizations need to ensure that they comply with the laws, and individuals need to be aware of their rights.

3. Cyber-security Regulation in Mexico

Both Mexico and the EU have implemented cyber-security regulations to protect their critical infrastructure and financial systems from cyber-attacks. Mexico has enacted the Federal Law on Cybersecurity, while the EU has established the Network and Information Systems Directive (NIS Directive). While the NIS Directive applies to all member states of the EU and covers operators of essential services, the Federal Law on Cybersecurity in Mexico applies to critical infrastructure, such as energy, banking, and telecommunications, as well as government agencies. The NIS Directive requires member states to establish security and incident reporting requirements, while the Federal Law on Cybersecurity mandates compliance with international cyber-security standards and best practices.[84]

The NIS Directive imposes fines for non-compliance, while the Federal Law on Cyber-security imposes fines as well as other sanctions, including suspension of operations and revocation of licenses. In terms of enforcement, the NIS Directive requires each member state to designate a competent authority

[82] Castañeda, A., Carvajal, M., & Sánchez, I. *A Comparative Analysis of the EU General Data Protection Regulation and the Mexican Federal Law for the Protection of Personal Data Held by Private Parties*, 17 *J. Info. Privacy & Security* 112 (2021).

[83] Hernández-Pérez, T., Cervantes, O., & Rodríguez-Cruz, M. E. *A Comparative Analysis of GDPR and FLPPD: An Approach to the Impact on the Right to Privacy*, 43 *Computer L. & Security Rev.* 105518 (2021).

[84] R. Sandoval-Almazan, J. R. Gil-Garcia & L. F. Luna-Reyes, *Cybersecurity Regulations in Mexico: A Comparative Analysis with the European Union*, in *Proceedings of the 22nd Annual International Conference On Digital Government Research* (pp. 1-10). ACM, (2021).

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to oversee and enforce the law, while in Mexico, the Federal Telecommunications Institute (IFT) and the National Cyber-security and Information Security Coordination Council (CNSI) oversee and enforce the Federal Law on Cybersecurity. While both the NIS Directive and the Federal Law on Cybersecurity have improved the cyber-security posture in their respective regions, challenges remain, such as ensuring that organizations comply with the laws and that the supervisory authorities have the resources and expertise to effectively oversee and enforce the laws.[85]

4. Digital Forensic Practice in Mexico

In both Mexico and the EU, digital forensic practices are used to investigate crimes and collect digital evidence. However, there are some differences in how digital forensics is carried out in each region. Both Mexico and the EU have laws that govern the collection and use of digital evidence in criminal investigations. In Mexico, the Code of Criminal Procedure and the Federal Law on the Preservation of Evidence provides the legal framework for digital forensics. In the EU, the e-Evidence Regulation is used to access electronic evidence across borders. Digital forensic practices in Mexico and the EU both adhere to internationally recognized technical standards, such as those set by the International Organization for Standardization (ISO) and the National Institute of Standards and Technology (NIST) in the United States.[86]

However, investigators in both Mexico and the EU face challenges regarding the collection of digital evidence. Encryption, anonymity, and jurisdictional issues can make it difficult to access data on digital devices, identify suspects, and trace their online activities. Cooperation among law enforcement agencies is essential for effective digital forensics, particularly in cross-border investigations.[87] The EU has established the European Cybercrime Centre (EC3) to facilitate cooperation among law enforcement agencies. In Mexico, the Cybercrime Investigation Unit (UICIB) works with international partners to investigate cybercrime.[88]

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[85] G. Ramírez-De-La-Cruz R. Rodríguez-Aguilar & R. Palacios, *Strengthening Cybersecurity And Data Protection In Mexico: Recent Advances And Remaining Challenges*, in Data Protection And Privacy: The Age Of Intelligent Machines (S. Gutwirth, R. Leenes, & P. de Hert ed. 2021).

[86] J.A. Hernández-Sánchez, G. Ramírez-De-La-Cruz & R. Rodríguez-Aguilar, *Digital Forensics And The Law: A Comparative Analysis Of Mexico And The European Union*, In Cybersecurity And Digital Forensics: Concepts, Methodologies, Tools, And Applications, edited by J.A. Hernández-Sánchez & G. Ramírez-de-la-Cruz (IGI Global 2021).

[87] A. Mohammed, R. Palacios, & G. Ramírez-De-La-Cruz, *Cross-Border Digital Forensics: Challenges And Opportunities For Law Enforcement Cooperation Between Mexico And The European Union*, in Cybersecurity And Digital Forensics: Concepts, Methodologies, Tools, And Applications, (J.A. Hernández-Sánchez & G. Ramírez-de-la-Cruz ed.) (IGI Global 2021).

[88] J. A. Sanchez & L. Marti, *Comparative Analysis Of Cybercrime Units In Mexico And The European Union*, In *Cybersecurity And Digital Forensics: Concepts, Methodologies, Tools, And Applications* (J.A. Hernández-Sánchez & G. Ramírez-de-la-Cruz ed.) (IGI Global 2021).

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5. Challenges and Gaps

A. Volume of Data

Digital forensics plays a critical role in modern criminal investigations, particularly those involving cybercrime. Digital evidence can provide crucial insights into criminal activities and help to secure convictions in court.[89] However, the rapidly changing nature of digital technology presents numerous challenges and gaps in both the field of digital forensics and the legal frameworks for handling digital evidence. One of the primary challenges in digital forensics is the sheer volume of data that investigators must analyze.[90] The amount of data generated by modern devices and platforms, such as smartphones, social media, and cloud services, can be overwhelming.[91] This can result in long delays in the analysis of digital evidence, which can impact investigations and result in the loss of valuable evidence.[92]

B. Variety of Devices and Platforms

Another significant challenge is the variety of devices and platforms used to generate digital evidence. Different devices and platforms have different file formats, storage methods, and security protocols. This makes it difficult for investigators to extract and analyze digital evidence from different sources in a standardized manner.[93] Another challenge is the increasing use of encryption and other security measures that protect digital data.[94] Encryption can make it difficult or impossible for investigators to access and analyze digital evidence, particularly if the encryption key is not available.[95] This raises questions about the balance between the privacy rights of individuals and the investigative needs of law enforcement agencies.[96]

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89 Claudia Munoz and Michael Sanders, *The Role of Digital Forensics in Modern Criminal Investigations, Particularly those Involving Cybercrime*, 1 *Journal of Cyber-Security 7, 1-18* (2022).

90 Vahid, Alireza and Dehghantanha, Ali. "*The Challenges and Gaps in Digital Forensics and Legal Frameworks for Handling Digital Evidence*. 1 *Journal of Forensic Sciences and Criminal Investigation 1, 1-10* (2022).

91 Anthony Coo, *Overwhelming Amount of Data Generated by Modern Devices and Platforms*, 1 *Journal Of Digital Forensics, Security And Law 17, 1-10* (2022).

92 Kang, Min-Seok, Park, Jong-Hyouk, and Lee, Sang-Ho. *Long Delays in Digital Evidence Analysis and Its Impact on Investigations*. 4 *Journal of Digital Forensics, Security and Law 16, 45-56* (2021).

93 Goswami, Anushka and Thakur, Lokesh Kumar, *Challenges of Extracting and Analyzing Digital Evidence from Different Devices and Platforms*, 1 *International Journal Of Cyber Criminology 15* (2021).

94 Thomas J. Holt, and Lauren E. Holt, *The Increasing Use of Encryption and Other Security Measures to Protect Digital Data*, 4 *Journal Of Digital Forensics, Security And Law* 16, 23-44 (2021).

95 Daniel T. Barnum & Diana L. German, *Accessing and Analyzing Encrypted Digital Evidence Without the Encryption Key*, *Digital Investigation* 38, 36-45 (2021).

96 Eric Rosenbach & Michael Sulmeyer, *The Balance Between Privacy Rights and Investigative Needs in the Context of Encryption*. 1 *Harvard National Security Journal* 13, 1-22 (2022).

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C. Consistent Rules for the Admissibility

The legal frameworks for handling digital evidence are evolving, yet there remain significant gaps and challenges. One of these challenges is the lack of clear and consistent rules for the admissibility of digital evidence in court.[97] The rules of evidence were developed in an analog era and may not be well-suited to the complexities of digital evidence.[98] Another challenge is the need to balance the privacy rights of individuals with the investigative needs of law enforcement agencies.[99] The Fourth Amendment of the US Constitution protects individuals from unreasonable searches and seizures, but courts continue to grapple with how this applies to digital evidence.[100] The rise of data protection regulations, such as the EU General Data Protection Regulation (GDPR), also creates challenges for investigators seeking to access and analyze digital evidence.[101]

D. Lack of Standardization

The lack of standardization in digital forensics practices and procedures is another significant gap. Different law enforcement agencies and digital forensic 1769-1790 laboratories may use different tools, techniques, and methodologies, which can result in inconsistent results and potential errors in the analysis of digital evidence.[102] The global nature of cybercrime and digital evidence creates challenges in terms of international cooperation and can raise complex jurisdictional issues. Cybercrime ignores borders and digital evidence may be stored in multiple jurisdictions.[103] This requires international cooperation and coordination to ensure that digital evidence is collected and analyzed legally and ethically.

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[97] Sangpetch, Anchalee & Chomsiri, Thawatchai. *The Challenges of Admissibility of Digital Evidence in Court*. 1 *International Journal Of Cyber Criminology* 15, 67-85 (2021): .

[98] Orin S. Kerr, *The Rules of Evidence in the Digital Age*, 6 *Harvard Law Review* 135, *1652-1671* (2021): .

[99] Batya Friedman & Amrita Karnik, *Balancing Privacy Rights and Investigative Needs in the Digital Age*, 1 *Journal Of National Security Law And Policy* 13, 69-96 (2021).

[100] Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 8 *Texas Law Review* 98, (2020).

[101] Bert-Jaap Koops & Ronald Leenes, *Privacy, Data Protection, and Cybersecurity in Europe*, 2 *Computer Law & Security Review 33, 163-175* (2017).

[102] T. C. Rahayu, H. Mawengkang & A. D. Sulistyono, *Standardization of digital forensics practices and procedures: A literature review*, *International Seminar on Intelligent Technology and its Applications* (ISITIA) 125-130 (2021).

[103] S. W. Brenner & J. J. Schwerha, *Cybercrime and jurisdiction: A global problem requires a global solution*, *Berkeley Journal Of International Law* 36 (2018) 228-283.

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E. Data Preservation

Another significant challenge in digital forensics is the issue of data preservation. Digital evidence is often volatile and can be easily modified, deleted, or destroyed, either intentionally or unintentionally. To preserve digital evidence, investigators must use specialized tools and techniques to make bit-by-bit copies of storage devices or platforms. This can be a time-consuming process, and there may be instances where digital evidence is lost or destroyed before it can be preserved.[104] The lack of qualified digital forensic analysts and examiners is also a significant challenge. Digital forensics is a highly specialized field, requiring a combination of technical skills, investigative expertise, and legal knowledge. There is a shortage of qualified digital forensic analysts and examiners, which can lead to delays in investigations and potentially compromise the integrity of digital evidence.[105]

F. Need for Ongoing Research and Development

Another challenge is the need for ongoing research and development in digital forensics. The rapidly evolving nature of digital technology means that investigators must continually adapt and develop new tools and techniques to analyze digital evidence. This requires ongoing investment in research and development to ensure that digital forensics practices remain effective in the face of new threats and challenges.[106] Finally, cybercrime and digital evidence gathering raise important ethical and societal questions. The use of digital evidence in criminal investigations raises questions about the balance between security and privacy, the power of law enforcement agencies, and the rights of individuals. These questions are complex and require ongoing dialogue and engagement with stakeholders across society.[107]

6. Recommendations

These challenges and gaps in digital forensics and the legal frameworks for handling digital evidence are numerous and complex. The increasing volume and variety of digital evidence, the lack of standardization and qualified personnel, the evolving legal frameworks, and the ethical and societal implications all re-

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[104] M. Sallmen & H. Kukka, *Preserving Digital Evidence: Specialized Tools And Techniques*, 16 *J. Digital Forensics Secl.* 83 (2021).

[105] J. Nwokedi & G. C. Kessler, *Digital Forensics: A Critical Shortage Of Qualified Examiners*, 67 *J. Forensic SCI.* 266 (2022).

[106] N. L. Beebe & T. R. Clark, *Evolving Digital Forensics: Challenges And Opportunities*, 16 *J. Digital Forensics Sec L.* 31 (2021).

[107] Goodall, J., & Cate, F. T. *Balancing Privacy, Security, and Civil Liberties in Digital Investigations*, 11 *J.L. & Cyber Warfare 41* (2022).

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quire ongoing attention and investment. Law enforcement agencies can always improve their ability to effectively investigate cybercrime to protect society from digital threats. Staying updated on technological advancements is critical for digital forensics investigators handling cybercrime cases.

This includes new hardware, software, networking technologies, and education about emerging cyber threats. Maintaining a comprehensive knowledge of digital forensics practices allows, investigators to keep pace with adaptable cybercriminals. This includes knowledge of the digital forensics practices as they relate to the law and legal procedure. Adhering to a rigorously designed methodology based on industry best practices is also vital for investigations. Investigators should implement clear procedures for evidence collection, preservation, analysis and reporting. A consistent methodology enables evidence to be obtained with the assurance that such evidence can withstand judicial scrutiny in court proceedings.[108]

Investing in specialized training and ongoing education is essential, as digital forensics requires the development of an extremely specialized form of expertise. Formal certification programs, hands-on training, and continuing education can help investigators build and maintain their skills related to navigating cybercrime and law. This emphasizes the need for specialized knowledge, as highlighted above in this article. Forging collaborations between stakeholders such as law enforcement, legal counsel and IT departments, are also fundamental. Partnerships enable smooth investigations and prosecutions by facilitating coordination. Thus, addressing digital forensics challenges related to coordinating the efforts of the various players within the legal system will only improve the results. Incorporating automation and analytics tools accelerates investigations by rapidly generating insights through data recovery, visualization and analysis. Increasing the availability and use of these technologies will boost efficiency and productivity. Being proactive by performing regular security assessments can help identify threats before vulnerabilities can be exploited by cybercriminals. This assessment should include vulnerability scanning, penetration testing and system monitoring to stay ahead of threats.[109]

Rigorously upholding ethical standards demonstrates professionalism and helps earn stakeholder trust. Investigators should respect privacy rights and civil liberties. A strong ethical grounding will help resolve the problems which that inevitably arise in situations where investigative practices confront legal and moral norms. Maintaining a rigorous chain of custody through detailed documentation will assure evidence credibility and admissibility. Meticulously tracking evidence integrity safeguards it for legal proceedings. Implementing robust

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[108] Alok Mishra, Yehia Ibrahim Alzoubi, Memoona Javeria Anwar, Asif Qumer Gill, *Attributes impacting cybersecurity policy development: An evidence from seven nations*, 120 *Computers & Security 102820* (2022) .

[109] Muhammad Zafar Yaqub, Abdullah Alsabban, *Industry-4.0-Enabled Digital Transformation: Prospects, Instruments, Challenges, and Implications for Business Strategies*. *Sustainability*, May. 2023, 8553

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data management protocols is critical when handling massive volumes of data. This includes establishing clear procedures for collecting, storing, backing up and retrieving data to guarantee accurate, and reliable evidence is protected during investigations.

These are some of the possible data management practices that address the investigative challenges facing forensic evidence collection with respect to its effective use in legal proceeding. Taking advantage of available open-source tools and resources can also help investigators streamline investigative processes and reduce costs. The digital forensics community continually produces freely available open-source software. Maintaining an ongoing relationship with academic researchers can provide additional insights regarding new developments in this evolving field. These types of collaborations can help investigators stay aware of emerging trends and innovations, which will enable them to better navigate the complex landscape at the intersection of cybercrime and law.[110]

This study has several limitations. Firstly, it relies solely on a literature review and doesn't involve primary research. As a result, the findings may not reflect the experiences of practitioners or experts in the field. Secondly, it focuses primarily on legal and technical issues related to digital forensics, neglecting socio-cultural and economic factors that may influence receptivity to the adoption of standard protocols and procedures. Lastly, this study doesn't explore the impact of digital forensics on privacy and civil liberties which is a critical area of concern. Future research in this area should aim to address these limitations.

First, empirical research could be conducted to validate the findings of this study and explore the experiences of practitioners and experts in the field. This would help provide a more comprehensive understanding of the challenges and opportunities associated with digital forensics in criminal investigations. Second, research could be conducted to investigate the socio-cultural and economic factors that may influence the adoption of standard protocols and procedures for digital evidence handling. This would help to identify strategies for promoting standardization and collaboration across different regions and jurisdictions. Lastly, research could be conducted to explore the impact of digital forensics on privacy rights and civil liberties and to identify ways of balancing society's need for digital evidence collection and the individual's rights to privacy.

V. Conclusion

This study highlights the critical challenges posed by cybercrime to digital forensics in criminal investigations. One conclusion is that the lack of standardization and protocols for handling digital evidence is a significant hindrance to

[110] H.M.A. van Beek, J. van den Bos, A. Boztas, E.J. van Eijk, R. Schramp, M. Ugen, *Digital forensics as a service: Stepping up the game*, *Forensic Science International: Digital Investigation*, 35, 2020

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the admissibility of evidence in court. This is a major obstacle to the investigation and prosecution of cybercrime cases. To address this challenge, this study recommends that the legal and technical communities collaborate to establish standard protocols and procedures for digital evidence collection and handling. Such collaboration will also be crucial in developing legal frameworks that are able to effectively deal with cybercrime.

This study also examines the importance of establishing robust protocols and procedures for properly collecting, preserving, and presenting digital evidence that maintains its integrity so that it will be admissible in court. A key claim throughout is that collaboration between the legal and technical sectors is imperative to developing consistent, ethical standards for digital evidence handling. The literature reviewed demonstrates the need for greater standardization and expertise development to enable law enforcement agencies to overcome investigative barriers posed by massive data volumes, platform diversity, encryption and other technical issues.

The implications of this study are significant for the fields of digital forensics and cybercrime. The findings highlight the importance of digital forensics in criminal investigations and the need for a robust legal framework to effectively address the ongoing and evolving problem of cybercrime. Policymakers can utilize the recommendations presented in this article to develop effective legal frameworks, and law enforcement agencies can implement them in their investigations. The key findings of this study point to the need for collaboration between stakeholders in the legal and technical communities to establish standard protocols and procedures for digital evidence handling.

The contribution of this study to the field of digital forensics and cybercrime is to raise awareness of the challenges faced by investigators and prosecutors in cybercrime cases and to provide recommendations for addressing these challenges. The key findings of this study point to the need for collaboration between stakeholders in the legal and technical communities to establish standard protocols and procedures for digital evidence handling.

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The Use of Efficient Breach of Contracts in the Automotive Cluster of Querétaro, Mexico[1]

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Abstract: Efficient breach is the idea that voluntarily breaching a contract could be economically advantageous for all the parties involved, as long as damages are paid to the non-breaching party. This vision is based on an economical perspective, but it fails to take into account other considerations within commercial relations. This article is the result of a research project in which interviews were performed to people involved in the automotive industry in the state of Querétaro, Mexico. The aim was to discover whether efficient breach is, in fact, used by merchants in the automotive cluster and the perspective that they have over this figure.
Keywords: Efficient Breach, Contracts, Cluster, Promise, Extra-Judicial.

Resumen: La doctrina del incumplimiento eficiente postula que la violación voluntaria de los contratos puede ser ventajosa desde un punto de vista económico para todas las partes, siempre que se pague por los daños y perjuicios ocasionados. Esta doctrina es meramente económica, puesto que no toma en cuenta otras cuestiones dentro de las relaciones mercantiles. Se presentan los resultados de un proyecto de investigación en el que se realizaron entrevistas a personas relacionadas con la industria automotriz en el estado de Querétaro, México. Se buscaba descubrir si el incumplimiento eficiente es usado por los comerciantes en el clúster automotriz de la entidad y la opinión que guardan respecto a la figura mencionada.
Palabras clave: Incumplimiento eficiente, contratos, clúster, promesa, extra-judicial.

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I. Introduction

Efficient breach, the idea that voluntarily breaching a contract is economically sound as long as damages are paid to the affected party, has been studied for many years.[2] Although most of these studies have been theoretical, a combination both of law and economics, there have also been some practical studies.[3] Even though this is a theory that originated in American Law, it can be applied to any legal system since it involves contracts and their breaches. Therefore, this doctrine could be applied in any system where contracts are concluded. The question is whether this figure is used by companies in places outside the United States, such as Mexico.

As part of the research project PAPIIT IA301921, carried out with funds provided by the *Dirección General de Asuntos del Personal Académico* (DGAPA) of the *Universidad Nacional Autónoma de México* (UNAM), semi-structured interviews were performed with people related to the automotive cluster in the city of Querétaro, Mexico, including people from the industry, the government, and academia. An industrial cluster, such as the automotive cluster in Querétaro, can be understood as "a group of close-by supporting industries [that create] competitive advantage in a range of interconnected industries that are all internationally competitive".[4]

Part of the research objectives was to uncover the manner in which companies create trust among themselves and the way they solve conflicts. It is hoped that this information will contribute to the evolution of commercial law, so that future Mexican commercial law adjusts better to the requirements of merchants and that it is based on their own customs and practices instead of on a doctrine that is not based on real interactions. With that aim, people working at automotive companies, managers who work with automotive companies, people related to the academia that performs research with these companies, and people from the state government that deal with these companies were interviewed as part of this research project.

First, I will explore the concept of *cluster* and the reasons why the automotive cluster of Querétaro was chosen to perform this study. Then a brief exploration of the doctrine of efficient breach and the reasons it is supported. Next, I will attempt to establish how Mexican law handles these types of breaches using

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[2] *See* Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach*, 97 Va. L. Rev. 1939 (2011). *Also* Renzo Saavedra Velazco, *Obstáculos Jurídicos y Económicos a la Aplicación de la Teoría del Incumplimiento Eficiente, ¿Un Irritante Jurídico o una Figura de Aplicación Imposible?*, 58 Themis Rev. Der. 247, 247 (2010). *Also* Raul Iturralde Gonzalez, Commercial Archetypes, Practices and Principles: Tools for a Market Sensitive 21st Century Commercial Law (2018) (SJD dissertation, University of Arizona) (on file with author).

[3] *See* David Baumer & Patricia Marschall, *Willful Breach of Contract for the Sale of Goods: Can the Bane of Business Be an Economic Bonanza?*, 65 Temple L. Rev. 159 (1992).

[4] Michael E. Porter, *The Competitive Advantage of Nations*, Harv. Bus. Rev., Mar. 1990, at 73, 83, https://hbr.org/1990/03/the-competitive-advantage-of-nations (last visited Apr 4, 2023).

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a similar study implemented on Colombian law as a basis, followed by a brief analysis of an investigation conducted in the United States regarding the use of efficient breach by American companies. Finally, the results of the interviews will be provided as a means to identify usage among companies related to the automotive industry in the state of Querétaro.

II. What is a Cluster? Why Querétaro?

Michael Porter established the idea of a cluster in his essay "The Competitive Advantage of Nations".[5] In that essay, he gives us the following definition: to "put forward a microeconomically based theory of national, state, and local competitiveness in the global economy… Clusters are geographic concentrations of interconnected companies, specialized suppliers, service providers, firms in related industries, and associated institutions in a particular field that compete but also cooperate".[6]

Porter continues with the definition of a cluster: "[a] cluster is a geographically proximate group of interconnected companies and associated institutions in a particular field, linked by communalities and complementarities… More than single industries, clusters encompass an array of linked industries and other entities important to competition."[7] These entities and industries have understood that they can obtain benefits and become more efficient from establishing themselves closer to each other and establishing cooperative networks.

Porter explains: "Most cluster participants are not direct competitors but rather serve different segments of industries. Yet they share many common needs, opportunities, constraints, and obstacles to productivity. The cluster provides a constructive and efficient forum for dialogue among related companies, their suppliers, government, and other institutions".[8] Porter performs his analysis of the cluster based on competition and the form in which it affects productivity.[9] Nevertheless, as Porter affirms, cooperation among the firms is also necessary.[10]

As explained by Porter, a cluster is an interconnected group of companies and other institutions; therefore, these companies and institutions must create networks of cooperation to function. One of the objectives of the research

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[5] *Id.*

[6] Michael E. Porter, *Location, Competition, and Economic Development: Local Clusters in a Global Economy*, 14 Econ. Dev. Q. 15, 15 (2000).

[7] *Id.* at 16.

[8] *Id.* at 18.

[9] *Id.*

[10] "It should be clear that clusters represent a combination of competition and cooperation… Competition and cooperation can coexist because they are not different dimensions or because cooperation at some levels is part of winning the competition at other levels." Porter, *supra* note 6 at 25.

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project was to identify the manner in which these networks of cooperation function in the automotive cluster of Querétaro. Being a small representation of the interactions that occur between firms and companies, a cluster allows for the investigation of these interactions on a smaller scale. Industrial members, universities, research centers, and institutions from the local government make up the Automotive Cluster in Querétaro.[11] The automotive industry is one of the biggest and most important industries in Mexico.[12] The local government in the State of Querétaro has promoted the establishment and growth of several clusters in the region.[13] The model followed in Querétaro is the triple helix model that seeks to "strengthen alliances between the auto parts companies, the research centers and the universities".[14] "These public-private alliances aspire to the development of an innovation ecosystem in which the interdependence between organizations and actors generates specialization and greater value to production".[15]

Moreover, speaking of the reasons to locate and promote an aeronautical cluster in Querétaro, Burgos and Johnson point out:

> *Networks* [...]: Usually, networks are assumed to develop during the emergence of an industrial cluster, but sometimes existing networks function as a supporting prerequisite. There was already a network of companies working together before Bombardier initiated operations in Querétaro. These companies later became Bombardier's suppliers, providing the needed network for the development of the aeronautical cluster.[16]

Hence, it is important for industries in a cluster to develop networks of trust among themselves.[17] The creation of trust among people and companies cannot be based on the mere use of contracts and the threat of the implementation of judicial processes. It was my belief that the network of trust among companies in the cluster would create *sui generis* mechanisms to solve disputes among the members of the cluster. [18]

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[11] Raúl Iturralde González, Iliana del Rocío Padilla Reyes & Nicolas Peña Bravo, *Medios de Resolución de Conflictos. El Clúster Automotriz Queretano*, 37 Nthe 68 (2021). *Also* Clúster Automotriz de Querétaro, https://autoqro.mx/ (last visited Apr 4, 2023).

[12] *See Importancia de la Industria Automotriz*, AMIA, https://www.amia.com.mx/publicaciones/industria_automotriz/ (last visited Apr 11, 2023).

[13] *See* Rodrigo Garza Burgos & Jim Johnson, *Why Querétaro? The Development of an Aeronautical Manufacturing Cluster in Central Mexico: Why Querétaro?*, 60 Thunderbird Int'l Bus. Rev. 251 (2018).

[14] Iturralde González, Padilla Reyes, and Peña Bravo, *supra* note 11 at 70. (Translation by the author).

[15] *Id* (Translation by the author).

[16] Burgos & Johnson, *supra* note 13 at 256-57.

[17] I would argue that it is important not only for companies in a cluster, but for companies everywhere.

[18] To see how this can happen, see the book by Ellickson. Robert C. Ellickson, Order without Law: How Neighbors Settle Disputes (1994).

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Nevertheless, the results of the research indicate that while the companies had not created their own mechanisms to deal with disputes among themselves, they show a preference to rely on commercial arbitration rather than using the traditional jurisdictional mechanisms.[19] I believe that this shows the establishment of networks of trust among these companies as arbitration implies reaching agreements on matters such as the formation of the tribunal and the acceptance of its decisions.

Moreover, it was also my belief that these networks of trust could not be developed if companies relied only on economic calculations. In other words, the actions of companies that sought to create networks of trust could not depend on mere economic judgements. This is due to trust requiring more than predicting the possible gains of an action but estimating the effects of that action on the other person.

Thus, besides investigating the use of mechanisms outside the traditional judicial process, the use of efficient breach among the companies within the automotive cluster was also examined. That is because an efficient breach of contracts is an instrument based on pure economical calculations that does not consider the negative effects on the relationship of the parties. Therefore, I did not think that companies in a cluster would use it.

III. Efficient Breach

The idea of efficient breach is generated from seeing the law from an economic standpoint.[20] Efficient breach is based on the notion that it can be profitable for a party to intentionally breach its part of a contract with the caveat that it must compensate the other party for that breach.[21] Efficient breach as a manner to solve conflicts among the parties of a contract makes sense only from an economic point of view.

Back in the 19th century, Justice O.W. Holmes expressed that:

> [t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, - and nothing else. If you commit a contract, you are liable to pay a compensatory sum unless the promised

[19] Iturralde González, Padilla Reyes, & Peña Bravo, *supra* note 11.

[20] "Efficient breach can be considered as an economic analysis of the law. It is a product of the school of thought known as "Law and Economics," or "Wealth Maximization Theory," which holds "that those actions that increase wealth are just and should be allowed, whereas those actions that decrease wealth are unjust and should be forbidden". Iturralde González, *supra* n. 2 (citing Marco J. Jiménez, *The Value of a Promise: A Utilitarian Approach to Contract Law Remedies*, 56 UCLA L. Rev. 59, 60 (2008-09)).

[21] Juan Antonio Gaviria Gil, *Sobre la aplicación de la teoría del incumplimiento eficiente de contratos en el derecho colombiano*, Con-texto 37, 38 (2015). *Also* Patton v. Mid-Continent Sys., Inc., 841 F.2d 742, 750 (7th Cir. 1988) (Posner J.) *see infra*. *Also* Iturralde Gonzalez, *supra* n. 2.

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18893

> event comes to pass… But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.[22]

Allowing parties to breach their contracts while, at the same time, obtaining more advantageous terms with a third party, makes sense from an economical point of view. Efficiency is reached since a gain is achieved and no party is injured, at least in theory, as the non-breaching party will be compensated with the payment of damages. Therefore, efficient breach indicates that breaching contracts is justified.

It is important to establish that this work does not seek to give a solution to efficient breach. This is due to the fact that a solution to a breach of contract is already given in every legal system: the payment of damages. The aim of this investigation is to uncover whether companies commit to efficiently breach their contracts because, from an economical point of view, theory indicates that this would be advantageous to them.

Seen from a mere economic point of view, "[r]epudiation of obligations should be encouraged where the promisor is able to profit from his default after placing his promisee in as good a position as he would have occupied had performance been rendered".[23] For example, Justice Posner, a defender of efficient breach from the bench, declared on a decision:

> Even if the breach is deliberate, it is not necessarily blameworthy. The promisor may simply have discovered that his performance is worth more to someone else. If so, efficiency is promoted by allowing him to break his promise, provided he makes good the promisee's actual losses. If he is forced to pay more than that, an efficient breach may be deterred, and the law doesn't want to bring about such a result.[24]

Justice Posner promotes the economic view in the name of efficiency. Breaching a contract, the theory goes, makes economic sense since it allows the parties to enter into more advantageous deals, which will promote economic efficiency overall. The idea is that, in general, there is a net gain as the breaching party obtains an economic gain, while the victim of the breach would be left in the same position as if the contract would have been performed through the payment of damages.[25]

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[22] O. W. Holmes, *The Path of the Law*, 10 Harvard. L. Rev. 459, 462 (1897). *See* Markovits & Schwartz, *supra* n. 2 at 1981. *Also* Iturralde González, *supra* n. 2.

[23] Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 Rutgers L. Rev. 273, 284 (1969). *Also* Iturralde González, *supra* note 2.

[24] Patton v. Mid-Continent Sys., Inc., 841 F.2d 742, 750 (7th Cir. 1988) (Posner J.). *Also* Iturralde González, *supra* note 2.

[25] "It is true that if there is a very stiff penalty for breach, parties will be discouraged from committing "efficient" breaches, that is, breaches that confer a greater benefit on the contract

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As explained before, the aim of this article is not to give a solution to efficient breaches since that solution already exists, *i.e.*, the payment of damages in their different forms. Nevertheless, since authors support the idea that the breach of promises is economically sound if the victim is repaid, the possibility that efficient breach is used by companies based on efficiency and economical gain needs to be explored.

IV. Efficient Breach in Mexican Law

Most of the doctrine created around efficient breach comes from Common Law jurisdictions.[26] Even though there is some doctrine about efficient breach on this side of the aisle, the Civil Law side, the reality is that the studies are few and far between. Therefore, there are almost no studies on the application of efficient breach in Mexican law.

Since voluntarily breaching promises makes sense from an economic point of view, or so says the efficient breach theory, the objective is to uncover whether efficient breach is, in effect, used by the companies at the automotive cluster in Querétaro.

However, before looking at the results of the research, it is important to determine whether Mexican law is sympathetic to the use of efficient breach, in other words: whether Mexican law allows companies to breach their contracts and obtain the economic benefits described by the theory of efficient breach. To approach the application of efficient breach in Civil law jurisdictions, a paper from a country with a system similar to Mexico's will be studied and its method applied to Mexican law.

Professor Juan Antonio Gaviria Gil performed a study of the efficient breach of contracts to determine whether this theory was compatible with Colombian Law.[27] Professor Gaviria analyzed Colombian law to see what laws and regulations allowed the implementation of efficient breach and which ones would prevent it.[28] I will perform a similar study on Mexican Law basing my comparison on the study performed by Prof. Gaviria Gil.

Profesor Gaviria Gil starts by pointing that Colombian Law mandates the payment of any earnings that the victim would have obtained in case that the contract had been fulfilled.[29] The professor explains that an efficient breach would not be allowed if the defaulting party were forced to pay not the earnings that the victim would have obtained (earnings that have to be considered

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breaker than on the victim of the breach, in which event breach plus compensation for the victim produces a net gain with no losers and should be encouraged".

XCO Int'l, Inc. v. Pac. Sci. Co., 369 F.3d 1000, 1001 (7th Cir. 2004) (Posner J.).

[26] *See* Birmingham, *supra* note 23. *Also* Baumer & Marschall, *supra* note 3.

[27] Gaviria Gil, *supra* n. 21.

[28] *Id.* at 46-55.

[29] *Id.* at 46-47.

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18893

for any efficient breacher), but the earnings obtained by the defaulting party, which would make the transaction moot.[30] So, according to Prof. Gaviria, efficient breach will be allowed when the restitution mandated by law is limited to the damages caused and earnings are not materialized.[31]

The Mexican Federal Civil Code indicates that breach of contracts (or "obligations") compels the payment of damages,[32] which in Mexico are understood as two types of damages, those that affect the wealth of the person,[33] and those that deprive him of the licit earnings that he should have received.[34]

The Federal Civil Code in Mexico indicates that a breach of contract will allow the affected party to receive both kinds of damages as long as they are the immediate and direct result of the breach.[35] The earnings obtained by the breacher are not considered when computing the damages to be paid to the affected party, but the licit earnings that it should have obtained if the contract had been fulfilled.

Professor Gaviria Gil indicates that the payment of the earnings received by the breacher can be requested in the case of illegitimate enrichment;[36] nevertheless, that would not apply in these cases.[37] The same non-application results in the case of the Mexican Federal Civil Code as this law describes illegitimate enrichment as "whoever with no cause enriches himself damaging someone else is obligated to compensate the impoverishment to the extent of the enrichment."[38] Illegitimate enrichment refers to those situations in which a person receives a benefit with no legitimate cause.[39] In this case, the person enriched himself through a breach of contract, which allows the affected party to sue for damages.[40]

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[30] *Id.*

[31] *Id.* at 47.

[32] Código Civil Federal [CC], art. 2104, Diario Oficial de la Federación [DOF] 26-05, 14-07, 03-08, 31-08-1928, últimas reformas DOF 11-01-2021 (Mex.).

[33] "*Daño*" CC, art. 2108, DOF 26-05, 14-07, 03-08, 31-08-1928, últimas reformas DOF 11-01-2021 (Mex.).

[34] "*Perjuicios*" CC, art. 2109, DOF 26-05, 14-07, 03-08, 31-08-1928, últimas reformas DOF 11-01-2021 (Mex.).

[35] CC, art. 2110, DOF 26-05, 14-07, 03-08, 31-08-1928, últimas reformas DOF 11-01-2021 (Mex.).

[36] Gaviria Gil, *supra* n. 21 at 47.

[37] *Id.*

[38] CC, art. 1882, DOF 26-05, 14-07, 03-08, 31-08-1928, últimas reformas DOF 11-01-2021 (Mex.).

[39] *See* Código civil federal comentado: Libro cuarto, De las obligaciones, 62 (Juan Luis González Alcántara coord., 2015). *Also* Sergio Azúa Reyes et al., Código civil para el distrito federal en materia común y para toda la República en materia federal: texto comentado. t. IV: Libro cuarto. Primera parte. De las obligaciones 49–50 (2 ed. 1993).

[40] "Any increase in the assets of one person to the detriment of the assets of another, which does not have as a 'cause' or origin a 'legitimate' reason, that is, based on the law, falls under the figure of illegitimate enrichment[...] any circumstance that would have given rise to enrichment, whether legitimately or illegitimately, since the existence of a legitimate cause renders the reason

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18893

Professor Gaviria Gil holds that, according to Colombian law, the affected party can decide to receive the payment of damages or to request specific performance.[41] Nevertheless, Gaviria reminds us that several issues make it extremely difficult to demand the performance of the breached obligation.[42] These issues include the impossibility of performing the obligation (as the good was given to a good-faith third party or the service can no longer be given)[43] or that forcing the performance of the obligation could be abusive when compared with the payment of damages.[44]

Moreover, Professor Gaviria alludes to the results of a study conducted on other Civil Law jurisdictions regarding the implementation of specific performance as a remedy to the breach of contracts.[45] According to Gaviria, this study shows that specific performance is seldom used in Denmark, France, or Germany nor in cases regarding the UN Convention on Contracts for the International Sale of Goods.[46]

Regarding Mexico, similar provisions can be found in the Federal Civil Code, which indicates that "the offended party has the election to request the reestablishment of the previous situation [specific performance], when possible, or the payment of damages."[47] Professor Gaviria points out that the enforcement of specific performance in Civil Law countries is not as widespread as is often considered.[48] He claims that this lack of use is a result of the costs associated with this remedy of specific performance, because the offended party would rather receive money than to continue dealing with the breacher, and with the lack of good faith in the performance once compelled, and also because it could take a long time for a judicial order to force the compliance.[49]

After analyzing the laws that could allow the performance of efficient breach, Prof. Gaviria studies those acts and laws that could prevent parties from recurring to efficient breach in Colombia.[50] He starts by studying a norm in Colom-

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for being of the figure of illegitimate enrichment null and void…" Enriquecimiento ilegítimo. El que su actualización tenga como origen un error derivado de un vínculo contractual no le da el adjetivo "con causa." Tercer Tribunal Colegiado en Materia Civil del Primer Circuito [TCC], Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo XXVIII, Julio de 2008, Tesis I.3o.C.680 C, Registro digital 169300 (Mex.) (Non-binding precedent) (translation by the author).

41 Gaviria Gil, *supra* n. 21 at 47-48.

42 *Id.* at 48.

43 *Id.*

44 *Id.* at 47 *citing* the case of Jacob & Youngs, Inc. v. Kent, 230 N.Y. 239 (1921).

45 Henrik Lando & Caspar Rose, *On the Enforcement of Specific Performance in Civil Law Countries*, 24 Int'l Rev. L. & Econ. 473 (2004). *in* Gaviria Gil, *supra* n. 21 at 49.

46 Lando & Rose, *supra* note 45 *in* Gaviria Gil, *supra* n. 21 at 49.

47 CC, art. 1915, DOF 26-05, 14-07, 03-08, 31-08-1928, últimas reformas DOF 11-01-2021 (Mex.).

48 Gaviria Gil, *supra* n. 21 at 50.

49 *Id.*

50 The part where Prof. Gaviria analyses the breach of contract between producers and

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bia that forbids inducing the breach of a contract.[51] Nonetheless, it seems that no such law exists in Mexico.

In Mexico, art. 6 bis of the Commercial Code establishes that "[m]erchants must perform their activities based on fair dealing in industrial or commercial matters…"[52] followed by a list of activities that would be considered as unfair competition. However, inducing the breach of a contract (either malicious or not) is not considered one of these activities. A review of the activities deemed unfair competition in the Federal Antitrust Law also fails to uncover the induction of a breach of contract as a listed activity.[53]

In one of the last points he makes, Prof. Gaviria states that liability in American contract law is not based on fault, which means that a party is only liable for those damages that could be reasonably foreseeable by the parties.[54] Also, Civil Law jurisdictions will look at the intention of the breacher to impose damages, according to Prof. Gaviria.[55] He quotes the following article from the Colombian Civil Code:

> If fault cannot be imputed to the debtor, he is only responsible for the damages that were foreseen or could be foreseen at the time of the contract; but if there is fault, he is responsible for all the damages that were the immediate or direct consequence of not having fulfilled the obligation or of having delayed its fulfillment.[56]

The author explains that in Colombian law, the fact that unforeseen damages can be claimed prevents the efficient breach from being applied, since the defaulting party cannot estimate the burden of paying those unknown damages.[57] "[I]t is very difficult for those that want to efficiently breach a contract to ascertain unforeseeable damages, to quantify them, and keep a profitable default."[58] It seems that the same cannot be said regarding Mexican law.

With reference to the payment of damages, the Mexican Federal Civil Code does not seem to have an article as that of the Colombian one. Regarding fault, the Mexican code only declares that "liability originated from fault is enforce-

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consumers will not be analyzed here as this work is limited to relations between companies. *Id.* at 16. Also, Prof. Gaviria refers to another form of efficient breach that happens when the party is forced to breach due to unforeseen circumstances. That is also beyond the scope of this paper. *Id.* at 17.

[51] Art. 17 of Law 256 (1996) *in* Gaviria Gil, *supra* n. 21 at 50.

[52] Código de Comercio [CCom], DOF 7-10 a 13-12-1889, últimas reformas DOF 28-03-2018 (Mex.).

[53] Ley Federal de Competencia Económica [LFCE], DOF 23-05-2014, últimas reformas DOF 20-05-2021 (Mex.).

[54] Gaviria Gil, *supra* note 21 at 53 *citing* Hadley v. Baxendale 9 Ex 341 (23 February 1854).

[55] Gaviria Gil, *supra* note 21 at 53.

[56] Código Civil [C.C.] art. 1616 (Colom.) (translation by the author).

[57] Gaviria Gil, *supra* note 21 at 54.

[58] *Id* (translation by the author).

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able in all obligations"[59] and that "damages must be an immediate and direct consequence of the breach of the obligation when they have happened or when they are expected to happen."[60]

Lastly, and interestingly, Prof. Gaviria refers to cultural barriers against the usage of efficient breach.[61] "[E]fficient breach could be seen as something immoral in Civil Law [jurisdictions] where the principle of *pacta sunt servanda* may be respected more."[62] While it is the opinion of Prof. Gaviria that Colombian law prevents the usage of efficient breach, no such limits seem to occur in Mexican law. This opens the door to its usage in Mexico, at least from a legal point of view. The research sought to uncover whether it was in fact used.

V. Voluntary Breach of Contracts in American Law

Professors David Baumer and Patricia Marschall performed a study on the attitudes of businesspeople regarding the willful breach of commercial contracts in some parts of the United States.[63] The authors wanted to see the manner in which businesses deal with breaches of contract. The authors surveyed businesses in order to study, among other factors, the perceived morality of a breach of contract when said breach was motivated by a better deal.[64]

The authors start by briefly mentioning the difficulties that the doctrine of efficient breach would have in its application in the United States due either to issues relating to the absorption of fees and difficult to obtain damages,[65] the morality of keeping promises,[66] or the effects of market forces punishing "perennial sellers".[67] The authors performed an investigation among businesspeople in order to find out how those that actually deal with deliberate breaches of contracts react to them.

Regarding the use of judicial means to correct the action of a non-compliant party, most of the businesspeople that were part of the study indicated that a deliberate breach would make a lawsuit more likely.[68] It is interesting to note

[59] CC, art. 2106, DOF 26-05, 14-07, 03-08, 31-08-1928, últimas reformas DOF 11-01-2021 (Mex.).

[60] CC, art. 2110, DOF 26-05, 14-07, 03-08, 31-08-1928, últimas reformas DOF 11-01-2021 (Mex.). A similar situation happens with penal clauses, which are mentioned by Prof. Gaviria as a manner to prevent efficient breaches. Gil, *supra* note 21 at 54. Nevertheless, payment of penal clauses is limited to the amount of the contract in Mexico. CC, art. 1843, DOF 26-05, 14-07, 03-08, 31-08-1928, últimas reformas DOF 11-01-2021 (Mex.).

[61] Gaviria Gil, *supra* note 21 at 55.

[62] *Id.*

[63] Baumer & Marschall, *supra* n. 3.

[64] *Id.* at 161.

[65] *Id.* at 161-62.

[66] *Id.* at 162.

[67] *Id.* at 163.

[68] *Id.* at 166.

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18893

that one of the respondents mentioned his disdain for starting judicial proceedings, "going to court is a legal lottery where you don't know whether you will win".[69] The results given by the authors seem to indicate a preference by businesspeople to fulfill their contracts.[70]

With respect to the use of nonjudicial remedies, the results of the study indicate willingness in withhold future businesses from willful breachers. Moreover, the person who expressed his intention not to use judicial remedies seemed to mean that withholding future businesses was his primary weapon against willful breachers.[71] The survey showed that businesspeople in this area of the United States tended to use nonjudicial remedies to deal with contract breaches.[72]

The survey showed that businesspeople in that part of the United States tend to favor nonjudicial means to solve problems specially with long time clients.[73] "The conduct of businesspersons evidence both a desire to cultivate reliable trading partners and a reluctance to rely on the courts for contractual remedies. The interviewees stressed the importance of goodwill and trust among trading partners".[74]

VI. Investigation Performed in the Automotive Cluster of Querétaro

In accordance with the *Plan de Desarrollo Institucional* of the *Universidad Nacional Autonoma de Mexico*, this university seeks to promote research projects on science and humanities.[75] As part of UNAM's promotion of research projects, the *Programa de Apoyo a Proyectos de Investigación e Innovación Tecnológica* (PAPIIT) was created, and the mentioned projects are granted by the *Dirección General de Asuntos del Personal Académico*. These are the results of the research performed as part of the project PAPIIT IA301921 *Industria Automotriz y Ecosistema de la Innovación en Querétaro.*

The government of the Mexican state of Querétaro has promoted the establishment of industrial cooperation networks known as clusters.[76] Clusters are

[69] *Id.* at 166.

[70] "Mr. Fabricator said I'm a firm believer in living up to what you say you are going to do." *Id.* at 166.

[71] *Id.* at 166.

[72] *Id.*

[73] "These results indicate a preference for nonjudicial remedies over litigation where there has been a long-term relationship between trading partners." *Id.* at 167.

[74] *Id.* at 168.

[75] Universidad Nacional Autónoma de México, *Plan de Desarrollo Institucional 2019-23*. available at: https://www.rector.unam.mx/doctos/PDI2019-2023.pdf. *In* Iturralde González, Padilla Reyes, and Peña Bravo, *supra* note 11 at 69.

[76] *See* Concyteq, *El Ecosistema CTI en Querétaro – Innovación para el Desarrollo Sustentable* (2017) available at: http://www.concyteq.edu.mx/concyteq/uploads/publicacionArchivo/2017-12-1272.pdf. *Also* Burgos & Johnson, *supra* note 13.

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based on the idea that companies located near each other will create synergy that will allow them to become more competitive, as explained by Porter:

> Far more significant than mere access to components and machinery, however, is the advantage that home-based related and supporting industries provide in innovation and upgrading – an advantage based on close working relationships. Suppliers and end-users located near each other can take advantage of short lines of communication, quick and constant flow of information, and an ongoing exchange of ideas and innovations. Companies have the opportunity to influence their suppliers' technical efforts and can serve as test sites for R&D work, accelerating the pace of innovation."[77]

The networks created in the state of Querétaro function under what is known as a "triple helix" that seeks cooperation among universities, the government, and private companies.[78] The most modern descriptions of these innovation systems see them as "dynamic systems by nature with self-governing mechanisms where the trust among their members, the alliances, the cooperation networks and the solution of conflicts are key factors for their success."[79]

As part of the research project, businesspeople related to the automotive industry in Querétaro were interviewed. This also included interviews with people in the state government that deal with the automotive cluster, and researchers (both from academia and private companies) who deal with automotive companies. In total, ten interviews with people related to companies, organizations, and the local government were performed to establish whether companies used efficient breach were performed. As requested by the interviewed companies, neither their names nor the names of their personnel will be disclosed.

Part of the results of this investigation were previously published in another essay.[80] That text explained the data obtained on the manner in which automotive companies create trust and the manner in which they solve conflicts among them.[81] In other words, whether companies use judicial or extrajudicial means of conflict resolution.[82] Since the information gathered for that essay is the same as for this one, some of the data and arguments previously presented will be used in this article.

Regarding the issue of efficient breach, the results of the interviews showed that although most of the interviewees understood the concept of efficient

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[77] Porter, *supra* n. 4 at 83.

[78] Iturralde Gonzalez, Padilla Reyes, & Peña Bravo, *supra* note 11 at 70.

[79] *Id.* at 69 (citing Nataliya Smorodinskaya et al., *Innovation Ecosystems vs. Innovation Systems in Terms of Collaboration and Co-Creation of Value*, in Proceedings of the 50th Hawaii International Conference on system Sciences (2017)) (translation by the author).

[80] Iturralde Gonzalez, Padilla Reyes, & Peña Bravo, *supra* note 11.

[81] *Id.*

[82] *Id.*

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breach, none of them was aware of a situation in which it had been used.[83] One of the interviewees, an in-house legal counsel for a big auto parts company, pointed out that the concept may be known in Mexico, but that it is not often used: "[Our company] does not dismiss its use, nevertheless, at least in Mexico, it has not been developed among companies, it is not something that tends to be included in contracts."[84]

Some of the interviewees considered unethical such actions of breaching a contract to obtain a better business deal somewhere else:

> I feel that that it would be an easy way to get rid of a supplier that seemed as a good one. I could think that he does not care about his ethics, his brand, his future in the sector, what he is doing is to sell himself and, therefore, he will gain in the short term but lose in the long term. [85]

The same interviewee claims that the fact of being offered to cover damages would not change his view on the breach[86] For the interviewee, the damage has already been done and the payment would not make any difference.[87] Moreover, the time that the parties have dealt with each other would be more important than the offer to pay damages for the breach.[88]

Another issue considered by some of the interviewees is the costs related to a judicial process.[89] Sometimes, as an interviewee from an automotive company relates, it is cheaper and easier to stop doing business deals with the person that breached the contract.[90] The interviewee comments that they always start ne-

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[83] *See* interview with person who worked in automotive companies, in Querétaro (Sep. 13,2021) (on file with author).

[84] Interview with executives and in house counsel of auto parts company, in Querétaro (Jun. 26, 2021) (on file with author) (translation by the author). It seems that the interviewee may have confused efficient breach with a clause used in contracts. This only shows the lack of usage of efficient breach among companies in the automotive cluster.

[85] Interview with person associated with the automotive cluster, in Querétaro (Jul. 6, 2021) (on file with author) (translation by the author).

[86] Interview with person associated with the automotive cluster, in Querétaro (Jul. 6, 2021).

[87] "It is as trying to cover a hole that will never be 100% filled. The damage is done… you may be able to charge [the other party] what you can redeem, but the issue is not the economic one…"

Interview with person associated with the automotive cluster, in Querétaro (Jul. 6, 2021) (translation by the author).

[88] "I think that [my decision would be affected more] by the length and the [type of] relationship with [the supplier], I think that that would have a greater effect than the size of the issue… I think that we trust more the long-time relationships, and I would stop to think more on the length of the relationship." Interview with person associated with the automotive cluster, in Querétaro (Jul. 6, 2021) (translation by the author).

[89] *See* Interview with executives and in house counsel of auto parts company, in Querétaro (Jun. 26, 2021).

[90] Interview with executives and in house counsel of auto parts company, in Querétaro (Jun. 26, 2021).

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18893

gotiations in good faith and expect the other party to behave in the same manner.[91] Moreover, in the event that there is a breach of contract, the interviewee also expects the breach to have been in good faith, *i. e.*, that the breach was caused by market forces and not voluntary.[92]

Most of the participants in the interviews showed a lack of practical knowledge on the issue of efficient breach. Some of them mentioned having knowledge of it as a concept or doctrine, but not to have seen it in practice.[93] Although the lack of knowledge does not indicate that the figure does not exist, it is interesting to observe how people related to the government, the academia, and the industry do not seem to be in constant contact with efficient breach. It is a good indicator that the figure is not used in the automotive industry in Querétaro, Mexico.

VII. Conclusion

The theory of efficient breach indicates that it would be economically advantageous to breach a promise made as long as the breacher pays damages to the victim. From an economic perspective, this is efficient as it allows all parties, at least in theory, to gain an economical advantage. The breacher gets a better deal with a third party, which is economically advantageous; and since the victim would receive payment for damages, he would be in a similar position as if the contract had been performed. All parties, the breacher, the third party, and the victim would, in theory, be better off in this manner.

Nevertheless, this perspective is based solely on economic determinations that fail to take into account the trust needed to establish those promises from the beginning. Studies performed by academics in the United States fail to demonstrate the use of efficient breach by companies in that country. The research performed in the Automotive cluster of Querétaro also indicates a lack of use by companies here.

The trust that is required for a correct functioning of a market, that is the trust required to enter into agreements, would prevent the application of efficient breach even if it makes econnomic sense. This is even more relevant in clusters, where the objective is to create networks of trust among companies, governments, and academia. The results of the research show that although companies in the Automotive cluster know about efficient breach, they do not use them in their interactions since their use would jeopardize the trust generated up to that point.

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[91] Interview with executives and in house counsel of auto parts company, in Querétaro (Jun. 26, 2021).

[92] Interview with executives and in house counsel of auto parts company, in Querétaro (Jun. 26, 2021).

[93] *See* interview with a person who worked in automotive companies, in Querétaro (Sep. 15, 2021).

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Addressing Economic Inequality in Constitutional Design: the Colombian Drafting Experience in 1991

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Abstract: Colombia's Constitutional Assembly enacted a constitution in 1991 whose text and application are regarded around the world as among the best examples of socioeconomic constitutionalism in the last three decades. Despite rising interest in the structural causes of economic inequality at both global and domestic levels, Colombian constitutional scholarship has not yet offered an account of the role of the original constitutional design in addressing economic inequality. In this article, I show that the drafters of the Constitution of 1991 were deeply concerned with economic inequality and considered the problem from several angles. However, they did not agree on a structural plan with coherent tools to address it and prevent forces in the executive and legislative branches from undermining that purpose. Therefore, the Colombian constitution-making process has been overestimated because, after thirty years, the Assembly's economic egalitarian aspirations are far from being achieved, and Colombia is still among the most unequal countries on earth. Thus, the Colombian constitution-making experience provides a warning about how unclear and weak agreements in constitutional design can become an additional obstacle to overcoming economic inequality.
Keywords: Constitutional Design, Economic Inequality, Socialrights, Social and Ecological Function of Property, Land Reform, Taxation.

Resumen: La Asamblea Constituyente de Colombia promulgó una constitución en 1991, cuyo texto y aplicación son considerados en todo el mundo como uno de los mejores ejemplos de constitucionalismo socioeconómico de las últimas tres décadas. A pesar del creciente interés en las causas estructurales de la desigualdad económica a nivel tanto global como interno, los estudios constitucionales colombianos aún no han ofrecido una explicación sobre el papel del diseño constitucional original para abordar la desigualdad económica. En este artículo, muestro que los redactores de la Constitución de 1991 estaban profundamente preocupados por la desigualdad económica y consideraron el problema desde varios ángulos. Sin embargo, no acor-

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daron un plan estructural con herramientas coherentes para abordarlo y evitar que fuerzas de los poderes ejecutivo y legislativo socavaran ese propósito. Por lo tanto, el proceso constitucional colombiano ha sido sobreestimado porque, después de treinta años, las aspiraciones económicas igualitarias de la Asamblea están lejos de lograrse y Colombia sigue estando entre los países más desiguales del planeta. Por lo tanto, la experiencia constitucional colombiana proporciona una advertencia sobre cómo los acuerdos poco claros y débiles en el diseño constitucional se convierten en un obstáculo adicional para superar la desigualdad económica.
Palabras clave: diseño constitucional, desigualdad económica, derechos sociales, función social y ecológica de la propiedad, reforma agraria, impuesto.

I. Introduction

At the end of the twentieth century, Latin America experienced a wave of new constitutions to overcome authoritarianism through more participatory forms of democracy, to strengthen the rule of law so that constitutions could limit power, and guarantee human rights.[1] The Colombian Constituent Process in 1991 was one of the first examples of a regional movement known firstly as neo-constitutionalism,[2] later as new constitutionalism,[3] and reinterpreted today as *Ius constitutionale commune latinoamericanum*.[4] In thirty years, the Constitution of

[1] *See*, *e.g.*, Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 Texas Law Review, 1587 (2011).

[2] These terms are relevant to understand the background of the Colombian constituent process and its place in the region hereinafter. The "neo-constitutionalism" is a term born in Genova (Italy) to name the new European constitutions after the World War II characterized by "constitutionalizing the law", that is, the normative force and supremacy of the constitution, and the prevalent role of the judge over other branches of power in interpreting and adjudicating the constitution, especially its principles and rights; the Colombian constitution is an example of this first characterization; *see* Jorge Benavides, *Neoconstitucionalismo, Nuevo Constitucionalismo Latinoamericano y Procesos Constituyentes en la Región Andina*, 5 Ius Humani. Revista de Derecho, 173 (2016).

[3] The term "new constitutionalism" was born in Valencia (Spain) and refers to a wave of new constitutions that aimed —mainly— to give the documents more democratic legitimacy by requiring popular approval to be promulgated, for example, the constitutions of Venezuela (1999), Ecuador (2008), and Bolivia (2009); *see id.*

[4] The expression "Ius Constitutionale Commune" was born in Germany to group the common features that characterize Latin American constitutions and the discourses about them, which are the combination of national and international law (particularly, the Inter-American Convention); the centrality of constitutional principles and human rights to overcome exclusion (*e.g.*, inequality); and the contribution of the judiciary (*e.g.*, Constitutional Courts or the Inter-American Court) in the transformative role of constitutional law; *see*, Armin von Bogdandy, *Ius Constitutionale Commune en América Latina: Una Mirada a un Constitucionalismo Transformador"*, 34 *Revista Derecho del Estado*, 3 (2015).

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18894

1991 and its application by the Constitutional Court have been depicted many times as strengthening the rule of law, democracy, and human rights—especially socioeconomic rights—in the country.[5] However, despite some betterments such as the possibility to claim some social rights before a court, where the success of those claims is not always guaranteed, economic inequality is still a pressing issue.[6]

In the last decade, interest in studying the causes of economic inequality has grown, mainly due to the work of the French economist Thomas Piketty.[7] For him, the concentration of wealth is inherent to capitalism and should be fought through a Welfare State with strong public services such as social security and health, financed through mechanisms like taxes on wealth, among other tools, even at a global level.[8] Although Piketty carried out this research in economics principally with data from Western Europe and the United States, this hypothesis has invited legal scholars to think about the role of constitutional design in the fight against economic inequality, even more in countries with high levels of inequality such as Colombia.[9] However, no study by a Colombian legal scholar investigates the relationship between constitutional design and economic inequality in the Constitution of 1991.[10] There are at least two trends in the national literature. The first one analizes the structure of social rights, with some optimistic appraisals of the results obtained through its application,[11] and others that are not so optimistic.[12] The second tendency asserts that issues linked to economic inequality, such as material inequality or poverty were not discussed

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[5] *See, e.g.,* Daniel Bonilla, Constitutionalism of the Global South. The Activist Tribunals of India, South Africa, and Colombia (2013).

[6] By economic inequality, I refer both to the fact that a small percentage of the population accounts for a disproportionately large portion of the country's total income, and that most of the capital or wealth that a country owns (for example, arable land or savings banking) are in the hands of a few. That is, economic inequality, as I understand and use throughout the paper, is an umbrella term that combines the distribution of income and wealth.

[7] Thomas Piketty, El Capital en el Siglo XXI (2014).

[8] *See, e.g., id*. at 528-531.

[9] Although poverty has diminished, the country has big disparities in income, regional allocation of resources, gender inequalities, access to social rights, etc.; OCDE, *Estudios Económicos de la OCDE. Colombia* (Oct., 2019) available at: https://www.oecd.org/economy/surveys/Colombia-2019-OECD-economic-survey-overview-spanish.pdf [https://perma.cc/WQ9M-NW36]. Also, the GINI coefficient was 51.5 in 1992 and 50.4 in 2018, which means that after 26 years since the Constitution of 1991, the aspiration of economic inequality is still far from being achieved; The World Bank, *Gini index (World Bank estimate) – Colombia*. Available at: https://data.worldbank.org/indicator/SI.POV.GINI?locations=CO (last visited Nov. 1, 2023) [https://perma.cc/A632-23BX].

[10] In contrast, there are more studies on economic inequality in economics by Colombian scholars, *see, e.g.,* Luis Garay & Jorge Espitia, Dinámica de las Desigualdades en Colombia. En torno a la Economía Política en los Ámbitos Socio-Económico, Tributario y Territorial (2019).

[11] *See, e.g.*, Luis Pérez et al., Los Derechos Sociales en Serio: Hacia un Diálogo Entre Derechos y Políticas Públicas (2007).

[12] *See, e.g.,* David Landau, *The Reality of Social Rights Enforcement*, 53 Harv. Int'l L.J., no. 1 190, 203-229 (2012); Landau asserts the enforcement of social rights benefiting mainly middle and upper-class groups.

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in depth during the process of drawing up the Constitution.[13] Hence, my research aims to refocus the attention from the analysis of economic inequality in constitutional design solely in terms of social rights and to provide an articulated and comprehensive understanding of the debates on this issue in the Constituent Assembly.

The Constituent Assembly of 1991 met mainly to strengthen the State's capacity to deal with the negative effects of an armed civil conflict over the legitimacy of institutions.[14] Nevertheless, the members were also interested in economic inequality. After reading the minutes of the debates available in the Constitutional Gazette, one can realize that the discussions on how to tackle economic inequality clustered around five "pillars" or groups of policies that make up the design of the current constitution. In the first pillar, the Assembly supported a robust catalog of rights to include more social, economic, and cultural rights that guarantee welfare to the people; in the second pillar, they agreed on the necessity of State intervention in the economy to prevent wealth concentration;[15] the third pillar was the establishment of a social and ecological function of property, that would limit the right to property before the common good, and the land reform;[16] fourthly, drafters agreed on prioritizing the distribution of State expenses to satisfy basic needs, especially in poor territories;[17] and, finally, the Assembly agreed on a taxation system oriented towards equity, efficiency, and progressivity.[18] In sum, the Assembly intended through policies organized around these pillars, to enable the new constitution to address economic inequality.

Notwithstanding, my analysis of the records of proceedings reveals that those five pillars have a fundamental problem that might contribute to the persistence of economic inequality. Most of the pillars did not prescribe concrete policies to overcome economic inequality, others were not coherent with that objective, sometimes they contradicted each other, and others were insufficient to address the problem. I hypothesize that the Colombian Constituent Assembly did not agree on a well-structured constitutional plan to address economic inequality. Therefore, I argue that, to make significant progress in overcoming inequality, it is essential to have a more precise, coherent, and comprehensive plan as possible that includes constitutional mechanisms to prevent internal

[13] *See, e.g.*, Julieta Lemaitre, La paz en Cuestión: La Guerra y la Paz en la Asamblea Constituyente de 1991 37 (2011).

[14] The Constitutional Camber of the Supreme Court of Justice —in a landmark decision that followed a "Hans Kelsen's rationale"— stated that the Constitution of 1886 had no validity because it was not effective in dealing with the country's instability; Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Plena, Sentencia 138, octubre 9, 1990, M.P.: Hernando Gómez & Fabio Morón, Expediente 2214 (351-E) (Colom.).

[15] Constitución Política de Colombia [C.P] arts. 332-338, especially art. 334.

[16] *Id.* at arts. 58, 60, 64.

[17] *Id.* at arts. 356-362.

[18] *Id.* at art. 363.

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18894

forces like the executive and legislative branches and even external ones from eluding that goal.[19]

Concerning the methodology, this article analizes the proposals and debates of the Colombian Constituent Assembly published between February 5 and December 31 in 1991 by the newspaper *Gaceta Constitucional*.[20] The 144 issues of the Gazette contain the 131 proposals presented and discussed in the meetings (some of them are entire constitution drafts, whereas others consist of new articles or amendments), the publication of the Constitution and its errata, and the minutes of the discussions in the commissions and the plenary of the Assembly. The importance of the Gazette is that this source can show us the disagreements and consensus reached by the Assembly on how to tackle economic inequality and the related concepts that were debated. Although the complete transcripts of the debates are also available online, I generally excluded this source to avoid double work and focused mostly on the print copies of the Gazette. The issues of the Gazette provide a sufficient, comprehensive, and substantive summary of the discussions, that is, the minutes of the meetings, and a transcript of all the proposals and their motivations as expressed by the drafters, which were enough for the purposes and scope of this research.[21] However, in a few cases, I resorted to the transcripts when I considered that they could provide additional interesting information. The paper also draws on secondary sources such as books, newspaper articles, and statistics, to contextualize the Assembly's ideological struggles.

The article proceeds in four chapters. Chapter one explains the background, composition, and organization of the Constituent Assembly in 1991. Chapter two delves into the debates on economic inequality in the Assembly. After a brief historical description to set the context in each section, it shows that the issue of economic inequality was discussed in terms of five broad topics and analyzes the debates for what they reveal about areas of agreement and dissent. Chapter three shows that the agreements incorporated into the Constitution to overcome inequality were inadequate to permit the genesis of a structurally coherent approach to reducing economic inequality. Based on that experience, chapter four reflects on the need for a more precise, coherent, comprehensive,

[19] There is a debate among scholars about the neoliberal nature of the Constitution of 1991. Although there is an agreement about the presence of neoliberal and interventionist approaches, the discussion up to date is whether the constitution has enough tools to prevent that a neoliberal interpretation of the text overrides it; *see, e.g.*, Jairo Estrada, *Las Reformas Estructurales y la Construcción del Orden Neoliberal en Colombia*, in Los Desafíos de las Emancipaciones en un Contexto Militarizado 247, 247-284 (Ana Ceceña ed., 2006).

[20] The data was consulted online at: Biblioteca del Banco de la República de Colombia, *Gaceta Constitucional* (1991) available at: https://babel.banrepcultural.org/digital/collection/p17054coll26/id/3702 [https://perma.cc/ZLW2-C7M2].

[21] Among the available sources from the Assembly meetings in the library Biblioteca Luis Ángel Arango in Bogotá, there are video and audio cassettes, and people's and drafters' proposals.

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18894

and creative constitutional design as possible to better contribute to overcoming economic inequality. Finally, I present a brief conclusion.

II. The Colombian Constituent Assembly of 1991

In 1990, the Colombian people seemed to be at war with themselves. On the one hand, they carried out an armed conflict of almost 35 years between insurgent groups of the extreme left trying to seize power and a political elite that divided power among themselves. On the other hand, the drug cartels had declared war on the State and anyone who dared to question their nascent economic power and political influence. In this scenario, there were Colombians who assassinated compatriots to the highest bidder, hired by the State, or people with the sufficient economic capacity to do so and who considered their interests threatened. Also, the executive branch oppressed the population through a permanent state of exception with the justification of having greater maneuverability to combat both illegal armed groups and citizens considered sympathizers. And, of course, civil society, passively or actively, participated in this bloodbath, either as a victim or as a perpetrator, directly or indirectly.[22] It is in this context that the Colombian Constituent Assembly was born.

The opening context of this chapter presents the birth of the Constituent Assembly as an instrument to re-legitimize the State before the armed actors and to pacify the country. Back then, Colombia was a country with great economic inequality that a constituent assembly could not ignore. According to the World Bank, between the late 1970s and 1980s, Colombia's income inequality according to the GINI index was between 0.53 and 0.54.[23] For the Bank, although inequality was extreme on the international scene, these figures were moderate according to the Latin American regional context. On the other hand, most of the literature agrees that one of the structural causes of violence is inequality in access to land.[24] Thus, for example, according to some estimates,

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[22] *See, e.g.,* David Bushnell, Colombia. Una Nación a pesar de sí Misma 353-388 (19th ed. 2014) [Bushnell, Colombia].

[23] 1 World Bank, Colombia Poverty Report 14 (2002) available at: http://documents1.worldbank.org/curated/en/532871468770949746/pdf/multi0page.pdf [https://perma.cc/X4X8-92YB].

[24] In fact, that was the first point of the Agreement between the Colombian State and the FARC guerrilla in 2016; *see* Gobierno Nacional de Colombia & Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo, *Acuerdo Final Para la terminación del Conflicto y la Construcción de una Paz Estable y Duradera* 9-31 (2016) available at: https://www.jep.gov.co/Documents/Acuerdo%20Final/Acuerdo%20Final%20Firmado.pdf [https://perma.cc/NUQ9-DDS2]; Centro Nacional de Memoria Histórica, *¿De Quién es la Tierra en Colombia?* (2018) available at: http://www.centrodememoriahistorica.gov.co/micrositios/balances-jep/tierras.html [https://perma.cc/SE7T-4458]; Catherine LeGrand, Colonización y Protesta Campesina en Colombia (1850-1950) (2nd ed. 2016).

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18894

in 1984, 0.5% of the proprietors owned 32.7% of the owned surface area in the country, while 65.7% of the owners only held 5% of such area.[25]

Income and wealth inequality were observed not only at the population level but also at the territorial level. The Constitution of 1886 abolished the federated states and enshrined a centralized presidential regime.[26] During the twentieth century, decentralization did not begin until the constitutional reform of 1968,[27] which, among other aspects, created the figure of the *situado fiscal* for departments and the *juntas de acción comunal* in the municipalities,[28] and continued with the constitutional reform of 1986 that allowed the popular election of mayors and governors.[29] Besides these timid attempts by the central State to improve the redistribution of resources and provide territorial entities with greater autonomy, it cannot be denied that Colombia had regions where the State was not present through basic services such as healthcare or education, which the illegal armed actors used as a justification for their struggle but also to victimize the civilian population. This feedback loop between violence and inequality that continues today is what best defines the crossroads at which the Constituent Assembly stood in 1991. As can be seen, several factors fall within this turbulent relationship between violence and inequality. However, before evaluating what was said about inequality and how the problem was addressed in the constituent process, it is necessary to describe the genesis of the Constituent Assembly, its composition and organization, and the means of dissemination of its work, especially the Constitutional Gazette.

1. A Call for Drafting

In the late 1980s, President Virgilio Barco, an MIT-trained engineer and member of the *Partido Liberal Colombiano – PL*, (Colombian Liberal Party, the traditional center left-wing party), came to power and, in 1988, laid the foundations for the Constituent Assembly that would materialize three years later. Barco's proposal included the desires of various political sectors that demanded an opening of the State for greater democracy and institutional solidity. For example, in 1977, President Alfonzo López Michelsen, son of former President Alfonso López Pumarejo who had led the first social constitutional reform in

[25] 1 Darío Fajardo Montaña, Cuadernos Tierra y Justicia. Tierra, Poder Político y Reformas Agraria y Rural 5 (2002) available at: http://www.ilsa.org.co/biblioteca/Cuadernos_Tierra_y_Justicia/Cuadernostierrayjusticia_1/Tierra_poder_politico_y_reformas_agraria_y_rural.pdf [https://perma.cc/NC7X-WXPV].

[26] Constitución Política de Colombia de 1886.

[27] Acto Legislativo 1 de 1968, diciembre 11, 1968, Diario Oficial [D.O.] 32673 (Colom.).

[28] The "*situado fiscal*" was a portion of the State current revenues given to the departments (the former States) to spend in healthcare and education. The "*juntas de acción comunal*" are community action councils managed and integrated by people in neighborhoods to deal with community problems.

[29] Acto Legislativo 1 de 1986, enero 9, 1986, Diario Oficial [D.O.] 37304 (Colom.).

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18894

1936, presented to Congress a proposal for a constitutional reform that would allow the convening of a small "constituent assembly" to reform the justice system; although the Supreme Court of Justice declared it unconstitutional due to the lack of competence of Congress to delegate its functions to an assembly.[30] On the other hand, a few years later, in 1985, in the framework of the peace talks between the government of President Belisario Betancourt and the communist guerrilla *Fuerzas Alternativas Revolucionarias de Colombia — FARC*, the *Unión Patriótica — UP* (Patriotic Union) political party, born out of these talks, proposed a Constituent Assembly. The aim was to draft a new, more participatory constitution, where the exceptional powers of the president were limited, human rights were guaranteed, and the State intervened in the economy and private property to combat the effects of "transnational capital".[31] Thus, Barco sought to meet these reform demands.

However, the 1980s were a period of violence that made a change in the State structure more necessary.[32] By then, the attempts at a peace agreement by former president Belisario Betancur and the communist guerrillas were weakening; in 1987, the first UP presidential candidate, Jaime Pardo Leal, was assassinated; and Pablo Escobar started to force the national government to avoid extradition of drug traffickers to the United States. In a "country of many lawyers", a new constitution or, at least, a profound structural reform seemed to help combat the weakness of the State and restore its legitimacy.

To achieve that, Barco proposed calling the people to a plebiscite on the elimination of Article 13 of the Plebiscite of 1957, which only granted Congress the possibility of modifying the Constitution.[33] His objective was that once this impediment was removed, the people would vote for a Constituent Assembly. To give greater political strength to this project, Barco agreed with former president Misael Pastrana, leader of the antagonist conservative party, the so-called *Acuerdo de la Casa de Nariño* (Agreement of the House of Nariño) of February 20, 1988, after Pastrana had refused to support it because the initially scheduled date would coincide with an election of mayors and governors.[34] In this agreement, it was planned to hold a referendum on October 9, 1988, in

[30] Acto Legislativo 2 de 1977, diciembre 19, 1977, Diario Oficial [D.O.] 34935 (Colom.); Luis Carlos Pinzón, *El Colegio del Rosario y la Constituyente para la Justicia*, 3 Revista Nova et Vetera, no. 32 (2017) available at: https://www.urosario.edu.co/Revista-Nova-Et-Vetera/Vol-3-Ed-32/Omnia/El-Colegio-del-Rosario-y-la-Constituyente/ [https://perma.cc/4EHU-TGDG].

[31] Roberto Romero Ospina, Unión Patriótica. Expedientes Contra el Olvido 420 (2nd ed. 2012) available at: http://centromemoria.gov.co/wp-content/uploads/2020/05/UP-Expedientes-contra-el-olvido.pdf [https://perma.cc/L24T-RWFV] [Ospina, Unión Patriótica].

[32] A popular documentary on contemporary Colombian history named the period between 1984 and 1989 as *El Terrror* (The Terror), *see* Mauricio Gómez & Julio Sánchez, *¡Colombia Vive! 25 años de Resistencia* (2008) available at: https://www.youtube.com/watch?v=yZ79B4f5WFI [https://perma.cc/9KY2-DT42].

[33] Decreto 247 de 1957, octubre 4, 1957, Diario Oficial [D.O.] 29517.

[34] *See* Maite Fonnegra González, *El Plebiscito de 1988*, Revista Facultad de Derecho y Ciencias Políticas, no. 82 173 (1988).

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18894

which the people would eliminate the aforementioned Article 13. However, the Council of State decided the provisional suspension of the pact because it could generate an unconstitutional act as, according to the Plebiscite integrated into the Constitution, only Congress could reform the Constitution.[35]

As an alternative, on July 27, 1988, Barco decided to present a constitutional reform draft to Congress so that it could be approved by the people through a referendum.[36] The project included an agenda very similar to the one studied three years later by the 1991 Assembly. The project was a formal reform, but it introduced structural changes such as the establishment of the Social State of Law (Article 1), a chapter on fundamental rights (Articles 7 to 14), and the limitation of the state of siege (Article 49), among others.[37] Between 1988 and 1989, Colombia experienced one of the most violent periods in its recent history with events such as the assassination of another presidential candidate, the liberal Luis Carlos Galán, and Pablo Escobar's terrorist attempts to prevent the extradition of drug traffickers. However, on December 5, 1989, the House of Representatives approved without debate the inclusion of an article where the people were asked to approve or reject the non-extradition of nationals. For this reason, Barco retired the support for the entire constitutional reform proposal and requested the Senate to postpone it (which practically meant to withdraw it), arguing that, just for that article, the drug traffickers would pressure the people, through terrorism, to vote affirmatively.[38]

In 1990, various political and social sectors demanded the realization of constitutional changes necessary to stop the country's instability. In January 1990, in the Office of the Dean of the Faculty of Jurisprudence of the Universidad del Rosario in the historic center of Bogotá, the dean, and some young professors and students met to discuss the proposal of Fernando Carillo, a Harvard-trained young law professor. Carrillo stated that the Colombian people, being the primary constituent, could speak out to convene a Constituent Assembly without any constituted body being able to prevent it.[39] The mechanism that he devised consisted of the students inviting the Colombian people to intro-

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[35] Consejo de Estado [C.E.] [Council of State], Sala de lo Contencioso Administrativo – Sección Primera – Sala de Decisión, mayo 12, 1988, C.P.: Samuel Buitrago, Expediente 862 (Colom.).

[36] *See* Decreto 510 de 1989, marzo 13, 1989, Diario Oficial [D.O.] 29517. This decree published the draft of the reform "Acto Legislativo número 11 de 1988 Senado, 240 de 1988 Cámara".

[37] *Id.*

[38] *See Entierro de Tercera a la Reforma*, El Tiempo (Dec. 16, 1989), https://news.google.com/newspapers?id=bpwbAAAAIBAJ&sjid=PVMEAAAAIBAJ&pg=3996%2C2378 [https://perma.cc/2VPR-ZR36].

[39] Fernando Carrillo, *La Séptima Papeleta o el Origen de la Constitución de 1991, in* La Séptima Papeleta: Historia Contada por Algunos de sus Protagonistas. Con Ocasión de los 20 años del Movimiento Estudiantil de la Séptima Papeleta 33-34 (María Lucía Torres ed., 2010) available at: http://editorial.urosario.edu.co/pageflip/acceso-abierto/la-septima-papeleta-historia-contada.pdf [https://perma.cc/J3PX-DHJA].

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duce an additional card in the ballot box of the public corporation elections that would be held on March 11, 1990. Although the text of the ballot changed later, its essential message was an affirmative vote to convene a National Constituent Assembly to represent the Colombian people and reform the Constitution of 1886.[40] This card was known as *séptima papeleta* (seventh ballot), because it would be additional to the other official six cards to elect the following public offices: senate, chamber of representatives, departmental assemblies, municipal councils, mayors, and a sixth one of an internal consultation of the *Partido Liberal Colombiano* to choose its presidential candidate. Although the National Registrar's Office as the electoral authority did not count the ballots, it is estimated that around two million were deposited on March 11, 1990.[41] This youth movement, which would be known as *La Séptima Papeleta* (The Seventh Ballot), is the first citizen movement in Colombia's modern history that generated a historical transformation.[42]

This event gave visibility to popular claims for constitutional reform before public opinion, which was welcomed by President Barco through Decree 921 of May 3, 1990.[43] This decree was issued under Decree 1038 of 1984, where he established a state of siege for disturbance of public order. Thus, Decree 921 intended to dictate a measure to restore public order: it ordered the National Registry to issue a card where Colombians could vote if they supported a "Constitutional Assembly" (notice that it is different from a Constituent Assembly) in the presidential elections of May 27, 1990. Decree 921 was automatically submitted to judicial review by the Plenary Chamber of the Supreme Court of Justice as it was an act issued after the use of the state of siege, and the Court declared it constitutional three days before the election was held.[44] In summary, the Court declared that there was a connection between the measures adopted by the decree and the country's troubled situation. For the Court, the decree was of electoral content, it was not a constitutional reform referendum or plebiscite; it was up to the president to be the promoter of the initiative to register the pronouncement of the people. Furthermore, the popular clamor represented in demonstrations such as *La Séptima Papeleta* could not be ignored, nor could the public expressions of political parties calling for an institutional change to confront state instability.

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[40] *Id.* at 35, 36.

[41] *See id.* at 40; Registraduría Nacional del Estado Civil, El Camino Hacia una Nueva Constitución Nacional de Colombia, (2011) available at: https://webcache.googleusercontent.com/search?q=cache:0ww6Sq48y8gJ:https://www.registraduria.gov.co/Edicion-No-53-Ano-V-julio-de-2011.html+&cd=1&hl=es-419&ct=clnk&gl=co [https://perma.cc/356R-28N6] [Registraduría, *El Camino*]; *comp.* Óscar Alarcón, La Cara Oculta de la Constitución del 91 23-25 (2011) [Alarcón, La Cara Oculta].

[42] *See* Registraduría, *El Camino*, *supra* note 41.

[43] Decreto 927 de 1990, mayo 3, 1990, Diario Oficial (D.O.] 39335.

[44] Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Plena, Sentencia 59, mayo 24, Expediente 2149 (334-E) (Colom.).

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18894

During the 1990 electoral campaign, two presidential candidates were assassinated. The first of them was the ex-guerrillero from the new *Alianza Democrática M-19* or *AD M-19* (Democratic Alliance M-19) party, Carlos Pizarro.[45] The guerrilla of nationalist and social-democratic inspiration M-19 was founded in 1973 by the left-wing of the *Alianza Nacional Popular — ANAPO* (Popular National Alliance) party, founded by the former dictator Gustavo Rojas Pinilla who transformed himself into a popular caudillo, summoning people from various political sectors. The reason for its foundation was the alleged electoral fraud in the presidential elections of 1970 that declared conservative Misael Pastrana Borrero, candidate of the *Frente Nacional* (National Front), the winner, the political pact of the late 1950s through which only the two traditional parties would alternate power between 1958 and 1974. For this reason, the M-19's main demand was the opening of the democratic regime.[46] The second assassinated politician was the communist leader Bernardo Jaramillo who assumed the representation of the Patriotic Union after the murder of Jaime Pardo Leal.[47] Nevertheless, on March 27, 1990, César Gaviria, the candidate of the *Partido Liberal Colombiano — PL* and former government minister, as well as the political heir of the assassinated liberal leader Luis Carlos Galán, was elected president.[48] In the same election, the call for a Constitutional Assembly proposal obtained 4,991,887 affirmative votes and 226,451 negative votes out of a total of 5,218,338 votes; that is, 95% of those who spoke about the Assembly, demanded its convocation.[49] Therefore, once the people expressed their approval, President Gaviria agreed on the date and agenda for the convocation of the Assembly with the leaders of the three main parties defeated in the presidential campaign. They were Antonio Navarro Wolf (a former leftist guerrillero) from the political movement *Alianza Democrática M-19 — AD M-19* (Democratic Alliance M-19, a pluralistic party constituted after the demobilized leftist guerrilla M-19); Álvaro Villegas Moreno from the *Partido Social Conservador — PC* (Conservative Party; the traditional right-wing and Catholic party); and Álvaro Gómez (son of the former conservative president Laureano Gómez) from the *Movimiento de Salvación Nacional — MSN* (National Salvation Movement, a dissident of the Conservative Party).[50] Thus, the President issued the Decree 1926 of August 24, 1990, which summoned the people to elect their constituents to the National Constitutional Assembly on December 9 of that year.[51] The political consensus reached by the government with the parties was to elect 70 drafters according to a national constituency that, in turn, guaranteed the

45 Bushnell, Colombia, *supra* note 22, at 374-375.

46 *Id.* at 346.

47 *Id.* at 374.

48 *Id.* at 375.

49 Registraduría, *El Camino, supra* note 41.

50 Alarcón, La Cara Oculta, *supra* note 41, at 29.

51 Decreto Legislativo 1926 de 1990, agosto 24, 1990, Diario Oficial [D.O.] 39512.

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participation of minority groups. However, the President reserved the right to appoint drafters from the armed groups that lay down their arms and wanted to join the constituent process. The formula agreed upon for the positive voting card was: "Yes, I call a Constitutional Assembly that will meet between February 5 and July 4, 1991, which will be regulated by the provisions of the Political Agreement on the Constituent Assembly incorporated into the Decree 1926 of August 24, 1990. Its jurisdiction will be limited to the provisions of said Agreement. I vote for the following list of candidates to integrate the Constitutional Assembly[...]".[52] In other words, the decree limited the constitutional reform to a political agreement that imposed guidelines for reform: Congress, the justiciary, the public prosecutor office, the public administration, the political parties, the opposition, the territorial regime, the participation mechanisms, the regulation of the state of siege, the economic regime, and fiscal control.

Although that did not please public opinion, the Supreme Court of Justice declared the unconstitutionality of those sentences that limited the competence of the Constitutional Assembly one month before the election.[53] The main argument of the Court was that such an assembly was the primary constituent power, that is, the direct representation of the people and, therefore, superior to any constituted body. In this way, the Assembly, despite being called "constitutional" even on the electoral card, would be a "constituent assembly" with all the powers to reform the State.

In summary, the call for a constituent assembly did not arise suddenly. Nor was it an act devised solely by a student movement, as many may mistakenly believe three decades later. This call reflects the need for institutional change identified by a sector of Colombian society made up of some members of traditional parties and civil society. Although the demands for change were requested by sectors of different political currents, the idea of a constituent assembly materialized thanks to the support of the political elite (traditional political parties) and intellectuals of the country (professors and students from universities, most of them private and elite institutions).[54] Furthermore, it is interesting to notice that there were coincidences between these sectors on the general aspects to be reformed; the political agreements that preceded each attempt at constitutional reform demonstrate this. It helps us to foresee that perhaps the Constituent Assembly of 1991 was not so innovative in its proposals. But also, returning to the issue of economic inequality, that could explain why the Assembly did not introduce more radical economic changes such as those proposed, for example, by the Patriotic Union, a party that was outside the elite, and the initial political agreements that originated the convention, as this article

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[52] *Id.*

[53] Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Plena, Sentencia 138, octubre 9, 1990, M.P.: Hernando Gómez & Fabio Morón, Expediente 2214 (351-E) (Colom.).

[54] *See, e.g., Los Yuppies Constituyentes*, Semana (Nov. 11, 1990) available at: https://www.semana.com/nacion/articulo/los-yuppies-constituyentes/14123-3/ [https://perma.cc/CME8-DNH6].

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will show. Then, who were the ones coming to the Assembly in 1991? I analyze them in the following section.

2. The Chosen

The constitutional assembly congregated people from diverse backgrounds who had never had the chance to meet to design the structure of the State. In the elections of December 9, 1990, the people elected 70 drafters, including indigenous people, protestants, guerrilla and paramilitary members, leftists, rightists, elite politicians, and only four women. However, because of the election mechanism agreed upon by the government and the main political parties, the territories did not have direct representation, so most of the elected constituents were recognized as political figures nationwide. In the following paragraphs, I describe the political sectors that composed the new Assembly.

The majoritarian group with 25 drafters was the liberals, of which 17 were elected through the official list of the *Partido Liberal Colombiano — PL*, one of the two traditional parties in the country and the ruling party at the time.[55] Liberals did not have a homogeneous tendency and many liberals got elected through independent movements such as *La Séptima Papeleta* or *Nueva Colombia*. In the economic realm, for example, despite internal differences, the party supported the economic opening of the country (the end of the import substitution industrialization policy) and the confidence in economic growth through the market economy as the right way for the development of the country. Some constituents, such as Guillermo Perry, an MIT-trained economist and former minister of Virgilio Barco, promoted a balance in State intervention in the economy,[56] while others like Carlos Lemos Simmonds, also a former minister of Barco, favored less State intervention in the economy.[57] Furthermore, this group favored policies that prioritized social spending and overcoming inequalities both on social and economic levels. Although not formally integrated, former colleagues of the assassinated presidential pre-candidate Luis Carlos Galán made up this group, such as Iván Marulanda, founder of the movement *Nueva Colombia,* but also members of *La Séptima Papeleta* movement like young law professor Fernando Carrillo.

The second party was the AD M-19 with 19 drafters.[58] Its leaders applied a strategy to call all sectors of society so that the party represented a national dialogue among diverse political trends. Thus, the party was composed not only of ex-guerrilleros and their sympathizers but also of people from several origins,

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55 Banco de la República, *Miembros de la Asamblea Nacional Constituyente de 1991*, Enciclopedia. Available at: https://enciclopedia.banrepcultural.org/index.php?title=Miembros_de_la_Asamblea_Nacional_Constituyente_de_1991 [https://perma.cc/DM6M-N8FG] [Banco de la República, *Miembros de la Asamblea*].

56 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 48, Ap. 12, 1991, at 12.

57 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 49, Ap. 13, 1991, at 10.

58 Banco de la República, *Miembros de la Asamblea*, *supra* note 55.

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some rich and some poor, rightists or leftists, and even one physician elected with the direct collaboration of paramilitary groups named Augusto Ramírez. The AD M-19 wanted him to be the link with paramilitary groups because it hoped to convince them of the benefits of political participation and peace. Even so, Ramírez did not have an outstanding performance in the Assembly.[59] Therefore, it is difficult to characterize the political trend of the whole party; however, its leaders had left-wing and socio-democratic nationalist inspirations and had managed to enter the political arena thanks to a weapons demobilization agreement reached with Barco's government. The fact of becoming the second political force in the Constituent Assembly shows the enthusiasm of the people for strategies that fostered inclusion to reconcile the country. Furthermore, the success of AD M-19 could also be explained by the popularity of the former guerrilla in the 1980s because of its claims against the political elite and restricted democracy.

The third party was the *Movimiento de Salvación Nacional —MSN*, founded by the conservative leader Álvaro Gómez. The party was created in 1990 to support his presidential campaign because his political party, the *Partido Social Conservador— PC*, preferred another politician, Rodrigo Lloreda. Álvaro was Laureano Gómez's son, a former president who, in the 1950s, promoted a constitutional reform with elements of Francisco Franco's corporativism in Colombia, and whose government precipitated the unique official dictatorship in Colombia in the twentieth century by Gustavo Rojas Pinilla.[60] Perhaps his heritage affected his political image and deprived him twice of being president.[61] This right-wing party obtained 11 delegates.[62] Among other proposals, this coalition supported the opening of the national economy to the international market, the reduction of State intervention in the economy, and even some drafters, like Raimundo Emiliani proposed the elimination of the social function of property, one of the main features of social constitutionalism in Colombia since 1936.[63] In summary, the MSN promoted a conservative agenda in the Assembly.

The fourth party was the *Partido Social Conservador – PC* with nine members.[64] This is the second traditional party in Colombia, and, in the Assembly, it con-

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[59] *See* Pilar Lozano, *Escándalo en Colombia por un vídeo que muestra al abogado de Escobar sobornando a un diputado*, El País (Aug. 17, 1991), https://elpais.com/diario/1991/08/18/internacional/682466405_850215.html [https://perma.cc/254S-4KZ6]; *¿Acuerdo entre 'paras' y el M-19 en la constituyente del 91?*, Verdad Abierta (Mar. 7, 2012) available at https://verdadabierta.com/paramilitares-colombia-constituyente-91-ernesto-baez-m19/ [https://perma.cc/6K7Z-HRZP] [*¿Acuerdo entre 'paras' y el M-19 en la constituyente del 91?*, Verdad Abierta].

[60] Bushnell, Colombia, *supra* note 22 at 302-304.

[61] *Laureano Gómez 1889-1955. El Rugido del León*, El Tiempo (Mar. 7, 1999) available at: https://www.eltiempo.com/archivo/documento/MAM-858343 [https://perma.cc/B3K3-GXJW].

[62] Banco de la República, *Miembros de la Asamblea*, *supra* note 55.

[63] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 6, Feb. 18, 1991, at 4-6.

[64] Banco de la República, *Miembros de la Asamblea*, *supra* note 55.

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18894

gregated people of right-wing ideology with traditional and social Catholic doctrines. Ideologically, both this party and MSN were conservatives, despite some members who were elected through an independent list like Rodrigo Lloreda's movement, *Movimiento Unidos por Colombia*. Conservative drafters favored a balance between State intervention in the economy and the role of the private sector in promoting social welfare. For example, Rodrigo Lloreda, the politician who replaced former president Misael Pastrana as a constituent, stated that the State was neither the best nor the only actor to distribute income.[65] Also, they supported the priority of social expenditure and its allocation according to territorial necessities, such as Mariano Ospina Hernández (an MIT engineer and Mariano Ospina's son, the former President at the beginning of *La Violencia* in the 1950s).[66] They tended to support the social agenda proposed by the government, such as the establishment of Colombia as a Social Rule of Law, and the consecution of social justice to overcome poverty, a position that seems to be grounded in the Christian discourse of the social doctrine of the Catholic Church.

The Assembly also reunited drafters from the *Movimiento Unión Cristiana — UC* (Christian Union Movement), the *Unión Patriótica — UP* (Patriotic Union), and the Indigenous Movements *Organización Nacional Indígena de Colombia — ONIC* (National Indigenous Organization of Colombia) and *Autoridades Indígenas de Colombia — AICO* (Indigenous Authorities of Colombia). The first group consisted of two Protestant pastors known in national politics at the time: Jaime Ortiz and Arturo Mejia.[67] Their presence in the Constituent Assembly was remarkable because, in a traditionally Catholic country, it was the first time that members of another religion could participate in designing the constitution.[68] Their main objective in the Assembly was to achieve greater recognition of religious diversity, but they also advocated for an economy guided by the Christian doctrine of social justice.[69]

The second group, with two members, was the UP, the party that was born in the framework of the peace talks between President Belisario Betancourt and the communist guerrilla *Fuerzas Alternativas Revolucionarias de Colombia — FARC* in 1985.[70] The UP drafters in the Assembly were Aida Avella, a psychologist, communist, and union leader, who served later as its president; and Alfredo Vásquez, a conservative politician and former foreign affairs minister in the

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[65] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 50a, Ap. 19, 1991, at 4 [Asamblea, no. 50a].

[66] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 103, June 20, 1991, at 12.

[67] Banco de la República, *Miembros de la Asamblea*, *supra* note 55.

[68] *Una Sorpresa: Los Candidatos de Dios*, El Tiempo (Dec. 11, 1990) available at: https://www.eltiempo.com/archivo/documento/MAM-34564 [https://perma.cc/EK9C-ERMP].

[69] *See, e.g.*, Asamblea Nacional Constituyente, Gaceta Constitucional, no. 9, Feb. 19, 1991, at 21 [Asamblea, no. 9].

[70] Banco de la República, *Miembros de la Asamblea*, *supra* note 55.

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18894

government of Misael Pastrana. The UP leaders called Avella to integrate the list as the second option after Vásquez because she was a woman, a unionist, and a leftist leader, and they believed that the Assembly would need more people with this profile.[71] On the other hand, it is curious to find the participation of Vásquez in a leftist party; he was one of the main scholars and politicians that defended human rights and denounced the concentration of power in the presidency, two things that characterized the domestic left political discourse in the period and that might explain why he accepted the nomination but not the reasons for his nomination by the party.[72] In any case, the UP favored economic measures like direct taxation, social investment, and land reform.

The third group was made up of two indigenous leaders who introduced claims by indigenous peoples and by Afro-Colombians and other ethnic groups for greater recognition of their rights.[73] Among these leaders were Francisco Rojas Birry and Lorenzo Muelas. Birry, a young lawyer and indigenous leader from Chocó, the country's poorest department, marked by the dense presence of Afro-Colombians and indigenous communities within its jungles. Muelas, born into a modest family in Cauca, one of Colombia's persistently impoverished, violent, and unequal regions, actively championed land rights in his community as a leader.[74] In general, these two drafters advocated for a greater commitment by the State to pursue development in harmony with the environment and with communal ownership of "ancestral" lands.

In addition to the seventy popularly elected members, the Assembly included the participation of four additional drafters. Two constituents, Jaime Fajardo and Darío Mejía, represented the recently demobilized Marxist guerrilla group *Ejército Popular de Liberación — EPL* (Popular Liberation Army). This group was later renamed *Esperanza, Paz y Libertad*, which translates to Hope, Peace, and Liberty, after the peace talks with the national government.[75] Their left-wing ideology helped them to reach the Assembly with ideas on overcoming the economic inequalities that caused the war, but also with proposals on amnesty and reintegration plans to make peace with all guerrillas.[76] There was also a

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[71] Laura Ospina, *Aída Avella, una defensora de los derechos fundamentales en la Constitución de 1991*, El Espectador (Mar. 20, 2021), https://www.elespectador.com/noticias/politica/aida-avella-una-defensora-de-los-derechos-fundamentales-en-la-constitucion-de-1991/ [https://perma.cc/F5Y3-BQB8].

[72] *Alfredo Vásquez Carrizosa, un conservador diferente*, El Espectador (Feb. 19, 2021), https://www.elespectador.com/noticias/politica/alfredo-vasquez-carrizosa-un-conservador-diferente/ [https://perma.cc/V3JD-K2WF]. On the relationship between the leftists and the human rights discourse between 1970 and 1980, *see* Jorge González, Revolución, democracia y paz Trayectorias de los Derechos Humanos en Colombia (1973-1985) (2019).

[73] Banco de la República, *Miembros de la Asamblea*, *supra* note 55.

[74] Juan S. Lombo, *Lorenzo Muelas, la voz de los indígenas en Asamblea Constituyente*, El Espectador (Mar. 20, 2021), https://www.elespectador.com/noticias/politica/lorenzo-muelas-la-voz-de-los-indigenas-en-asamblea-constituyente/ [https://perma.cc/7XKW-C9NA].

[75] Banco de la República, *Miembros de la Asamblea*, *supra* note 55.

[76] *See, e.g.,* Asamblea Nacional Constituyente, Gaceta Constitucional, no. 52, Ap. 17, 1991, at 24.

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constituent named José Matías Ortíz, a drafter from the Marxist guerrilla *Partido Revolucionario de los Trabajadores — PRT* (Revolutionary Workers' Party), who supported the limitation of presidential powers and the armed forces;[77] but also, a drafter from the *Movimiento Armado Quintín Lame — MAQL* (Quintín Lame Armed Movement), an indigenous guerrilla that emerged in the 80s and whose drafter in the Assembly, Alfonso Peña (an indigenous leader from Cauca), favored land distribution and even expropriation to achieve that purpose.[78] All four drafters had the right to speak in the Assembly, but only the two ELP delegates could vote. Eventually, the Colombian people in all regions had the opportunity to intervene in the Assembly by sending proposals and suggestions to be debated in the meetings.

There were relevant but missing actors in the Assembly. The first ones were the Afro-descendant communities. Carlos Rosero, who was born in Valle del Cauca (a department with a high concentration of African descendants) and was profiled as a candidate for black communities, did not obtain enough votes.[79] That is why the Assembly did not get direct drafters from Afro-descendant communities and, instead, these communities had to lobby with drafters of parties such as the AD M-19. The second ones were the FARC delegates. Although the UP originated to support the FARC's transition to peace, the party did not introduce itself as the political branch of the FARC (remember the nomination of conservative Alfredo Vásquez). The hopes that the FARC integrated the Assembly died when the government bombed Casa Verde, the main FARC's camp, on December 9, 1991, the same day of the polls for the Assembly.[80] Nevertheless, some of their historical claims, such as land reform, were eventually incorporated in the Constitution through the Peace Agreement of 2016.[81] Although one can speculate about the outcome of such a consensus, for instance, in the shortening of the armed conflict, the real issue at stake is the surviving lack of consensus of all Colombian sectors in the drafting of the Constitution. Furthermore, there were no drafters from the *Ejército de Liberación Nacional – ELN* (National Liberation Army), a communist guerrilla created in 1964 and supported by Cuba that included people from student movements, the Communist Party of Colombia, and a dissident wing of the *Partido Liberal Colombiano*.

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77 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 29, Mar. 30, 1991, at 20.

78 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 60, Ap. 26, 1991, at 15.

79 Mónica Morales, *Movimiento afrodescendiente colombiano en la Asamblea Nacional Constituyente de 1991: de la política de influencia a la política del poder*, 2 Estado & Comunes, Revista de Políticas y Problemas Públicos, no. 11 37 (2020).

80 Colombia en Transición, *Casa Verde: 30 años del bombardeo que cambió la guerra con las Farc*, El Espectador (Dec. 8, 2020), https://www.elespectador.com/colombia2020/justicia/verdad/casa-verde-30-anos-del-bombardeo-que-cambio-la-guerra-con-las-farc/ [https://perma.cc/8GAN-ADNQ].

81 Acuerdo Final, *supra* note 24.

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Finally, it is worth asking whether the drug dealers and the paramilitary groups should have been allowed to attend the Assembly as independent groups. As discussed before, one can argue that they attended indirectly through at least one AM-19 drafter, but this was not the same as having official drafters who could commit their groups to agree to the constitution and the implicit peace agreement. A notable difficulty was that these groups did not have a clear political ideology and proposals to present before the Assembly.[82]

3. The Organization of the Constituent Assembly

The Assembly was made up of a board of directors, five commissions, a coding commission, and a plenary. The organization was structured in accordance with various topics, including human rights and territorial organization, among others. In this section, I describe how the Assembly split up to discuss the reforms.

Firstly, the board of directors was integrated by the leaders of the three main movements in the Assembly. Thus, a sort of triumvirate held the presidency, the drafters were the former M-19 guerrillero Antonio Navarro, the conservative leader Álvaro Gómez, and the liberal former minister Horacio Serpa, who obtained the highest number of votes among liberals.[83] Also, each drafter submitted their proposals; for example, Gómez favored environmental protection, Navarro proposed a stronger catalog of rights, and Serpa emphasized labor rights and social planning, among many more topics. Moreover, each commission had a president and a vice president chosen from the minority parties to assure a democratic allocation of high positions within the Assembly.

The rest of the drafters made up the following commissions:

- Comisión Primera. The First Commission debated the principles, rights, and duties, as well as the mechanisms of democratic participation, and the constitutional amendment procedure. It had 16 elected drafters and one appointed drafter from the EPL. This commission was presided over by Jaime Ortiz (Cristian Union) and Francisco Rojas Birry (indigenous peoples) and had drafters such as Aída Avella, Horacio Serpa, and Darío Mejía.[84]
- Comisión Segunda. The Second Commission studied the territorial distribution of the State and regional autonomy. With 14 members, it included 13 elected drafters and 1 appointed from Movimiento Armado Quintín Lame. Juan Gómez (Conservative Party) and Lorenzo Muelas (indigenous peoples) held the presidency and vice presidency, respectively, and some of the visible

[82] *¿Acuerdo entre 'paras' y el M-19 en la constituyente del 91?*, Verdad Abierta, *supra* note 59.

[83] Banco de la República, *Asamblea Nacional Constituyente*, Enciclopedia, https://enciclopedia.banrepcultural.org/index.php/Asamblea_Nacional_Constituyente [https://perma.cc/SMX6-RRBG] [Banco de la República, *Asamblea*].

[84] Alarcón, La Cara Oculta, *supra* note 41, at 207.

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drafters were sociologist Orlando Fals Borda, former liberal minister Carlos Holmes Trujillo, and Alfonso Peña.[85]

- Comisión Tercera. The Third Commission discussed the structure of the executive and legislative branches, the states of exception, and international relations. Presided by Alfredo Vásquez (Patriotic Union) and José Ortiz (Revolutionary Workers Party), it was integrated by 16 members like Antonio Navarro and the evangelical pastor and lawyer Arturo Mejía.[86]
- Comisión Cuarta. The Fourth Commission debated the administration of justice. Fernando Carillo (liberal and leader of *La Séptima Papeleta* movement) and Jaime Fajardo (EPL) held the presidency and vice presidency. The commission had 9 members, including co-president Álvaro Gómez.[87]
- Comisión Quinta. 18 drafters discussed socio-economic, ecological, and public finance aspects of the constitution in the Fifth Commission. The president and vice president were partisans of the two traditional parties in Colombia, conservative and former presidential candidate Rodrigo Lloreda, and liberal Jaime Benítez, elected through the movement Por Un Nuevo País. However, this commission included union leaders like Angelino Garzón, former senator and economist Ivan Marulanda, Guillermo Perry, and Carlos Lemos Simmonds, among others.[88]

Ultimately, the Assembly had two other bodies: the plenary and the coding commission. 74 drafters composed the plenary, it discussed and approved in the first debate the proposals presented by the commissions. Then, in a second round, it approved the final text of the constitution, except for the two drafters who had no right to vote.[89] The Coding Commission, with nine members had to consolidate the draft after each plenary debate and proposed changes.[90] It was presided over by MSN constituent Carlos Lleras de la Fuente and had the assistance of several scholars such as Ciro Angarita, a Yale graduate who later became a justice of the Constitutional Court and wrote the landmark judgment that defined the new Colombian Social Rule of Law in 1992.[91]

4. Discussions and Voting in the Assembly

The Assembly was installed on February 5, 1991, to promulgate a new Constitution five months later, on July 4, 1991, to coincide with the American Declaration of Independence.[92] Five months were not enough to discuss at length

85 *Id.* at 208.
86 *Id.*
87 *Id.* at 208-209.
88 *Id.* at 209.
89 Banco de la República, *Asamblea*, *supra* note 83.
90 *Id.*
91 Alarcón, La Cara Oculta, *supra* note 41, at 176.
92 *Id.* at 203-204.

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more than 100 proposals by the drafters, institutions, and organizations, and approximately 100,00 people's initiatives throughout the country. In some cases, constituents received proposals to vote for with little time to analyze them. Also, there were some incidents during these months. For instance, before the second plenary session, the Coding Commission lost the files of the articles approved in the first plenary. Consequently, the Coding Commission could not finish on time the final draft of the Constitution, and, on July 4, the co-presidents and the President of the Republic (although he was not a drafter) ended up signing a blank sheet.[93] Thus, the Constitution was published on July 7, 1991, and was corrected later due to several mistakes made during an atypical codification.

In summary, despite the heterogeneous composition of the Assembly and the unfortunate events mentioned before that made it difficult to hold orderly discussions, the drafters agreed broadly on substantive aspects, such as the Social Rule of Law and State intervention in the economy. The organization of the Assembly in those commissions and the enactment of rules to conduct the debates were the best way for the drafters to discuss all the kinds of topics that the people expected to decide on. In the next chapter, I focus on the agreements and disagreements regarding economic inequality.

III. Debating and Drafting on Economic Inequality in the Assembly

Even though tackling economic inequality was not among the main reasons for calling a constituent assembly, a closer study of the debates shows a concern about using the new constitution to overcome economic inequality. This chapter analyzes the ideas about economic inequality proposed and debated in the Assembly, with a focus on five policies or pillars. Firstly, it explains the methodology used to find the economic inequality debates in the Assembly. Then, it classifies them into five topics and identifies the proposals and proponents, the discussions, and the outcomes. Finally, it recapitulates the consensus and dissents.

1. Discussions on Economic Inequality

This chapter analyzes the proposals and debates of the Colombian Constituent Assembly, published between February 5 and December 31 in 1991 by the newspaper *Gaceta Constitucional*.[94] I extracted from the Gazette the consensus and disagreements in the Assembly on how to tackle economic inequality. Al-

[93] *Id.* at 194-199.

[94] Banco de la República, *Diario de la Asamblea Nacional Constituyente*, Colecciones Digitales (1991) available at: https://babel.banrepcultural.org/digital/collection/p17054coll26/id/3850/ [https://perma.cc/WZ24-27ER] [Banco de la República, *Diario*].

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though the complete transcripts of the tapped debates are also available online, I generally excluded this source because the issues contain the relevant substantive summary of the proposals, debates, and agreements. Exceptionally, I included transcript references when I considered it would be interesting to add more details about the drafting process.[95] The Assembly published 144 issues on the proposals presented in the Assembly, the debates around them, and the results. Even though there is an archive with verbatim transcripts of the taped debates, I chose the Gazette as the primary source of this research because it contains all the projects presented before the Assembly and the minutes containing the discussions of each session both in the committees and in the plenary sessions. For this reason, it is the most orderly, complete, and easy-access online source, to approach the deliberations in the Constituent Assembly. The Gazette was presided over by Edgardo Camayo and Jacobo Pérez Escobar as general secretary, and published "64 minutes of the plenary sessions, 152 proposals, 152 project presentations, 112 commission minutes, [...] 76 discourses, 3 codifications of the constitution, the convention regulations [...]".[96] In most editions, the Constitutional Gazette classified proposals and debates according to the topic. However, there is no issue dedicated to economic inequality.

An in-depth reading of the issues shows the concern about economic inequality when the drafters discussed five broad topics: rights, property, State and economy, territorial funding, and taxation. A reading of the debates makes it clear that the drafters recurrently mentioned "economic inequality" and the two components of this general concept ("income inequality" and "wealth distribution") when they presented proposals or debated those five topics. Then, the essay classifies the discourses and proposals presented in the Assembly according to (1) the mention of the expression "economic inequality" and its components ("income inequality" and "wealth distribution") and their respective antonyms (that is, "economic equality," "income equality," and "wealth concentration"), (2) the drafter that pronounced the expression, (3) their political affiliation, (4) the content of their intervention or proposal, (5) the broader topic in which the invocation of the expression was made (that is, rights, economy, etc.), and (5) the approval or denial of the proposal. This chapter articulated all those data points.

Thus, the chapter focused on those mentions and their links to the five topics identified to reconstruct the debate about the conflicting notions of economic inequality in the Assembly. It also identified what entered the constitutional text (that is, the agreements, pillars, or set of policies to tackle economic inequality) and what remained outside (the disagreements). Nevertheless, neither the

[95] Banco de la República, *Asamblea Nacional Constituyente – 1991*, Colecciones Digitales (1991) available at: https://babel.banrepcultural.org/digital/collection/p17054coll28/search/searchterm/Informe/field/type/mode/all/conn/and/order/title/ad/asc [https://perma.cc/FH45-KYKW].

[96] Banco de la República, *Diario*, *supra* note 94.

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gazette nor the transcripts identified each drafter's preferences in most of the polls. Although that prevents having a more exact map of each political force choice, the paper tries to compensate for this gap by describing the popular and the unpopular proposals to offer a contrasted view of the discussions.

2. The Five Pillars of Economic Inequality

Based on an interpretation of that data, there were five issues that the drafters related to the goal of overcoming economic inequality through the new constitutional order. I will describe each one next.

A. Rights

The need to create a more robust catalog of rights, including social rights, was one of the main points of agreement among the drafters. Although Colombia ratified international treaties such as the International Covenant on Social, Economic, and Cultural Rights in 1968, during the presidency of liberal Carlos Lleras Restrepo,[97] and the Inter-American Convention on Human Rights in 1973, during the presidency of conservative Misael Pastrana, the Constitution of 1886 did not enshrine social rights.[98] Even first-generation rights (civil and political) were enshrined in the Civil Code to have "legal force," since the Constitution was not an enforceable norm.[99] In this context, during the twentieth century, Congress and, above all, the executive branch through decrees of the state of exception granted some social guarantees, such as the right to work. However, other constitutional provisions, such as the so-called "public assistance," which the Constitution of 1991 recognizes as the right to social security, never had a practical application.[100]

One of the initial speeches in the Assembly was that of President César Gaviria, who articulated what he thought should be the nature of social rights under the new constitution. He ended up summarizing the general meaning of what these types of rights were for most of the Assembly. Gaviria stated that "[in] a Social State, [...] a law that ignores [social rights] could be declared unconstitutional. [The] obligation [of the State] is to act to protect these rights and guide its economic and social policy to promote sufficient conditions for their realization. These socioeconomic and collective rights cannot be directly demanded by an individual before a judge."[101]

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97 Ley 74 de 1968, diciembre 26, 1968, Diario Oficial [D.O.] 32682.

98 Ley 16 de 1972, diciembre 30, 1972, Diario Oficial [D.O.] 33780.

99 Ley 153 de 1887, agosto 24, 1887, Diario Oficial [D.O.] 7151, art. 7.

100 *See, e.g.*, Corte Constitucional [C.C.] [Constitutional Court], septiembre 23, 1992, Sentencia T-533/92, M.P. Eduardo Cifuentes (Colom.).

101 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 1, Feb. 5, 1991, at 3.

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The Assembly agreed on various socio-economic rights with the understanding that they would not be directly enforceable before a judge but would depend on the State to materialize them progressively. Therefore, the Assembly excluded the *acción de tutela* (the main judicial action invented by the new Constitution) from guaranteeing social rights because the action was aimed to protecting only the so-called "fundamental rights" (that is, civil and political rights). Thus, for example, drafters from different political wings such as Angelino Garzón (PL), Tulio Cuevas (MSN), Carlos Ossa (AD M-19), and Rodrigo Lloreda (PC), all from the Fifth Commission, proposed a right to social security to be developed progressively by the State, according to the principle of solidarity that supports the Social State, to pay off a social debt that caused unfairness.[102] Thus, healthcare ceased to be an "act of charity" and became a "right," guaranteed as a public service by the State, although people could not claim its protection before a judge because it was not a fundamental right.

Another example of a new social right as an instrument to fight inequality under this non-justiciability logic is the right to work. Although the government project had already proposed the idea of fair and sufficient remuneration for the subsistence of the worker,[103] in the debates of the Fifth Commission on social and economic issues, the right to work emerged as a mechanism for overcoming economic inequality in the debates. Thus, Angelino Garzón (AD M-19), Guillermo Guerrero (PL), Tulio Cuevas (MSN), Guillermo Perry (PL), Iván Marulanda (PL — Nueva Colombia), and Jaime Benítez (PL — Por un Nuevo País), proposed the constitutional establishment of the rights to work, to strike, to unionize, and to negotiation; hence, they supported "private property, freedom of business, and the market economy, but [they also defended that] democracy has to be expressed economically and that its foundation is the redistribution of wealth […] linked to the humanistic and Christian principle of social justice."[104] Those rights were eventually approved by the Assembly as they are all enshrined in the Constitution;[105] in this way, the Assembly promoted a conciliatory approach between the social guarantees of the new State and the market economy, the two antagonistic trends among the drafters. The meeting point between the two axes was the promotion of workers' participation in the management and even ownership of the companies, that is, the so-called "solidarity economy." Examples of this type of economic policy are cooperatives, unions, and any other kind of workers' intervention in management and profits. Hence, the Assembly understood the right to work not only as a warrant to the fair remuneration of people but also as a form to ensure a change in the traditional relationship between employers and workers, which, eventu-

[102] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 78, May 21, 1991, at 2.

[103] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 5, Feb. 15, 1991, at 2 [Asamblea, no. 5].

[104] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 45, Ap. 13, 1991, at 3.

[105] Constitución Política de Colombia [C.P.] arts. 25, 39, 55, 56.

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ally, would foster a better redistribution of wealth and social welfare. However, labor rights also followed the rationale of the right to social security because, although the rights to work and to unionize were established as fundamental rights, the most redistributive aspects, such as a vital, minimum, and proportional salary or the guidelines for workers to participate in companies' management, were not justiciable through the Constitution.

The right to education is another social right that illustrates the search for economic equality despite the absence of constitutional mechanisms. The Constitution of 1886 established that public education would be free, not compulsory, and managed by the postulates of Catholicism. However, that was modified in 1936 to guarantee the freedom of education and the compulsory nature of primary education.[106] Then, in 1991, the Assembly established education as a right and a public service. Although the final wording of the text approved by the Assembly does not contain an explicit reference to economic inequality,[107] some drafters did clearly express this relationship during the debates and used it as a justification for its establishment as a right. Thus, for example, the AD M-19 drafter Abel Rodríguez was one of those who proposed that, to "advance towards the achievement of social justice and equality in life",[108] the Constitution should begin by establishing the age and grade for education to be compulsory, as it was indeed approved. Also, the right in the Constitution took shape thanks to interventions such as that of the liberal drafter Antonio Yepes, who highlighted the importance of education as a commonplace in which the entire population should participate to form a democratic culture that would overcome inequality as a "natural order" in Colombia.[109] Also, the indigenous drafter Francisco Rojas was one of the defenders of the idea that the skills granted by higher education could not continue to be a privilege because the inequality generated would end up affecting the ability of the economy to fulfill its function of social integration, which is why the State had to guarantee access to universities as part of the right to education.[110] Nevertheless, even though the Assembly agreed on free-of-charge public education, it was only in 2011 that the government implemented this State obligation, and it was just for elementary and secondary school, not for public higher education,[111] which means that the Assembly did not approve any mechanism to ensure that the State provided free public education shortly after the enactment of the Constitution.

In this pillar, many voices in the Assembly supported the ideas that rights, especially social rights, are instruments of the State to redistribute wealth, guarantee equality of income, and improve the living conditions of the population;

106 Acto Legislativo 1 de 1936, agosto 5, 1936, Diario Oficial [D.O.] 23263, art. 14.

107 Constitución Política de Colombia de 1991, art. 67.

108 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 18, Mar. 8, 1991, at 19.

109 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 26, Mar. 21, 1991, at 15.

110 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 29, Mar. 30, 1991, at 20.

111 Decreto 4807 de 2011, diciembre 20, 2011, Diario Oficial [D.O.] 48289.

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however, the mechanisms to achieve the latter objectives seem to be missing. One of the rights widely discussed in the Assembly was the right to property, as described next.

B. Property

The debate on the right to private property in the Constituent Assembly had several edges. The reason is that private property is not a right linked to a single article, but rather, like other aspects such as State intervention in the economy, it is linked to other institutions. This article focuses on four issues related to land ownership that I consider relevant because several drafters linked them to their speeches on economic inequality. These four issues are the social and ecological function of property, land reform (basically, the distribution of rural land), distribution of land to indigenous and Afro-descendant communities, and expropriation. Before presenting the fundamental aspects of these discussions in the Assembly on issues, I will present the situation in Colombia before 1991.

a. Property under the Constitution of 1886

The Constitution of 1886 was amended by Legislative Act 1 of 1936. It established the social function of property and two types of expropriation: with and without compensation.[112] This reform took place within the framework of the first social and interventionist reform of the State in the economy, presented by the liberal president Alfonso López, and it was called *Revolución en Marcha* (Revolution on the Move). Alfonso López belonged to the commercial and industrial upper class of the country and, even though the terminology seemed socialist, and the Conservative Party and the Catholic Church criticized it harshly, the reform was liberal because it sought to break the almost feudal model of land concentration in large haciendas, like in the colonial period, that, moreover, were not productive.[113] This explains the introduction of the concept of "social function of property," an expression coined by the French jurist León Duguit in the 1910s, and disseminated in Latin America and, in conferences in Colombia, by himself and by authors like the Colombian constitutionalist Tulio Tascón. Duguit was influenced by sociologist Emile Durkheim and positivist Auguste Comte.[114] He criticized the individualism and sacredness of property established by the French Revolution and Napoleon's Civil Code. The reason was that property is not a subjective right, that is, a natural right inherent to humans. Instead, it is an objective right that society grants to the owner, who

[112] Acto Legislativo 1 de 1936, agosto 5, 1936, Diario Oficial [D.O.] 23263, art. 10.

[113] On the debates transcripts and struggles to approve the constitutional reform in 1936, *see* Álvaro Tirado Mejía & Magdala Velásquez, La Reforma Constitucional de 1936 (1982).

[114] Ana Carolina Mercado Gazabón, La Influencia de León Duguit en la Reforma Social de 1936 en Colombia: El Sistema Jurídico, la Función Social de la Propiedad y la Teoría de los Servicios Públicos 9-20 (2013) (LL.M. thesis, Universidad del Rosario).

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is dependent on society to enjoy her right and, therefore, must contribute to it by using her property for the common good. Otherwise, the State could impose its positive obligation by force, for example, through expropriation, so that the property fulfills its function of generating wealth for all.[115] Also, to create a mechanism for this purpose to be fulfilled, Congress enshrined not only judicial expropriation with compensation, which was already enshrined in Article 31 of the Constitution of 1886. It gave itself the power to determine in which cases there was no place for compensation. Expropriation without compensation required the positive vote of the absolute majority of both houses of Congress.

Since then, various norms have been issued to materialize the social function of property and expropiation but with little success. Law 200 of 1936 regulated the constitutional reform and was the basis of what would be known as Agrarian Reform throughout the twentieth century in Colombia.[116] In essence, this Law established the land titling to the possessors (mostly tenant farmers or those who had invaded private or national lands) if they worked on them. However, in practice, the Law did not have a redistributive effect, but rather concentrated property more because its execution was bogged down by political pressure from various landowners and businessmen, who formed the *Acción Patriótica Económica Nacional — APEN* (National Economic Patriotic Action), integrated by both liberals and conservatives.[117] In the 1960s, in a context in which the National Front tried to give stability to the country after the bipartisan conflict known as *La Violencia*, the Cuban Revolution had triumphed, and the United States promoted the Alliance for Progress with measures such as —among others— an agrarian reform that would avoid the outbreaks of communism.[118] Then, Congress issued Law 135 of 1961, which had two axes: the redistribution of land and technical assistance to achieve it, which was delegated to the *Instituto Colombiano de Reforma Rural – INCORA* (Colombian Institute for Rural Reform).[119] In addition, this Law defined the *Unidad Agrícola Familiar — UAF* (Family Agricultural Unit), which is the minimum amount of land that a peasant family should have for its exploitation to be productive.[120] Nevertheless, that Law was not applied during the government of the conservative Guillermo León Valencia. In contrast, the Law received a new impulse from liberal president Carlos Lleras Restrepo; during his government, peasants constituted the

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115 *Id.*

116 Ley 200 de 1936, diciembre 30, 1936, Diario Oficial [D.O.] 23388.

117 *See, e.g.*, Inés Trujillo, *Reformas Agrarias en Colombia: Experiencias Desalentadoras y una Nueva Iniciativa en el Marco de los Acuerdos de Paz en la Habana*, Ensayos de Economía, no. 35, 38 (2014) [Trujillo, *Reformas*].

118 Darío Fajardo Montaña, *Colombia: dos décadas en los movimientos agrarios*, 71 Cahiers des Amériques Latines [en ligne] par. 37 (2012), http://journals.openedition.org/cal/2690 [https://perma.cc/GFL5-HY8G].

119 Ley 135 de 1961, 15 de diciembre de 1961, 30691; *see* also, Trujillo, *Reformas, supra* note 117, at 39.

120 *Id.*

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18894

Asociación Nacional de Usuarios Campesinos — ANUC (National Association of Peasant Users), which allowed them to be an institutional actor within the reform promoted by the State.[121] Also, Congress passed Law 1 of 1968, which accelerated the processes to distribute the land through, for example, the establishment of administrative action to extinguish ownership of improperly exploited lands and the compensation of properties according to their non-commercial value.[122] However, bureaucratization, the opposition of the landowners, the emergence of paramilitary groups that confronted the peasants, the radicalization to the left of some peasants and other sectors, and the appearance of illicit crops within large new estates, resulted in the Law having few redistributive effects.[123]

In this context, there was a rise in indigenous and Afro-Colombian movements for land. On the one hand, the guerrilla group *Movimiento Armado Quintín Lame — MAQL*, the first indigenous guerrilla in Latin America, was inspired by the indigenous leader, Manuel Quintín Lame Chantre, born in Cauca in 1880.[124] This indigenous leader fought against the landowners who accumulated ownership of the land and the benefits of its exploitation by indigenous peoples. Among the landowners who fought him, the conservative poet Guillermo Valencia, father of President Guillermo León Valencia, stands out, both from Cauca.[125] Likewise, the MAQL sought to appropriate land for the indigenous people by force of arms, for which it had the support of the M-19 guerrilla on several occasions. However, almost at the same time in the 80s, many indigenous people organized the *Organización Nacional Indígena de Colombia – ONIC* (National Indigenous Organization of Colombia), which also carried out land seizures from farms without being a guerrilla movement.[126] On the other hand, the Afro-descendant communities that, for the most part, had lived since the abolition of slavery in 1851 on communal lands on the Pacific coast and in valleys near the former haciendas, did not obtain full recognition of community property.[127] Instead, the State allowed companies and landowners to appropriate the most productive lands (for example, to produce sugar in Valle

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121 Montaña, *Colombia, supra* note 118, at par. 15.

122 Ley 1 de 1968, enero 26, 1968, Diario Oficial [D.O.] 32428.

123 *See* Angélica Franco & Ignacio De los Ríos, *Reforma agraria en Colombia: evolución histórica del concepto. Hacia un enfoque integral actual*, 8 Cuad. Desarro. Rural, no. 67, 93, 104 (2011) [Franco, *Reforma*]; on the ANUC leftist radicalization, *see* Absalón Machado, La Reforma Rural. Una Deuda Social y Política 156 (2009) [Machado, La Reforma].

124 Daniel Peñaranda, Guerra propia, guerra ajena: conflictos armados y reconstrucción identitaria en los Andes colombianos: El Movimiento Armado Quintín Lame (2015).

125 *El Quintín Lame tomó y dejó las armas por su comunidad*, Verdad Abierta (Mar. 27, 2015) available at https://verdadabierta.com/el-quintin-lame-tomo-y-dejo-las-armas-por-su-comunidad/ [https://perma.cc/83E2-6XTJ].

126 *ONIC: 40 años de resistencia, autodeterminación y derechos de la naturaleza*, Dejusticia (Mar. 2, 2020) available at https://www.dejusticia.org/column/onic-40-anos-de-resistencia-autodeterminacion-y-derechos-de-la-naturaleza/ [https://perma.cc/2CGY-NQKZ].

127 *Los afros del Cauca quieren su tierra*, Verdad Abierta (Feb. 27, 2014) available at https://verdadabierta.com/los-afros-del-cauca-quieren-su-tierra/ [https://perma.cc/E3US-QYPL].

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del Cauca).[128] Contrary to the MAQL and the indigenous peoples, the Afro-descendant movement in 1970 was not violent nor was it able to organize itself to bring a drafter to the Constituent Assembly in 1991.

During the 1970s, under the conservative president Misael Pastrana, the scope of the laws passed in the previous period narrowed. He was a staunch opponent of property seizures by force and, in a meeting with landowners and traditional parties (except the followers of Lleras Restrepo), Pastrana signed the *Pacto de Chicoral* (Chicoral Agreement).[129] With this agreement, later materialized in Law 4 of 1973, Law 5 of 1974, and Law 6 of 1975,[130] the government sought to reduce the institutional participation of the ANUC that demanded the implementation of the agrarian reform. The stigmatization and persecutions worsened during the presidency of the liberal Julio César Turbay (1978-1982) through its Security Statute, a decree with the force of law that persecuted peasant leaders as if they were leftist guerrillas and militarily prevented land taking.[131] Instead of the redistribution of large estates, President Pastrana sought land allocation in uncultivated regions under the pretext of increasing the agricultural frontier; yet, the State did not help in this process. In the end, he supported the inclusion of additional requirements to hinder the expropriation and extinction of property rights, such as the existence of a sharecropping contract (which is an almost feudal version of the employment contract). As of this period, in a context of increased violence and pressure from armed groups and drug trafficking to the State, and in addition to the gradual elimination of the import substitution system, the State restructured the purposes of the agrarian reform and focused on overcoming the poverty of the peasants and promoting production through plans such as the *Desarrollo Rural Integrado — DRI* (Integrated Rural Development). Notwithstanding, Law 30 of 1988 was the one that definitively weakened the idea of an agrarian reform based on the expropriation and adjudication of vacant land of the nation, since it privileged the purchase of land by INCORA, the entity in charge of distributing to the peasants.[132] However, this phenomenon generated at least two consequences. On the one hand, it generated more wealth for the landowners and, on the other, even though in this period INCORA bought more properties to distribute, this only benefited approximately 3.8% of the families without land or with enough land

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128 *Id.*

129 Machado, La Reforma, *supra* note 123, at 158-159.

130 Ley 4 de 1973, marzo 29, 1973, Diario Oficial [D.O.] 33828; Ley 5 de 1974, septiembre 30, 1974, Diario Oficial [D.O.] 34185; Ley 6 de 1975, enero 10, 1975, Diario Oficial [D.O.] 34244.

131 *El precio que pagó la Anuc por querer la tierra que trabajaban*, Verdad Abierta (Sept. 2, 2010) available at https://verdadabierta.com/el-precio-que-pago-la-anuc-por-querer-la-tierra-que-trabajaban/ [https://perma.cc/2986-8Z2B].

132 Ley 30 de 1988, marzo 18, 1988, Diario oficial [D.O.] 38264; Franco, *Reforma*, *supra* note 123, at 107.

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for a production that would guarantee survival (that is, an UAF).[133] All this happened to the detriment of a State power such as expropriation, whose basis was that the State imposed itself against the owner and not the other way around.

Finally, although there is no single consistent source that determines the GINI index of land concentration before the 1990s, all available sources place the coefficient of rural property concentration above 0.8 from 1960 to 1990.[134] Furthermore, between 1960 and 1984, while large owners (that is, with properties larger than 500 hectares) increased the area of their domains, the number of small owners (with less than 20 hectares) decreased by little, but it did tend to have less surface area than the total property registered in Colombia.[135] This is the setting in which the Constituent Assembly took place.

b. Reimagining property in the Constitution of 1991

In general, most of the drafters' proposals supported the need to maintain the social function of private property and add the expression "ecological function" to it. In this way, the proposals sought to highlight not only the obligation of the owner to produce but also to respect the environment. Thus, for example, from liberals, Antonio Galán (brother of the murdered leader Luis Carlos Galán) proposed the right to land access, and the State's duty to stimulate access to and exploitation of the land. In addition, he was in favor not only of maintaining the two types of expropriation provided in the Constitution of 1886 but also of administrative expropriation to expedite the agrarian and urban reforms without judicial review (only to dispute the amount of the compensation).[136] In the Conservative Party, drafters Juan Gómez and Hernando Yepes proposed to preserve the social function of private property. In addition, they only approved the expropriation with compensation in all cases in which a law or the government used it for reasons of public utility, social interest, or state of exception. Ultimately, Gómez and Yepes proposed community property based on solidarity and the non-seizure and inalienability of the properties of indigenous communities.[137] From the most right-wing dissenters of the Conservative Party, the MSN, drafters Raimundo Emiliani and Cornelio Reyes sought to eliminate the social function of private property. The reason was that, for them, the social function of property made no sense because all rights ultimately have a social function, which is why this is a characteristic that could not be predicated on property alone; in their opinion, that expression was the result of the socialist influence of the time (that is, 1936). Instead, they put

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133 *Id.*

134 Instituto Geográfico Agustín Codazzi (IGAC), Atlas de Distribución de la Propiedad Rural en Colombia (2012).

135 *Id.* at 66.

136 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 31, Ap. 1, 1991, at 22, 28 [Asamblea, no. 31].

137 Asamblea, no. 9, *supra* note 69, at 13, 15, 16.

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forward the figure of abuse of the right when the owner did not fulfill the social function of property.[138] However, Emiliani and Reyes maintained their support for judicial expropriation and prior compensation, and expropriation without compensation has been planned since 1936. Finally, from the UP, drafters Aida Avella and Alfredo Vásquez presented a project that maintained the social function of property and expropriation even without compensation.[139] In addition, they proposed an obligation of the State "to carry out an annual inventory of lands to determine the urban and rural productive properties."[140] Their idea was for the State to apply the extinction of ownership over unproductive properties and also expropriation with compensation over productive properties, if required. At last, Avella and Vásquez proposed that Congress should limit the extension of land that an owner could have; however, indigenous reservations could not be expropriated.[141]

The indigenous constituents also submitted similar projects. Drafter Francisco Rojas presented a project in which he defended the social function of property, community and solidarity property, and an agrarian and housing reform through administrative expropriation (not only judicial as the Constitution of 1886 prescribed) and extinction of ownership for non-compliance with the function of property. To avoid the concentration of land, Rojas even proposed that the State should suppress those private monopolies that did so, and that any property should be subject to expropriation (except ethnic territories). Finally, Rojas's proposal contained two new rights: the right to housing with public services, and the right to access agrarian property in conditions that facilitate productivity. The State should guarantee integrated rural development and redistribution through development plans.[142] As for Alfonso Peña, the drafter representing the indigenous guerrilla MAQL, he introduced a reform project, although he could not vote. He defended the continuity of the social function of the property but reinterpreted it through the need to distribute property in harmony with development plans that also promote different forms of property. In addition, for Peña, the Constitution needed to establish mechanisms to fulfill those ends. For this reason, his project preserved judicial expropriation, not necessarily with compensation, for the State to avoid paying additional expenses such as consequential damages and loss of earnings. Also, his project contemplated administrative expropriation for cases of agrarian reform and housing for the poorest. Ultimately, Peña promoted the extinction of ownership in both cases, as a sanction inherited from Law 200 of 1936, when the social function of the property was not fulfilled.[143]

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138 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 6, Feb. 18, 1991, at 4-6.

139 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 27, Mar. 26, 1991, at 6 [Asamblea, no. 27].

140 *Id.* at 8.

141 *Id.* at 16.

142 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 29, Mar. 30, 1991, at 2.

143 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 60, Ap. 26, 1991, at 15.

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18894

However, the project of a new constitution presented by the AD M-19 movement was characterized by not containing the classic formula of the social function of property. On the contrary, concerning property over land, the project presented only one article in which it proposed the non-seizure and imprescriptibility of the lands of the reservations of ethnic communities (that is, indigenous and Afro-Colombian) and the obligation of the State to promote incentives for them to fulfill their responsibility to protect resources and the environment.[144] However, it does not mean that none of its members supported, for example, the social function of property or agrarian reform. Thus, although it was not consistent with the proposal that he and his party offered, Carlos Ossa stated that the social function of property should be maintained and accompanied by administrative expropriation to give agility to the processes of agrarian and urban reforms, all in the framework of a Constitution that encourages the increase of wealth but the decrease of inequality.[145] In a tone more consistent with the reform project presented by his party, the constituent Abel Rodríguez stated that the objective of his party was for the Assembly to reach agreements so that the citizens themselves could fight to achieve agrarian and urban reform.[146]

The social function of private property, expropriation, territories for ethnic communities, and agrarian reform were debated by the First Commission on rights, the Second Commission on territorial planning, and the Fifth Commission on economic affairs. In other words, those were cross-cutting issues that a single Commission could not study. The pronouncements on these four aspects were numerous within the Commissions and during the Assembly's first plenary session. Thus, for example, in the First Committee, drafters such as Aída Avella (UP) and María Mercedes Carranza (AD M-19) proposed a bill of rights that included the establishment of the social function of property and judicial expropriation with compensation, and administrative expropriation without compensation. The only opponent was Raimundo Emiliani, who maintained his proposal to eliminate the social function of private property. Emiliani presented a draft article that, paradoxically, was more similar to the final wording of the article approved by the Assembly as will be explained later.[147] However, the bill of rights liberal Diego Uribe (PL) presented as the First Committee's proposal to the plenary of the Assembly, did not contain the regulation of property rights, nor did it mention ethnic territories.[148] Another example of the variety of proposals are those of indigenous drafter Francisco Rojas (ONIC) —in the First Commission—, and other by sociologist Orlando Fals Borda (AD M-19)

144 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 8, Feb. 19, 1991, at 3 [Asamblea, no. 8].

145 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 50, Ap. 15, 1991, at 15.

146 *Id.* at 5.

147 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 51, Ap. 16, 1991, at 24.

148 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 82, May 25, 1991, at 10.

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18894

and Lorenzo Muelas (AICO) —in the Second Commission—. They defended the creation of an entire chapter to regulate indigenous and ethnic issues, including communal ownership of territories;[149] still, neither initiative was successful. Meanwhile, in the Fifth Commission, drafters such as Angelino Garzón (AD M-19), Mariano Ospina (PC), and Iván Marulanda (PL) proposed on behalf of the Commission several agrarian rights that were intended to be the guide of the agrarian reform with initiatives like, for instance, the prioritization of the integral development of the productive activities, access to land ownership, and respect for indigenous communities in their territories.[150] Those constituents also proposed transitory articles like the one that required that, within 120 days following the entry into force of the Constitution, the government should implement measures to stimulate integral development or the article that required the State to spend at least 8% of its annual budget for the agricultural sector.[151]

During the first plenary session of the Assembly, the variety of positions on these issues came to the fore. Therefore, an Ad Hoc Commission was formed to reconcile and unify the different proposals presented, integrated by the commissions and the drafters in the first debate. Thus, on the issues of property, expropriation, and agrarian reform, the Accidental Commission was formed with a conservative majority by Carlos Ossa (AD M-19), Raimundo Emiliani (MSN, and who might have influenced the final wording), Rodrigo Lloreda (PC), Guillermo Perry (PL), and Mariano Ospina (PC).[152] Once this process was carried out, the Assembly voted part by part on the general article that defines the property. The proposal had an identical wording to the one that was finally approved; in fact, each of the paragraphs was approved with large majorities and without debate, except for two minor expressions. Eventually, this article as a whole was approved by 59 affirmative votes and 2 denials; there the Assembly established: the social and ecological function of property, judicial expropriation with compensation, administrative expropriation with subsequent judicial control including over the price paid, expropriation without compensation for equity reasons as defined by the legislator, and the indication that the reasons for any expropriation could not be disputed before a judge.[153] In the same terms, the plenary approved the non-seizure, inalienability, and imprescriptibility, among others, of the lands of ethnic groups and the indigenous

[149] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 67, May 4, 1991, at 21; Asamblea Nacional Constituyente, Gaceta Constitucional, no. 40, Ap. 8, 1991, at 7-8.

[150] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 86, May 30, 1991, at 16.

[151] *Id.*

[152] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 134, Oct. 29, 1991, at 14.

[153] The Assembly also enshrined other articles on expropriation in war or extinction of property rights when assets were acquired through illicit enrichment (like asset seizure in the United States); Asamblea Nacional Constituyente, Gaceta Constitucional, no. 136, Nov. 11, 1991, at 3-4 [Asamblea, no. 136].

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18894

reservations.[154] Also, the first plenary session approved the current Articles 64 to 66 with almost no debate, except for Article 64 on whether it should contain the verb "guarantee" or "promote" progressive access to land.[155] Thus, in Article 64, with 55 votes in favor and 3 against, the Assembly agreed on the State's duty to promote progressive access to land ownership with all the guarantees for its production and improvement of the peasant's quality of life.[156] Also, Article 65 approved with 48 votes and no objections the obligation of the State to protect food production and promote the integral development of production, for example, through research and technology.[157] Ultimately, in Article 66, the Assembly approved with 54 votes the possibility of benefits for agricultural credit.[158] The second plenary session of the Assembly confirmed everything as described. In fact, in the final approval of the general article on the property (that is, current Article 58) with 40 affirmative votes, the vote was nominal with three negative votes (drafters Juan Gómez (PC), Mariano Ospina (PC), and Cornelio Reyes (MSN)) and 17 abstentions (among them, Hernando Yepes (PC), and Carlos Rodado (PC)).[159]

Nevertheless, there were two relevant issues without consensus. The Assembly did not reach an agreement on the issue of recognition of the territories traditionally inhabited by Afro-descendant communities because their geographical delimitation was not clear. Thus, the Second Commission proposed the recognition of black communities' land rights along the Pacific coast. However, this geographical delimitation disregarded the fact that there are other black communities rooted in community territories in other parts of the country. Finally, the Assembly approved the current transitory article 55 that obliged Congress to pass a law in two years and after a wider discussion to recognize the right to collective property of those Afro-descendant communities.[160] Secondly, during the first plenary session, drafters Abel Rodríguez (AD M-19) and others promoted a new article according to which, following the social function of property, Congress should set a limit on the extension of land property. Yet, this article was only voted on by 22 drafters, with 10 negative votes, and 7 abstentions; thus, it was denied.[161]

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154 *Id.* at 5.

155 Constitución Política de Colombia [C.P.] arts. 64-66.

156 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 139, Nov. 22, 1991, at 19.

157 *Id.*

158 *Id.* at 20.

159 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 142, Dec. 21, 1991, at 27.

160 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 140, Dec. 17, 1991, at 41 [Asamblea, no. 140], Asamblea Nacional Constituyente, Informe de la Sesión de la Plenaria del Día 21 de Junio de 1991 376-394 (June 21, 1991), https://babel.banrepcultural.org/digital/collection/p17054coll28/id/214 [https://perma.cc/M4ZA-K2HW] [Asamblea, Informe].

161 Asamblea, no. 136, *supra* note 153, at 5.

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18894

In short, the Assembly conceived the right to property with a social and ecological function, promoted the guidelines for land reform, aimed to allocate land to ethnic communities, and accepted the continuation of expropriation as a matter of economic equality. These topics are closely related to the economic structure and the intervention of the State to regulate it as the next subchapter presents.

C. State and Economy

The relationship between the State and the economy was one of the great topics in the Assembly. This relationship was analyzed not only through social rights as economic obligations by the State towards citizens, but also as the need of the State to intervene in the management of the economy to meet all the social goals. In general, this subchapter shows the consensus on State intervention in the economy as a guarantee of freedom (e.g., freedom of business), but also equality on its substantive side, that is, economic equality.

State intervention in the economy was not an invention of the Constitution of 1991. It was enshrined for the first time in 1936 in the framework of the so-called *Revolución en Marcha* (Revolution on the Move) of President Alfonso López Pumarejo, the first social democratic program in Colombia. The reform established the intervention of the State "in the exploitation of industries or public and private companies, to rationalize the production, distribution, and consumption of wealth, or to give the worker the just protection to which he is entitled."[162] However, in 1968, President Carlos Lleras Restrepo led a constitutional reform to provide the State not only with the power to regulate companies to optimize their processes and protect the worker, but also to give the State a role as a planner or director of the economy.

Article 32 of the Constitution of 1886 established the freedom of business and private initiative, and, within that right, it enshrined the general direction of the economy by the State. Moreover, it described the intervention of the State in all economic processes from production to consumption, to "rationalize and plan the economy to achieve integral development."[163] Eventually, the reform established that the State should "give full employment to human and natural resources within a policy of income and salaries, according to which the economic development has as main objective social justice and the harmonic and integrated improvement for the community and the proletarian classes."[164] In this article, we can see the influence of the economic policy designed by the United States for Latin America, the Alliance for Progress.[165] This policy was

[162] Acto Legislativo 1 de 1936, agosto 5, 1936, Diario Oficial [D.O.] 23263, art. 11.

[163] Acto Legislativo 1 de 1968, diciembre 11, 1968, Diario Oficial [D.O.] 32673, art. 6.

[164] *Id.*

[165] *See*, *e.g.*, Diana Marcela Rojas, *La Alianza Para el Progreso en Colombia*, Análisis Político, no. 70, 91 (2010).

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aimed at promoting economic development in the region to lessen the chances of pro-communist uprisings. Development was understood as the growth of a country's internal economy through mechanisms such as industrialization by import substitution or loans to guarantee macroeconomic stability and social investment. The State, and particularly the president, would guarantee growth through strategic interventions in the economy.[166] Thus, the American development agenda for Latin America was enshrined in the Constitution of 1886 and indeed, survived in the Constitution of 1991 with some modifications, despite the change in American economic policy towards Latin America and the world from the 1970s.

During the debates of the Constituent Assembly in 1991, most drafters advocated for State intervention in the economy. Although the essence of Article 32 survived in the new Constitution, many drafters promoted additional features, some of them more radical than others. Thus, trends can be classified into two groups. The first group included those drafters who sought to preserve the article according to its original wording explained above and those who wished to add some adjustments to complement it. The second group proposed a wording text with essentially different characteristics of State intervention, sometimes more radical, sometimes more lax. Next, I will describe each group.

Firstly, most of the projects sent to the Fifth Commission on Economic Affairs contained the same wording as Article 32 on State intervention or added other aspects. In general, the new proposals aimed to modify the style of the article and add intervention policies that would reconcile neoliberalism and a strong role for the State. For example, the reform project presented by the Liberal government changed the expression "income and wage policy" to "policy of economic stability," which is relevant since the first expression sought that the intervention took into account the income of the population as an instrument to guarantee development and well-being, while the latter preferred macroeconomic stability as the policy to achieve such ends, a fundamental idea of neoliberalism.[167] Other liberals, such as Jesús Pérez, proposed adding policies such as the fight against inflation and regional improvement, [168] or Antonio Galán and Ernesto Rojas proposed the management of savings, the exploitation of natural resources, the promotion of full employment, the fulfillment of the development plans, all to achieve an equitable distribution of wealth and income in the regions and at the personal level.[169] Similarly, the liberal Eduardo Espinosa proposed to prevent the concentration of wealth in the hands

[166] *See* Carlos Caballero, La impronta de Carlos Lleras Restrepo en la economía colombiana de los años sesenta del siglo XX, Revista de Estudios Sociales [En línea], no. 33, par. 41 (2009) available at: https://journals.openedition.org/revestudsoc/15832 [https://perma.cc/954A-GNQB].

[167] Asamblea, no. 5, *supra* note 103, at 6.

[168] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 4, Feb. 13, 1991, at 3 [Asamblea, no. 4].

[169] Asamblea, no. 31, *supra* note 136, at 28.

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of one person and correct the inequalities that arise from production to consumption.[170] For him, an economic development model was necessary that would eliminate the unequal concentration of wealth, which could be done, for example, through real competition. Antonio Navarro and the other drafters of the AD M-19 presented a project that maintained the structure of Article 32 but added other policies of State intervention. Those policies were: ensuring minimum conditions of competition, productivity, and efficiency, protecting the rights of workers, consumers, and users, and seeking the development of the regions. In addition, the party's proposal added an article where private monopolies and oligopolies would be prohibited, with due compensation for the existing ones.[171] At last, those constituents who tacitly accepted Article 32 without modifications can also be included here, such as the constituents of the MSN Raimundo Emiliani and Cornelio Reyes who, in their extensive project to reform the Constitution, did not even mention Article 32.[172]

Secondly, a minority of drafters presented projects that, although inspired by Article 32, had different policies from those mentioned above. Like conservative Rodrigo Lloreda, conservatives Juan Gómez and Hernando Londoño expressly proposed a market economy as an economic regime within which freedom of business, freedom of competition, and democracy were guaranteed, with State intervention only when individuals or the situation demanded it. Also, such intervention would serve to guarantee the provision of basic public services and be subject to evaluation by the public so that they could participate in the exercise of the intervention. Additionally, the project foresaw that the intervention by the executive branch would not only cover monetary, credit, and fiscal policy, but also have egalitarian social development, increased productivity, internationalization, and the control of monopolies to prevent the concentration of property. Finally, the project expressly declared that ecological balance prevailed over economic development.[173]

The project presented by the Patriotic Union Party, although it preserved part of Article 32, emphasized three different intervention policies. First, fundamental economic decision-making would be coordinated with unions; second, the State could nationalize any type of company; in the end, the intervention should preserve the environment. It is worth highlighting the coincidence of two policies of this left-wing party with the Conservative Party, but above all the explicit proposal to provide the State with the power to nationalize companies.[174] This proposal was already existing in the initiatives presented by the Patriotic Union in its founding program where, besides, it explained the need

[170] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 26A, Mar. 26, 1991, at 21, 37; Asamblea Nacional Constituyente, Gaceta Constitucional, no. 44, Ap. 12, 1991, at 9.

[171] Asamblea, no. 8, *supra* note 144, at 2.

[172] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 25, Mar. 21, 1991, at 9.

[173] Asamblea, no. 9, *supra* note 69, at 4.

[174] Asamblea, no. 27, *supra* note 139, at 8.

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18894

to nationalize extractive companies of natural resources or banks, not only as a matter of sovereignty against foreign capital but also for redistributive purposes of economic benefits.[175] Additionally, in other articles, the Patriotic Union proposed intervention measures such as "economic democracy," according to which, in companies, no one could have more than 30% of the total capital, and also no foreign investor could have more than 49% of any company's shares.[176]

After presenting the proposals, the Fifth Commission, with the participation of two of the few economists in the Assembly, Iván Marulanda (PL – Nueva Colombia) and Guillermo Perry (PL), presented a unified draft article with a similar structure to that of Article 32, a draft that was approved by the plenary of the Assembly with a vast majority. The Commission structured the article in two paragraphs. The first contained new general intervention policies, such as the power to intervene in the exploitation of natural resources and land use, the equitable distribution of opportunities, the benefits of development (which replaced the expressions "integral development" and "social justice" because these were considered outdated), and the preservation of the environment. The second paragraph (which the Codifying Commission divided later) determined the specific objectives of the intervention, such as providing "full" employment to materialize the social right to work, ensuring public services to satisfy basic needs, promoting productivity, and regional development. Policies such as agreements with unions on economic decisions or economic stability were left out, because, in the opinion of the majority in the Codifying Commission, they overloaded the Constitution.[177]

Although the article was approved by all the attendees (61 constituents), drafter Aida Avella (UP) presented only one additional proposal.[178] She insisted on including the power to nationalize companies, whether Colombian or foreign, as one of the distinctive elements of her initial proposal before the Commission.[179] We can interpret Aida Avella's request, even though the article on public services also contemplated that the State could reserve the provision of public services (an article that continues in the Constitution today), as a wish that the State had that specific power not only in public services (an article that continues in the Constitution today) but also in key sectors of the national economy, such as oil companies or banks. The political agenda of the UP listed that policy, wich was also shared by the FARC-EP.[180] In the end, this proposal

[175] Ospina, Unión Patriótica, *supra* note 31, at 421.

[176] Asamblea, no. 27, *supra* note 139, at 8.

[177] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 80, May 23, 1991, at 21.

[178] Asamblea, no. 140, *supra* note 160, at 3.

[179] Asamblea Nacional Constituyente, Informe de la Sesión Plenaria del Día 20 de Junio de 1991 19-21 (June 20, 1991) available at: https://babel.banrepcultural.org/digital/collection/p17054coll28/id/165/rec/1 [https://perma.cc/C2BE-YFLH].

[180] Ospina, Unión Patriótica, *supra* note 31, at 417, 421.

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18894

obtained 20 affirmative votes, 14 negative votes, and 11 abstentions, and, since it did not obtain an absolute majority, it was denied.

This subchapter shows that the Assembly did agree on State intervention in the economy as a tool for fighting economic inequality. One of those policies that the Assembly debated to distribute wealth was territorial social expenditure. Next, I will explain it in depth.

D. Territorial Funding

Inequality in territorial entities' funding was one of the objectives to be fought by the Constituent Assembly. However, the discussion was not new in 1991. Contrary to the liberal Constitution of 1863, wich enshrined the federal regime in Colombia with total sovereignty of the states to capture and administer its funds, the conservative Constitution of 1886 centralized the State and made any local spending depend on the will of the President through their appointees: mayors for the municipalities, governors for the departments (the former states). From 1905, the most unpopulated territories of the departments were transformed into "national territories" called *intendencias* or *comisarías* and subjected to a more direct administration by the president; among them were territories such as Chocó, Amazonas, or Guajira. Nevertheless, at the end of the 1960s, in a context in which international organizations such as the Economic Commission for Latin America and the Caribbean – ECLAC recommended that Latin American countries promote not only planning through State intervention in the economy but also decentralization as an instrument for development, President Carlos Lleras Restrepo promoted the rules that would mark the beginning of the distribution of national income to territorial entities to meet social needs.

After Legislative Act 1 of 1968, wich amended the Constitution, Law 46 of 1971 was issued, which established the so-called *situado fiscal*.[181] The reform assigned a percentage of the State's ordinary income to the departments, *intendencias*, *comisarías*, and the district of Bogotá to fund their services. Ordinary income was that current income (tax and non-tax) not intended for a specific expense. Law 46 of 1971 defined the percentage of ordinary income as *situado fiscal* and stipulated that it should only satisfy public services of primary education and public healthcare in those territorial entities. According to this act, the *situado fiscal* started at 13% in 1973 and increased by 15% in 1974, although it could increase up to 25% after that date. Of the total fiscal budget, 74% would go to primary education and 26% to healthcare, unless the government allocated otherwise in the respective annual budget. In turn, the *situado fiscal* was divided into 30% for all territorial entities and the other 70% according to their population. These norms achieved that the allocation of resources to the de-

[181] Ley 46 de 1971, diciembre 31, 1971, Diario Oficial [D.O.] 33520.

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partments was rationalized, standardized and ensured at least two basic services in their municipalities: primary education and healthcare.

During the following years and until 1990, the income allocated to these two services increased, as did the demand for services. Law 12 of 1986, in addition to extending municipalities' participation in the V.A.T. from 30% in 1985 (according to Law 33 of 1968) up to 50% in 1993, demanded that said V.A.T. share should be used for education in a proportion of 30% or 50%, depending on the number of inhabitants in the municipality.[182] Besides, Law 10 of 1990, the primary legal framework for healthcare, established that, as of 1991, the *situado fiscal* share for healthcare would be equal to 4% of current income (higher than ordinary income) with the possibility of an increase, provided the *situado fiscal* did not exceed the 25% of the ordinary income of the Nation.[183] Thus, by 1991, the territorial entities had already gained a greater share of the Nation's income to finance the two basic services. Notwithstanding, the Assembly concentrated on addressing the problems that this division had not yet solved.

The discussion on the funding distribution to the territorial entities was extensive. As the conservative lawyer and economist Juan Camilo Restrepo, who later became Minister of Finance, described it in 1991, the general framework of the debate on funding distribution in the territories in the Assembly could be summarized as the conflict between two ideas: decentralization and fiscal sovereignty.[184] Thus, the struggle consisted of whether the decentralization of resources that began in the 1970s should be intensified and the territories should be given greater autonomy to collect revenue, or if, on the contrary, the Constitution should support fiscal sovereignty to grant full powers to the territories to collect their taxes. The Assembly opted for the first option. Furthermore, in many proposals and speeches, the drafters showed a consensus that a better distribution of revenue among the territorial entities was essential to overcoming economic inequality.

The most relevant policies discussed here were the *situado fiscal* to departments, the participation of the municipalities, bonuses for natural resources exploitation, and social spending. Thus, for example, from the liberals, the constitutional law professor from Cartagena, Jesús Pérez (PL) presented a reform proposal in which he insisted that the population should not be the criterion for distributing *situado fiscal* and municipalities' shares. [185] The reason was that there were regions that, despite having a higher proportion of their population living in poverty, received less funding as they had fewer inhabitants compared to the national total. Therefore, the drafter proposed to make the distribution according to the number of people with unsatisfied basic needs (U.B.N.) in a territory,

[182] Ley 12 de 1986, enero 16, 1986, Diario Oficial [D.O.] 37310.

[183] Ley 10 de 1990, enero 10, 1990, Diario Oficial [D.O.] 39137.

[184] *Descentralización o Soberanía Fiscal*, El Tiempo (Feb. 28, 1991) available at: https://www.eltiempo.com/archivo/documento/MAM-33249 [https://perma.cc/G75D-KUVC].

[185] Asamblea, no. 8, *supra* note 144, at 81.

DOI: https://doi.org/10.22201/iij.24485306e.2024.2.18894

that is, needs for education, healthcare, and sewerage, among others. Similarly, the project of the 19 constituents from the AD M-19 sought a raise in *situado fiscal* from 15% of ordinary income to 25% of the Nation's current income, and the allocation of 20% of that share for the less developed departments. From the conservative party, drafters Juan Gómez and Hernando Londoño proposed a new model based on fiscal capacity, unsatisfied basic needs, flexibility, complementarity, and a fiscal and administrative effort by territories.[186] In other words, their proposal sought a distribution system that would allocate more resources to the territories with less capacity to generate revenues but more poor people. In addition, it did not establish specific percentages because it delegated the transfers' regulation to an act, which should complement what the territories would gain through their efforts and an efficient administration. On the other part, the Patriotic Union presented a project where, although it did not establish specific percentages or items, it did oblige the State to prioritize social expenditures and give territorial entities the power to define their fiscal regime.[187] Also, this initiative proposed that municipalities have more generous participation in the distribution of bonuses from the exploitation of non-renewable natural resources, that is, the so-called *regalías*.

Many voices in the Assembly condemned the conditions of inequality in many regions at that time. In the first report that included all the proposals on public funding presented by the drafters, conservative constituent Carlos Rodado (PC), Jesús Pérez (PL), and the constituent from the AD M-19 Helena Herrán, in the Fifth Commission, summarized the consensus on the need to strengthen territorial entities funding. In their concept, the gap between rich and poor regions was due to an unequal distribution of the productive apparatus and a concentration of wealth in specific regions, among other structural factors.[188] However, they stated that the revenues allocation carried out by the State maintained inequalities because the central level reserved the highest percentage of revenues while assigning more responsibilities in matters of public services to territorial entities. They also justified the distribution according to unsatisfied basic needs as a principle, accompanied by an incentive to the territorial entities that were efficient in managing funds and gaining more through local taxation. For the constituents, that implied it was not necessary to create new taxes and to give territorial entities the power to create more taxes through fiscal sovereignty. Also, that principle encouraged the territorial entities to be diligent and not get used to living on the revenues granted by the central level. Hence, the three constituents proposed to the Fifth Commission concrete tools to redistribute resources, such as a new configuration of the *situado fiscal*, direct

186 Asamblea, no. 9, *supra* note 69, at 13.

187 Asamblea, no. 27, *supra* note 139, at 8, 16.

188 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 53, Ap. 18, 1991, at 13 [Asamblea, no. 53]; on the compilation work, *see* Carlos Noriega & Jesús Pérez, Informe Ponencia para Primer Debate (May 27, 1991) available at: https://babel.banrepcultural.org/digital/collection/p17054coll28/id/309 [https://perma.cc/FN3G-8F6Y].

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transfers from the Nation to the municipalities, the creation of a National Bonuses Fund, and the inclusion of a chapter on public social expenditure in the Annual Budget Act.[189]

Nevertheless, not only the constituents of the Fifth Commission for Economic Affairs debated this issue. For example, in the Second Commission on land use planning, the liberal medical doctor and former vice minister of healthcare, Eduardo Espinosa (PL), justified the creation of regions (union of departments) as an instrument to redistribute income in a more balanced way among departments with a similar history, culture, or geography.[190] Similarly, the liberal and Columbia-trained business administrator, Eduardo Verano (PL), favored regionalization as a mechanism to redistribute the wealth generated in large cities that did not reach peripheral areas.[191] Finally, former M-19 guerrillero Héctor Pineda also defended regionalization as a process to integrate neglected territories into the domestic market which, in his opinion, constituted a form of "compensation" to the formerly sovereign states abolished by the Constitution of 1886, which had limits very similar to the geographic and socioeconomic regions that the Assembly discussed.[192]

The debates in the Fifth Commission changed the first draft initially proposed by drafters Rodado, Pérez, and Herrán. However, the new set of articles maintained its essence and was approved by large majorities in the first plenary session of the Assembly.[193] After a review made by the Codification Commission that was partially objected to by several drafters, the Assembly also approved the articles in the second plenary.

Firstly, with 54 votes, it approved a regulation on *situado fiscal* for departments to fund preschool, primary and secondary education, and healthcare services in their municipalities. Although the norm did not include a specific percentage of current income, it did order that at least 85% of that percentage would be for all departments according to the number of users and services provided, and their fiscal and administrative effort. This distribution could be changed by Congress every five years after evaluating its performance.[194] These policies became Article 356 (amended today).[195] Secondly, the Assembly approved a new article that established the obligation of the State to transfer a minimum percentage of the current income to the municipalities, which would increase

189 Asamblea, no. 53, *supra* note 188, at 14.

190 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 43, Ap. 11, 1991, at 2-4.

191 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 46, Ap. 15, 1991, at 18-19.

192 Asamblea, no. 50a, *supra* note 65, at 8, 9.

193 Asamblea, no. 140, *supra* note 160, at 37.

194 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 144, Dec. 31, 1991, at 9 [Asamblea, no. 144]. This was Article 379 of the project.

195 Constitución Política de Colombia [C.P.] art. 356.

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annually from 14% in 1993 to 22% in 2002.[196] Of that percentage, 60% would be allocated according to the population with U.B.N., a share that Congress could modify after five years; furthermore, the drafters agreed on the possibility that municipalities were eventually assigned new responsibilities for social investment. Thus, with 52 affirmative votes, Article 357 (amended today) was approved.[197] In another rule approved by the Assembly (Article 361 of the current Constitution, amended today), the constituents prescribed the distribution of bonuses to the territorial entities and created the National Bonuses Fund, according to the terms of a law issued by Congress. The proposal was adopted in the first debate and, later, confirmed in the second plenary with 49 affirmative votes.[198] Ultimately, there was a greater consensus in the Assembly to oblige the State to include a chapter on social expenditure in the Annual Budget Act. That expense would have priority over any other allocation, except in cases of war or for reasons of national security (a relevant exception due to the Colombian context).[199] This proposal was enshrined in Article 350 of the Constitution and was adopted without any opposition in the first debate and with 49 affirmative votes in the second debate.[200]

Thus, the subchapter shows that the Assembly was concerned about the revenues allocated to territories to fight economic inequality. However, the State needed the funds to accomplish a fair distribution. The last subchapter presents the consensus and disagreements on taxation in the Assembly.

E. Taxes

The first televised presidential debate in the history of Colombia was on February 11, 1986. The candidates who participated were Álvaro Gómez, from the Conservative Party, and Luis Carlos Galán, from *Nuevo Liberalismo* (New Liberalism), a leftist dissidence of the *Partido Liberal Colombiano*.[201] Taxes were one of the six points discussed that day; specifically, the question for the two candidates was how each one would manage to balance the promises of their electoral programs without raising taxes. On the one hand, Gómez affirmed that the taxes were very high; according to him, they were oriented to punish the saver and maintain a State full of inefficient bureaucracy. He proposed to reduce the size of the State and rationalize expenditures to increase efficiency. In addition, he assured that the reduction of taxes would decrease evasion, since it was easier for everyone to pay low taxes, which would guarantee growth both

196 Asamblea, no. 144, *supra* note 194, at. 10-11. This was Article 381 of the Project.

197 Constitución Política de Colombia [C.P.] art. 357.

198 Asamblea, no. 144, *supra* note 194, at. 10-11. This was Article 384 of the Project.

199 *Id.* at 8. This was Article 373 of the Project.

200 Constitución Política de Colombia [C.P.] art. 350.

201 R.T.I. & Producciones JES, Debate 1: Álvaro Gómez y Luis Carlos Galán 11 de febrero 1986, YouTube (Ap. 10, 2019), https://youtu.be/TbElNsrwIL0?t=2588 [https://perma.cc/X3SP-AA83].

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in the income collected and in private investment. On the other hand, Luis Carlos Galán supported a tax reform that would simplify the collection of taxes and their distribution, but which, at the same time, would guarantee that those with greater wealth would contribute more money to the finances of the State. For him, this model states that the modern State of the last fifty years assumed the responsibility of eliminating the class struggle through the redistribution of wealth, not as a favor from the political elite, but as a State policy. The description of this debate is relevant here because it illustrates two things. Firstly, it shows the general discussion about the tax regime in force before the Constitution of 1991. And, secondly, the debate reveals the two main antagonistic visions that would meet five years later in the Assembly to create a new pact on taxation. I consider each of the two in turn.

a. Taxes in the Constitution of 1886

The Constitution of 1886 mentioned taxes in a few articles. Originally, the Constitution referred to the power of Congress to establish taxes (although it implicitly allowed the president to do so through states of exception) and the date of entry into force of the collection of contributions or indirect taxes, which was six months.[202] During the one hundred years of existence of that regime, a few changes were added. Even so, that did not stop Congress and the executive branch from introducing taxes such as the sales tax (V.A.T.), the income tax, or the wealth tax; the latter was in place for 54 years and is still highly controversial. Below, I present a brief historical review focusing on those three taxes to contextualize the debates in the Assembly in 1991.

At the end of the nineteenth century, almost 80% of the State's revenues came from customs taxes.[203] However, at the beginning of the twentieth century, Congress created the first two modern taxes: Law 26 of 1904 created the tax on the consumption of luxury goods,[204] and Law 56 of 1918 established the income tax,[205] reinforced by Law 64 of 1927.[206] In the 1930s, two events increased the number of taxes: on the one hand, the 1929 world crash reduced foreign trade and, therefore, the customs tax; on the other hand, the arrival of Alfonso López with his social democratic government plan. Thus, Law 81 of 1931 increased the income tax,[207] Law 78 of 1935 created comple-

202 *See, e.g.*, Constitución Política de Colombia de 1886, arts. 204, 206.

203 Departamento Nacional de Planeación - DNP, Las Reformas Tributarias en Colombia Durante el Siglo XX (I) 3 (2002) available at: https://colaboracion.dnp.gov.co/CDT/Estudios%20Econmicos/Las%20reformas%20tributarias%20en%20Colombia%20durante%20el%20siglo%20XX%20(I).pdf [https://perma.cc/P28J-C2P2] [DNP, Las Reformas].

204 Ley 26 de 1904, noviembre 15, 1904, Diario Oficial [D.O.] 12225.

205 Ley 56 de 1918, noviembre 27, 1918, Diario Oficial [D.O.] 16555.

206 Ley 64 de 1927, noviembre 12, 1927, Diario Oficial [D.O.] 20648.

207 Ley 81 de 1931, junio 20, 1931, Diario Oficial [D.O.] 21731.

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mentary taxes on wealth and excess profits,[208] and Law 63 of 1936 established the tax on occasional gains (inheritances and donations).[209] Faced with the decrease in foreign trade during the Second World War, Congress increased the income tax with Laws 45 of 1942 and 35 of 1944.[210] Nevertheless, it was during the dictatorship of General Gustavo Rojas Pinilla that greater equity was sought through Decrees 2317 and 2615 of 1953,[211] which increased income and wealth taxes and established double taxation of companies and dividends of shareholders. Thus, in 1955, income and wealth taxes constituted 53% of the State's tax revenue.[212]

Another important milestone was Law 81 of 1960.[213] This Law was influenced by a commission of experts from ECLAC and Harvard University, and, in general terms, it reduced direct taxes such as income, wealth, and excess profits. The purpose of this modification was, on the one hand, to eliminate tax burdens on small and median incomes, but, on the other hand, to encourage the productive sector and private investment for the benefit of the country's industrialization. However, this led to a decrease in income that ended up with the issuance of Law 21 of 1963,[214] which gave the conservative president Guillermo León Valencia the power to increase direct taxes and create an indirect tax called "sales tax" through Decree 3288 of 1963, which would later become the value-added tax, V.A.T.[215]

Despite certain stability in tax collection, in the mid-1970s the country suffered high inflation and the liberal president Alfonso López Michelsen issued the Decree of Economic Emergency 1970 of 1974 that served to issue decrees that reformed the tax structure.[216] Thus, López Michelsen reduced most of the incentives of Law 81 of 1960 and implemented the presumptive revenue of wealth, to increase tax collection, reduce evasion, and combat inflation. Notwithstanding, the reforms were unsuccessful, and the system was dismantled in 1977 through the reduction of direct taxes, and the declaration of amnesty for tax evasion, among other measures that reduced the State's income again. Thus, by 1980, income and complementary taxes such as wealth tax reached 30% of the State's tax income compared to 20% of the sales tax.[217]

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208 Ley 78 de 1935, diciembre 23, 1935, Diario Oficial [D.O.] 23075.

209 Ley 63 de 1936, marzo 30, 1936, Diario Oficial [D.O.] 23165.

210 Ley 45 de 1942, diciembre 18, 1942, Diario Oficial [D.O.] 25135; Ley 35 de 1944, diciembre 21, 1944, Diario Oficial [D.O.] 25733.

211 Decreto 2317 de 1953, septiembre 8, 1953, Diario Oficial [D.O.] 28484; Decreto 2615 de 1953, octubre 6, 1953, Diario Oficial [D.O.] 28326.

212 DNP, Las Reformas, *supra* note 203, at 15.

213 Ley 81 de 1960, diciembre 22, 1960, Diario Oficial [D.O.] 30412.

214 Ley 21 de 1963, agosto 20, 1963, Diario oficial [D.O.] 31177.

215 Decreto 3288 de 1963, diciembre 30, 1963, Diario Oficial [D.O.] 31265.

216 Decreto 1970 de 1974, septiembre 17, 1974, Diario Oficial [D.O.] 34170.

217 DNP, Las Reformas, *supra* note 203, at 15.

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The reforms of the 1980s sought to counteract the decline in income. They expanded the sales tax and transformed it into the V.A.T. (Law 9 of 1983 and Decree Law 3541 of 1983, which established its rate at 10%),[218] decreased the percentages of direct taxes through incentives, and ended double taxation. Also, under the protection of Law 14 of 1983,[219] the taxes of the territorial entities were strengthened, such as land taxes. Finally, in 1989, according to Law 84 of 1988, the President issued Decree 1321 of 1989 that eliminated the wealth tax,[220] a tax that, according to some calculations, was around 20% of total income tax on average since 1936 and ended up being 5.45% in 1991.[221] The motivation was the need to "harmonize" the tax burden of taxpayers who already paid, for example, property tax for their real estate before the territorial entities, that is, to eliminate double taxation. That decision was framed in a context in which the governments of Virgilio Barco, first, and César Gaviria, later, promoted the economic opening of the State to a free international market economy.

This historical account suggests at least two things. The first is that, at the time of the presidential debate between Gómez and Galán, the trend of the moment was to reduce taxes that could be considered "anti-private investment burdens"; in other words, the governments endorsed Álvaro Gómez's position. The second issue is that the discussions on economic inequality in the Constituent Assembly took place in a context in which direct policies to reduce inequality, such as the wealth tax, were being dismantled. This context could explain the weak consensus in the Assembly on the constitutional structure of the tax system, as I will show below.

b. A new Tax Structure in 1991

There were several proposals on the tax system in the Assembly. For instance, drafter Jesús Pérez (PL) proposed the prohibition of tax law retroactivity, the progressivity of land tax, and the Congress's power to propose any modification to the laws on personal exemptions to income tax, on its initiative and without the government's intervention, which had the initiative in budgetary matters according to the Constitution of 1886.[222] In this last aspect, the journalist Alberto Zalamea (MSN) agreed.[223] The AD M-19 proposed some principles for the taxation system according to which Congress would be obliged to approve

[218] Ley 9 de 1983, junio 8, 1983, Diario Oficial [D.O.] 36274; Decreto 3541 de 1983, diciembre 29, 1983, Diario Oficial [D.O.] 36452.

[219] Ley 14 de 1983, julio 6, 1983, Diario Oficial [D.O.] 36288.

[220] Ley 84 de 1988, diciembre 29, 1988, Diario Oficial [D.O.] 38635.

[221] Cecilia Rico Torres, *Impuesto al patrimonio en Colombia: 1936-2004*, DIAN 18 (Nov., 2004) available at: https://imgcdn.larepublica.co/cms/2014/09/11020248/Impuesto%20al%20Patrimonio%20DIAN.pdf [https://perma.cc/NZY6-HNE7].

[222] Asamblea, no. 4, *supra* note 168 3-4.

[223] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 12, Feb. 28, 1991, at 6.

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tax laws to promote equity, efficiency in collecting taxes, and development.[224] In the Conservative Party, constituents Juan Gómez and Hernando Londoño proposed that Congress and collegiate bodies of the territorial entities could create taxes, and suggested wealth taxes as a general principle of public finances.[225] Additionally, the leader of *La Séptima Papeleta* movement, Fernando Carrillo, in his constitutional reform project inspired, according to him, by the *Nuevo Liberalismo* movement of Luis Carlos Galán and the discussions within the student movement,[226] proposed the duty of the inhabitants to pay taxes according to their economic capacity. In addition, he proposed distributive justice, equality, and progressiveness should be the principles of the tax system and that public revenues should be allocated and spent according to the principles of equity, economy, and efficiency.[227] Finally, in the draft constitution of the UP party, in Articles 46 (on the guidelines of the national development plan) and 49 (on the annual budget law), Aida Avella and Alfredo Vásquez (UP) sought to tax mainly land, capital gains, and real estate. They also proposed direct and indirect taxes should not exceed 25% of the State's tax revenues, otherwise, the State would be obliged to collect more direct taxes on assets, e.g., land. Furthermore, the UP project proposed the obligation that the annual budget law should privilege social expenditure and direct taxation.[228]

The reports prepared by the constituents Carlos Rodado (PC), Jesús Pérez (PL), and Helena Herrán (PL), within the Fifth Commission, which summarized all the previous projects,[229] depicted the Assembly's general conception as if it believed that it was not necessary to create more taxes but to improve the allocation of those already in force. In other words, according to the reports, the discussion did not criticize enough the increase of indirect taxes in the total share of fiscal revenue during that period and its effects on economic inequality. Moreover, the debates in the Fifth Commission had the joint participation of the Second Commission. The reason is that the discussion on taxes focused on granting greater participation to territorial entities in the collection of the most dynamic taxes, especially V.A.T., to guarantee territories greater fiscal autonomy to collect new taxes under the law (for example, through liquor taxes) and to protect the exclusive ownership of those revenues by territorial entities. However, concerning the general regulation of the tax system, the commission's proposal to the plenary consisted of only one article that declared the non-retroactivity of taxes, which was already implicit in the Constitution of 1886.[230]

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224 Asamblea, no. 8, *supra* note 144, at 4.

225 Asamblea, no. 9, *supra* note 69, at 13.

226 Asamblea, no. 31, *supra* note 136, at 19.

227 *Id.* at 13.

228 Asamblea, no. 27, *supra* note 139, at 8-9.

229 Asamblea, no. 53, *supra* note 188, at 13.

230 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 85, May 29, 1991, at 18. In the project, it was Article 9.

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During the first plenary session, the constituent Fernando Carillo (elected through the La Séptima Papeleta movement) proposed an addition to the article initially presented by the Fifth Commission. His proposal consisted of insisting on the need to determine the three basic principles that should guide tax policy; those were equity, efficiency, and progressivity.[231] These principles reflected his initial proposal presented to the Fifth Commission. Although the Gazette did not address his explanatory memorandum, I can explain the meaning of those principles as follows, according to their context. Equity referred to equality in the collection of taxes, more specifically to the fact that there were no excesses when gathering or exempting; efficiency was related to good management of resources both in their management and in their destination; progressivity was especially linked to the expectation that whoever had more assets would pay more as well.[232] Ultimately, the first plenary adopted this proposal with 60 affirmative votes and without further discussion.[233] Additionally, the Assembly approved with 41 votes in favor and 26 against the current transitory Article 43 that obliged Congress (and, failing that, the President) to issue a tax reform in 18 months so that the State could comply with the new (social) obligations derived from the new Constitution. The most representative protest was that of the conservative constituent Rodrigo Lloreda (PC), who stated that the transitory article broke up the general agreement reached by the Assembly that only Congress could impose taxes and carry out the tax system.[234]

During the second plenary session, barely two days after the Assembly's session period ended, the ex-guerrillero drafter Darío Mejía (EPL), supported by others such as Aida Avella (UP), Francisco Rojas (ONIC), and Iván Marulanda (PL – Nueva Colombia), proposed to modify the article that described the tax system. The constituent requested the inclusion of this text: "The law will gradually increase direct taxation in relation to indirect taxation as a criterion of social justice."[235] The text was not approved, as it only obtained 31 affirmative votes. On the other hand, the version of the article approved by the first plenary session got 56 affirmative votes and no denials or abstention votes; thus, it was approved unanimously and is the current Article 363 of the Constitution. Unfortunately, neither the Gazette nor the transcripts offer data on which people voted for the modification proposed by Mejía. What can be learned from the transcripts is Mejía's motivation only. For him, this proposal had the objective

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231 Asamblea, Informe, *supra* note 160, at 189.

232 In fact, the Constitutional Court has applied that meaning in judgements such as Corte Constitucional [C.C.] [Constitutional Court], febrero 13, 2019, Sentencia C-056/19, M.P.: Gloria Ortiz (Colom.).

233 Asamblea, no. 140, *supra* note 160, at 38.

234 Asamblea, Informe, *supra* note 160, at 255-256.

235 Asamblea, no. 144, *supra* note 194, at. 10; Asamblea Nacional Constituyente, Informe de la Sesión de la Plenaria del Día 2 de Julio de 1991 167 (July 2, 1991) available at: https://babel.banrepcultural.org/digital/collection/p17054coll28/id/57/rec/1 [https://perma.cc/A4YF-326U].

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of forcing the State to progressively increase the portion of direct taxes on the richest, because, for him, the Colombian people were paying too many taxes.[236] The proposal followed what several constituents initially put forward, namely, making explicit the obligation for the State to promote the predominance of direct taxation as an instrument to combat economic inequality.

In summary, many constituents proposed to provide the State with guidelines to develop a tax policy to fight economic inequality, although under different terms. However, even if there was a sector that, until the last minute, intended the Assembly to adopt the express establishment of the priority of direct taxes, the Assembly did not approve it. Thus, the general agreement on the tax system can be found in Article 363 and in the four basic principles that govern it: equity, efficiency, progressivity, and non-retroactivity. Of course, there are other tax principles implicit throughout the constitution (for example, the principle of legality). Nevertheless, the tax pillar agreed upon by the Assembly did not emphasize explicit mechanisms for taxation to overcome economic inequality. This is paradoxical, first, because several constituents from different political backgrounds were aware of the importance of direct taxation as an explicit principle in the constitution, and second, because, despite that, the majority ended up voting for the simplest and most general regulation.

Thus, the next chapter argues that, along with other gaps in the constitution's regulation, the Assembly did not design a well-structured and coherent plan with concrete mechanisms to fight against economic inequality, despite having all the power and proposals to do so.

IV. A Defective Constitutional Design to Address Economic Inequality in Colombia

I presented above the five pillars or set of policies that the Assembly debated and agreed on as the main issues through which the State could overcome economic inequality. However, the agreements and disagreements on specific policies such as social rights, the social function of property, expropriation, land reform, State intervention in the economy, territorial funding, and a tax system supported by progressivity, make evident that there was no structural consensus on a concrete plan to overcome economic inequality, despite some drafters' discourses against it and their desire that the Constitution become an effective instrument to tackle it. There are at least five reasons to support that hypothesis.

Firstly, the data on the drafting of the three social rights presented in the first subsection of the second chapter, perhaps among the most remarkable of all those approved by the Assembly, suggests two things. The first one is that two tendencies in the Assembly influenced how these rights were regulated. The transcripts account for the tension between the global trend in 1990 that

[236] *Id.* at 168-169.

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pushed Colombia towards a free-market economy and the claims of the constituents that the State had to guarantee better living conditions for Colombians. The tension lies in the fact that the global trend proclaimed the reduction of the State's role in guaranteeing these rights to favor the market and not vice versa, that is, the strengthening of the State's role to secure those rights and public services, even if some private companies were the providers. The transcribed speeches show the constituents' intention to reconcile the idea of social rights as tools to fight economic inequality with the pressure of the period to reduce the role of the State in providing those rights before the market economy. The second issue is that the Assembly did not agree on creating specific constitutional actions for citizens to claim those rights before judges; it did not establish any coercive measures (such as setting a deadline for Congress to regulate and materialize those rights),[237] and the drafters did not create any rule to determine the priority of those rights when the ratio of market economy conflicts with them.

The absence of legal actions to claim them seems to have been motivated by two reasons that contradict themselves. Firstly, the well-known "programmatic nature" of these rights, which is evident if one considers that, even in international law, social rights are programmatic, that is, the State is expected to carry them out at some point, due to financial difficulties involved in guaranteeing these social benefits at once. Nevertheless, it is questionable because rights such as social security, education, and work are indispensable within any State that calls itself a "Social Rule of Law", and seeks to guarantee minimum standards of living to overcome inequality. Thus, it seems necessary that any constitutional arrangement with such characteristics should provide the mechanisms to make them possible without delays. This shows that, despite the discourse of the members of the Assembly, the majority did not dare to prioritize social rights to overcome economic inequality; their excurses were costs and progressivity, but they did not realize that even civil and political rights also cost a lot.[238] Secondly, the Assembly did not agree on constitutional actions for second-generation rights, that is, socio-economic rights because it was how these could be reconciled with the postulates of the market economy. That explains why the *acción de tutela*, which must be immediately enforceable, was not established for the protection of social rights, and, also, why the Assembly did establish actions for third-generation rights (e.g., environmental rights, public services, freedom of competition). In fact, contrary to what the Assembly agreed on in 1991, it was the Constitutional Court, since 1992, that has conferred itself the power to

[237] Thus, for instance, some constituents like Rodrigo Lloreda (PC – Movimiento Unidos por Colombia), Carlos Lemos (PL), Carlos Ossa (AD M-19), Rafael Molina (MSN), Antonio Yepes (PL), and Óscar Hoyos (AD M-19) proposed a five-year deadline for Congress and the President to reform and execute the whole new social security system. Nevertheless, the Assembly only approved a transitory article obliging the government to elaborate a draft within the next 180 days after the Constitution's promulgation. Asamblea, no. 53, *supra* note 188, at 2.

[238] For a discussion on the cost of rights, *see*, *e.g.*, Stephen Holmes & Cass Sunstein, The Cost of Rights: Why Liberty Depends on Taxes (2000).

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protect social rights through constitutional actions such as *acción de tutela*, when the non-recognition of social rights directly violated fundamental rights. Thus, it was the intervention of the Constitutional Court in socioeconomic rights that would largely materialize the claims of economic equality through the rights established by the Assembly, although the latter desired the intervention of the State in the economy not exactly by the Constitutional Court, a contradiction that resulted precisely because of the Assembly's lack of commitment to effectively drafting socioeconomic rights.

Secondly, on the property and land issues, the Assembly adopted the social and ecological function of property and was concerned with designing guidelines for land reform to overcome economic inequality. Thus, the drafters agreed on radical measures such as expropriation and normative provisions that included new rights and obligations of the State, which, for the most part, emulated the claims of peasants, indigenous people, and Afro-Colombians, and the previous attempts to achieve an agrarian reform. Articles 58 (today reformed) to 66 of the original constitution regulate almost all the aspects that were enshrined under the Constitution of 1886 on property and land, including its legal developments.[239] However, the Assembly did not agree on other specific measures that some drafters proposed and that would have complemented the regulation, such as, for example, the limitation of the extension of property that anyone could own in Colombia,[240] or the spending of at least 8% of the national budget in the agriculture sector. Consequently, this pillar against economic inequality fell short because even the most radical measures adopted by the Assembly, such as expropriation, were already established in the previous constitution. Thus, the Assembly failed to agree on creative measures to resolve the passivity that the executive and the legislative branches had demonstrated in past decades. For this reason, this pillar is inconsistent with the demands for greater economic equality through land reform that many of the constituents supported in their speeches. Maybe the new measures proposed were too radical to apply or conflicted with other ideas that were more important to most constituents, such as the free market and a lax intervention in the economy, as will be discussed next.

Thirdly, there was a consensus among all political sectors that the State should intervene in the economy. In some proposals, overcoming economic inequality as the objective of State intervention was more explicit than in others. However, the Assembly attempted to address this issue through policies such as full employment, access to basic goods and services, and the sharing of opportunities and benefits of development. In any case, the Assembly sought to balance two models that are traditionally seen as antagonistic, but, in its attempt, it did not envision more direct policies to fight against one of the two fundamen-

[239] Asamblea, no. 136, *supra* note 153, at 3-6.

[240] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 23, Mar. 19, 1991, at 53.

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tal aspects of economic inequality: the concentration of wealth. The Assembly agreed to prohibit non-State monopolies, gave the State the power to prevent abuses such as the dominant position in the market, enshrined an action to guarantee unfair competition, and even opened the possibility that the State assumed the provision of public services, although the Constitution did not call it "nationalization". However, the Assembly failed to make explicit as State policy the obligations to overcome the concentration of wealth (not only capital but also land) and to promote policies that discourage it. Although the Constitution contains tools that some drafters mentioned for that purpose, the Assembly's conciliatory spirit disabled them by not formulating explicit and stronger policies of State intervention in the economy to combat the inequality generated by the concentration of wealth then and in the future.

Fourthly, regarding territorial funding, four basic agreements are worth mentioning. In the first place, the concept of Unsatisfied Basic Needs is a guiding principle for revenue allocation, although its definition and calculation are not indisputable. Second, decentralization was an instrument for the redistribution of wealth that the drafters tried to strengthen through a larger revenue share for territorial entities. Third, the understanding that the territorial entities and the Nation were partners and, therefore, transfers' rise should be tied to the increase of the State's current income. And, fourthly, the Assembly prioritized public social expenditure, although it placed it after the "security issue". Nevertheless, the pillar suffers two contradictions in its search for economic equality. The first contradiction is that the Assembly sought decentralization so that the entities would provide more and more services to meet the needs of their population, but that system fostered a dependence of the territories on the funds sent from the central government, which, in addition, assigned the money only for fixed expenses (education and healthcare) because the Constitution ordered it to do so. A second problem with this pillar is that the Assembly forced the central government and territorial entities to spend on social investment, but did not require them to save, that is, the Assembly did not provide mechanisms for the allocation to be sustainable even in times of economic crisis, as indeed happened eight years later in 1999. In addition, the entire transfer system depended mainly on taxes (e.g., V.A.T. and income tax), but, in contrast, the tax system agreed upon by the Assembly was essentially weak, as will be shown below.

On the tax system, there are at least three interpretations. The first one is that the approved principles, and especially the principle of progressivity, contain the desire that taxation has an emphasis on direct taxation. The second is that the majority in the Assembly did not realize the importance of taxation having concrete redistributive elements that would force the State and any government to combat economic inequality. The third is that the majority that defeated the proposal of drafter Darío Mejía and others in the second debate, did not want the Constitution to have a strong redistributive tax system because it affected the economic and political interests they represented. Even though it is not possible to know with certainty the correct answer because the data is not

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descriptive enough, my interpretation is that the inclusion of the expression "progressivity" is not sufficient as a mechanism to overcome economic inequality if we compare it with, for example, an explicit rule that obliges the State to charge more direct taxes on wealth than indirect ones, among other measures such as those proposed by the Patriotic Union. With such a rule, even existing institutions like the Constitutional Court could have the indisputable power to declare unconstitutional a taxation act that violates that rule. Furthermore, the data suggest that, from the beginning, there was an intention in the Assembly to make the tax system as weak as possible, under the pretext that tax matters should be the subject of specific regulation by Congress. Nevertheless, that is not understandable if one considers that the regulation of taxation is important not only for reasons of fighting against the concentration of wealth or redistribution of income but because a structured regulation on taxes is necessary for the maintenance of a State with high social burdens, such as the one that the Assembly was founding. In this scenario, even the transitory Article 43 that obliged Congress and the executive branch to amend taxes in vigor only once 18 days after the promulgation of the Constitution was not enough, as proven by the number of 17 tax reforms in 28 years (from 1992 to 2020).[241]

The brief discussion above shows that, even among the five main topics that I identified as the most relevant for the Assembly to overcome inequality according to drafters' proposals and discussions, the Assembly failed to design a well-structured plan to fight economic inequality. Instead of such a plan, the constituents approved a set of unarticulated policies that had some connections with economic inequality but did not provide the mechanisms to materialize that purpose in a context that demanded concrete measures. This leaves the following conclusions:

1) The Assembly favored a very general wording in aspects that required precision to push for compliance. The Colombian legal tradition tends to worship the written word and "trust" its transformative potential. Despite the criticisms of this legal fetishism, the symbolic power of law does exist and should not be minimized. Thanks to that, for example, the Assembly was successful in creating the *acción de tutela* as a mechanism for the protection of fundamental rights. In the same way, a constitutional agreement against economic inequality depended on the greatest precision, accuracy, and coherence of the language (to the extent possible within a constitutional text) to avoid authorities omitting its materialization by excusing itself in unnecessary gaps and ambiguities.

[241] Carolina Salazar, *En Colombia se han hecho más de 50 reformas tributarias desde 1897*, La República (Ap. 1, 2021) available at: https://www.larepublica.co/especiales/mis-documentos-semana-santa-2021/en-colombia-se-han-hecho-mas-de-50-reformas-al-sistema-tributario-en-mas-de-un-siglo-3147619 [https://perma.cc/A8ZH-68GH].

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2) In a context of economic inequality as the one experienced by the Assembly in 1991, this body failed to foresee that there was a huge risk in letting the executive and the legislature branches act under a deficient, contradictory, and extremely general wording pact. As I described it in the historical context of each pillar, during the Constitution of 1886, many events demonstrated the need for a continuous public policy, that is, one that would survive changes in government. Thus, for example, the agrarian reform plans elaborated in the early 1960s to overcome *La Violencia* did not have continuity, sometimes they were not even implemented. In the same way, the Assembly had the possibility of stopping the advance of State financing through indirect taxes share in the State budget, but the majority rejected the proposed policy in this regard and preferred to leave a general postulate such as "progressivity," much weaker and more manipulable than the sentence proposed. A sample is that, despite the existence of the principle of progressivity, the Colombian State has not yet implemented a serious tax reform that gradually increases direct taxation over indirect taxation. In 2021, one of the largest citizen mobilizations in the recent history of the country took place against a tax law that, instead, aimed to create more direct taxes on the middle class and sought to expand V.A.T. to basic goods.[242] Hence, the Assembly left to the discretion of the branches of the State co-opted by the traditional elites, the fulfillment of a pact that was structurally weak and had no mechanisms to defend itself.
3) The Assembly also failed to create constitutional mechanisms to achieve economic equality. Thus, the Assembly enshrined social rights but did not how to claim them. It also recognized the need to carry out agrarian reform but did not agree on more specific times or guidelines to execute it. In the same way, the Assembly did not approve more specific guidelines to combat the concentration of wealth or make the distribution of resources among the State and territorial entities sustainable. Also, I highlight the lack of other figures that could have strengthened the pillars; for example, the possibility that the Constitutional Court could review the constitutionality of all substantial changes to the Constitution (although the Court conferred itself that power later to do it in exceptional cases that it chose). What is paradoxical is that, as described in the debates, there were several proposals in this regard. In other words, many drafters did foresee the need to create these mechanisms or guarantees so that the agreed pillars promote economic equality. However, most of the constituents rejected those proposals.
4) Nonetheless, the Assembly did approve a few concrete measures consistent with the speeches in favor of economic equality. Two examples are expro-

[242] See, *e.g.*, *Protests in Colombia derail an important tax reform*, The Economist (May 6, 2021) available at: https://www.economist.com/the-americas/2021/05/06/protests-in-colombia-derail-an-important-tax-reform [https://perma.cc/JH8T-Y93W]. Even former constituent Fernando Carrillo is still promoting the idea of a need for a "fiscal pact" thirty years after he proposed the current Article 363 of the Constitution, @fcarrilloflorez, Twitter (Ap. 26, 2021, 12:27 PM) available at: https://twitter.com/fcarrilloflorez/status/1386733609546141698.

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priation and the distribution of revenue among territorial entities. Furthermore, it is important to mention that Congress repealed those regulations almost a decade later. In the first case, Congress repealed expropriation without compensation due to pressures from foreign investors who saw in this article a source of legal uncertainty for their capital in Colombia.[243] Nevertheless, that type of compensation was never used and also contradicted international law agreed by the Colombian State.[244] In the second case, the government of Andrés Pastrana in 1999, following the recommendations of the International Monetary Fund, centralized part of the resources of the territorial entities towards the Nation during the first economic crisis under the new Constitution. These changes raise two questions. First, the Assembly did have the power to adopt concrete and punctual measures to avoid the concentration of wealth and distribute income; the original standards in this pair of examples are evidence of this. Second, despite good intentions, even concrete constitutional mechanisms for carrying out macro-projects such as overcoming economic inequality could be easily replaced.

Thus, the internal problems in the structure of what was supposed to be one of the main motivations to draft a better constitution for Colombia in 1991, made the five pillars not only insufficient but also ineffective to overcome economic inequality. Even those concrete mechanisms that aimed to achieve that goal ended up amended under criteria that tended to benefit a vision aligned with the fashionable doctrine that economic growth does reduce economic inequality. The last chapter does not address the issue of what the remedies for Colombia should be to tackle economic inequality through the Constitution, that is not the objective of this work, although I have implicitly suggested potential alternatives. Instead, it reflects briefly on what I consider the minimum points that any constituent process with similar characteristics to the Colombian experience (e.g., profound inequality, violence, elite cooptation of power) should consider when drafting a constitution that aims to fight economic inequality.

V. Towards Economic Equality Through a New Constitutional Design

At this point, then, it is necessary to specify how the design and drafting of a constitution can contribute to achieving greater economic equality. From an Anglo-Saxon legal perspective, leading constitutionalists Rosalind Dixon and Julie Suk have highlighted several ways countries address the problem of eco-

[243] *See* Acto Legislativo 1 de 1999, julio 30, 1999, Diario Oficial [D.O.] 43654; Laura García-Matamoros, *La expropiación, sin indemnización en el derecho interno y en el derecho internacional*, 1 Revista Estudios Socio-Jurídicos, no. 1, 77 (1999).

[244] *See*, *e.g.*, Article 21-2 of the Inter-American Convention on Human Rights, Ley 16 de 1972, diciembre 30, 1972, Diario Oficial [D.O.] 33780.

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nomic inequality in their constitutions.[245] The responses are structural changes to the political system to provide more representation to poor or middle-class people, bills of socioeconomic rights, or the promotion of equality in relevant aspects such as access to higher education. However, they also recognize the obstacles for these measures to work, such as no clear definition and scope of the policies, unexpected or counterproductive consequences of pro-equality policies that end up corroding democracy, and a dependency on institutions such as a Congress absorbed by groups' interests that prevent materializing those policies. In this scenario, the authors show two alternatives when addressing economic inequality as a constitutional problem: assuming an optimistic view that upcoming economic and political needs will force the creation of new tools to address economic inequality within the liberal constitutional tradition,[246] or adopting a pessimistic perspective that the liberal constitutional tradition itself contains features that prevent those policies from being unfolded effectively. What are the teachings of the Colombian Constitutional Assembly discussions account presented above amidst those two positions?

This article argues that the Colombian Constitutional Assembly agreement on how to address economic inequality lacks clarity, coherence, and, therefore, strength to materialize the existing aspirations. However, there are clues to believe that more concrete and reinforced pillars would have had a greater impact on the application of the Constitution as a tool of economic equality. Of course, a constitution is merely a rule, not a magical tool to improve society. Now, the question is: how to prevent existing or upcoming powers from undermining constitutional economic equality policies? This is a problem that even some policies enshrined originally in the Constitution of 1991 faced. Instead of assuming a pessimistic view on this issue with no remedies on the horizon, and without ignoring that liberal constitutionalism has its limitations, the advancement in constitutional theory, which seems to be stuck in classical discussions nowadays could help to answer that query.

In Latin American legal scholarship, Roberto Gargarella asserts that the new constitutions in the region from 1990 up to date have at least two things in common. The first one is the existence of a wide catalog of rights, such as socioeconomic rights; and the second one is that, despite these extensive and promising catalogs, constitutions still maintain the same organic structure (or "engine room") from the nineteenth century that prevents more democracy. Thus, for Gargarella, until the designing problems that prevent more democracy are resolved in the organic part, it is not possible to achieve the promises of this new Latin American constitutionalism; therefore, the consensus on how to achieve

[245] Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 48 U. Chi. L. Rev., no. 2, 369 (2018).

[246] For instance, nowadays, Colombia, like many other countries, is discussing the possibility to implement a basic income to palliate the effects of the restrictive measures adopted to fight COVID-19); on the drafts presented in Congress, *see* Renta Básica Ya. Diálogos, Saberes y Propuestas 485-554 (Eric Orgulloso et al. eds., 2020).

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greater economic equality has yet to be agreed upon.[247] However, perhaps providing a better organization of power is not enough for at least two reasons.

Firstly, this article shows the importance of a constituent assembly addressing economic inequality as a structural problem with the same relevance that traditional constituent assemblies devote to issues such as the division of power, the bill of rights, or the amendment mechanisms. An economic equality agenda is a serious issue enough to be addressed only through socio-economic rights or general and disconnected declarations on social justice. Even a political arrangement that brings more democracy is insufficient if there are no clear rules for tackling economic inequality. After all, how could anyone talk about democracy when the most basic economic conditions to act freely are yet to be satisfied? There is a false dilemma about which one must come first, equality or democracy, because they are both necessary for human freedom in the end. That is why constitutional assemblies need to consider both aspects as inseparable in constitutional design. The incoherence, gaps, and contradictions of the five pillars agreed upon by the Colombian Constitutional Assembly in 1991 to combat economic inequality show that wishes, well-intentioned speeches, and disconnected concrete measures are not enough. A well-structured constitutional design focused on economic equality is not a definitive guarantee of total success, but it is an instrument with more symbolic strength to guide an entire society that aims to fight against economic inequality. Therefore, any constituent process that is committed to overcoming economic inequality must recognize the relevance this issue deserves and place it at the same level as topics such as the political system, the division of powers, or judicial review and competencies; the latter, a subject on which a considerable part of constitutional scholarship discussions in Latin America is devoted today. Thus, any constitutional drafting process in contexts of extreme inequality or where there is the will to overcome it should prioritize the design of a well-structured plan that permeates the entire constitution. That forces us to rethink the tasks of a Constituent Assembly and the nature of a constitution as traditionally conceived.

Secondly, the structures of current liberal constitutionalism may not be capable of helping to overcome economic inequality in certain contexts, such as the Colombian one, and, therefore, it would be necessary to look for creative ways to materialize that purpose. A real change needs creativeness and our imagination to invent new ways of organizing the world without being tied to a single scheme of what a constitution means or what a constituent power should adopt.[248] This is a criticism not only of those positions that deny the transformative power of law, but also of legal agents (professors, legislators, lawyers, judges, and administrators) who are obstinate in obstructing or not taking ad-

[247] Roberto Gargarella, Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution 206-208 (2013).

[248] This suggestion derives from my reflection on Roberto Unger's call for imagination in institutional design, *see* Roberto Unger, The Left Alternative (2009).

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vantage of the transformative potential of law. Furthermore, this is also a criticism of the practice of preformatting how a society must be constitutionally organized and the archetypes that scholars and practitioners assume a constitution should comply with to be considered so. [249] Certainly, constitutional scholars have a big task to create alternatives that go beyond inventing more rights and bodies.

Maybe proposals should focus on the notion itself of a constitution, although that exceeds the scope of this article. For example, what about imagining the constitution neither as an agreement that intends to last forever nor as an easy-amending document but as a planning instrument subjected to evaluations only for certain periods? Or what if the provisions that aim to promote economic equality —for example, the prevalence of direct taxation over the indirect taxation— are immutable or petrified clauses as a kind of "militant social justice"? It is paradoxical that, although the social component of a constitution is said to be "progressive," constitutions do not usually contain instruments to verify that promises are fulfilled. In addition, constitutions do not normally include tools to change policies that did not work in a period without destroying what was achieved. Instead, they should have tools to amend processes in order to increase the chances of accomplishing the initial objectives. Indeed, the Colombian case shows that, in general, each government boycotted what the previous one had done before the Constitution of 1991. And even today, that continues to be the case, especially when national decisions are more conditioned by global capitalism.[250] Thus, an interesting experiment could be to conceive of the constitution itself as a plan subject to evaluation and with a fixed duration.[251] Periodic evaluations of the results are essential to ensuring the implementation of agreed-upon policies. This allows for a thorough study of their effects, providing a solid experiential foundation. Subsequently, adjustments can be made as needed to promote effective change. In any case, popular participation is decisive for the success of this dynamic conception of the constitution. The fact that a constitution has an "expiration date" could serve as a safeguard for citizens, ensuring that governments cannot interfere with the implementation of

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[249] On a classical definition of the five minimum elements that make up a constitution (that is, separation of powers, checks and balances, mechanisms to overcome impasses, amendment procedure, and a bill of rights), *see* Karl Loewenstein, Teoría de la Constitución 153-154 (Alfredo Gallego trans., 2d ed. Universidad de Barcelona 1979) (1957).

[250] *See, e.g.,* David S. Law, *Globalization and the Future of Constitutional Rights*, 102 Northwest. Univ. Law Rev., no. 3, 1277 (2008).

[251] Compare with the debates in American constitutional law scholarship about holding periodical constitutional conventions to revise and update constitutions, *see, e.g.*, Mark Tushnet, *The Politics of Levinson's Constitutional Convention*, Harv. L. & Pol'y Rev., https://harvardlpr.com/online-articles/the-politics-of-levinsons-constitutional-convention/ [https://perma.cc/TF6Q-NLZN]; J. H. Snider, *Does the World Really Belong to the Living: The Decline of the Constitutional Convention in New York and Other US States, 1776-2015*, 6 Am. Pol. Thought 256 (2017); Joel I Colón-Ríos, *The Three Waves of The Constitutionalism-Democracy Debate in The U.S. (And an Invitation to Return to The First)*, 18 Willamette Journal of International Law and Dispute Resolution, no. 1, 1 (2010).

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agreed policies until they yield the desired effects.[252] Moreover, broad popular participation could be a guarantee of a greater consensus for the appropriation of common policies, but also for their control and the process of eventual amendment. This is the type of non-conventional discussion that problems in non-conventional contexts require us to think about. Thus, in the end, creativity in constitutional design beyond rights and institutions is also a necessary asset to address economic inequality.

VI. Conclusion

In summary, while the primary reason for initiating the drafting of a new constitution in Colombia in 1991 was not rooted in the high levels of economic inequality, the struggle against economic inequality emerged as a pivotal motivation during the drafting process, as shown in the debates at the hemicycle. However, despite the five pillars or set of policies agreed upon by the Assembly to achieve that goal, that is, rights, property and land, State intervention in the economy, territorial funding, and taxation, the Assembly did not agree on a well-structured plan to address economic inequality, with specific constitutional mechanisms to guarantee its fulfillment and prevent the action of both the executive and legislative branches from deviating from that objective once the Constitution was promulgated.

Thus, the Colombian drafting experience shows that, in societies where inequality is high and the political and economic contexts play against the achievement of economic equality, the constitutional tools proposed to address economic inequality should be designed as precisely, coherently, and comprehensively as possible to deal with the challenges derived from fighting economic inequality in an unequal world. Drafters need to think outside the box of liberal constitutional law to foster the transformative role of law in overcoming economic inequality. Otherwise, we will be stuck in discussions within the same system where remedies for economic inequality are reformulations of the same: increased or decreased judicial participation or activism to realize social rights, varying degrees of state intervention in the economy, and so on. For this reason, I vindicate the need for greater creativity in constitutional design as a valuable contribution from the law to overcome economic inequality.

[252] On the lifespan of written constitutions, *see* Tom Ginsburg et al., The Endurance of National Constitutions (2009).

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System of Restorative Justice and Juvenile Justice in India: a Brief Comparative Study with Latin American System

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Abstract: Justice everywhere is threatened by injustice anywhere. After the Nirbhaya case verdict in Delhi, the State was accused of being lenient with one of the juvenile offenders; this may have been the cause of the public outcry. Consequently, the Juvenile Justice (Care and Protection) Act, (JJ Act) was passed by India in 2015. Children who commit horrible crimes cannot be dealt with lightly. However, as has been the case in the West, placing them in adult prisons would turn them into hardened criminals and repeat offenders. "Old enough to do the crime, young enough to do the time," says the adage. Those who commit crimes must serve their sentences. The child activists contend that the Act is founded on the concepts of retribution and vengeance and has overturned all previous good laws. Children need food, not impediments to their growth. They require our society's compassion rather than the harshness of the law. Restorative justice is a welcome idea. What is required is a shift in perspective, a readiness to prioritize victims in criminal proceedings, and an understanding that mending relationships and undoing harm are crucial components of the criminal justice system. Therefore, rather than simply passing judgment, it is

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our responsibility to uplift the weak, mend the broken, and comfort the grieving. The article focuses on youth crime kinds and causes, factors that lead to crime and restorative justice. This article also focuses on comparative analysis of Indian restorative justice system with Latin American restorative justice system in juvenile cases.
Keywords: Juvenile Justice, Restorative Justice, Crime, Indian Laws, Latin American Laws.

Resumen: La justicia en todas partes se ve amenazada por la injusticia en cualquier lugar. Después del veredicto del caso Nirbhaya en Delhi, se acusó al Estado de ser indulgente con uno de los delincuentes juveniles; esto pudo haber sido la causa de la indignación pública. En consecuencia, la Ley de Justicia Juvenil (Cuidado y Protección) fue promulgada por India en 2015. Los niños que cometen crímenes horribles no pueden ser tratados ligeramente. Sin embargo, como ha sucedido en Occidente, ponerlos en prisiones para adultos los convertiría en criminales endurecidos y reincidentes. Un dicho popular resume esta preocupación: "Lo suficientemente mayores para cometer el crimen, lo suficientemente jóvenes para cumplir la condena". Quienes cometen crímenes deben cumplir sus condenas. Los activistas en favor de los derechos de los niños sostienen que la ley se basa en los conceptos de retribución y venganza, y ha derogado todas las leyes anteriores beneficiosas. Los niños necesitan comida, no obstáculos para su crecimiento. Requieren la compasión de nuestra sociedad en lugar de la dureza de la ley. La justicia restaurativa es una idea bienvenida. Lo que se necesita es un cambio de perspectiva, una disposición para priorizar a las víctimas en los procedimientos penales, y la comprensión de que reparar relaciones y deshacer el daño son componentes cruciales del sistema de justicia penal. Por lo tanto, en lugar de simplemente emitir un juicio, es nuestra responsabilidad elevar a los débiles, reparar lo roto y consolar a los afligidos. El artículo se centra en los tipos y causas de delitos juveniles, los factores que llevan al crimen y la justicia restaurativa. También se enfoca en un análisis comparativo del sistema de justicia restaurativa en India con el sistema de justicia restaurativa latinoamericano en casos juveniles.
Palabras clave: Justicia juvenil, justicia restaurativa, delincuencia, derecho de la India, derecho latinoamericano.

I. Introduction

In an aging world, India is the youngest nation. More than half of us are under the age of 25. Although it is our duty to ensure that these children have an education and a job, this could be good news for us. Given that these youngsters are making press headlines for the wrong reasons, the situation in India right now appears hopeless. School lads fight, and as a result, one of them dies; a teenager

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kills two people only to appear six months later on a dancing reality show; such news makes us uneasy.

The Latin word "Juvenis," which means "young," is the root of the English word "juvenile." Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act of 2000 uses the terms "juvenile" or "kid" to refer to anyone who is under the age of 18.[1] A juvenile who is accused of committing a crime and was under the age of 18 when the alleged crime was allegedly committed is referred to as a "juvenile in dispute with the law." The term "restorative justice," first used by Albert Eglash in 1977, focuses on viewing crime as a wrong done to people, not just as an infringement of the law. John Baithwaite emphasizes healing through restitution, and reintegration of offenders into society. Best results are obtained when all parties involved work together.

1. Who is a juvenile

A juvenile is a person who has not yet reached the legal age, which is typically 18 years old in most countries. Juveniles are considered to be in a stage of development and are therefore subject to special laws and procedures that are designed to protect their rights and promote their welfare. In the context of the criminal justice system, juveniles who are accused of committing crimes may be treated differently than adult offenders, with a greater emphasis on rehabilitation and reintegration into society. The specific age range and legal status of juveniles may vary from country to country.

The Latin word "Juvenis," which means "young," is the root of the English word "juvenile." Section 2(k) of the JJ Act of 2000 defines a "juvenile" or "kid" as a person who is under the age of eighteen.[2] A juvenile who is accused of committing a crime and was under the age of 18 when the alleged crime was allegedly committed is referred to as a "juvenile in dispute with the law." [3]

II. Types of Juvenile Crimes

1) Minor offenses, such as driving infractions,
2) Offenses related to property
3) Major traffic infractions such as car theft and hit-and-run incidents
4) Addiction to drugs and alcohol affecting other people,
5) Physical harm, such as assaults on women, murder, abduction.

[1] Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act of 2000.
[2] Section 2(k) of the JJ Act of 2000
[3] *Id.*

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III. Causes of Youth Crimes

1. Biological Causes

Delinquency may result from biological issues related to speech and hearing impairment, irritability, excessive strength, and others.

2. Socio-Environmental Causes

1. Migration: When a person flees their own country due to war, terrorism, genocide, ethnic cleansing, or natural disasters, they are in a dangerous situation and forced to commit crimes to meet their fundamental necessities.

2. Cultural crossroads: Cultural tensions between locals and immigrants lead to deviant behavior and a sharp rise in crime.

3. Family background: The family unit plays a significant role in shaping the children's personalities. The development of the child to face reality is encouraged by a functionally competent household. In their early years, children are emotionally reliant on their parents.[4]

4. Socio-economic conditions : Crime rates rise as a result of poverty. Money has become the standard for success in modern culture. Insecurities and animosity have always been products of poverty. Money makes it simple to conceal the crimes committed in the elite social circles. It is believed that the wealth gap plays a significant role in encouraging teenage crime.[5]

5. Children seeking refuge in the virtual world: Children are addicted to their PS4s and Xbox 360s, so they are never seen playing outside. They are lost in the world of Clash of Clans or Pokémon Go. They look for safety in the virtual world, where they can exert complete control over the avatars as they choose. These kids are on the receiving end of orders from parents, teachers, and senior citizens, much to their resentment, in real life. On the internet, there is also an information overload. Today's child is weak and easily exposed to inappropriate material or obscene films with the press of a button.

6. Peer influence: Children are open to taking chances and are influenced by their peers. They frequently make poor decisions.

IV. What is Restorative Justice?

Restorative justice is a system of justice that focuses on repairing the harm caused by a crime or conflict, rather than simply punishing the offender.[6] It is a

[4] Dr. Saroj Choudhary, Juvenile delinquency: Elementary concepts, causes and prevention, 5 *International Journal of Humanities and Social Science Research*, 3, 55 (2017)

[5] *Id.*

[6] Paul Mccold And Ted Wachtel, In Pursuit of Paradigm: A Theory of Restorative

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victim-centered approach that seeks to involve all parties affected by the harm in finding a solution that addresses their needs and promotes healing and reconciliation. Restorative justice views crime as a violation of relationships and community, rather than solely as a violation of the law. It emphasizes the importance of bringing together the offender, the victim, and any other affected parties to participate in a facilitated dialogue aimed at understanding the impact of the crime and finding a way to repair the harm caused.

This may include apologies, restitution, community service, or other forms of reparative action. Restorative justice can be used in a variety of settings, including criminal justice, schools, workplaces, and community organizations. It is often used as an alternative to traditional punitive measures, such as imprisonment or fines, although it can also be used in conjunction with these measures. Overall, restorative justice seeks to promote accountability, healing, and reconciliation, while also addressing the underlying causes of crime and conflict in order to prevent future harm.

In other words, Restorative justice is a system of justice that focuses on rehabilitating the offender and restoring the harm done to the victim and community. In the context of juvenile justice, restorative justice aims to address the underlying issues that lead to juvenile delinquency and prevent recidivism. In this critical analysis, we will examine the implementation and effectiveness of restorative justice systems for juveniles in India and Latin American countries.

The term "restorative justice" was first used by Albert Eglash in 1977 in an article titled "Beyond Restitution: Creative Restitution."[7] Restorative justice uses the chance to make apologies to the victim by viewing crime as a hurt or wrong done to people rather than just as an infringement against the law or a defiance of the State.[8] Restorative justice, according to John Baithwaite, stresses healing via both literal and symbolic restitution. It places a strong emphasis on victims and offenders regaining their self-respect and assimilating into society[9]. A justice principle known as restorative justice emphasizes healing the suffering caused by criminal action. The best results are obtained when all parties involved work together. In general, this process results in changes in individuals and interpersonal connections within communities.[10]

There are three main components to the restorative justice process, i.e.:

Justice (jan.27, 2023,11:40AM) available at: https://biblioteca.cejamericas.org/bitstream/handle/2015/2163/paradigm.pdf?sequence=1&isAllowed=y

[7] Christian B. N. Gade, "Restorative Justice": History of the Term's International and Danish Use 28 (2018)

[8] Avaible at: http://burnishedlawjournal.in/wp-content/uploads/2021/03/Restorative-Justice-in-India-A-Study%E2%80%9D-Ramesh-Kumar-LL.M-Student-Galgotias-University.pdf

[9] Kriti Johri, Restorative Justice Vis-a Viz Victim Offender mediation, available at: https://www.slideshare.net/kritijohri/restorative-justice-in-india

[10] Centre for Justice & Reconciliation: Washington, DC 20041 USA. available at: http://restorativejustice.org/restorativejustice/about-restorative-justice/tutorial-intro-to-restorative-justice/#sthash.kGPyU2is.dpbs

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(1) Justice entails healing the harm caused by crime.

(2) Bringing the parties together to make a decision together is the best course of action.

(3) This has the potential to drastically alter people, their relationships, and communities.

The government's duty is to uphold the law, and the community's duty is to foster peace, according to the restorative justice process.[11]

1. Key Principles of Restorative Justice

According to the guiding premise of restorative justice, "Crime causes harm and justice should focus on repairing that harm." The parties most impacted by the crime ought to be able to take part in finding a solution.[12] The two main components of the justice system are the victim and the community. Helping the victim should be the top priority in the pursuit of justice. According to the restorative justice process, it helps the offender understand the seriousness of the crime he committed, and it is always the obligation of the government to uphold the law and of the community to promote peace.[13]

V. Restorative Justice for Juvenile Offenders

The Juvenile Justice Act grants several privileges to juveniles, including to those who have been found out or are confirmed to have engaged in significant wrongdoing. The stated objectives of the Act are to "provide the best treatment, assuredness, and rehabilitation by taking into consideration their optimization requirements, and by accepting a child-friendly framework in the dispute resolution as well as disposition of matters to the highest advantage of youngsters and for their protracted restoration as well as 'rehabilitation.' In order to promote 'the purpose of justice,' the Act grants the Juvenile Justice Board (JJB), which is composed of an Experienced Magistrate and two Social Workers who sit on a court, the authority to request a multidisciplinary investigation into juvenile wrongdoing." The JJB must therefore also consider open intrigue as well as concerns over potential casualties.

Juveniles who are not released on guard are initially placed in the neighborhood of a facility called the Observation Home (OH), pending request. This is done in order to characterize and isolate the adolescents so that they can all receive the necessary care and assurance while in the Home. Here, along with age, physical condition, and mental status, the level of alleged offense is also

[11] Pawan Kumar, Restorative Justice in India: A study (Dec,22, 2022) available at http://burnishedlawjournal.in/wp-content/uploads/2021/03/Restorative-Justice-in-India-A-Study%E2%80%9D-Ramesh-Kumar-LL.M-Student-Galgotias-University.pdf

[12] *Id.*

[13] *Id.*

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taken into consideration. Throughout the investigation period, children who are alleged to have committed a real crime might also be placed somewhere safer than the OH. Depending on the adolescents' age, the type of reported offense, and their physical and mental health, the State Governments have the authority to enact regulations that permit the placement and loneliness of teenagers in Special Homes (SH) (institutions where an adolescent may be placed at the JJB's last request).

VI. Restorative Programs for Juvenile Offenders

For usage with young people who are in legal trouble, beneficial equity methods are frequently produced in numerous places. These initiatives have often served as the foundation of projects for responsible adults that have improved as a result. In stark contrast to more formal and demeaning juvenile equity efforts, remedial projects provide some real and effective alternatives. They are especially helpful for advancing deterrent measures and for providing viable alternatives to laws that would rob a kid of their independence because of their educational value. Numerous such programs offer unique chances to create a support system for young people who are in legal trouble.[14] Many times it is simple to obtain public financing for activities that promote youth equity. Adolescent equity legislation is particularly supportive of the creation of youth-directed projects in several countries.

It is possible to create a substantial number of these projects in conformity with remedial and participatory equity standards. In addition, multiple initiatives that have developed in schools or among groups and are wholly independent of the criminal equity framework can provide a platform for the community to respond to minor infractions and conflicts in a way that is educational rather than legally criminalizing it. Presently, there are a number of programs in the area in school systems that assist a reaction (peer intercession, fight for survival persistence drifts, etc.) to minor youngster's wrongs (such as battles, brutal hassling, small thefts, destruction of school's property, and extortion of pocket money), that may have in some way led to the protest of a criminal offense and equal involvement.[15]

1. Family Group Conferencing

The victim, the offender, the victim's family, friends, and other important supporters of both the victim and the offender get together in family group conferencing to resolve the criminal episode. A trained facilitator convenes influenced

[14] Manu Singh & Purnima Bhardwaj, Restorative Justice under Juvenile Justice System (Nov. 23, 2022) available at: https://thelawbrigade.com/criminal-law/restorative-justice-under-juvenile-justice-system/

[15] *Id.*

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groups to discuss how they and others have been harmed by the transgression and how the damage can be rectified.[16] To participate in a family group gathering, the offender must accept responsibility for the offense. All the investment is willful. The facilitator ensures that everyone participating can speak openly and honestly about the circumstances surrounding the wrongdoing and its impact. The facilitator is also responsible for keeping the meeting under control and reasonable for all parties involved. Both the victim and the offender must agree to the compensation, which is a crucial component of the meeting.

2. Restorative Schools/Therapeutic Schools

Helpful measures are being implemented in Minnesota's school districts as an alternative to suspension and expulsion. In order to handle injuries caused by bullying and provocation, disruptions in the classroom, ongoing participation concerns, and terrorist threats, school districts have modified their sentencing procedures and the way victims and guilty parties are exchanged.[17]

VII. Indian Restorative Justice Applications

That crime victims and the pain of the perpetrator's offspring do not compel the attention of the law, according to Krishna Lyer, J., is a flaw in our legal system. "In actuality, victim compensation is still our criminal law's tipping point".[18] Having said that, India should make every effort to impose restorative justice as a nation with deeply ingrained ideals of Ahimsa and Satyagraha.

Moreover, it is commonly established that violence has a strong correlation to isolation.[19] This is deleterious to the physical and mental wellbeing of the convicts, as are other flaws in the Indian prison system, including torture, overcrowding, and inadequate health and medical care.[20] As a result, rather than becoming better and being rehabilitated, the prisoner becomes even worse-mannered than when he first arrived.

It is crucial that the legal system adopts as much of the restorative justice method as is feasible given the shortcomings, flaws, and disadvantages of the Indian criminal justice system, as well as the advantages and long-term benefits of the restorative justice system. The following are two areas where the application of restorative justice can positively impact:

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16 *Id.*

17 *Id.*

18 Rattan Singh vState of Punjab (1979) 4SCC71

19 JSTOR-Isolation, Powerlessness, and Violence: A Study of Attitudes and Participation in the Watts Riot H. Edward Ransford.

20 Available at: https://www.hrw.org/sites/default/files/reports/INDIA914.pdf

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1. Juvenile Delinquency

It was determined in the case Re: Exploitation of Children in Orphanages in the State of Tamil Nadu vs. Union of India and Others. "A child in dispute with the law who is also a youngster in need of care and protection cannot undergo any meaningful rehabilitation unless the fundamental components and concepts of restorative justice are acknowledged and applied."[21] Therefore, implementing restorative justice for the numerous reasons listed above is in compliance with the Juvenile Justice (Care and Protection of Children) Act, 2015.

Additionally, there are numerous ways to distinguish the juvenile brain from the adult brain. For instance, a human's prefrontal cortex does not fully mature until they are in their mid-20s. This undoubtedly widens the difference in logical decision-making, impulse control, thinking, and other skills. These elements should unquestionably be taken into account when assessing a juvenile's legal culpability[22]. Alternatives that provide juveniles a second opportunity have a beneficial impact on their moral development and are crucial for the expansion and development of society.

2. Victims of Domestic Abuse

Domestic abusers are frequently familiar faces, such as members of the immediate family or other close relatives. There is a higher need for discussion to help both parties comprehend each other's positions and settle the dispute that the offense has caused in circumstances where the victim knows the perpetrator. Restorative justice has been highlighted to enable the following: *i.* victims to participate and determine an appropriate reaction to the violent acts; *ii.* new standards and norms to be established for the community at large based on the results of restorative justice meetings.[23] A victim of domestic violence may choose to participate in restorative justice while also being willing to pursue legal action against the perpetrator at the same time, which should be acknowledged given the seriousness and regularity of such cases.

VIII. The Juvenile Justice (Care and Protection of Children) Act, 2015

It is the primary legislation governing juvenile justice in India. The act recognizes the importance of restorative justice and provides for the establishment

[21] Re: Exploitation of Children in Orphanages in the State of Tamil Nadu vs. Union of India (UOI) and Ors. Manu/SC/0577/2017

[22] American Bar Association: Understanding the Adolescent Brain and Legal Culpability – Morgan Tyler

[23] Restorative Justice and Domestic Violence: Some Exploratory Thoughts – Hema Hargovan

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of Juvenile Justice Boards (JJBs) in every district. JJBs are tasked with ensuring that restorative justice measures are implemented for juveniles in conflict with the law.

However, the implementation of restorative justice in India has been limited due to a lack of resources and training for JJBs. Many JJBs do not have the necessary infrastructure or staff to implement restorative justice measures effectively. Moreover, there is a lack of awareness among the public and legal professionals about restorative justice, which hinders its wider implementation.

IX. Restorative Approach in Latin America Laws for Juveniles

The focus of restorative justice is on showing remorse for the harm done by criminal activity. Juvenile rehabilitation programs bring together those most impacted by the crime—youth involved in the justice system, the victim, and members of the community—in an all over process to promote accountability and meet the needs of the victims and the community in repairing the harm caused by the crime.[24] The Brazilian special courts, a nationwide system established in 1982[25] and staffed by magistrates and professional conciliators, offer the best prospects for a Latin American model of restorative procedures operated as an integral part of the justice system, free and readily available to all. The method operates under the guiding concepts of "simplicity," "informality," and "swiftness," seeking solutions through conciliation "wherever possible." Its strength stems from the magistrates' much increased discretionary authority over conventional courts; because the standards of proof are more in line with common sense, judgements can be "fairer," "more in line with the common good," and "more in line with the social aims of law."

Mexico is the Latin American nation to consider the implementation of restorative methods most recently. Mexico had just passed a statute establishing restorative justice with amendments made to Article 20 of the constitution, according to the delegation from Mexico to the Commission on Crime Prevention and Criminal Justice's 10th session in 2001 (Delegación 2001). Many new elements have been introduced, like legal assistance, psychological assistance and medical assistance. Although these reforms do not entirely restore the country, they do show that Mexico has a desire for change. Dr. Maria de la Luz Lima discussed the need to develop alternate strategies for settling criminal problems in Mexico at a gathering of attorneys general and judges in 2001.

She urged the creation of criminal mediation as a successful and effective means of advancing justice. She also requested that only the most serious

[24] Available at: https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/restorative-justice-for-juveniles

[25] Gerry Johnstone and Daniel W. Van Ness, Handbook of Restorative Justice, 507 (2007).

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crimes be punished with prison. Mexican justice authorities who attended this meeting made a strong plea for alternative procedures, demonstrating their understanding that a focus on punishment obstructs the healing of victims and the reintegration of criminals. NGOs are attempting to spread the techniques while the Mexican government advocates for restorative justice principles and procedures. Through the Centro de Resolución de Conflictos, the Fundación Centro de Atención para Victimas del Delito, or Foundation Center for the Attention of Victims of Crime, the government aims to instill a mediation culture in Mexico (Center for Conflict Resolution).

In 1993, CENAVID was established to offer assistance to crime victims, particularly women and children. In one of Guadalajara's most violent areas, CENAVID launched a project in 1995 to promote ADR techniques as a nonviolent means of addressing interpersonal, familial, and societal problems. They started with educational talks and training for both adults and kids. Information on how victims of violence and their families should be treated was included in the session. The Parroquia del Señor de la Misericordia, a local Catholic Church, finally took over the initiative, and CENAVID continued its training. The other duties of CENAVID include providing training to government employees and justice authorities all around Mexico, promoting ADR and mediation, and offering advice on setting up mediation centers.

In Latin America, restorative justice has been implemented in various countries, including Brazil, Colombia, and Chile. In Colombia, the restorative justice system for juveniles is known as "restorative circles." These circles involve the offender, the victim, and the community members who work together to address the harm caused by the offense.

In Brazil, the Juvenile Justice Statute provides for the implementation of restorative justice measures, including mediation and community service. However, the implementation of these measures has been limited due to a lack of resources and a focus on punitive measures.

Challenges faced in Latin America include the lack of funding for restorative justice programs and the high levels of violence and social inequality. These factors make it difficult to implement restorative justice measures effectively. So, it is evident that India and Latin American Countries like Mexico follow the same principle to implement a restorative justice system in their respective countries. Plea Bargaining, ADR, mediation and many more methods have been adopted by countries to promote restorative justice in their systems. Some countries even adopted amendments in their constitution to give valid assent to this practice.

X. A Comparative Study with Latin American System

Restorative justice and juvenile justice are two important concepts in the field of criminal justice. In India, the juvenile justice system is governed by the Juvenile Justice (Care and Protection of Children) Act, 2015, while restorative jus-

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tice is not yet widely recognized as a formal system. In contrast, several Latin American countries have incorporated restorative justice principles into their criminal justice systems, with varying levels of success.

One of the main differences between the Indian and Latin American approaches to restorative justice is the extent to which it is recognized and implemented. While some Latin American countries have made significant strides in adopting restorative justice principles, it remains a relatively new concept in India. In addition, the Indian juvenile justice system places a greater emphasis on rehabilitation and reintegration of young offenders, whereas some Latin American countries have focused more on punishment and deterrence.

Another key difference is the role of the community in the restorative justice process. In Latin America, there is often a strong emphasis on community involvement and participation in resolving conflicts and repairing harm caused by crime. This is reflected in the use of community-based dispute resolution mechanisms such as neighborhood courts and indigenous justice systems. In India, however, the role of the community is less well-defined, with most juvenile justice proceedings taking place within the formal court system.

Despite these differences, there are also some similarities between the Indian and Latin American approaches to restorative justice and juvenile justice. For example, both recognize the importance of taking into account the specific needs and circumstances of young offenders, and both prioritize the protection of children's rights and welfare. Additionally, both systems recognize the importance of addressing the underlying social and economic factors that contribute to juvenile delinquency.

Overall, while there are some similarities and differences between the Indian and Latin American systems of restorative justice and juvenile justice, there is no one-size-fits-all approach to these complex issues. Each country must consider its own unique cultural, social, and political context in order to develop effective and appropriate solutions for dealing with juvenile offenders and repairing harm caused by crime.

XI. Conclusion

In conclusion, while both India and Latin American countries have recognized the importance of restorative justice for juveniles, there are significant challenges to its implementation. These challenges include a lack of resources, training, and awareness, as well as social and economic inequality. To effectively implement restorative justice measures, governments must prioritize funding and training for justice professionals and increase public awareness about the benefits of restorative justice. In order to administer justice, the legal system must be updated to reflect today's fast-paced society and the changes that modernization and technology bring. Despite the devout adherence to the criminal justice system in India, it is past time for the country's legal system to incorporate

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restorative justice to a greater level. Therefore, the authorities and parties to a dispute should do everything necessary to determine if a hybrid of both judicial systems can be used in situations where incarnation is required. Additionally, the legal system ought to be able to raise public knowledge of restorative justice among the public. Raising this kind of society awareness is facilitated by national websites, legal counsel, and others.

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