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TWO STEPS FORWARD, ONE STEP BACK: ASSESSING THE IMPLEMENTATION OF MEXICO'S FREEDOM OF INFORMATION ACT

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> A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.
>
> James Madison, Letter to W. T. Barry, August 4, 1822

I. Introduction

"Right to know," "transparency in government," "freedom of information" — these phrases form part of the din of a growing international movement, both at the supra-national level and within sovereign nations, to give citizens more knowledge about, and by extension more participation in, the

workings of the institutions that govern their lives. Not only have international norms emerged,[1] but the past decade has seen a veritable explosion of Freedom of Information ("FOI") laws at the domestic level.[2] Perhaps the most exciting in a legal sense, and most symbolic from a political perspective, is Mexico's FOI reform.

During most of the last century, Mexican national life was dominated, in authoritarian fashion, by a single, secretive political machine, the Institutional Revolutionary Party ("PRI").[3] Under PRI, a ruling elite kept a tight-fisted rein on public information. Manipulated press fed Mexican citizens propaganda, government agencies operated in closed-door fashion, policy decisions went unaccompanied by reason or explanation, and political patronage determined electoral succession.[4]

At the start of the 21st century, Mexico occupies a very different position. As early as the 1980s and 1990s, opaque walls surrounding Mexican political life began to give way to democratic change, and by 2000, the executive branch saw a peaceful party transition. The election of President Vicente Fox from the center-right National Action Party ("PAN")[5] ushered in an era of unprecedented openness, characterized most emblematically by the 2002 passage of the Federal Law of Transparency and Access to Public Government Information.[6] The Act made clear, by bold placement in the first article, its intention "to guarantee the access of all persons to information held by federal governing entities."[7] It also created the landmark

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[1] See *e.g.*, The Atlanta Declaration, International Transparency Conference, Carter Center, February 26-8, 2008, available at: *http://www.cartercenter.org/documents/Atlanta%20Declaration%20and%20Plan%20of%20Action.pdf*; See also *Case of Marcel Claude Reyes et al. v. Chile*, Inter-American Court of Human Rights (September 19, 2006), available at: *http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc*.

[2] See David Banisar, *Freedom of Information Around the World*: *A Global Survey of Access to Government Information Laws*, Privacy International, 2006, available at: *http://www.privacyinternational.org/foi/foisurvey2006.pdf*; John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85 (2006); Thomas Blanton, *The World's Right to Know*, Foreign Policy, No. 131 (Jul. 2002), at 50.

[3] See generally, ALEJANDRA RIOS CAZARES & DAVID A. SHIRK, EVALUATING TRANSPARENCY AND ACCOUNTABILITY IN MEXICO: NATIONAL, LOCAL, AND COMPARATIVE PERSPECTIVES (2007), Ch. 1.

[4] *Id*.

[5] See generally, RODERIC AI CAMP, POLITICS IN MEXICO: THE DEMOCRATIC CONSOLIDATION (2006).

[6] Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental (LFTAIPG). The National Security Archives at George Washington University has an English language translation, available at: *http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB68/laweng.pdf*.

[7] Federal Transparency and Access to Public Government Information Law, Ch. I, article 1 (self-translation). "Tiene como finalidad proveer lo necesario para garantizar el acceso de toda persona a la información en posesión de los Poderes de la Unión, los

Federal Institute for Access to Public Information ("IFAI") for enforcing executive branch compliance.[8] Citizens can now appeal an information denial from a federal agency to an administrative court, receive a decision within 50 days, and if necessary, file suit thereafter in federal court.[9] Agencies, on the other hand, are afforded 20 days to respond to an initial request,[10] and if found lacking on appeal, they are bound by an IFAI decision.[11] Such rulings come down against federal agencies far more often than against requestors,[12] and, perhaps as a result, the law has helped uncover "aviadores" (people on government payrolls, yet not actually employed) and expose wrongdoings in the administration of concessions, bids, licenses, and permits.[13]

Still, critical work is needed to truly deliver on the promises and potential of this legal apparatus. It is estimated that up to 10% of Mexico's GDP is still mired in corruption.[14] Large swaths of society, particularly indigenous groups and those with low-incomes, are unaware of the law, have difficulty using it, or lack trust in its efficacy.[15] Some executive agencies, even where vested interests have given way to genuine volition, still lack the institutional capacity to actually find and furnish requested information.[16] There is an uneven level of sophistication with regard to data archival, internal organization, public interfacing, record-keeping, and document management. More generally, and perhaps most importantly, pieces of the Mexican trans-

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órganos constitucionales autónomos o con autonomía legal, y cualquier otra entidad federal."

8 IFAI (Instituto Federal de Acceso a la Información Pública) maintains a website, available at: *http://www.ifai.org.mx*.

9 Federal Transparency and Access to Public Government Information Law, Ch. IV, articles 49, 55, and 59.

10 *Id.*, Ch. III, article 44.

11 *Id.*, Ch. IV, article 59.

12 BANISAR, *supra* note 2, at 79, noting by one calculation that in 2005 "IFAI found for the requestor in 42 percent of the cases and confirmed the agency decision in 17 percent of the cases."

13 *Lost in Transition: Bold Ambitions, Limited Results for Human Rights Under Fox*, Human Rights Watch, Ch. 3, n. 84 (2006), available at: *http://www.hrw.org/reports/2006/mexico0506/mexico0506web.pdf*.

14 See *e.g.*, *http://www2.eluniversal.com.mx/pls/impreso/noticia.html?id_nota=31337&tabla=articulos*.

15 See *e.g. Aún hay resistencia a la transparencia: Lujambio.* Interview of Alonso Lujambio, President Commissioner of the IFAI, with José Antonio Gurrea of *El Financiero*. March 7, 2008. "Sin embargo, todavía hay muchos mexicanos que no saben de la existencia de la ley y de las posibilidades que ofrece el uso del derecho a la información. Hay una socialización pendiente y una tarea urgente. En eso estamos."

16 Estudio cualitativo y Encuesta 2007, *La cultura de los servidores públicos alrededor de la transparencia*, Centro Internacional de Transparencia y Acceso a la Información (April 22, 2008).

parency regime have begun to backslide. A small number of states have taken measures, of highly dubious constitutionality, to weaken their IFAI equivalents.[17] In the federal system, proposals have been floated to reorganize and potentially defang the law.[18] Whether transparency in Mexico will flourish and push the country toward additional and much-needed reforms in other sectors or whether the enterprise will go the way of the once touted Human Rights Commission is as yet an open question.[19]

One of the most fascinating, and indeed compelling, aspects of the Mexican case is that it is not just Mexico that stands to gain. The country has the potential to serve as a global model for, or at least to offer key insights into, the design and implementation of transparency laws in other developing countries. The Dominican Republic, Ecuador, and Peru, which passed FOI laws in 2004,[20] and Argentina and Brazil, which have considered similar laws, are watching closely.[21] Chile recently passed a law that established a commission inspired by IFAI.[22] Mexico's recent and ongoing experiences on the path to more open governance may thus highlight the potential, as well as the pitfalls, of FOI laws to fight corruption, promote human rights, and consolidate democratic gains, particularly in the context of Latin America.

And Mexico's fate is not just of interest to other developing nations. The U.S. stands to benefit immensely from strides its southern neighbor makes toward stable democracy, honest government, and robust economic health. Each journalist who reports more effectively on government programs, each victim of state-sponsored violations who more easily obtains redress, and each marginalized civil society actor that enters the sociopolitical fold produces international and North American spillover effects. With this in mind, this paper invites policy makers to consider, or reconsider, modern Mexico through the lens of its FOI enterprise. In particular, the article focuses on the law's passage, its legal structure, achievements to date, and future prospects.

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17 The state of Querétaro led the charge by combining its "órgano garante" with the state human rights commission. The formal press release details some of the changes, available at: *http://www.legislaturaqro.gob.mx/index.php?option=com_content&task=view&id=2507&Itemid=2*.

18 For a cursory explanation, see ZACHARY BOOKMAN, Op-ed, *Secrecy Makes a Comeback in Mexico*, LOS ANGELES TIMES, April 22, 2008.

19 For a look at the human rights analogy, see *Economist* (February 14th, 2008), available at: *http://www.economist.com/displayStory.cfm?story_id=10696136*.

20 Ackerman, *supra* note 2, at 98. Check the Peruvian case.

21 See *e.g.* Chilean debates on the formation of the "Consejo de la Transparencia," available at: *http://www.senado.cl/prontus_galeria_noticias/site/artic/20080910/pags/20080910105448.html*.

22 The Chilean government chronicles its FOI developments online, available at: *www.bcn.cl* and *www.proaccesso.cl*.

The organization is as follows. Part II canvasses the evolution of transparency in Mexico from constitutional reform in the late 1970s through electoral reform and economic liberalization in the 1990s, and the administrative and constitutional achievements of the last decade. To fully situate Mexican FOI in its historical and global context, a brief discussion is provided on the growth of the international transparency movement. Part III analyzes the Mexican effort from a legal lens. What are the law's normative intentions with respect to journalists, academics, business interests, civil society players such as think tanks or advocacy groups, rural and agricultural cooperatives and unions, and ordinary private interests? How does the structure of the law facilitate, or impede, its goals? Part IV presents the first five years of data on the usage and effect of the federal law. This section also includes qualitative assessment, based in part on the authors' experiences, interviews, and observations, of the current state of FOI implementation in Mexico. After considering future prospects, including barriers to further implementation in the coming decades, the paper closes on a sober tone; acknowledging the great strides already made, but cautioning against the view, whether in Mexico or abroad, that an FOI law, even one of this caliber, is capable in the abstract of transforming a closed society.

II. The Evolution of Mexico's FOIA

FOI in Mexico was not the product of a spontaneous political revelation at the opening of the new millennium, but rather the culmination of a deep history encompassing stakeholders in many sectors over a multi-generational period. Section 1 establishes a constitutional context for the consideration of public information in Mexico. Section 2 addresses the intense multi-decade period of political and economic liberalization that preceded the election of Vicente Fox in 2000. Section 3 examines the civil society success story that catalyzed the passage of Mexico's FOI law. Section 4 parses recent developments related to constitutional reform and state level roll-out. A final word, in Section 5, situates Mexico amid a global flurry of FOI activism and legislation.

1. *Constitutional Context*

Mexico's governing legal document stems from the Constitution of 1917, drafted in the city of Querétaro during the Mexican Revolution.[23] Broadly

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[23] See Victor E. Niemeyer, *Revolution at Queretaro: The Mexican Constitutional Convention of 1916-1917*, The Annals of the Am. Acad. of Pol. & Soc. Sci., 417, 173-174 (1975).

speaking, that early modern period of Mexican history was imbued with a democratic-socialist fervor, clearly expressed in a number of constitutional articles. Government transparency was not high on the list of priorities,[24] but for purposes of considering the evolution of the issue, article 6 provides the key backdrop. Originally, it stated: "The expression of ideas shall not be subject to any judicial or administrative investigation, unless it offends good morals, infringes the rights of others, incites to crime, or disturbs the public order."[25] Such language left significant room for interpretation, and unsurprisingly, actual practice saw the "expression of ideas" as something of a state-dominated industry in the 20th century.

FOI saw its first explicit constitutional mention in 1977, as a result of "State Reform," a broadly-named push to open the authoritarian dominance put deeply into question by government repression in the 1960s.[26] Linked to freedom of expression, the reform parsimoniously established that "the Right to Information shall be guaranteed by the State." [27] Issa Luna Pla notes that:

> [T]he Mexican government announced a political reform that... considered the right of information as a new dimension of Mexican democracy with respect to ideological pluralism and the wealth and diversity of the expression of ideas, opinions, and convictions. Such reform was concretized... into a new sentence in article 6 guaranteeing freedom of expression…[28]

Regarding the short-term effect of the 1977 Constitutional Amendment, a Human Rights Watch report noted that it "had little impact in practice as attempts to exercise the new constitutional right were generally unsuccessful."[29] Nevertheless, it gave purchase to key developments. The Mexican

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A standard English translation of Mexico's 1917 Constitution is the Becker version, available at: *http://www.historicaltextarchive.com/sections.php?op=viewarticle&artid=123*.

24 Transparency was not much of a constitutional matter in the early 20th century, but nevertheless it was a contemplated concept in the "constitutional consciousness" of some political cultures.

25 *Id.*, article 6, The 1917 Constitution of México, Becker version.

26 The most salient example of government repression is the Tlatelolco Massacre, which took place October 2, 1968. See *e.g.* KATE DOYLE, *The Tlatelolco Massacre: U.S. Documents on Mexico and the Events of 1968*, available at: *http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB99*.

27 *Supra*, note 25, article 6, stating "El derecho a la información será garantizado por el Estado."

28 ISSA LUNA PLA, MOVIMIENTO SOCIAL DEL DERECHO DE ACCESO A LA INFORMACIÓN EN MÉXICO (México, Instituto de Investigaciones Jurídicas, UNAM) (2009) self-translation.

29 *Lost In Translation*: *Bold Ambitions, Limited Results for Human Rights Under Fox*, 2006, available at: *http://www.hrw.org/reports/2006/mexico0506/3.htm*.

Supreme Court soon tied the new constitutional right to the freedom of political opposition, and over the years it increasingly read into it the vindication of other substantive rights.[30]

That the PRI political machine left much to be desired in carrying out its own Constitutional mandate actually highlights one of this paper's key undercurrents. Freedom of information is only as good as its institutional implementation. An FOI law or even a constitutional reform can be passed for political reasons, such as an effort to assuage an effervescent civil society or the desire to give an appearance, however veiled, of good governance. Legislation, even if strongly drafted, is therefore insufficient, particularly in the developing country context, to guarantee transparency. A truly open society requires a popular culture that demands access and takes ownership of government. Yet, such an assertion merely exposes the underlying question of how to create such a culture to ensure the political class, and adopt transparency as the basis for its legitimacy. What one may deduce from Mexico's experiences, detailed below, is a push-and-pull growth process whereby democratic surges produce official legislation, which through normative change as well as actual reform, re-catalyzes and pushes foward further citizen action.

2. *Pre (PRI)-Fox Developments*

Questions arose in popular debate, as well as in litigation, on how to interpret the new constitutional article and how to legally respect a right of access to information.[31] Regarding the involvement of Mexico's judiciary, Sergio López Ayllón writes that "in a diverse number of [post-amendment] cases (including decisions in 1992, 1996, and 2002), the Mexican Supreme Court took the opportunity to construct progressively, though not without doubts or an excess of prudence, a subjective right of access to information."[32] López Ayllón, however, is quick to remark that "in practice, it was practically impossible to exercise [this right] since the jurisprudence did not establish standards and specific procedures for doing so."[33]

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[30] Guillermo Ortiz Mayagoitia, *Transparencia, Asunto de Derechos Fundamentales Indispensable para la Democracia Constitucional* (June 11, 2008), available at: *http://www.scjn.gob.mx/PortalSCJN/MediosPub/Noticias/2008/Noticia20080611.htm.*

[31] Sergio López Ayllón, *Democracia y rendición de cuentas: La Ley Mexicana de transparencia y acceso a la información*, Documentación Administrativa, 273, 140 (September 2005).

[32] *Id.,* at 142. For discussion on the details of these cases and further background, see Jose Ramón Cossío Díaz, *El derecho a la información en las resoluciones de la Suprema Corte de Justicia de México* in ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO (2002), at 305.

[33] *Id.*, at 143.

Mexico still needed significant reform, some of which took place in the succeeding decades. A catalyst for progress in the voting arena was the 1988 election in which the leading opposition candidate, Cuauhtémoc Cárdenas, a former PRI member who split off after the nomination of Carlos Salinas de Gortari by the incumbent president, lost a seemingly insurmountable lead due to a highly suspect "caída del sistema" (a collapse of the vote tabulation system).[34] In the wake of substantial public ire, the Federal Electoral Institute ("IFE") was created in 1990 to police campaign spending and media time in the run-up to the 1994 presidential election.[35] The most important aspects of this reform included citizen representation on IFE's General Council, a cleaned-up national voting list, and photo identification cards for electors. Electoral reform continued in the 1990s under Ernesto Zedillo. After admitting to flaws in his own presidential election, Zedillo promoted additional reform, which passed in 1996, giving the IFE full autonomy and creating a more sophisticated balloting system.[36]

During the late 1980s and 1990s, Mexico was experiencing a roughly contemporaneous period of trade liberalization in which the country's highly regulated and nationalized economy began to interact more deeply with world markets. This process may have begun as early as 1986, when Mexico signed the General Agreement on Tariffs and Trade.[37] By the late 1980s, the Salinas administration started privatizing a number of state-owned corporations, a progression which included the sale in 1990 of Mexico's telecommunications monopoly to Carlos Slim Helu.[38] In 1994, Mexico joined the Organization for Economic Co-operation and Development (OECD),

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[34] See Andrew Reding, *Mexico at a Crossroads: The 1988 Election and Beyond*, WORLD POLICY JOURNAL 5, No. 3 (Fall 1988). *See* also Preston, Julia & Dillon, Samuel, *Opening Mexico: The Making of a Democracy*, New York: Farrar, Straus & Giroux, 2004.

[35] IFE's website includes background information on its creation and mandate, available at: *http://www.ife.org.mx/portal/site/ife/menuitem.911a647873b195a841695c16100000f7*.

[36] See Joseph L. Klesner, *Electoral Reform in Mexico's Hegemonic Party System*: *Perpetuation of Privilege or Democratic Advance?*, August 1997, citing Weldon, Jeffrey A., *Mexico's 'Definitive' Electoral Reform*, Enfoque (Center for U.S.-Mexican Studies, University of California, San Diego), Fall 1996.

[37] The General Agreement on Tariffs and Trade (GATT) was replaced in 1994 by the World Trade Organization, which still maintains a list of GATT signatories, including Mexico, and the dates they signed the agreement, available at: *http://www.wto.org/English/thewto_e/gattmem_e.htm*.

[38] For a discussion of Mexico's economic liberalization and privatization trend, see generally, KEVIN J. MIDDLEBROOK & EDUARDO ZEPEDA, CONFRONTING DEVELOPMENT: ASSESSING MEXICO'S ECONOMIC AND SOCIAL POLICY CHALLENGES (2003). For a review of Carlos Slim Helu and his business fortune (ranked as the world's richest man by *Forbes* magazine in 2006), see David Luhnow, *The Secrets of the World's Richest Man*, WALL STREET JOURNAL, August 4, 2007, available at: *http://online.wsj.com/public/article/SB118615255900587380.html*.

a bold move only recently repeated by another Latin American country.[39] The most far-reaching development of the decade, however, was the 1992 signing and 1994 implementation of the North American Free Trade Agreement ("NAFTA") between Canada, the United States, and Mexico.[40] NAFTA more closely connected the Mexican marketplace with its North American neighbors, allowing for increased flows of goods, people, money, and even increased scrutiny from regulators and media.[41]

While the PRI was executing this progressive agenda,[42] opposition politics in Mexico were gaining ground. In a sort of denouement to an active decade of electoral and economic liberalization, in 1997, Mexico elected a majority of opposition members to Congress for the first time in almost seven decades.[43] Momentum crowned in 2000 with the election of Vicente Fox, candidate for the National Action Party (PAN). Although not directly germane to FOI on its face, this event and those just discussed are best seen as part of a multi-sector transformation process. If one defines democracy as the cession of power peacefully from one party to another, Fox's election marks the (re)birth of Mexican democracy. Causes for this broad course of events are, as previously alluded to, difficult to pinpoint, because the reforms themselves may have been the result of a changing political culture while that culture was undoubtedly coaxed by the reform process itself. Nevertheless, an essential insight is that the actual achievement of transparency legislation in Mexico, detailed below, is but one stage, perhaps a late one, in a deep transition from a closed political system to a more robust and fully functioning democracy.

3. *Grupo Oaxaca*

An oft-repeated criticism of the Fox administration harps on the wasted opportunities to continue apace the multi-decade stretch of political and economic reforms reshaping Mexico upon his ascendance.[44] For better or

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39 For information on Chile's accession to the OECD, see Latin American Economic Outlook 2008, OECD, available at: *http://www.oecd.org/dataoecd/61/35/39563538.pdf*.

40 See generally, William A. Orme Jr., UNDERSTANDING NAFTA: MEXICO, FREE TRADE, AND THE NEW NORTH AMERICA (1996). The NAFTA Secretariat maintains a website providing access to the legal documents, available at: *http://www.nafta-sec-alena.org/DefaultSite/index.html*.

41 For an updated look at trade flows, *see generally*, Hufbauer, Gary Clyde *et al.*, NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES (2005).

42 Throughout this period, the PRI exercised heavy and secretive influence in legislative, judicial, and even private affairs. See generally, JOSÉ ANTONIO CRESPO, PRI: DE LA HEGEMONÍA A LA OPOSICIÓN, UN ESTUDIO COMPARADO, 1994-2001 (2001).

43 *Id.*

44 See *e.g.*, JONATHAN FOX ET AL., MEXICO'S RIGHT-TO-KNOW REFORMS 13 (2006); Fredo Arias-King, *Mexico's Wasted Chance*, THE NATIONAL INTEREST (Winter 2005-6).

worse, the passage of Mexico's FOI law may be the most ambitious and successful achievement of Fox's administration. Interesting questions center on why Fox acted in this particular sphere and on what forces acted upon him. To answer these, one must look to the civil society movement that crystallized shortly after the 2000 election under the rubric "Grupo Oaxaca."

This appellation, bestowed by New York Times correspondent Ginger Thompson,[45] refers to the more than 100 journalists, human rights activists, scholars, and lawyers who gathered in Oaxaca in May, 2001. Shortly before the meeting, in early 2001, the Fox administration's draft for FOI legislation leaked to the media. This caused the Oaxaca group to counter with its own legislative proposal, the Oaxaca Declaration, which finalized in October of that year. Reports from the U.S.-based National Security Archive ("NSA") indicate that the "Grupo Oaxaca's" efforts resulted in a "sea change" to the government's original draft law.[46] Kate Doyle, head of the NSA's Mexico Project, noted that civil society pressure "caused a radical turn-about in the conceptualization and drafting of the law inside the government."[47] The group's effort impacted the autonomy of the regulating body, IFAI, as well as the stance taken towards administrative silence. Describing "positiva ficta," Doyle says, "Article 53 [of the law] resolves in the Grupo Oaxaca's favor the question of what an agency's failure to respond to a request means. [Now] the lack of a response will be considered acceptance of the request, setting in motion the process and deadlines normally associated with an accepted request, with the added advantage of an expedited procedure."[48] While the government was responsible for initiating Mexico's FOI law in the first place, "sweeping exemptions, gaping loopholes, and [the lack of an] identifiable timetable," were removed from the initial draft law or ironed out as a result of the "the consensus that emerged after months of internal debate" and lobbying from newspapers, academics, and opposition party members. Doyle concludes that changes prompted by the civil society reaction "resulted in a far better proposal —and one that looks, in places, very much like the draft sent by the Grupo Oaxaca."

Doyle's conception of the influence of the Grupo Oaxaca on the final outcome of the legislation is not without contest. Sergio López Ayllón, the federal official in charge of negotiating with civil society and the lead drafter of the final versions of the law, argues that the Oaxaca Group and the Executive proposals coincided on fundamental points and differed pri-

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[45] Ginger Thompson, *Mexicans Move to Pry Open Potentially Explosive Files*, NYT (October 12, 2001), available at: *http://query.nytimes.com/gst/fullpage.html?res=9A06EFD8143FF931A25753C1A9679C8B63*.

[46] Kate Doyle, *Mexico Passes New Freedom of Information Law, National Security Archive* (May 2, 2002), available at: *http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB68/index3.html*.

[47] *Id.*

[48] *Id.*

marily on technical questions and details. López Ayllón notes that some of the main proposals of the Oaxaca Group were even constitutionally unfeasible, including a proposal to grant investigative and sanctioning powers to IFAI.[49] Juan Francisco Escobedo, a member of the Oaxaca Group, cuts something of a middle ground, acknowledging that what stuck from the civil society proposal was not insignificant, particularly the reach of the law over unions and political parties and the general design of IFAI.[50] Despite the existence of differing interpretations of the government's position and its interplay with civil society, one may conclude that intervention of the Grupo Oaxaca triggered changes in the government's initial draft law regarding, at the least, the autonomy of the IFAI and the Senate involvement in appointing Commissioners as a means of political legitimacy.

Further more, civil society involvement facilitated the political conditions necessary for obtaining the FOI law's unanimous legislative approval. Having originally pledged delivery of an FOI law in August 2001, President Fox eventually adopted the law on December 1st, "so that he could [still] claim he had fulfilled his promise to produce a law within his first year in office."[51] The uncertainty inherent in a new administration combined with the hurry to meet this self-imposed deadline generated a unique opportunity to pass the law before the most conservative sectors of the federal bureaucracy could undertake a detailed analysis of the initiative. These sectors, including Treasury, Foreign Affairs, and Justice would later oppose FOI reforms. The Act, however, was formally considered by the Mexican Congress upon reconvening in March, and signed into law in June of 2002.

4. *State Level Roll-Out*

Extending transparency to the states (Mexico has a federal system with 31 states and a federal district) has been a particular focus since November 2005, when a National Transparency Congress was convened in Guadalajara calling for constitutional reform to bind the states, alongside the federal government, to minimum FOI standards.[52] A 2008 follow-up report on the culture of transparency in Mexico by the Annenberg School at the Uni-

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[49] See Sergio López Ayllón, *La creación de la ley de acceso a la información, 17*, in TRANSPARENTAR AL ESTADO: LA EXPERIENCIA MEXICANA DE ACCESO A LA INFORMACIÓN (Hugo A. Concha Cantú, Sergio López-Ayllón & Lucy Tacher Epelstein eds., 2004).

[50] See Juan Francisco Escobedo, *Movilización de opinión pública en México: el caso del Grupo Oaxaca y de la Ley Federal de Acceso a la Información Pública*, 3 REVISTA IBEROAMERICANA DE COMUNICACIÓN, 39-65 (Fall-Winter 2002).

[51] *Id.*

[52] See ISSA LUNA PLA, MOVIMIENTO SOCIAL DEL DERECHO DE ACCESO A LA INFORMACIÓN EN MÉXICO (Instituto de Investigaciones Jurídicas, UNAM, 2009).

versity of Pennsylvania explained that "at that meeting, three governors —from Aguascalientes, Chihuahua, and Zacatecas, representing three different political parties, PAN, PRI, and the PRD, respectively— signed the Declaration of Guadalajara along with Maria Marván, IFAI's then president."[53] Considering the autonomy inherent in Mexico's federal system, it was acknowledged at the outset that constitutional action was required if "generalized practices and norms" were going to be institutionalized at the state level.[54]

Progress continued in 2006 with state representatives convening at the National Forum for Government Openness, held in the city of Zacatecas, to discuss existing state-level transparency laws and implementation challenges.[55] Later in the year, at the Second Annual National Transparency Congress, a draft constitutional reform emerged, now known eponymously from its location as the Chihuahua Initiative.[56] The authors of the Annenberg Report note that "five governors (from Aguascalientes, Chihuahua, the Federal District, Veracruz, and Zacatecas) presented the document to the Political Coordination Assembly in the House of Representatives (la Cámara de Diputados)," which "then adopted the reform as its own."[57] Just months later, in March 2007 in the House and April in the Senate, with uncommon tri-partisan congressional support and a minimum of debate, an amendment was approved.[58] Indeed, the Annenberg authors called it "a testament to the vibrancy of the collaborative partnership that originally advocated for the Transparency Law."[59]

The successful passage of the amendment offers a glimpse into the deeply political nature of FOI reform. The waning days of Fox's term (Mexico has single six-year terms of presidential office) were relatively inactive in a pol-

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53 *Follow Up Report on The Federal Institute for Access to Information & A Culture of Transparency*, The Annenberg School of Communications, University of Pennsylvania, available at: *http://www.global.asc.upenn.edu/docs/FollowUp_Report_January_2008.pdf*.

54 *Id*. See generally, PEDRO SALAZAR UGARTE, EL DERECHO DE ACCESO A LA INFORMACIÓN EN LA CONSTITUCIÓN MEXICANA (2008); MIGUEL CARBONELL ET AL., HACIA UNA DEMOCRACIA DE CONTENIDOS: LA REFORMA CONSTITUCIONAL EN MATERIA DE TRANSPARENCIA (2008).

55 National Forum for Government Openness and Transparency in Mexico, Zacatecas, Mexico, March 30-31, 2006. Co-sponsored by the World Bank, IFAI, the Government of the State of Zacatecas, and the State Commission for Access to Public Information.

56 Pla, *supra* note 14, at 190.

57 Annenberg Report, *supra* note 42.

58 A copy of Mexico's current constitution with the amendment is posted by the Mexico's Congress, available at: *http://www.diputados.gob.mx/LeyesBiblio/pdf/1.pdf*. The National Security Archive has a brief note as to its significance, available at: *http://www.gwu.edu/~nsarchiv/mexico/constitution.htm*.

59 Annenberg Report, *supra* note 42.

icy sense. Transition to the Calderón administration was mired in doubts over the presidential election results. In that setting, "access to information" was an issue on which broad political consensus could be achieved. In addition, IFAI, the "behind-the-scenes" architect of the reform, had considerable political capital and the advantage of perceived political neutrality. An important opportunity thus emerged. By proposing the federal law, which covers the executive branch, as a model for other jurisdictions, the FOI reforms begun in the first years of the Fox administration could be more deeply entrenched.

Like the 2002 federal legislation, the 2007 constitutional reform promoted broad use of electronic tools to facilitate citizen access, conditions of anonymity in the use of FOI, and creation of autonomous bodies to supervise regulation and enforcement. To facilitate the legislative changes mandated by the amendment, IFAI commissioned the writing of a Code of Best Practices (Código de Buenas Prácticas) from the Center for Economic Faculty and Research ("CIDE" or Centro de Investigación y Docencia Económicas) which in turn solicited the help of an array of legislators, officers, and experts.[60] After a series of drafts, the final product emerged in October 2007 with the aim of facilitating an intended one-year timeframe for passage of state legislation. By the end of 2007, all 31 states, as well as the Federal District of Mexico City, had passed transparency legislation, albeit of divergent strength and efficacy. Outside of the executive branch, however, the legislature, judiciary, and the autonomous constitutional bodies, including the Central Bank, Federal Electoral Institute, and National Commission on Human Rights have so far failed to comply with the obligation to establish independent bodies to oversee citizen complaints.

5. *International Context*

To fully understand the events outlined above, it may be helpful to consider the Mexican struggle as one of the latest in a global push toward FOI. To date, 80 countries have passed "sunshine" legislation, with the majority having done so in just the past ten years.[61] When one plots FOI legislation by year, as done in Figure 1 below, it shows a development that some commentators have called an "explosion."[62]

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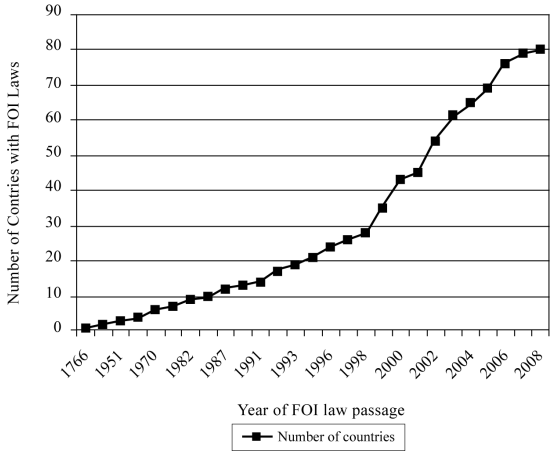
60 The Code of Best Practices is posted on IFAI's website, available at: *http://www.ifai.org.mx/TemasTransparencia/transparenciaRepublica*.

61 See Banisar, *supra* note 2.

62 See *e.g.* Green, Eric, *Freedom of Information Laws Burgeoning Worldwide*, August 29, 2007, available at: *http://www.america.gov/st/washfile-english/2007/August/200708291251141xeneerg0.6091425.html*; see also Ackerman, *supra* note 2.

FIGURE 1. COUNTRIES WITH FOI LEGISLATION LINE GRAPH (BY YEAR)



FIGURES 1 AND 2 SOURCE: Authors based on *supra* note 62 and Ackerman *supra* note 2.

In tracing the evolution of FOI laws, Sweden's Freedom of the Press Act, passed almost 250 years ago, tops the list.[63] Not long after its advent, the French Declaration of Rights of Man in 1789 "called for the right of citizens to review expenditures of the government."[64] In the early 19th century, the Americas too were aware of the concept of FOI, as emblemized by Madison's famous quote that "knowledge will forever govern ignorance: And a people who mean to be their own governors, must arm themselves with the power knowledge gives."[65]

Despite early recognition, however, the profile of government transparency has seen its greatest expansion in the years since WWII. Article 19 of the UN Declaration of Human Rights passed in a post-war flourish of international cooperation. It states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[66]

A few prominent FOI laws, including the U.S. law, followed in the ensuing decades, leading some to label the growth of FOI laws as "a post-war

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[63] A short historical narrative is given in Andrew McDonald, *What Hope for Freedom of Information in the UK?*, in TRANSPARENCY: THE KEY TO BETTER GOVERNANCE? 129 (Christopher & David Held eds., 2006).

[64] David Banisar, *Freedom of Information International Trends and National Security* (October 2002), available at: *http://www.humanrightsinitiative.org/programs/ai/rti/articles/foia_intl_trends_and_nat_sec.pdf*, quoting Declaration of the Rights of Man (1789), available at: *http://www.yale.edu/lawweb/avalon/rightsof.htm*.

[65] James Madison, Letter to W. T. Barry, 1822.

[66] Universal Declaration of Human Rights, *General Assembly resolution 217 A (III)*, (Dec. 10, 1948), available at: *http://www.un.org/Overview/rights.html*.

trend."[67] This is not strictly accurate, though. Most FOI activity has taken place in the last generation, and really the last decade, as Figure 1 above shows.

To further consider the state of FOI in a global context, below is a list of individual countries with FOI laws and the year each law was passed.

FIGURE 2. PASSAGE OF FOI LEGISLATION CHART
(BY COUNTRY AND YEAR)

1766	Sweden
1888	Colombia
1951	Finland
1966	United States
1970	Denmark
	Norway
1978	France
1982	Australia
	New Zealand
1983	Canada
1987	Austria
	Philippines
1990	Italy
1991	Netherlands
1992	Hungary
	Ukraine
	Spain
1993	Kazakhstan
	Portugal
1994	Belize
	Belgium
1996	Iceland
	Lithuania
	South Korea

1997	Thailand
	Ireland
1998	Israel
	Latvia
1999	Czech Republic
	Albania
	Georgia
	Greece
	Japan
	Liechtenstein
	Trinidad and Tobago
2000	South Africa
	United Kingdom
	Boznia and Herzegovina
	Bulgaria
	Lithuania
	Moldova
	Slovakia
	Estonia
2001	Poland
	Romania
2002	Panama

[67] Green, *supra* note 52, "Steven Aftergood, a senior research analyst at the Washington-based Federation of American Scientists, agreed with Fuchs that the world has seen a 'real post-Cold War wave of freedom of information laws.'"

FIGURE 2. PASSAGE OF FOI LEGISLATION CHART
(BY COUNTRY AND YEAR)

	Pakistan
	Mexico
	Jamaica
	Peru
	Tajikistan
	Uzbekistan
	Zimbabwe
	Angola
2003	Croatia
	India
	Kosovo
	Armenia
	Slovenia
	St. Vincent & Grenadines
	Turkey
2004	Dominican Republic
	Serbia
	Switzerland
	Ecuador
2005	Antigua & Barbuda
	Azerbaijan
	Germany
	Uganda
	Taiwan
2006	Cayman Islands
	Honduras
	Kyrgyzstan
	Macedonia
	Nepal
	Nicaragua
2007	China
	Jordan
2008	Chile
	Cook Islands

It is interesting to note, as *Freedominfo.org* has, that "out of the 38 poorest countries classified by the World Bank as Highly Indebted Poor Countries (HIPC), none has an FOI law."[68] An obverse look is also telling: almost a third of countries with FOI laws (25 in total) are counted among the most developed countries, including those in Western Europe and North America, along with Japan, South Korea, Australia, New Zealand, and Israel.

Before any generalizations are made regarding the efficacy of FOI legislation, a note of caution is in order. As Ackerman and Sandoval-Ballesteros have decried, there is a dearth of scholarly attention on the issue.[69] The transparency movement has gained notice among government officials, courts, lawyers, and academics, as evidenced in part by the recent Atlanta Conference on Transparency[70] and the landmark 2006 ruling by the Inter-

[68] See Freedominfo.org survey, available at: *http://www.freedominfo.org/features/20060322.htm*.

[69] Ackerman, *supra* note 2 at 87.

[70] See *e.g.*, The Atlanta Declaration, International Transparency Conference, Carter

American Court of Human Rights in the *Case of Marcel Claude Reyes et al. v. Chile*.[71] But there is still a sizeable gap between political involvement in terms of the boom in FOI legislation and what the world actually knows, both empirically and theoretically, about transparency. Do FOI laws reduce corruption? Promote economic growth? Consolidate young democracies? Affirmative answers to these questions have probably animated the passage of FOI laws in developing countries, particularly in Latin America, but outright conclusions are difficult to draw in light of scant research in the field.[72]

III. The Written Word

It will be helpful before going further to quickly flesh out the definitional differences between the many terms used in the FOI colloquy. This is done in Section 1. Section 2 canvasses the legal intentions behind Mexico's FOI law. What did the law hope to accomplish? In the face of competing models, how and why did Mexico choose its particular course? Section 3 examines the language of the law and the legal structures it created. How does IFAI function? Is it a model worth replicating? How significant are the FOI exceptions the law allocates? For the sake of clarity, Section 4 differentiates an FOI law from other types of transparency regulation, using targeted transparency policies as an example.

1. *Vocabulary of Transparency*

The push toward transparency, in Mexico and at the global level, involves many different stakeholders within government, among civil society members such as NGOs and think-tanks, from academia, and within the private sector. With a cacophony of voices and a multiplicity of terms, it can be difficult at times to know exactly what is being said. The following breakdown is neither definitive nor comprehensive, but meant merely to differentiate some of the most commonly used phrases.

Center, February 26-8, 2008, available at: *http://www.cartercenter.org/documents/Atlanta%20Declaration%20and%20Plan%20of%20Action.pdf*.

71 *Case of Marcel Claude Reyes et al. v. Chile*, Inter-American Court of Human Rights (September 19, 2006) (holding that article 13 of the American Convention on Human Rights provides for a full right of access to information held by public bodies).

72 One notable attempt to remedy the deficit in FOI scholarship is that of Fung, Archon, Mary Graham & David Weil, The Political Economy of Transparency: What Makes Disclosure Policies Sustainable?, Institute for Government Innovation (Winter 2002).

A. *Transparency*

Transparency refers to the architecture or the full gauge of the secrecy of a society. In other words, it refers to "[t]he degree to which information is available to outsiders that enables them to have informed voice in decisions and/or assess the decisions made by insiders."[73] As a result, transparency encompasses "many elements: open government, with access to official forums, and institutions that respond to the citizen; freedom of information laws, protection of public interest disclosure (whistle blowing); a free press practicing investigative journalism; and a lively civil society sector campaigning for openness of all these kinds."[74] In sum, transparency is the complete bag. As an aside, it should be evident how difficult it is to "measure" transparency given that it involves so many variables throughout the state.[75]

B. *Access to Information*

ATI, as it is sometimes called, refers to a citizen's ability to find out about the inner workings of his or her government. The concept involves a high degree of "ownership" in the sense that democratic government, or self-government to use Jefferson's phrase,[76] is merely a portion of the citizenry working on behalf of the greater whole. Put succinctly, "[a]ccess to information allows for informed participation by people who have a right to be involved in decisions that affect their lives."[77] Because this is but one component of the above, ATI is different, far narrower, than the concept of transparency as a whole.

C. *Right to Know*

The U.S. government describes its FOIA as a law providing "that any person has a right, enforceable in court, to obtain access to federal agency

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73 THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD (Ann Florini ed., 2007).

74 Paul Sturges, *Corruption, Transparency, and ICT's*, INTERNATIONAL JOURNAL OF INFORMATION ETHICS 2 (November 2004).

75 In the case of the Mexican federal government, transparency is often applied specifically to the proactive information published by departments and entities regarding many basic features of their business, including the directory of public servants, salaries, contracts and procurement, organizational framework, subsidies, and authorizations.

76 See *e.g.* Jefferson, Thomas, "Every man, and every body of men on earth, possesses the right of self-government." Opinion on Residence Bill, 1790.

77 IFI Transparency Resource: Bank Information Center, available at: *www.freedominfo.org*.

records."[78] This definition centers on the granting of a legal right to information. Such a right may exist independently of, or subordinate to, the political or philosophical conception of a human right to government information. With regard to FOI, it seems apt to consider a "right to know" as part and parcel of a right to self-government and therefore perhaps in the realm of a human right. Indeed, democratic government can only exist with the knowledge, consent, and participation of the populace. Stated differently, autocracy or communism cannot function or exist if all citizens know about and are involved in governance.[79]

D. *Freedom of Information Act (FOIA)*

A FOIA refers to the specific legislative grant offering access to information in government files on behalf of the citizenry. Many think a "right to information can only be effectively exercised and implemented on the basis of laws, regulating this right in accordance with international standards."[80] While this proposition may seem intuitive, the case of England may serve as a counterweight to the idea that a FOIA is a necessary component for government transparency. That country enjoyed a relatively high degree of transparency before passage of its law, and it is unclear what effect its recent (2005) FOI experiment has had on government administration.[81]

2. *Normative Aims*

By way of introduction to the normative potential of Mexico's transparency law, it is worth considering the *Reyes* ruling briefly mentioned above. Decided in 2006 by the Inter-American Court on Human Rights, the case was originally filed in 1998 by a member of the Chilean parliament along with two environmental activists. Together, they sent an ATI request to the Chilean government requesting copies of background checks and environmental reports on U.S.-based logging company Trillium Corporation, which was operating in the Lengua forest in the Rio Condor valley of Tierra del Fuego. Although such information was in existence by virtue of Chil-

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78 *Agency Views on Changes Resulting from New Administration Policy*, Report to the Ranking Minority Member, Committee on the Judiciary, U.S. Senate. US GAO (Sept. 2003), available at: *http://www.gao.gov/new.items/d03981.pdf*.

79 The implications of classifying a "right to know" as a human right, some of which may be negative, are regrettably outside the scope of this article.

80 Freedom of Information Advocates Network, available at: *www.Foiadvocates.net*.

81 The UK government maintains an independent website, available at: *http://www.ico.gov.uk*. In October 2006, the government commissioned a private study on the costs of administering the FOI law, available at: *http://www.foi.gov.uk/reference/foi-independent-review.pdf*.

ean law requiring it as a condition precedent to the business enterprise, the only information received was the value of Trillium's investment.

The Court found this withholding violated article 13 (freedom of thought and expression) of the American Convention on Human Rights[82] which, as the Court stated:

> [S]hould be understood as a positive obligation on the part of the State to provide access to the information it holds; this is necessary to avoid abuses by government officials, to promote accountability and transparency within the State, and to allow a substantial and informed public debate that ensures there are effective recourses against such abuses.[83]

The Court limned a wide ambit for the right of access to information, especially with regard to public concessions, on the basis that ATI "enables civil society to control the actions of the Government to which it has entrusted the protection of its interests."[84]

While not binding on other countries in a domestic law sense, this ruling holds powerful normative sway. It doubtlessly fed off the growing global transparency movement (indeed the court referenced a "regional consensus… about the importance of access to public information"),[85] and in return, the opinion offers deep interpretative support to certain overarching principles undergirding national laws. Such domestic principles, in general, have the power on a national scale to filter into the public consciousness or even to affect routine bureaucratic processes. For Mexico, the normative power of its law could prove its strongest asset and the best hope the country has for continuing its democratic progression.

A. *FOI Principles*

So what are these principles in Mexico's case? There are at least four. First, article 2 of Mexico's FOI law affirms that information in possession of the state is public, implying (and in fact stating elsewhere) that reserved information constitutes a temporary exception to the general rule that information belongs to individuals, third parties and private entities.[86] This is a

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82 Signed at the Inter-American Specialized Conference on Human Rights, San Jose, Costa Rica, November 22, 1969, available at: *http://www.hrcr.org/docs/American_Convention/oashr.html*.

83 *Case of Marcel Claude Reyes et al. v. Chile*, Inter-American Court of Human Rights (September 19, 2006) at 34, available at: *http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc*.

84 *Id.*

85 *Id.* at 41.

86 *Supra* note 6, article 2.

simple but powerful affirmation of democratic values because, by extension, an individual need not identify him or herself or explain why he or she wants information. Simply speaking, government information already belongs to the people.

This leads directly to the second principle, namely, the idea of limited exceptions to the public character of government information. Articles 13 and 14 list contexts in which information "shall be deemed as privileged," including situations of national security, economic stability, and individuals' health and safety.[87] Article 15 checks to some extent the open-ended nature of this classification by stating that privileged information "may remain as such for a period of up to twelve years" and that "said information may be declassified when the causes that originated [it] are terminated or when the reserve period has been completed."[88]

A third principle, embodied in article 6, centers on the notion of maximum openness. As the law states, "in the interpretation of this law the principle of publicity of information in possession of the compelled bodies should be favored."[89] This "maximum disclosure and accessibility" standard embodies in microcosmic form the watershed change the law represents. It builds on the previous principles, declaring that, *ceteris paribus*, information should be released or disseminated. Any "tie" goes to the citizen.

A fourth principle, universal access, is no less democratic than the previous three. Distilled in article 40, the law states that "any person" may make a request for access to information.[90] Although deceptively simple, the language again carries great import. Not only are agencies and other government organs forbidden from discriminating on the basis of sex, race, income and other categories, but Mexican citizenship or nationality is not even required. A picture presents itself: a law that 1) allows absolutely anyone to request information, without the need for identification, 2) for the request to be interpreted in favor of access, and 3) if not subject to a series of exceptions, themselves of limited extent and duration, for the information to be released by the requested body.

B. *FOI Objectives*

If not readily apparent from the passage of the law or the underlying principles animating it, article 4 openly lists the law's objectives. The first two objectives aim to "[p]rovide whatever is necessary so that anyone may have access to information by means of simple and fast procedures" and to "[m]ake public management transparent by means of spreading the infor-

87 *Id.* at article 13, I, III, IV respectively.

88 *Id.* at article 15.

89 *Id.* at article 6.

90 *Id.* at article 40.

mation created by the compelled bodies."[91] The fourth (of six) states the goal of promoting "accountability to citizens, so that they are able to assess the performance of the compelled bodies."[92] A final objective goes so far as to state an intention to "contribute to the democratization of Mexican society."[93]

Because these proclamations are lofty and far-reaching, one might be tempted to label them generic or superficial. After all, there is a fine line between an ambitious scope and empty rhetoric. But such pronouncements add muscle to the principles noted above by anchoring them to overarching objectives. Administrative practice is the ultimate arbiter of the law's success, but, as mentioned, a body of normative promises carries weight in that collectively it may influence, albeit subtly, the decision-making of transparency actors and the broader cultural conditions that serve to check government actors.

Article 7 pushes this idea further by mandating an array of basic items public bodies must provide from the outset, online among other places.[94] Among the requisite disclosures are a breakdown of organizational structure; directory and salaries of public officials; services rendered; information on allocated budgets; licenses, permits, and authorizations granted; and hiring agreements.[95] Although not comprehensive, this proactive measure —to be updated every three months— not only provides a host of useful information that by itself may empower citizens, but it also sets a tone of openness that may help permeate layers of time-hardened, secretive operating procedures. Accompanied by normative claims, this approach helps establish a referential transparency framework that judges, citizens, agency personnel, and even future legislators can point to when defending, using, or promoting the access to information.

The power of a normative framework lies on the margin. Whether within the confines of government, such as agency personnel or IFAI Commissioners, or from the perspective of the citizen requestor, including the very impetus to file a request and what information to seek, a robust sociopolitical context can both lead and support the routine exercise of a citizen's right to know.

3. *Legal Structure*

In contrast to overarching transparency principles and their ability to color or even push forward a sociopolitical culture, a discussion of formal

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91 *Id.* at article 4, I, II.

92 *Id.* at article 4, IV.

93 *Id.* at article 4, VI.

94 *Id.* at article 9.

95 *Id.* at article 7.

legal or institutional structures treats the explicit mechanisms by which an FOI law functions. In Mexico's case, the most striking and innovative institutional creation is the Federal Institute for Access to Information.

A. *IFAI*

The IFAI is a specialized, operationally independent executive branch agency with a multi-purpose charge. Article 33 states that, as a body, it is designed for "promoting and disseminating the use of the right of access to information; deciding if a request… is accepted or denied; and protecting all personal data under the custody of the departments and entities [of the Federal Public Administration]."[96] The following breakdown of IFAI's principal functions provides an ordered visual representation of the entity's multifarious duties.

FIGURE 3. PRINCIPAL FUNCTIONS OF IFAI CHART[97]

Appeals Resolution	*Regulatory*	*Supervisory*	*Promotion and Dissemination*	*Administrative*
• Resolve information disputes arising from application denials by federal dependencies.	• Manage, maintain, and protect personal data. • Classifying confidential information. • Criteria for document archival.	• Monitor FOI among federal entities and dependencies.	• Spread knowledge of the right to access. • Empower public servants. • Promote academic research. • Facilitate inter-agency collaboration.	• Independently manage operations, including finances, human resources, and juridical.

The creation of a separate executive agency to administer the law, including an administrative court for resolving information disputes, was nothing short of a novel concept. By way of contrast, U.S. information appeals must be filed in the same agency that issued a rejection or provided an unsatisfactory response.[98] IFAI hears disputes only from within the exec-

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96 *Id.* at article 33.

97 Translated and adapted from Atzimba Baltazar Macías & Juan Pablo Guerrero Amparán, *El Instituto Federal de Acceso a la Información Pública: la construcción institucional*, in TRANSPARENTAR AL ESTADO: LA EXPERIENCIA MEXICANA DE ACCESO A LA INFORMACIÓN (Hugo A. Concha Cantú, Sergio López-Ayllón & Lucy Tacher Epelstein eds., 2004), p. 59.

98 See 5 U.S.C. Sec. 552.

utive branch (home to some 250 federal agencies),[99] but it does so as an entirely separate entity which preserves an important measure of objective scrutiny. In addition, if the IFAI Commissioners (five in total, serving for staggered 7 year terms)[100] rule in favor of the requestor on an agency's refusal or inadequate response, the opinion binds the agency. The case is done. A citizen whose request is not granted may, on the other hand, continue the appeals process in the federal court system.

There are a few notable drawbacks to this otherwise enlightened design. First, IFAI's rulings are not enforceable by IFAI, but instead require the heavy hand of the Ministry of Public Function, which manages the federal government's three million public servants.[101] If a ruling goes unheeded, the most IFAI can do is send a recommendation for action to this Ministry which is ultimately subordinate to the President. While a public pronouncement followed by the weight of an administrative judgment and increased scrutiny is often enough to command respect, it is not the same as having a swift, binding, and independent sanctioning mechanism.

A second concern involves the federal court system, which badly needs reform. In the U.S., as well as in many other countries, a citizen can expect reasonably timely case resolution and the country as a whole benefits from *stare decisis*, the creation of precedent. Mexico's system, however, neither uses a well-developed system of precedent (a ruling applies only to the party that wins the case!) nor has it adequate administrative and technical capacity to handle the case volume.[102] The legal claim of a citizen requestor on appeal from an adverse IFAI ruling to a federal court is only as strong as the court system that will ultimately hear the appeal.

A third concern deals with the nature of IFAI's autonomy. Though accorded operational, budgetary, and decisional independence by law,[103] this sounds better than it is. Operationally, the institution still has to apply, through the Treasury Department, to Congress for a yearly budget approval. Any truly progressive action on the part of the agency could thus jeopardize future revenues. A more independent design would include a minimum budget allocation, perhaps a minimum percentage growth per year, in order to shield the IFAI from retaliatory congressional inclinations.

As for decisional independence, the commissioners are appointed by the President (subject to Senatorial veto). Although their terms outlast the President's, there is an undeniable sway. For example, at the end of 2006, after

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99 See *e.g. Report on The Federal Institute for Access to Information & A Culture of Transparency*, The Annenberg School of Communications, University of Pennsylvania, p. 12.

100 *Supra* note 6, article 34.

101 Secretaría de la Función Pública.

102 See *e.g.* ANA LAURA MAGALONI, THE JUICIO EJECUTIVO MERCANTIL IN THE FEDERAL DISTRICT COURTS OF MEXICO: A STUDY OF USES AND USERS AND THEIR IMPLICATIONS FOR JUDICIAL REFORM (2002).

103 *Supra* note 6, at article 33.

widespread recognition of a "declared and manifest" friendship between President Calderón and the President Commissioner of IFAI, Alonso Lujambio Irazábal, IFAI's commissioners held a public debate about how to address possible conflicts of interest.[104] A 3-2 vote favored a "soft" approach.[105] Three years later, in April 2009, Lujambio resigned from the IFAI to accept an offer from Calderón as Secretary of Education. Despite the oath of independence required of IFAI commissioners upon ascendance to their official posts, in his acceptance speech, Lujambio was quick to declare "personal and institutional loyalty" to President Calderón.[106] In practical terms, Lujambio's move means that, with the conclusion of the seven year terms of two other commissioners, President Calderón will appoint three information commissioners in a single year. He already appointed one in 2007. To prevent further erosion of IFAI independence, deeper public scrutiny of the candidates is needed as well as greater Senate oversight in the confirmation process. Most important, commissioners' terms should be lengthened. Although the comparison is slightly inapposite, in many countries, Supreme Court Justices serve 15 years or more for precisely this reason.[107] In addition, it might be worth forbidding commissioners from holding appointed executive positions for a lengthy period of time, or at all, after serving in the IFAI. While severe, this would control political ambition that might lead a commissioner to rule in favor of, or act in a partial manner toward, the executive branch.

B. *Other Institutions*

Mexico's FOI law applies to the three branches of government, legislative, judicial and executive, as well as autonomous constitutional entities such as the Bank of Mexico, the Federal Electoral Institute (IFE), the National Commission for Human Rights (CNDH) and the National Autonomous University of Mexico (UNAM). It compels the branches and the autonomous entities to pass internal regulations ensuring compliance.

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104 Numerous newspaper articles and editorials were published on IFAI conflicts of interest. See JONATHAN FOX *et al.*, MEXICO'S RIGHT-TO-KNOW REFORMS. CIVIL SOCIETY PERSPECTIVES, Fundar, Woodrow Wilson (2007), p. 55; John Ackerman, *El Instituto Federal de Acceso a la Información Pública: diseño, desempeño y sociedad civil*, CIESAS, Universidad Veracruzana, pp. 39-41.

105 *Id.*

106 Lujambio stated, in pertinent part: "While assuming this new responsibility, I hereby manifest my personal and institutional loyalty to you, Mister President." See Dresser, Denise, *"Lo que realmente estaban pensando"*, PROCESO, April 12, 2009, p. 48.

107 In the U.S., Justices serve life tenure "during good behavior," article III, U.S. Const., though most countries (and U.S. states) place term or age limits. Calabresi, Steven & Lindgren, James, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J. L. & PUB. P. 3 (2006).

By way of comparison, the U.S. law (and many others) applies only to federal agencies, entities, and corporations.[108] This contrast is not telling, however. The judicial and legislative bodies in the U.S. have upheld long traditions of open records, debates, and opinions, while the same cannot be said of Mexico's counterparts. Moreover, Mexico's judicial and legislative bodies are given substantial latitude in adopting their own institutions and procedures.[109] Part III of the law, particularly article 61, states that the Federal Legislative Power, the Judicial Power, the Federal Electoral Tribunal, and the autonomous constitutional bodies "shall establish by means of rules or agreements of a general character, the bodies, criteria and institutional procedures to make available access to information to the people, in compliance with the principles and time limits established in this law."[110] This arrangement can introduce the potential for conflicts of interest when complaints for information denials stem from the bodies in charge of reviewing the cases. Further, in light of Mexico's thick bureaucracy and secretive traditions, the ample discretion afforded these institutions over FOI implementation is disheartening when considered along with their apathetic and dilatory responses to the law's mandates.

C. *IFAI Equivalents*

In addition to its general administrative and promotional functions, IFAI serves as an administrative court of appeals for those individuals whose information requests to the executive agencies are denied (or responded to unsatisfactorily). Likewise, the non-executive agency bodies that fall under the law's purview must set up "an internal unit responsible for enforcing the Law, for resolving appeals."[111] In a majority of cases, this mandate is satisfied by the creation of a collegial body (cuerpo colegiado).[112] The Mexican Senate, for example, has the Committee for Guaranteeing Access to Information and Transparency, composed of a representative from each parliamentary party. The Federal Judicial Power also has a dedicated commission made up of several of its members.[113] The Federal Electoral Institute (IFE), one of the autonomous constitutional bodies, has a complicated system involving an Advisory Commission made up of Consejeros Electorales [Electoral Advisors] named by the Advisor General of IFE, and non-voting representation from the various political parties. While it is difficult to draw

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[108] See *e.g.* ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE (2007), at 26, offering a brief overview of the evolution of the U.S. FOI law.

[109] *Id.* at ch. III.

[110] *Id.* at article 61.

[111] *Id.* at article 61, VII.

[112] See López Ayllón, *supra* note 29, at 155.

[113] *Id.* at 155.

preliminary conclusions about how well these myriad institutions function, one wonders if they could have been folded into the IFAI umbrella. This would have centralized the operation, making it more accountable and subject to scrutiny, while still preserving the bodies' independence.

D. *Liaison Units*

The United States has information officers in the executive agencies, responsible for managing the response mechanisms for incoming information requests. Mexico has "unidades de enlace" in each federal dependency and entity. These liaison units serve as an interface between requestor and agency. Article 28 of the FOI law lists the various functions of the liaison units, which include collecting and disseminating the information in article 7 (that which must be published proactively); receiving and processing information requests; assisting interested parties in creating requests, including providing them with departmental information if necessary; and keeping records of requests, results, and costs.[114] These bodies, scattered across the entire government, serve as the point of initial contact for users of the FOI law.

E. *Information Committees*

The law mandates the creation of information committees alongside the liaison units in each governmental entity. The committees are made up of an internal comptroller, the head of the liaison unit, and a public servant designated by the head of the agency. Article 29 lists the functions of the information committees, which include "the juridical responsibility of denying information requests, establishing the inexistence of requested information, generating specific criteria for the classification of documents, and coordinating the classification and conservation of administrative archives."[115] This body presents the potential point of friction between agencies and dependencies and the public at large, because the information committees are charged with making the hard decisions on freedom of information requests. IFAI cases come from those requests for information that are rejected by these bodies.

F. *Fees*

FOI can be expensive. For example, "by the mid-1990s," the U.S. "executive branch was processing more than half a million requests for information each year at a cost of about $100 million."[116] 2008 will show a mul-

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114 *Supra* note 6, at article 28.

115 López Ayllón, *supra* note 31, at 153, paraphrasing article 29, FOI law *supra* note 6.

116 ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE (2007).

tiple of this. Who should bear these costs? While ultimately borne by taxpayers in any scheme, with a progressive taxation scheme and questions of user and benefit concentration, it matters whether payments come from up-front fees or government coffers.

Mexico decided to force the government to absorb the vast majority of administrative costs associated with its law's administration. Agencies ask for remuneration of postage and delivery. There are also nominal fees for the costs of reproducing documents, set out in Chapter IX of the law.[117] In an early stage, this generous posture is a good way to encourage filings.

4. *Differentiation*

In France and other countries, three different pieces of legislation regulate what the Mexican law does alone: access to administrative documents; correction, transfer, and security of personal data; and a law of archives. Yet, to appreciate the depth and breadth of Mexico's FOI law, it is useful to recognize what the law does not do. There is an important distinction, for instance, between public FOI laws and other types of transparency-related regulations, namely, those that cover private actors. In FULL DISCLOSURE, Fung *et al.* focus their efforts on analyzing targeted transparency policies. They define the difference as follows: "[i]nstead of aiming to generally improve public deliberation and officials' accountability, targeted transparency aims to reduce specific risks or performance problems through selective disclosure by corporations and other organizations."[118] Examples abound, including nutritional information labels, car safety ratings, and school performance.

One can quickly discern that though both efforts fall under the rubric of transparency policy, they treat different actors. The authors note that targeted transparency is woven together by the following characteristics: "1) mandated public disclosure, 2) by corporations or other private or public organizations, 3) of standardized, comparable, and disaggregated information, 4) regarding specific products or practices, 5) to further a defined public purpose."[119] This creates an action cycle, they argue, in which "1) information users perceive and understand newly disclosed information, 2) and therefore choose safer, healthier, or better-quality goods and services, 3) information disclosers perceive and understand users' changed choices, 4) and therefore improve practices or products, 5) that in turn reduce risks or improve services."[120]

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117 *Supra* note 6, at Ch. 9.

118 Fung, *supra*, at 5.

119 *Id.* at 6.

120 *Id.*

The authors of the study argue that targeted policies can work under the right circumstances. A successful "action cycle" is also the hope for, and perhaps the *raison d'être* of FOI laws, but the verdict is not yet in. The next section addresses qualitatively and quantitatively (not definitively) the case in Mexico.

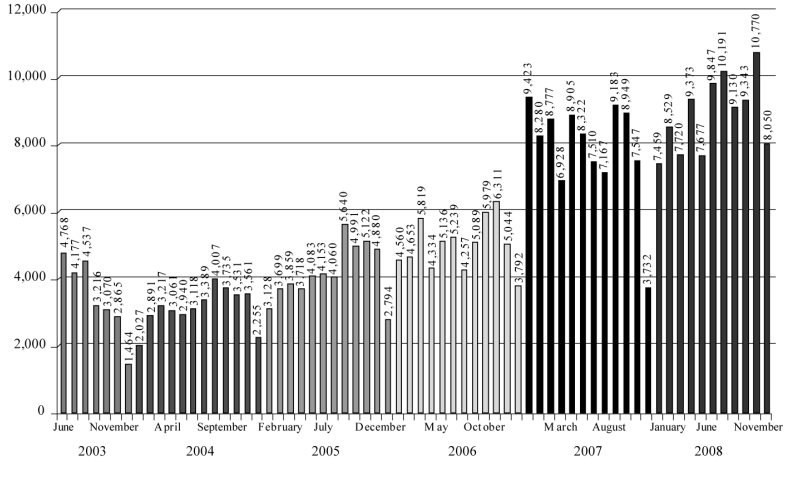
IV. The State of Implementation

With anyone, anywhere in the world able to access government information in Mexico, the first question is how many do so. What are the numbers? This inquiry is addressed using data on initial information requests, IFAI complaints, and judicial appeals. The section then turns to correlative follow-up questions. From which government entities are individuals requesting information? Who, exactly, is requesting information? How do people, physically, make requests? These issues are treated serially, with a final section devoted to the successes Mexico can boast of so far, and more importantly, to outstanding challenges to continued implementation.

1. *Petitioner Requests, IFAI Complaints, and Judicial Appeals*

Close to 360,000 information requests have been filed since Mexico's FOI law went into effect on June 12, 2003.[121] The figures are laid out below, by year and month.

Figure 4. Information Requests Bar Graph



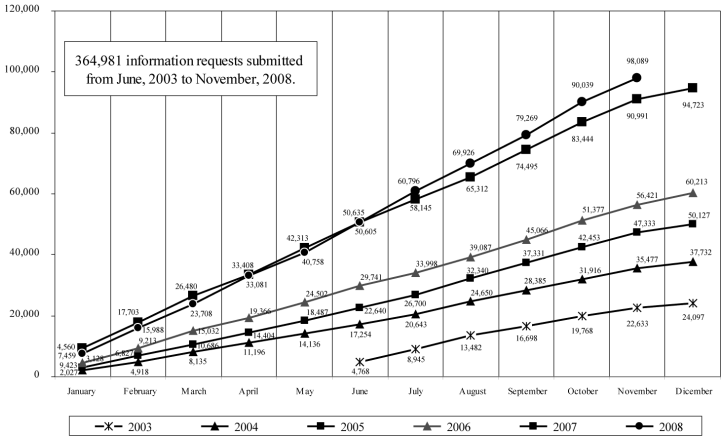
Figures 4-18 Source: IFAI, available at: *http://www.ifai.org.mx/gobierno/#estadisticas*.

[121] More than 1,000 requests were filed the first day.

Requests per year during 2007 and 2008 are roughly twice as high on a monthly basis compared to 2003 and 2004.

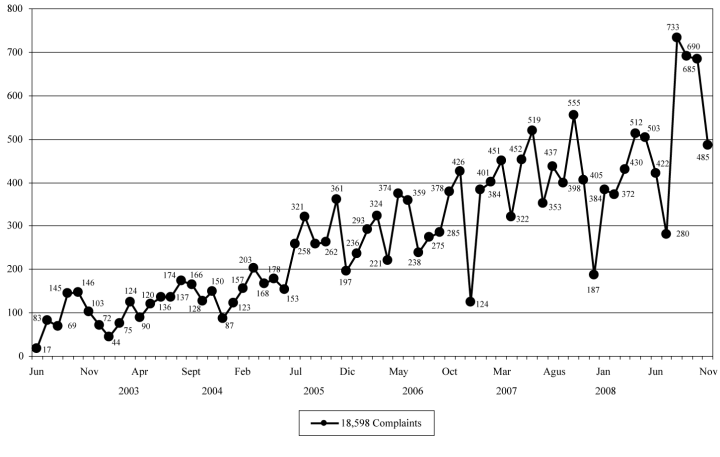
The following figure, a line-graph representation of the data above, shows initial requests have almost quadrupled in five years.

FIGURE 5. INFORMATION REQUESTS LINE GRAPH (BY YEAR)



Of those initial requests that become complaints to IFAI, Figure 6 below shows a similar upward trend since the law's inception. In total, there have been about 18,500 complaints, the majority of which have come in the past two years.

FIGURE 6. IFAI COMPLAINTS LINE GRAPH



Because the graph above includes individual numbers by month, one can see a recurrent dip in complaints filed around the winter holidays, particularly in December. Overall, the number of complaints in 2007 and

2008, like the number of requests, are close to four times as high as in 2003 and 2004.

The most common causes of complaint include a basic summary denial of information, incomplete or only partial access, or the incomprehensibility of information received. Troublingly, a growing phenomenon regards request responses citing the inexistence of requested information. Because the FOI law grants access to information contained in pre-existing documents, agencies and departments can legitimately declare requested documents are not in existence if indeed that is the case.[122] Does this encourage less documentation? It does. Out of the total number of responses, inexistence as an answer grew from 2.6% in 2003 to 9.1% in 2008, more than three times. Most worrisome is that a non-negligible percentage of agency answers are, upon examination, actually evasive or unresponsive.[123]

The figure below aggregates numerical data from the preceding discussions on initial requests and IFAI complaints to show the proportional rates at each level, including the response rate, the complaint rate, and the access rate (the rate at which the information requested is provided) of IFAI decisions. The roughly 200 appeals (called *amparos*), which have been filed in the federal court system against IFAI by requestors, are also shown, along with the appeals rate and affirmation rate from the federal courts.

FIGURE 7. REQUEST, RESPONSE, IFAI COMPLAINT, JUDICIAL APPEAL CHART

Requests, Responses, IFAI Complaints, Judicial Appeals (by year, with rates)							
	2003	*2004*	*2005*	*2006*	*2007*	*2008*	*Total*
Total Requests	24,097	37,732	50,127	60,213	94,723	94,023	360,915
Complaints Filed	635	1,431	2,639	3,533	4,864	5,496	18,598
Complaint Rate	2.64%	3.79%	5.26%	5.87%	5.13%	5.85%	5.15%
Access Rulings	156	465	1016	1046	1736	2034	6452
Access Rate	25%	33%	39%	30%	36%	37%	35%
Judicial Appeals	30	53	19	47	7	39	195
Appeals Rate	5%	4%	1%	1%	0.14%	1%	1%

[122] See article 46.

[123] According to new IFAI studies, up to 15% of those responses claimed to be positive by government agencies may in fact be negative.

FIGURE 7. REQUEST, RESPONSE, IFAI COMPLAINT, JUDICIAL APPEAL CHART (continuation)

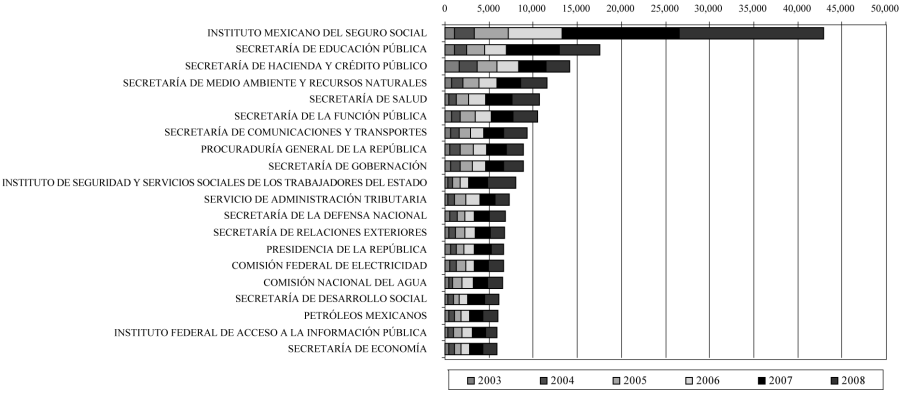
Requests, Responses, IFAI Complaints, Judicial Appeals (by year, with rates)							
	2003	*2004*	*2005*	*2006*	*2007*	*2008*	*Total*
Rulings for IFAI	8	8	3	24	75	23	141
Affirmation Rate	27%	19%	19%	29%	76%	72%	72%

Complaints to IFAI, somewhat in line with requests in general, have grown steadily, from 2.6% of total requests in 2003, to 5.8% in 2008. This may be a sign of growing public confidence in IFAI's work, itself a sign of the efficacy of the rulings. On the other hand, it might be a negative comment on the quality or forthrightness of agency responses or a sign of more precise and complex requests. The appeals rate, the number of appeals from IFAI complaints, has dropped significantly. The same cause-effect difficulty presents itself when interpreting this figure. Interestingly, the affirmation rate, court rulings in favor of IFAI decisions, has reached 70%. This suggests either that IFAI has handled the vast majority of cases in a persuasive manner or that courts are, for bureaucratic or other reasons, not inclined to stringent review.

2. *Government Perspective*

To answer the question where requests are directed, the figure below ranks the 20 government agencies with the most information petitions.

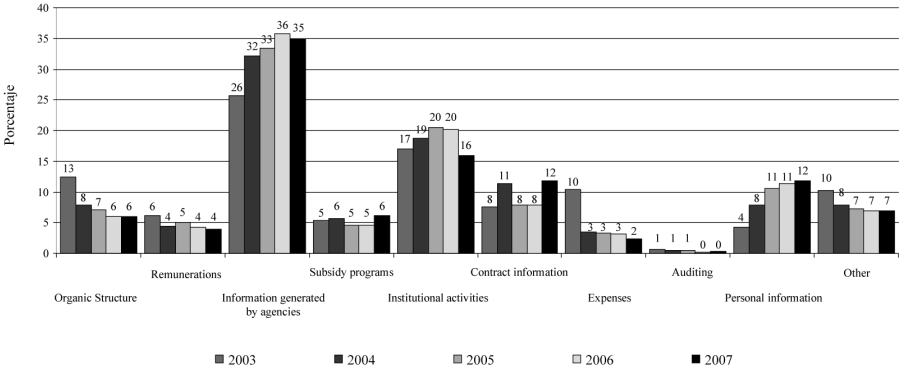
FIGURE 8. AGENCIES WITH THE HIGHEST NUMBER OF REQUESTS BAR GRAPH



By a margin of more than 2 to 1, Mexico's Department of Social Security, which oversees pensions and medical records, trumps the next closest agencies, the Ministries of Education, the Treasury, Environment and Natural Resources, and Health.

The following figure breaks down requests into subject matter in an effort to show the kinds of information solicited from government agencies. The largest proportion of requests, by far, is dedicated to information generated by agency dependencies, such as reports, minutes of meetings, communications, and subject-specific analyses. Institutional activities, such as programs, projects, and internal regulations, holds the second highest place by year.

FIGURE 9. REQUESTS BY SUBJECT BAR GRAPH



On average, agencies respond to access to information petitions in 11 work-days or about two weeks.[124] They deliver a variety of answers, the types of which are presented in the figure below along with the answer type's proportional representation. By adding the quantity of responses indicating information that is already publicly available (say, on the web platform) to that which is electronically or otherwise delivered, one can see just under three-fourths of requested information is delivered in full.

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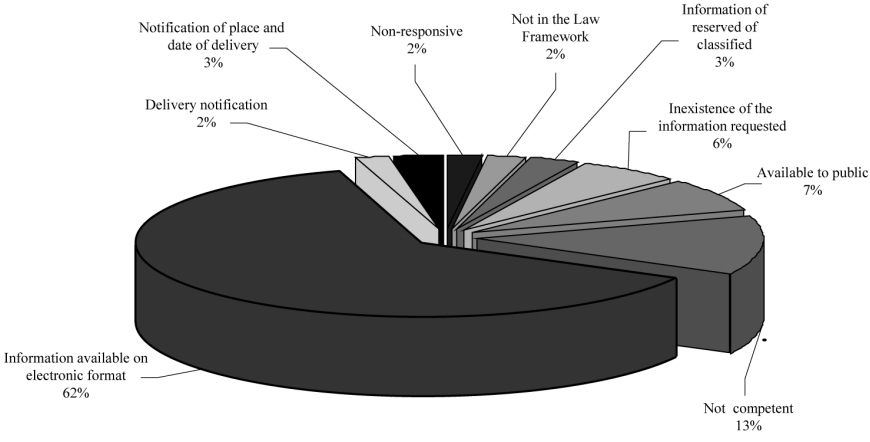
[124] This information is provided in weekly and monthly reports generated by the Director General of Coordination and Oversight of IFAI.

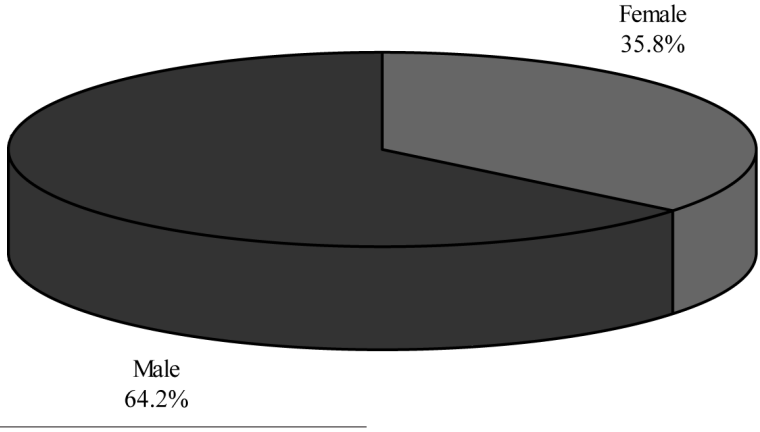
FIGURE 10. AGENCY RESPONSE PIE CHART



3. *Requestors*

User profile information is available to IFAI by way of the applicants themselves, given voluntarily and without rigorous verification.[125] Although far from perfect, 65% of users take the time to provide personal details, allowing for at least a sketch of the user population. Starting with a simple gender breakdown, the figure below shows that men are close to two times as likely to make an information request.[126]

FIGURE 11. REQUEST PERCENTAGE BY GENDER PIE CHART

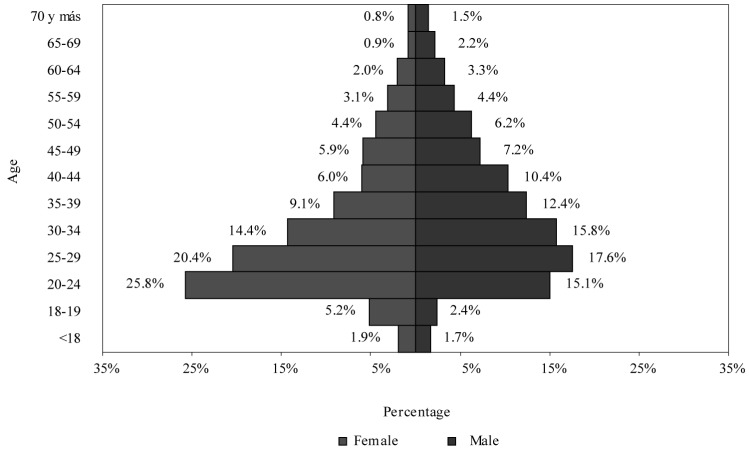


[125] Anonymous requesting grants a degree of security to applicants, but it means that an accurate user profile is hard to achieve.

[126] This information is not broken out by year, but instead aggregated over the life of the law. It is intended to provide a snapshot picture of the law's user base after five years in effect.

The following figure plots requestors' age by gender, showing that females request information at slightly younger ages than their male counterparts. This fact may reflect broader educational trends in Mexico, such as increasing college and university opportunities for women.

FIGURE 12. REPORTED AGE BY GENDER GRAPH



The figure below breaks out the request percentage by requestor's age, by year.

FIGURE 13. REQUEST PERCENTAGE BY AGE BAR GRAPH

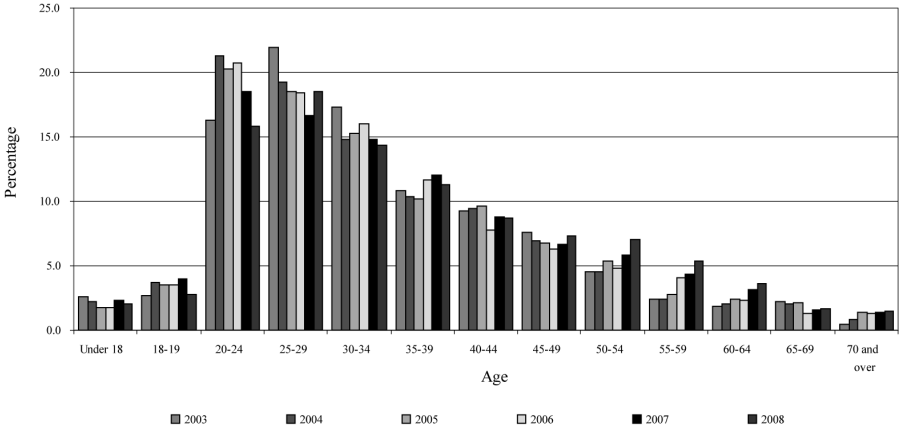
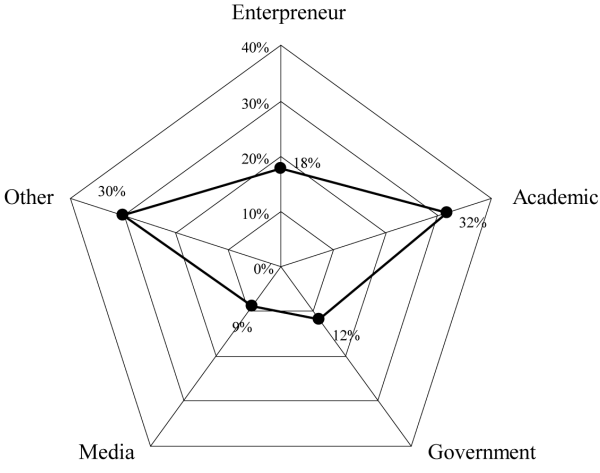


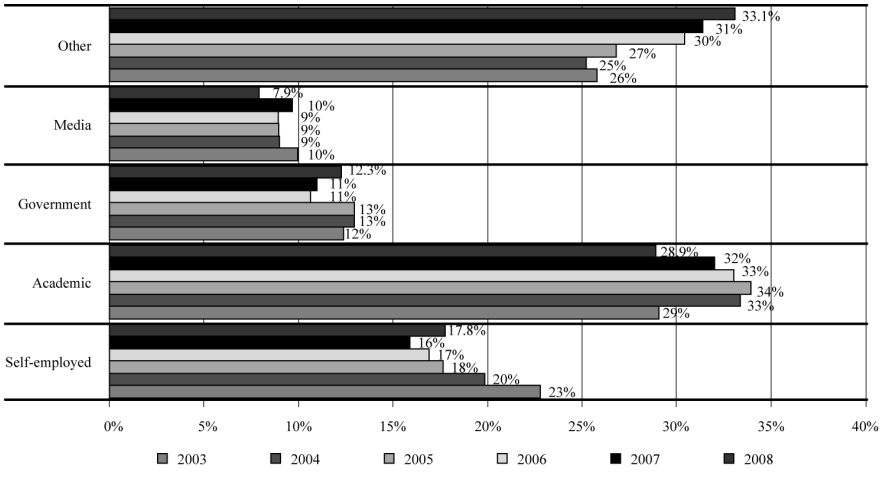
Figure 14 below gives an occupational assessment, listing the four most popular fields (academia, journalism, government work, and private businesses) as well as a catch-all, along with their percentage representation over the life of the law.

FIGURE 14. REPORTED OCCUPATION GRAPH



The figure below breaks this data out into its yearly percentage representation.

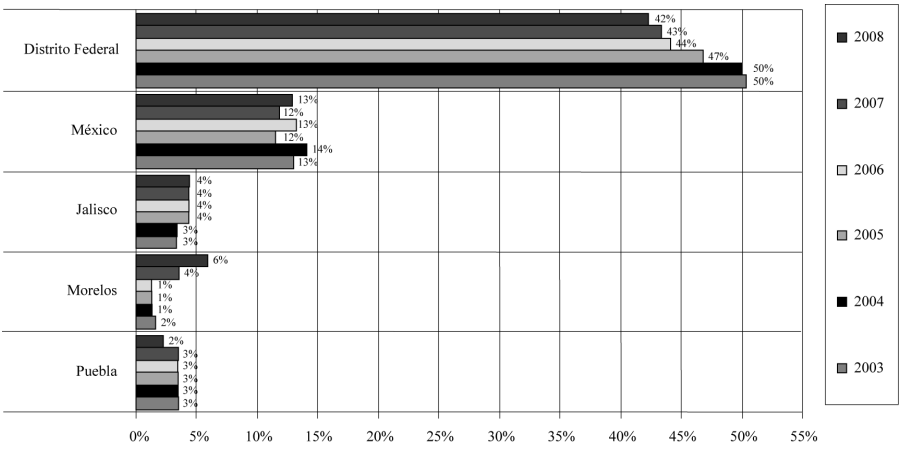
FIGURE 15. REPORTED OCCUPATION BAR GRAPH (BY YEAR)



Two rough trends are apparent in the figure above, namely, that those who are self-employed and those in "other" fields are using the law increasingly. While media, academia and government work are expected bastions of requestors, it is a positive sign to see the private sector and "others" taking ownership of the law, or at least demonstrating that the value proposition of making a request for information has shifted favorably.

To round out the user profile, consider the figure below, which contains the five federal states (including the Federal District) from where the most information requests originate. The numbers are dominated by people in the federal government's backyard. Close to half the information requests received by federal agencies come from the Federal District (Mexico City). Adding the metropolitan surroundings, including those in the states of Mexico and Puebla, the numbers jump by a third.

FIGURE 16. REQUEST ORIGIN BAR GRAPH (BY YEAR)



According to the data, 64% are male, 55% live in the Mexico City Metropolitan Area, and 54% are between 20 and 34 years old. On a professional basis, 32% locate themselves in the academic sector, 18% in the business sector, 12% are bureaucrats, and 9% work in media. With this in mind, one can flesh out a hypothetically average user, probably a young metropolitan male with an income and education level higher than the national average (due both to geographical and occupational concerns).

Not to be overlooked is the concentration of demand for public information. From June 2003 to October 2008, over 350,000 information requests were filed, but they were done by only 129,000 SISI users. A mere 7,000 of these users accounted for half the requests. The further one burrows, the more concentrated the demand: 270 users made up 21% of the total number of requests; only 36 users accounted for 32,000 requests (close to 10%). The figure below offers a startling view of request activity.

FIGURE 17. DEMAND CONCENTRATION CHART
Registered users to file electronic applications
As of October 31st, 2008

Requests	*Number of users*	*Total requests*	
1	95,233	95,233	27%
2	16,517	33,034	9%
3-5	10,597	38,379	11%
6-10	3,523	26,263	7%
11-20	1,837	26,625	7%
21-50	1,124	34,668	10%
51-100	382	26,599	7%
101-200	146	20,498	6%
201-300	64	15,386	4%
301-400	24	8,161	2%
401-500	16	7,223	2%
501-1000	14	9,719	3%
Over a 1000	6	15,143	4%
Total	129,483	356,931	100%

If access to information can change the behavior of public authorities by virtue of a diverse cross-section of the population observing or monitoring their behavior, then the concentration of demand exhibited above is cause for concern. It might undermine the positive effects of the right to know, because the broad base is more pinpointed than previously thought. The public deliberation that takes place at IFAI may countervail this proposition, however. Given that the "individuals" behind information requests are frequently journalists, specialized civil society activists, or organizations, cases often have a large reach. When issues are promulgated to a wide audience by way of a front page national newspaper, perhaps for days on end, a single request can have a multiplying effect.[127]

4. *Technology Platform*

One of the distinguishing aspects of the Mexican case is the level of technological sophistication embedded in the law's administration. The figure

[127] Some examples on the importance of newspaper dissemination of transparency stories can be found in JONATHAN FOX ET AL., MEXICO'S RIGHT-TO-KNOW REFORMS. CIVIL SOCIETY PERSPECTIVES, Fundar, Woodrow Wilson (2007).

below shows electronic requests and responses as a percentage of total requests and responses. The numbers make it clear that Mexico's FOI system is almost wholly digital.

FIGURE 18. ELECTRONIC REQUESTS CHART

	2003	*2004*	*2005*	*2006*	*2007*	*2008*	*Total*
Electronic Requests	22,488	35,055	47,874	57,739	92,261	91,514	346,931
Written Requests	1,609	2,677	2,253	2,474	2,462	2,509	13,984
Electronic Requests as % of Total	93%	93%	96%	96%	97%	97%	96%
Total Requests	24,097	37,732	50,127	60,213	94,723	94,023	360,915
Electronic Responses	19,831	31,744	42,673	51,169	81,439	79,584	306,440
Written Responses	1,445	2,369	1,925	1,929	1,948	2,087	11,703
Electronic Responses as % of Total	93%	93%	96%	96%	98%	97%	96%
Total Responses	21,276	34,113	44,598	53,098	83,387	81,671	318,143

The use of electronic tools is a principle reason Mexico's law has been internationally recognized. If Mexico can continue apace its rapid growth and dissemination of the right to know, the innovations discussed below could form a global model for FOI implementation.[128]

A. *System for Information Petitions*

The Sistema de Solicitudes de Información (SISI) allows a petitioner to file a request for information, follow-up on the request, retrieve the agen-

[128] Mexico's electronic FOI platform was chosen as one of the "Top 20" programs of the 2007 IBM Innovations Award in Transforming Government, administered by the Ash Institute for Democratic Governance and Innovation at the John F. Kennedy School of Government at Harvard University.

cy's response, and file an appeal if the response is unsatisfactory –all online.[129] This robust platform delivers on the claim that information requests can be submitted from anywhere in the world, at any time.[130] And while one can still request information personally or by mail, about 97% of Mexico's requests are made electronically.

SISI's electronic request system has also been utilized at the state and municipal levels of government, under the name Infomex (*Información México*).[131] The 2007 constitutional reform, which extended right to information mandates to all state governments, required the adoption of tools to provide access. Infomex allows local governments to adapt the system to their own particular needs and local legislation. Currently, a number of states, as well as the Federal District, are either implementing or using the system.[132]

B. *ZOOM*

To facilitate access to previous information requests, an advanced web-based search engine known as ZOOM was developed to permit users to search the universe of electronic information requests submitted to the Federal Executive Branch, their corresponding responses from government agencies, and any appeals filed, along with their resolutions. Users can search by keyword, phrase, date, or agency. This facilitates the work of specialists and academics, and it also improves the efficiency of government agencies because they can search for precedents and check for previous responses and compliance.

C. *Portal-Transparencia*

The third electronic innovation is the Transparency Portal (Portal de Transparencia or POT),[133] which organizes, systematizes, and homogenizes the presentation of basic operational information online.[134] This allows users access to the majority of Executive Branch agency compliance with mandatory disclosure requirements in a single location, meaning users

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129 The implementation of these technologies was paid for out of IFAI's annual budget of roughly $20 million.

130 See SISI's platform, available at: *http://www.sisi.org.mx*.

131 The project was facilitated by a World Bank grant of $470,000 USD.

132 These states include Coahuila, Chihuahua, the Federal District, Hidalgo, Jalisco, Morelos, Nuevo León and Veracruz. Aguascalientes, Baja California, Chiapas, Colima, Guerrero, Oaxaca, San Luis Potosí, Sinaloa, Tabasco, Tamaulipas, Tlaxcala and Zacatecas are still in the implementation process.

133 Available at: *Portaltransparencia.gob.mx*.

134 This information may include directories, audits, budgets, and operational rules.

are no longer required to consult agencies' individual websites. POT makes it possible, for example, to find out how many procurement contracts the national oil company, Pemex, has signed with IBM, while also providing the number of contracts IBM has signed with all other agencies within the Federal Public Administration. In its first year and a half of operation, the portal has registered more than 18 million visits, averaging approximately 30,000 searches per day.[135] Roughly 25% of traffic pertains to the directory of public officials; 17% to salaries and benefits; 15% to procurement and contracts; and 6% to authorizations, licenses, and concessions.[136]

5. *The Value Proposition*

Mexico's technology platform addresses, and raises, a number of problems with the country's FOI challenge. The following subsections consider successes and barriers to the current implementation. Key areas of concern are *a)* dissemination, *b)* monitoring and compliance, *c)* publicity and media, *d)* citizen trust, *e)* request quality, and *f)* poverty.

A. *Dissemination, Centralization, and Transaction Costs*

Given that Mexico is territorially large, has a geographically dispersed population, and that transportation and communication systems outside the capital are often unreliable and relatively expensive, the centralization (on the Web) of the FOI system reduces transaction costs for users.[137] By providing citizens with electronic means with which to request information, retrieve an agency's response, search previous requests, and consult agency information, citizens are offered the possibility of exercising their information rights without having to travel to Mexico City or rely for delivery on an inefficient postal service.[138]

Highlighted by this achievement, however, is the fact that Internet penetration is still in its nascent stages in Mexico. Estimates show only 23 million people have consistent web access, representing approximately 20% of the country's population of 110 million.[139] The number of individuals who can regularly and reliably access the Internet is an issue stretching far out-

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135 See *e.g.* Elizabeth Velasco, *The Government Receives 13,646,000 Information Hits In Almost A Year*, LA JORNADA, December 22, 2008.

136 *Id.*

137 See *generally*, Ronald Coase, *The Nature of the Firm*, ECONOMICA, Vol. 4, No. 16, November, 1937.

138 See *e.g.* Giselle Abramovich, *USPS to Improve Mexican Mail*, DM News, August 21, 2007, available at: *http://www.dmnews.com/USPS-to-improve-Mexican-mail/article/98233*.

139 See Internet World Stats, available at: *http://www.internetworldstats.com/central.htm*.

side the confines of FOI, touching on economic development in general. But as it stands, the tremendous benefits of the centralized FOI platform are not fully leveraged. After all, transaction cost calculations do not apply to those without virtual access. Complexity is another issue, or rather a flipside of the sophistication of Mexico's technology. Assuming increased Internet access in the coming decades, how usable will the technology platform be for a wide audience of differing levels of experience with computers and the Internet? This is less of a critical issue and more a future caution for policy makers to take into account the need to keep technical aspects as simple as possible as Internet penetration and site development progress.

A more pressing concern involves the relationship between federal and state jurisdictions.[140] Currently, the main information technologies are primarily limited to the federal government, with access at the local level limited only to those states and municipalities that have adopted Infomex. Considering the vast body of state-level information, SISI should be integrated into Infomex to permit users to access public information at all levels of government in any state through a single portal.

B. *Monitoring, Compliance, Incentives, and Trust*

Mexico's FOI apparatus encourages a range of different types of governmental oversight by virtue of a realigned incentive structure for the parties involved. From the perspective of the IFAI, a web-based system facilitates the monitoring of agency compliance and reduces the cost of supervision. Because statistics and agency responses can be gathered electronically, the IFAI can more easily spot trends and identify roadblocks to access. It can therefore intervene to address problems as they arise.

Within the ranks of the bureaucracy, the FOI apparatus encourages the diminution of a variety of institutional obstacles to transparency. First, public officials are increasingly held in check by virtue of knowing that every administrative document is the potential subject of an information request. The risk of being caught in a foolish mistake has risen substantially, as has the damage a mistake or wrongdoing could cause. Second, public officials are themselves frequent users of the law and thus serve as a type of internal check. Access to information regarding the workings of other public agencies and officials not only furthers efficiency and productivity within government business, but it also may aid in the fight against corruption by al-

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[140] A caveat: The figures above have been associated with the agencies in the federal system. Because so much of the business of daily life is conducted at the local or regional level, a measure of transparency in general depends in large part on the actions of states and municipalities. Although important aspect of this paper, a close analytical inquiry into this substrata (the numbers at least) is left for another endeavor.

lowing the reproduction of a system of informed insiders. Scandalous information is more likely to leak and agency personnel are better able to serve as witnesses in whistle-blowing situations. Third, because requests can be anonymous, the current system prevents dwelling on questions of *who* is requesting information and *why*. The practice of discretionary handouts or hold-ins has been quelled because an information request now *must* be addressed unless it falls under narrowly defined exception classifications.

From the citizens' vantage, submission of information requests through a system where the user has complete control over what personal data can be accessed by government agencies provides protection against a perceived power imbalance. With time, one might expect government officials to grow more comfortable with the public aspect of their duties, while citizens concurrently gain confidence in their right to demand accountability. This is not to say that trust or citizen confidence in the bureaucracy is the goal. A degree of skepticism on the part of all government players is salutary to a democratic system that relies on checks and balances. Of more concern is a properly aligned incentive structure where citizens find it worth their time and energy to access government files. An administrative oversight body like IFAI can ensure compliance, or at least raise the stakes of non-compliance, while reminding government officials of the constituency for whom they work.

C. *Publicity and Media*

Mexico's FOI infrastructure, particularly the ZOOM and POT search engines, fortify the media's ability to conduct genuine investigative reporting. For example, despite high levels of government resistance, a series of citizen requests and subsequent appeals resulted in an IFAI mandate that the Savings & Loan Institute (IPAB - Instituto para la Protección al Ahorro Bancario) release records related to the decision-making process that resulted in the privatization of the banking system.[141] Other salient examples include the publicity of files related to federal investigations into crimes committed during the "dirty war;" release of the procedures used for calculating official economic projections; disclosure of public trust funds previously classified as banking secrets; institutional emails; subsidy beneficiaries; and disclosure of the Office of the President's shopping list, which resulted in the cessation of expensive clothing purchases for the First Lady.[142] At

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[141] Mario di Costanzo, *The Bailout of the Banking System: Transparency Issues*, in Jonathan Fox *et al.*, *supra* note 98, p. 177.

[142] See Juan Pablo Guerrero, *The Right to Know in Mexico: the Challenge of Dissemination*, in FOCUS ON CITIZENS; PUBLIC ENGAGEMENT FOR BETTER POLICY & SERVICES, OECD, Gov/PGC (2008), pp. 210-212.

play in each case, was a discrete request in combination with promotional media coverage. Combating superficial government-fed press coverage will take far more than the FOI landscape can manage alone (it is necessary, not sufficient), but laying the groundwork for meaningful inquiry and providing useful research tools is a start.

D. *Request Quality*

While SISI allows the IFAI to monitor agency responses to a limited extent, it does not allow them to verify the quality and relevance of the information provided. This presents a serious limitation to the IFAI's work since it is essentially confined to ensuring that agencies reply within the time limit established and only roughly in the manner requested by the user. Full monitoring of compliance with the law's mandates will require verification that the information provided through SISI meets the substantive demands of the original request. Studies speaking to this are underway, but a full understanding of response quality is not yet available.[143]

E. *Poverty and Education*

By most accounts, Mexico has not performed well with respect to the law having a transformative impact on the lives of the poor. One program showed cause for optimism by having tested a provisionally effective and scalable method of bringing "outsiders" and civil society actors into the fold. Launched by IFAI, with the support of the William & Flora Hewlett Foundation, in August 2005, the Communities Project (*Proyecto Comunidades*) promoted the use of Mexico's FOI law within various social groups deemed unlikely to exert their right of access.[144] The project operated in 116 communities across 9 states, and in collaboration with 20 different local organizations. Forty percent of the participants were from indigenous backgrounds, 60% were women, and 70% lived on less than $2 per day.[145] The

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[143] IFAI developed an evaluation system of the quality of agency responses called Sistema de Evaluación 2009. Its debut is expected in 2009. See also Jonathan Fox & Elizabeth Haight, *¿Como responden las instituciones a las resoluciones del IFAI?: Un estudio piloto. El caso de la Secretaría de Hacienda y Crédito Público, 2005-2006*, available at: *http://www.ifai.org.mx/ProyectoComunidades*, in Información del Proyecto a disposición del Órgano Interno de Control, 2B Segundo Informe.

[144] The Hewlett Foundation grant was $750,000. The Program received in 2007 a special internal recognition as the "grant of the year" in the Governance Agenda of William & Flora Hewlett Foundation. A longer description of some of its impacts can be found in Juan Pablo Guerrero, *supra* note 134.

[145] Beneficiaries were diverse, including teenage groups, women, street children, farm-

program sought to make a right to information relevant by linking it to a range of issues, including the environment, reproductive health, intra-family violence, sustainable economic activities, and human rights.

Some notable successes are listed below:

— *Colectivo Ecologista*, in the State of Jalisco, supported a local community's efforts to obtain information regarding the territorial status of the community's land. After requesting information on government conservation programs, the landowners decided to reject developer's offers. They kept title to their properties and formed an association to sponsor projects dealing with protection of natural resources and ecologically sustainable development.
— Poor women in the state of Veracruz discovered their names on the lists of various public health and housing programs. They were eligible for a host of benefits. Their requests also turned up a number of incongruities, such as men on the list of beneficiaries for pap smears and mammograms.
— Federal prisoners in Monterrey, Nuevo León, many of whom were too poor to afford legal counsel, used the FOI law to gain access to their personal files. Initial information requests were denied by the bureau of prisons, but the prisoners appealed and in a precedent-setting ruling won a right to such information for prisoners nationwide. As a direct result, over a third of the group walked free, most having initially been convicted for petty offenses.

Despite the promise behind these early successes, the Communities Program was cut in early 2008, after only a two-year pilot. Given that evidence showed the project was having a profound impact on the communities in which it operated, this was a premature and wasteful move.[146] More than a year after cancellation of the program, no institutional alternative has been implemented.[147]

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ers, artisans, educators, prisoners, municipal authorities, and indigenous people who can only speak *Nahuatl* and *Mixteco*.

146 An independent impact evaluation conducted by researchers at Mexico's National Autonomous University (UNAM), found that 9 out of 10 participants reported exercising their right to know helped them resolve community problems, and 8 out of 10 affirmed they would continue to exercise their right after the project. Follow-up reports also indicated that under certain circumstances, members started an incipient appropriation process, which both strengthened group identity and forged ties with social actors, non-governmental organizations, and state and local governments.

147 A broad description of the "Proyecto Comunidades" is forthcoming. See Juan Pablo Guerrero & Maylí Sepúlveda, *El derecho a saber en grupos marginados: la experiencia del Proyecto Comunidades*.

V. Conclusion

Three key problems have presented themselves. First, federal lawmakers have violated their own constitutional reform by failing to create specialized bodies to review and resolve, independently, complaints in those branches of government not covered by the 2002 law, namely, the Mexican Congress and the judiciary. This indifference laced with a strong smell of impunity, was emulated by the constitutional agencies (Central Bank, Federal Elections Institute, Human Rights Commission) which were supposed to create their own independent transparency regulation bodies. They, too, have not seriously acted.

Second, paradoxically, the Calderón government, which openly supported the 2007 Constitutional Reform, has proved itself less transparent than its predecessor administration. The claim of "inexistence" as an agency response to FOI petitions has mushroomed. In 2008, almost one out of every ten responses declared information to be inexistent (8,208 times), leading to a corresponding rise in IFAI complaints. In fact, this cause of complaint rose 30% per year for the past two years. Worse, IFAI's rulings are ignored by agencies almost without consequence, particularly, but not solely, by the Attorney General's Office. The pretext of national security as a reason for classifying public information also sets a dangerous trend.[148] Another example of the backsliding under Calderón's watch concerns the denial of access, for life, to the requested 2006 election ballots.

Third, the impact of transparency and the right to know on corruption has been unimpressive. A bulky transparency apparatus has not shown a reliable reduction of corruption or a rise in accountability per se. The reasons are deeply rooted in the Mexican political system, which lacks a robust ombudsman's office; protection for whistle-blowers; legislation against conflicts of interest; and efficient and precedential judicial administration. An FOI law alone is a blunt tool to fight corruption entrenched in the sociopolitical fabric. Like sunlight shining on a polluted puddle, transparency seems to have disclosed additional wrongdoings and corruption in Mexico without really cleaning the water.

The last year saw the addition of a worrisome development. As part of a broad reform of the Public Security system, the Mexican Congress amended article 16 of the Code of Federal Penal Regulations.[149] In late 2008, it re-injected a heavy dose of secrecy into affairs of the Attorney General's office. Whereas the original FOI law put past investigations and completed

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[148] See Daniel Lizárraga, *El dogma de la opacidad*, PROCESO, Feb. 22, 2009, at 34.

[149] Miguel Ángel Granados Chapa, *Oscuro Ministerio Público*, REFORMA, Dec. 22, 2008; Juan Ciudadano, *MP: Quebrado y Escondido*, REFORMA, Dec. 22, 2008; Daniel Lizárraga, *Candado a la transparencia*, PROCESO, Dec. 24, 2008; Mauricio Merino, *La venganza de los políticos*, EL UNIVERSAL, Dec. 24, 2008.

inquiries into the public domain, the new legislation keeps them in the private realm of the prosecutor indefinitely when brought to court and for up to twelve years where investigators resolve not to prosecute. This reform triggered strong condemnation from IFAI's commissioners who called it "the first great retrocession" since the law's passage.[150] Notably, the issue still generated internal division at IFAI. The commissioners voted 3-2 to adopt the new Code's stance on forbidding access to closed investigation files. A positive development emerged in February 2009, however, when the National Human Rights Commission presented the issue to the Supreme Court, which agreed to review the case. It is thus possible that the 2007 Constitutional Reform may prove a containment wall against dangerous legal regressions on the constitutional right to know. Supreme Court resolutions on similar matters show cause for optimism, but the unconstitutionality of the Penal Code reform is as yet an open question. As an aside, the IFAI's vocal response is curious in light of earlier setbacks such as Querétaro's renegade effort earlier in the year to gut its IFAI equivalent in blatant contravention of the Constitution. Although grave, the Penal Code amendment is not the first great retrogression in Mexican FOI. Calling it so signals more about the combative and internecine politics gripping IFAI's governing body than anything else.

Finally, two related macro issues weigh heavily on Mexico's FOI prospects, or perhaps dwarf the agenda altogether. First, as the global economy suffers its worst recession in the post-war years, Mexico is sure to suffer economically.[151] A combination of currency devaluation, unemployment and inflation may push transparency onto the backburner, especially if the political agenda is overburdened by social unrest. Mexico's economy is already plagued by bureaucratic inefficiency and the remnants of its autocratic past. But if the 2006 election is any guide, many voters find free market promises unbecoming or disingenuous.[152] Caught in a difficult cycle, Mexico cannot provide opportunity for enough of its citizens, and this, ironically, encourages disenchantment over further democratic and economic reform. Yet, nothing could be more important to the future of Mexico's FOI regime than stable growth.

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150 María de la Luz González, *Pide PGR a IFAI frenar las descalificaciones*, EL UNIVERSAL, December 20, 2008. The official stand of IFAI on the matter is available at: *http://www.ifai.org.mx/pdf/sala_prensa/publicaciones/comunicados/2008/ComunicadoIFAI046.pdf*.

151 See *e.g. Crisis Management in Mexico*, THE ECONOMIST, November 12, 2008, available at: *http://www.economist.com/displayStory.cfm?story_id=12587590*.

152 Reminiscent of the Bush-Gore 2000 U.S. presidential election, Mexico's Federal Electoral Tribunal ordered a partial recount of the 2006 presidential election results after widespread irregularities. It then declared Felipe Calderón president-elect. His opponent, Andrés Manuel López Obrador, famous for his socialist policies toward the poor, was widely popular as mayor of Mexico City. See *e.g.* López Obrador, Andrés Manuel, *Recounting Our Way to Democracy*, Op-Ed, N. Y. TIMES, August 11, 2006.

The second elephant in the room, drug trafficking and organized crime, presents the greatest threat to FOI in particular and the country's political-economic stability in general. Mexico is buckling under the weight of the War on Drugs.[153] Under the Bush administration, the United States tightened the border and dramatically raised the street sale prices, and thus profit, associated with the drug trade. South American drug trafficking took root in Mexico, and the situation, especially in Northern states, now reaches epic proportions. Journalists and judges have been killed by the scores;[154] police by the hundreds; ordinary citizens by the thousands.[155] With respect to the recent reform of article 16 of the Penal Code, one wonders what effect organized crime had on legislators' motivations, whether through a desire to fight back more aggressively or outright corruption. Suffice it to say, this challenge is immense, and, along with it, may come a strong urge to put on hold or brush aside the country's accountability efforts in the name of swift or sweeping responses.

That would be a mistake. Security and freedom stand and fall together. If the myriad concerns outlined above are any clue, Mexico's FOI apparatus is less likely to perish in one fell swoop than it is to suffer a slow-form legislative nullification. Mexico's remarkable FOI achievements demonstrate the transformative power civil society can wield over administrative decision-making and ordinary citizens' empowerment. The law is dead letter, however, to the extent the public sits idly by as it dies from a thousand cuts. The transparency community must fight on and fight harder for its freedoms. The Mexican government must bear its burden of managing the dual challenges of economic growth and drugs and crime with broad-based, balanced, and steadfast responses. And the rest of North America, the United States and Canada, must recognize that Mexico is too important to fail, and that the gains, domestic and supranational, are too promising for any other course.

In sum, FOI prospects in Mexico deserve a sober appraisal. With a promising start, a disappointing recent past, and a daunting near-term future, the outlook is not sanguine. A transparency law, however well-conceived, is not a panacea. It rises and falls with the general health of the state. Freedom of information reaches no further than the political will that imbues it. With the final script unwritten on this bold FOI enterprise, the world watches hopefully to see if Mexico can pull it off.

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153 See *e.g. Spot the Drug Trafficker*, THE ECONOMIST, October 30, 2008, available at: *http://www.economist.com/displayStory.cfm?story_id=12514107*.

154 See *e.g. Reporters covering Mexico drug wars risk their lives*, L. A. TIMES, July 6, 2008 (noting at least 30 journalists were killed since 2000).

155 See *Death Toll in Mexico's Drug War Surges*, L. A. TIMES, December 9, 2008 ("In a chilling assessment of Mexico's drug war, the country's top prosecutor said Monday that more than 5,000 people had been killed in drug violence so far this year").

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AN OVERVIEW OF MEXICO'S SYSTEM OF LEGAL EDUCATION*

Luis Fernando PÉREZ HURTADO**

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* This article is based on Chapter II of Luis Fernando Pérez Hurtado, *The Next Generation of Mexican Lawyers: A Study of Mexico's System of Legal Education and its Law Students* (2008) (J.S.D. dissertation, Stanford Law School), available at *www.ceead.org.mx*.

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I. Introduction

In 2001, a United Nations Human Rights Commission visited Mexico to assess the degree of independence of its judges and lawyers.[1] Among other findings, the final report concluded that "[the] total want of organization of legal education and qualification for practice, and the lack of organization of the profession, without any disciplinary procedures to ensure accountability, may have been the cause of the many ills in the administration of justice in Mexico over the years."[2] The report further indicated that "it is imperative that the government undertakes without delay a study of the system of legal education and qualification to practice the legal profession in Mexico, at both the federal and State levels."[3]

Despite its bearing on the quality and efficiency of the legal system, little is known about Mexican legal education. Few studies have been carried out on this topic and most consist of anecdotal accounts or personal points of view on the current characteristics of, or suggested improvements for, legal education at particular universities. There are few empirical studies on the matter; even if such studies provide valuable information and an interesting analysis, many topics need exploration.

One of the first efforts to describe Mexican legal education was Charles Eisenmann's study carried out in 1954, *The University Teaching of Social Sciences: Law*, which included Mexico as one of the countries studied.[4] Several other studies came from five Latin American law school conferences organized by UDUAL (*Unión de Universidades de América Latina y el Caribe*) between

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[1] *Civil and Political Rights, Including Questions of: Independence of the Judiciary, Administration of Justice, Impunity. Report of the Special Rapporteur on the Independence of Judges and Lawyers, Dato'Param Cumaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 2001/39. Addendum. Report on the Mission to Mexico*, U.N. ESCOR, 58th Sess., at 4, U.N. Doc. E/CN.4/2002/72/Add.1 (2002).

[2] *Id.* at 41.

[3] *Id.* at 45.

[4] Charles Eisenmann, The University Teaching of Social Sciences: Law (Revised and enlarged ed. 1973).

1959 and 1972, which addressed topics like curriculum content, teaching and pedagogy, legal research, and institutional organization. Some of these studies have been included in two of the most influential books on Mexican legal education: Héctor Fix-Zamudio's *Metodología, Docencia e Investigación Jurídicas*, and Jorge Witker's *Antología de Estudios sobre Enseñanza del Derecho*.[5] These works describe Mexican law schools and legal education in the 1960s and 1970s, pointing out the advantages and problems of such education and suggesting different approaches to improve it. Most of the studies published thereafter either focus only on a single university, a specific legal area or a geographical region.[6] The limited number of empirical studies on this subject (*e.g.* the work of Héctor Fix-Fierro, Sergio López-Ayllón and Ana Laura Magaloni)[7] provide little information on the situation nationwide.

In addition, my field work[8] has revealed that the government collects only limited information on the institutions of higher education (hereinafter also referred to as "institutions" or "IHE") that offer a bachelor's degree in law (hereinafter also referred to as *Licenciatura en Derecho* or "LED").[9] The

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[5] HÉCTOR FIX-ZAMUDIO, METODOLOGÍA, DOCENCIA E INVESTIGACIÓN JURÍDICAS (12th ed. 2004); ANTOLOGÍA DE ESTUDIOS SOBRE ENSEÑANZA DEL DERECHO (Jorge Witker ed., 1976).

[6] For example, see LA ENSEÑANZA DEL DERECHO EN LA UNIVERSIDAD IBEROAMERICANA (Víctor Manuel Rojas ed., 2002); UNIVERSIDAD IBEROAMERICANA, DIAGNÓSTICO SOBRE LA EDUCACIÓN LEGAL EN DERECHOS HUMANOS EN MÉXICO (2002); or David Cienfuegos Salgado, *Breve introducción sobre la enseñanza del derecho en Guerrero*, LEX, DIFUSIÓN Y ANÁLISIS, 3th Epoch, Year VII, No. III (September 2004).

[7] For example, see DEL GOBIERNO DE LOS ABOGADOS AL IMPERIO DE LAS LEYES. ESTUDIOS SOCIOJURÍDICOS SOBRE EDUCACIÓN Y PROFESIÓN JURÍDICAS EN EL MÉXICO CONTEMPORÁNEO (Héctor Fix-Fierro ed., 2006).

[8] See *infra* Section VI.

[9] Several concepts mentioned in this study can have varying interpretations. Therefore, I here provide the following definitions to specify how each term is used in this study.

— *Institution or IHE*: An establishment, campus, academic unit, institution or center of higher education. Most university systems and public universities are formed by two or more IHEs. Even if some institutions are part of the same university and share administrative structures and some educational elements, each IHE operates within a different context. As a result, in this study, we will differentiate such IHEs for purposes of clarity.

— *IHE System*: A group of IHEs under the same administrative, financial, curricular, and/or pedagogical structure. Each IHE system states the characteristics or elements that unify or identify the institutions that form the system. In the case of public institution systems, IHEs generally share the same administrative, financial and curricular structures. The private institution systems present different kinds of structures and most are operated by corporations, families or religious groups.

— *Academic year*: This term is synonymous with "school year." The academic year generally starts in August or September and finishes by the following June or July.

— *Academic Terms*: These are blocks of time into which each academic year is divided. Generally, the division is into years, semesters, four-month periods or quarters.

analysis, evaluation and planning of legal education is based on particular guidelines at each IHE, mainly built upon the individual perceptions and opinions of faculty members and administrative staff. There is no existing agency to regulate or provide guidelines for legal education. As a result, there is general agreement among faculty, deans and practitioners that the problems and challenges of legal education and legal practice must be addressed urgently.

But what do we mean by "Mexico's system of legal education"? Broadly speaking, the legal education system consists of formal and informal educational experiences that prepare lawyers to practice law.[10] These begin before students enroll in a program and continue throughout their careers. In addition to studying for a bachelor's degree in law these experiences include students' perceptions of a range of topics that comprise the law and any law courses taken before the LED; internships, *pro bono* work and extracurricular undergraduate activities; graduate programs, continuing education and other courses; as well as programs focused on specific legal activities like those for the judiciary and notaries.

More specifically, Mexico's system of legal education refers to the *Licenciatura en Derecho*, the basic program that will ultimately allow graduates to practice law.[11] This system focuses on the creation, operation and development of institutions of higher education that offer a LED; the regulatory

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[10] The term "lawyer" is used in this study for the terms "*Abogado*" and "*Licenciado en Derecho*" as used in Mexico.

[11] The principal federal laws, regulations and agreements relevant to legal education and legal practice in Mexico are:

— Articles 3 and 5 of the Mexican Constitution (Constitución Política de los Estados Unidos Mexicanos, hereinafter referred as "Const.");

— General Education Law (*Ley General de Educación*, hereinafter referred to as "LGE") (Published in the Federal Official Gazette (*Diario Oficial de la Federación*, hereinafter referred to as "D.O.F.") on July 13, 1993). According to Article 1: "This law governs the education provided by the State —Federation, federal entities, and municipalities—, their decentralized organs and private entities with authorization or recognition of official validity of studies.";

— Law for the Coordination of Higher Education (*Ley para la Coordinación de la Educación Superior*, hereinafter referred to as "LCES") (Published in the D.O.F. on December 29, 1978). Article 1 establishes that this law "is of general observance in the entire Republic, and its purpose is to establish foundations for the distribution of the higher educational functions among the Federation, the states and the municipalities, as well as to foresee corresponding economic contributions, in order to contribute to the development and coordination of higher education.";

— Regulatory Law of the Constitutional Article 5 relating to the Practice of Professions (*Ley Reglamentaria del Artículo 5° Constitucional*, hereinafter referred to as "LR5°") (Published in the D.O.F. on May 26, 1945). Article 1 points out that LR5° dispositions will govern the Federal District in common order matters, the Republic in federal matters, except those excluded by the LGE and in local authorities concurrent with jurisdiction matters;

framework that applies to higher education and professional practice; students' profiles and interests; professors' training, performance and experience; the structure and contents of the study plans and programs; as well as the educational context of the teaching-learning process. This study will be based on this specific understanding of Mexico's legal education system.

For those not familiar with legal education in Mexico and the LED, it is important to first clarify some general characteristics, which will be developed more fully below:

a) The basic law degree —*Licenciatura en Derecho*— is not a graduate program as in the United States, but an undergraduate degree.
b) At the beginning of the 2006-2007 academic year, 930 institutions offered an LED.
   Less than 20% of these institutions are involved in research or academic extension activities. Some institutions offer two or more LEDs with different modalities, durations and/or approaches.
c) In most IHEs, the curriculum is rigid. Students at each level are assigned courses, professors, and schedules without any choices or elective courses. Law students take between 40 and 70 mandatory courses during their studies.
d) Over 90% of the law professors combine teaching with professional practice, and most law degree programs do not have full-time faculty.
e) The cost to open and run a law degree program is low. In general, all that is required is a few badly paid lecturers; facilities for educational purposes with one classroom for each level; and a library with the books recommended for each course.

The present article focuses on three aspects of the structure of legal education in Mexico: *a)* the procedure to obtain the license to practice law; *b)* the content and structure of the law degree programs; and *c)* the increase in the number of law degree programs, focusing on the causes and characteristics of this growth.

II. The Process to Obtain a License to Practice Law

At first glance, the process to obtain a license to practice law in Mexico seems straightforward. After graduating from high school, a student begins

— Agreement Number 234 which establishes the General Bases for Authorization or Recognition of Official Validity of Studies (*Acuerdo 243*, hereinafter referred to as "Agreement 243") (Published in the D.O.F. on May 27, 1998);

— Agreement Number 279 which establishes the Formalities and Procedures related to the Recognition of Official Validity of Studies (*Acuerdo 279*, hereinafter referred to as "Agreement 279") (Published in the D.O.F. on July 10, 2000).

the *Licenciatura en Derecho* at an institution belonging to the National Education System. There, the student takes the required courses, meets the institution's requirements to graduate and gets a diploma. The student then registers the diploma at the General Office for Professional Practice, and finally gets a license (*cédula profesional)* that allows him to practice law anywhere in the country.

However, each step may present variations depending on the institution. Therefore, we will analyze each one to explain any nuances they may have. It is very important to analyze the way each IHE enters the National Education System because that determines the requirements their students must meet to obtain a license to practice law.

1. *Which IHEs belong to the National Education System?*

Any institution may offer higher education programs, but only those belonging to the National Education System are authorized to award diplomas for the corresponding academic degrees, which are valid throughout the country.[12] Public IHEs enter the National Education System when they are founded.[13] Private IHEs require official recognition of the validity of studies (*Reconocimiento de validez oficial de estudios,* hereinafter also referred to as "Recognition" or "RVOE"), or need to be "incorporated" into or validated by a public IHE (*Incorporación de Estudios,* hereinafter referred to as "Incorporation") to form part of the system.

The RVOE required for private IHEs is the explicit recognition by federal or state authorities of the validity of the academic program offered by a private institution, at a specific location and with a qualified faculty.[14] Incorporation is the authorization a public IHE gives a private IHE to use its curriculum, system and methods. In this case, the public institution is in charge of academic and administrative supervision of the private IHE.[15]

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[12] Article 60 of LGE.

[13] *Id.* article 10.

[14] Articles 3, frac. 10 and 5 of Agreement 243. For further information on procedures and the application of the RVOE, see Luis Fernando Pérez Hurtado, *El marco jurídico de las instituciones particulares que ofrecen la licenciatura de derecho en México*, in EVOLUCIÓN DEL DERECHO EN AMÉRICA LATINA, t. II (2006).

[15] Examples of procedures and requirements: Universidad Nacional Autónoma de México, Dirección General de Incorporación y Revalidación de Estudios, Instructivo de Incorporación 2007 (2007), available at: *http://www.dgire.unam.mx/contenido/inc_est/inc_est.htm*; Universidad Autónoma de Querétaro, Reglamento de Incorporación y Revalidación de Estudios de la Universidad Autónoma de Querétaro (approved on December 7, 1984), available at: *http://www.uaq.mx/leyes/rire.html*; Universidad Autónoma del Estado de Hidalgo, Reglamento de Incorporación de Estudios (approved on December 14, 1999), available at: *http://www.uaeh.edu.mx/universidad/rie.htm*; Universidad de Colima, Reglamento de Incorporación de Estudios (2002) (approved on February 27, 2002), available at: *www.ucol.*

2. *How can a law program obtain the RVOE or Incorporation?*

The source of a RVOE or Incorporation determines the degree of academic and administrative "freedom" or "flexibility" a private IHE has. The authorities that can grant a RVOE are:[16] *a)* the federal government by presidential decree, *b)* the federal government through the Ministry of Education (SEP), and *c)* state governments through their respective ministries of education, but only for institutions and programs within that state. The institutions allowed to incorporate programs are:[17] *a)* decentralized entities of public institutions of higher education created by the federal government, and *b)* decentralized entities of public institutions of higher education created by states, but only for private IHEs and academic programs within that state.

RVOE by presidential decree is awarded directly by the President of Mexico. This allows the institution a certain degree of academic and administrative freedom.[18] Article 5 of the corresponding regulation states, "The recognized schools will freely elaborate their study plans and programs, and teaching methods, but cannot implement them without prior authorization from the Ministry of Education..."[19] Very few IHEs have gotten their RVOE in this manner.[20] According to González Avelar, RVOE

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mx/universidad/sria-general1/doctos/Acuerdos/2002/acuerdo_01.pdf; Universidad de Sonora, Reglamentos de Incorporación de Estudios (1999) (approved on May 19 and June 3, 1999), available at: *http://www.uson.mx/la_unison/reglamentacion/reglamento_incorporacion_estudios.htm*.

16 Article 14, frac. IV of LGE and articles 16 and 17 of LCES.

17 *Id*.

18 Articles 5 and 8 of the *Reglamento para la Revalidación de Grados y Títulos Otorgados por las Escuelas Libres Universitarias*, published in the D.O.F. on June 26, 1940, at MIGUEL GONZÁLEZ AVELAR Y LEONCIO LARA SÁENZ, LEGISLACIÓN MEXICANA DE LA ENSEÑANZA SUPERIOR 182-84 (1969). This replaces the *Reglamento para la Revalidación de Grados y Títulos Otorgados por las Escuelas Libres Universitarias*, issued on March 8, 1932, which in turn replaced the *Ley Reglamentaria de las Escuelas Libres*, issued on October 22, 1929. Other characteristics of this RVOE are that recognized schools may award officially valid diplomas once they are authenticated by SEP (article 9); the SEP is in charge of IHE inspection to determine whether IHEs comply with the regulations and presidential decree awarding recognition (article 10), and the RVOE can only be derogated by presidential decree if they do not comply with the regulations and the presidential decree awarding Recognition (article 11).

19 Article 5 of the *Reglamento para la Revalidación de Grados y Títulos Otorgados por las Escuelas Libres Universitarias*, *id*.

20 Some examples of presidential decrees are: Decreto por el cual se Concede a la Escuela Libre de Derecho el Reconocimiento y los Privilegios a que se Refiere la Ley Reglamentaria de Escuelas Libres (issued on January 28, 1930); Decreto que Dispone se Reconozca la Validez Oficial a los Estudios hechos en el Instituto Tecnológico y de Estudios Superiores de Monterrey (issued on July 24, 1952), Decreto Presidencial que Concede al Instituto Tecnológico Autónomo de México el Reconocimiento Oficial y los Privilegios

by presidential decree is awarded to "[e]ducational centers of major interest and academic solidity, to which the State wishes to award a special statute because of their responsibility and reliability."[21] The presidential decree gives special "autonomy" to a private institution, which some prefer to call "freedom," in terms of academic and administrative functions.

Federal and State RVOEs are awarded by the SEP and education offices in each state, respectively. While a RVOE by presidential decree allows an institution to freely develop its academic programs, Federal or State RVOE is awarded to an institution, but only for a single academic program in a specific location.[22] If the IHE decides to implement an academic program that has been recognized at another campus, then the IHE must request a new RVOE. As a result of this program-and-campus-specific recognition process, an institution may have programs with a federally or state-awarded RVOE —which means they are part of the National Education System— as well as academic programs without a RVOE.

Incorporation is awarded by federal and state public universities with the corresponding authority stipulated in their charters and bylaws. Incorporation consists of according recognition to a program of studies at a private IHE that follows the same program of study as the IHE to which they are incorporated. The private IHE's program remains under the academic and administrative supervision of the public university that granted the incorporation. In general, one may say that the private IHE becomes an "extension" of the public IHE as both must offer exactly the same plan of study and adopt the same academic, evaluation and graduation requirements.

One of the distinctive characteristics of the Mexican system of higher education is the various sources from which private IHEs may obtain the RVOE or Incorporation.[23] During the 2006-2007 academic year, of the 1,006 LEDs in private IHEs:

Contenidos en el Reglamento para la Revalidación de Grados y Títulos Otorgados por las Escuelas Libres Universitarias de 1940 (issued on April 10, 1962). These decrees are included in MIGUEL GONZÁLEZ AVELAR & LEONCIO LARA SÁENZ, *supra* note 18, at 219-20, 387-88 and 242-43.

21 Miguel González Avelar, *La legislación mexicana de enseñanza superior*, in MIGUEL GONZÁLEZ AVELAR & LEONCIO LARA SÁENZ, LEGISLACIÓN MEXICANA DE LA ENSEÑANZA SUPERIOR 33, 55 (1969).

22 Generally, in order to obtain the Federal or state RVOE, the IHE submits a request to authorities that contains: *i)* general information about the institution and the studies seeking recognition; *ii)* information on the study plans and programs, including a bibliographical list; *iii)* a description of the facilities; and *iv)* information on the faculty's qualifications. Afterwards, a visit is made to verify the institution's hygiene, security and pedagogical conditions. Recognition is awarded or not, based on the outcome of the verification of the documents submitted by the IES and the verification visit. See for example, article 5, format 1 and Appendix 1, 2, 3, 4 and 5 of Agreement 279 and article 5 of Agreement 243.

23 There is no rule that prevents institutions from obtaining incorporations or RVOEs

a) 70 LED had a RVOE by presidential decree.[24]
b) 301 LED had a RVOE from the federal Ministry of Education.
c) 576 LED had a RVOE from a state level ministry of education.[25]
d) 34 LED were incorporated into the National Autonomous University of Mexico (UNAM).[26]
e) 25 LED were incorporated to a public institution at the state level.[27]

In total, the law programs offered at the beginning of the 2006-2007 academic year obtained their RVOE or incorporation from 36 different sources.

As mentioned above, the source from which private IHEs obtain their RVOE or the Incorporation determines their degree of academic and administrative "freedom" or "flexibility". Institutions with a RVOE by presidential decree are free —as public IHEs are— to define their academic programs. Thus, each institution decides on the content of its LED programs of study, as well as the requirements their graduates must fill to obtain a license to practice law. In other words, such institutions decide what their students need to do in order to practice as lawyers. IHEs with Federal or State RVOE submit their study plans and programs to the corresponding authority, which can be rejected or the authority may ask that they be modified.[28] At first glance, this might promote the homogenization (or stan-

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from different sources for different academic programs. An IHE can have programs with incorporation, programs with Federal RVOE, and programs with state RVOE at the same time, as long as they guarantee academic-administrative continuity and independence for each program. For example, the UNAM establishes that "An institution with study plans incorporated to the Ministry of Education or other educational entities, may request the UNAM for incorporation of studies, as long as it has the needed facilities for teaching plans from another entity, independently, and that there is sufficient administrative-academic separation from the enrollment, study plans and authorized groups from UNAM." See Disposition 1.9, UNAM, Dirección General de Incorporación y Revalidación de Estudios, *Instructivo de Incorporación 2007* (2007), available at: *http://www.dgire.unam.mx/contenido/inc_est/inc_est.htm*.

24 These are the programs at Escuela Libre de Derecho (in Mexico City), Instituto Tecnológico Autónomo de México, Instituto Tecnológico y de Estudios Superiores de Monterrey, Universidad Iberoamericana, Universidad La Salle and Universidad del Valle de México.

25 In some states, it is difficult to confirm which IHEs have State RVOE since they do not have an accessible and updated list.

26 The UNAM is the only decentralized organism created by the federal government that to date awards incorporation to law degree programs.

27 The public autonomous universities which grant incorporations to law programs are: Universidad de Guadalajara, Benemérita Universidad Autónoma de Puebla, Universidad Autónoma del Estado de México, Universidad Autónoma de Morelos and Universidad Autónoma de Tlaxcala.

28 In general, there are three essential areas of RVOE and Incorporation requirements: *a)* study plan and program structure and contents *b)* security and functionality of facilities, and *c)* the faculty's qualifications and dedication.

dardization) of law programs. Nevertheless, each of the 32 authorities that may award a RVOE or incorporation has its own criteria for approving study plans and programs.

Institutions specify graduation and licensing requirements in their graduation rules. Authorities are not allowed to modify them, but only ensure that IHEs have the corresponding rules. Thus, even if federal or state authorities can influence the content of the legal education, IHE ultimately decide what is needed to practice law. Just as incorporated institutions must teach the same study plans and programs, they must also have the same graduation requirements as the IHE to which they are incorporated.[29]

Every IHE, public and private, is required to register with the General Office of Professions (DGP).[30] This registration serves to obtain documentation from each institution that allows the Office to identify the validity of professional diplomas and thereby issue the corresponding licenses to practice. The DPG awards licenses only to those graduates holding a diploma from a registered institution.

3. *What requirements are needed to obtain a law diploma?*

A professional diploma is a document issued by public or private institutions with RVOE to someone who has met with all the graduation requirements.[31] Obtaining the license for professional practice is simply an administrative process, which consists of registering the diploma with the appropriate authorities. The difference between a law graduate who cannot practice and one who can is the fulfillment of the requirements to obtain a law diploma.

All institutions of higher education share certain common requirements to obtain a diploma.[32] The student must have *a)* taken and passed all the courses in the corresponding plan of study, *b)* completed mandatory *pro bono* service, and *c)* fulfilled the graduation requirements stated in the institution's internal rules.

Pro bono service has been established by the federal government as mandatory for all bachelor degree programs in Mexico. It consists of a tempo-

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29 Other operative differences are: *a)* Federal and state RVOE allow private IHEs to issue their own diplomas, but they must be authenticated by the authority that awarded recognition. As for incorporation, diplomas are issued by the public IHE, though they include a note saying that the studies took place at an incorporated IHE; *b)* there is no time limitation for Federal RVOE and for some state RVOE, but incorporation usually must be renovated each year.

30 Articles 19 of LCES and 9, frac. I of RLR5°.

31 Articles 1 of LR5°, 12 of RLR5° and 1 of LGE.

32 Article 8 of LR5°.

rary job that students perform for the benefit of society and the country.[33] Each IHE determines how *pro bono* service is to be accomplished, considering the plan of study, the nature of the profession, and the social needs to be met.[34] *Pro bono* service must be completed in a period of no less than six months and no more than two years.[35] For the LED, as in many other bachelor degree programs, the corresponding *pro bono* service lasts between 240 and 400 hours over a six-month period.[36] Most students complete this service during the final years of their program.

Each institution determines its graduation requirements in its internal rules. In other countries —the United States, for instance— the local bar association or the judicial branch of government determines the requirements a graduate must fulfill in order to practice law. Generally, in these countries, a standardized exam designed by the professional association or the judicial branch must be passed. However, in Mexico, institutions determine the requirements their own law graduates must complete to be able to practice.

Final graduation requirements are generally called "options for degree conferral" (*opciones de titulación*). This phase is completed at the end of the study program and once the *pro bono* service is completed. The traditional option for degree conferral was a long research paper, called a professional thesis, defended orally before an evaluation committee. Nowadays, there is a wide variety of options for degree conferral, so the thesis option is used less frequently.[37] Three options have become particularly common.[38] The first is called "automatic degree conferral" or "option zero," with the sole requirement of having passed all the courses and completed *pro bono* service. Some institutions with RVOE by presidential decree initiated this option, on the grounds that regular examination throughout study years assured the quality of the graduates. However, at present, other IHEs offer this option to attract more students to their programs.[39] The second option is the General Exam to Graduate from the LED (*Examen General para el Egreso de la Licenciatura en Derecho*), first administered in 2000 by the National Center for

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[33] Article 53 of LR5°. For further details see LOURDES RUIZ LUGO ET AL., EL SERVICIO SOCIAL EN MÉXICO (Collection ANUIES, Temas de Hoy en la Educación Superior, 1995).

[34] Article 85 of RLR5°.

[35] Article 55 of LR5°.

[36] LOURDES RUIZ LUGO ET AL., *supra* note 42, at 42.

[37] Some examples are to have a high grade point average, take seminars or start a graduate program.

[38] Interview with Héctor Luis Navarro Pérez, Director, Dirección de Instituciones Particulares de Educación Superior de la SEP (March 19, 2004).

[39] An IHE's web site points out: "Due to our prestige and our excellent level of education, here you can obtain your [professional] diploma without writing a thesis or taking a final overall examination." See *http://www.wmnet.edu/ventajas/index.asp*.

the Evaluation of Higher Education (hereinafter referred to as "CENEVAL").[40] This general exam is a "specialized evaluation instrument aimed at globally, usefully, transparently, substantively, specifically, validly and reliably evaluating the level of indispensable knowledge, skills and values a law graduate must have in order to initiate his or her professional life."[41] Some IHEs use this exam just to determine the academic level of their law graduates, while others use it as an option for degree conferral. In any case, the number of examinees has increased from 3,800 in 2000 to 7,215 in 2004.[42] The third option for degree conferral is "professional experience," which means the law graduate has worked at least five years in law-related matters. This option has been used at different —mostly public— IHEs that want to increase the number of licensed graduates in their programs. Furthermore, this "professional experience" option is an additional source of income for institutions since they charge considerable fees to those students who choose this option.[43]

4. *How is a license to practice law obtained?*

A professional license is required to practice law.[44] Obtaining a license is a simple administrative procedure that consists of registering the diploma from a public or private institution with the DGP,[45] the federal authority able to issue professional licenses valid nationwide.[46] Anyone can obtain a

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[40] According to the information in its web page, the CENEVAL is a center that: "…offers evaluation services to hundreds of schools and universities, companies, education authorities and professional organizations in Mexico, as well as to other private and government entities." See *www.ceneval.edu.mx*.

[41] See *http://www.ceneval.edu.mx/portalceneval/index.php?q=info.fichas.ficha13*. According to this site, the exam is developed by CENEVAL "with the collaboration of a scientific council, a basic academic committee and an extended committee formed by experts on different areas of law, from the academic sphere, from professional associations and from private and public sectors."

[42] CENEVAL, Reporte de Resultados de los EGEL 1994-2004 (Reporte Estadístico Año 2005, No. 6) at 11, available at: *www.ceneval.edu.mx*.

[43] Some institutions are now asking for other requirements beside the "graduation options", for instance, knowledge of a foreign language or participation in an entrepreneurial project.

[44] Article 2 of LR5°.

[45] There are two other ways to obtain a law license without a law degree from an institution incorporated to the National Education System. One is to register a diploma from a foreign institution issued to a Mexican law graduate. See Agreement 286 where Self-Acquired Knowledge or Working Experience Knowledge are Accredited, published in the D.O.F. on October 30, 2000, and its modification by Agreement 328, published in the D.O.F. on July 30, 2003. The other is for a person to validate self-taught legal knowledge through working experience. See *http://www.sep.gob.mx/wb2/sep/sep_1285_acreditacion_de_cono*.

[46] Article 23 of LR5°.

license to practice as long as the diploma comes from an IHE that has been registered at the DGP.[47] This procedure is to check compliance with IHE requirements for degree conferral, as well as the validity of the diploma.[48]

Even if the lawyer's profession requires a license to practice law, this license is necessary only when working with judiciary authorities and in an administrative dispute when acting as an agent, employer or adviser,[49] except when acting as an agent in labor, agrarian or cooperative law matters, and in the case of constitutional protections in criminal law.[50] Thus, those without a license cannot present themselves as lawyers or act as such in the above situations. However, they may give legal advice and express their opinion in legal matters without engaging in unauthorized practice of law.

Information from the 2006-2007 academic year reveals that bachelor law programs actually run under twenty-one different names. Of the 1,130 law programs that year, 1,046 were called "*Licenciatura en Derecho*;" the other 84 law programs used some other name, for instance: Bachelor of Legal Consulting, Bachelor of Legal Sciences, Bachelor of Tax Law, Bachelor of Corporate Law, and Bachelor of International Law.

A license allows the practice of the profession corresponding to the name of the study plan, so the DGP cannot modify those names. Thus, if someone studied a program called "Bachelor of Social and Constitutional Law," that will be indicated on the professional license. In an interview with the author, the head of the DGP Department of Registration and Issuance of Professional Licenses stated, "the judicial authority must decide in each specific situation whether the license allows for that specific professional practice."[51] This means that each local, state or federal judiciary authority decides whether the professional license presented by the "legal representative" is allowed to practice in a specific jurisdiction. What will a judge from the state of Yucatán decide when a "legal representative" with a license from a "Bachelor of Indigenous Law" offered only in the state of San Luis

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47 Article 3 of LR5°. See articles 14, 15 and 18 of RLR5°. The documents submitted with the application are: birth certificate, high school diploma, *pro bono* service certificate, final overall examination act or waiver of final examination, and the professional diploma. For further information on the procedure, see Requisitos para el Registro de Título y Expedición de Cédula Profesional, available at: *http://www.sep.gob.mx/wb2/sep/sep_Registro_de_Titulo_y_Expedicion_de_Cedula_Prof.*

48 The number of licenses to practice law has increased in the last years, from 14,699 in 1999 to 19,958 in 2003. Source: Information provided by the Dirección de Autorización y Registro Profesional (March 17, 2004). The increase will continue, not only because of the increase in the LED enrollment, but also because institutions are simplifying the degree conferral process.

49 Articles 27 and 28 of the LR5°.

50 Article 27 of LR5°.

51 Interview with Ligia Desiree Álvarez Góngora, Head of the Departamento de Registro y Expedición de Cédulas de la DGP (March 17, 2003).

Potosí appears for a criminal case? Will a law graduate with a license for a "Bachelor of Bureaucracy Law" from Mexico City be allowed to represent a client in a family case in the state of Coahuila? At present, authorities have discretionary powers to decide who may or may not act as a lawyer in cases that require a specific license.

5. *Quality of law degree programs*

Each law school, and not lawyers' associations or the judicial branch, generally determines its study plan and programs as well as the requirements for graduates to become licensed lawyers. The process to incorporate an institution into the National Education System is not intended to achieve specific quality standards; rather, its purpose is to assure minimum educational conditions for a law degree program.

The instruments the government uses to determine program quality are diagnostic assessment and accreditation of academic programs.[52] Diagnostic assessment is a comparison of indicators proposed by a government organization, the Inter-Institutional Committee for the Evaluation of Higher Education taking into consideration the characteristics of the educational program when the evaluation is done.[53] This is a voluntary process that includes a self-evaluation, a visit from academic peers and recording recommendations that identify both program achievements and problems. It has to analyze the causes of any problems and present recommendations for improvement. One limitation of the diagnostic assessment is that evaluation results are directly linked to the amount of resources the government assigns to public IHEs, so institutions try only to fulfill the demands without striving for innovations or new developments. Another negative effect is that the evaluation does not include private IHEs. Since they do not receive federal funding, they do not have incentives to participate in a diagnostic assessment process. To date, no private institution's LED has been evaluated.

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52 For further information on the subject, see Luis Fernando Pérez Hurtado, *Evaluación, reconocimiento y acreditación educativa en México: espacios para la innovación en la enseñanza del derecho*, in INNOVACIÓN EN LA EDUCACIÓN JURÍDICA EN LATINOAMÉRICA (Rogelio Pérez-Perdomo ed., in press).

53 See Comités Interinstitucionales para la Evaluación de la Educación Superior, at: *www.ciees.edu.mx*.

The Social and Administration Sciences Committee is the CIEES committee in charge of evaluating the bachelor of law and law graduate programs, in all their modalities. This committee establishes the indicators on which the evaluation is based, and are included in "Criterios para Evaluar Programas Académicos de Licenciatura y Posgrado," and further explained in "Marco de Referencia para la Evaluación de Programas Académicos de Licenciatura y Posgrado."

As to academic program accreditation, there are two recognized accreditation agencies for law programs, both approved in April 2006: the *Consejo Nacional para la Acreditación de la Educación Superior en Derecho* (CONFEDE), and the *Consejo Nacional para la Acreditación de la Enseñanza en Derecho* (CONAED).[54] At first, it may be inferred that the accreditation of law programs is a specific effort to raise the quality of legal education since the accreditation agencies emerged from lawyers' associations and law schools, and their sole activity is to accredit law programs. However, accreditation agencies do not freely determine the form and content of the process; rather they are subject to the reference framework established by the Council for the Accreditation of Higher Education (COPAES), which applies to almost every academic program in higher education. Thus, the accreditation of law programs is but another mechanism of general educational policies to improve all higher education programs.

The accreditation process for law programs by these two accreditation bodies is new. By the end of 2007, only 15 of 930 institutions with law programs had been accredited,[55] so it is not possible to know institution's response or the effect accreditation may have on the quality of legal education. So far, the only effects the accreditation of a law program may have had are "public recognition" of the program's quality —especially important for private institutions to distinguish themselves from others and promote their graduates with possible employers— and public IHE's access to additional government funding.

III. Study Plans and Programs for the *Licenciatura en Derecho*

While there is no "national law curriculum" in Mexico, there are common characteristics that will be explored here.

1. *Basic legal education*

The contents of the academic programs are defined in plans and programs of study. As mentioned above, public IHEs, private IHEs with a

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[54] According to the Council for the Accreditation of Higher Education (COPAES), accreditation means, "public recognition awarded by a non-governmental accreditation agency formally recognized by the COPAES (Council for the Accreditation of Higher Education), since it meets certain criteria, indicators and quality parameters within its structure, organization, operation, supplies, teaching processes, services and results. It also means the program has social relevance." COPAES, *Marco general para los procesos de acreditación de programas académicos de nivel superior*, at 3, available at: *http://www.copaes.org.mx/documentos/Documentos/3_Marco_general.pdf*.

[55] See COPAES, Programas Acreditados al 31 de Diciembre del 2007, available at: *http://www.copaes.org.mx/oar/oar.htm#Programas%20Acreditados*.

presidential decree RVOE, and, to a certain degree, private IHEs with federal or state RVOE, are free to define their own study plans and programs.

One may think that such freedom and the lack of a mandatory standardized exam would produce a wide variety of structures, contents and approaches in the plans of study of Mexico's LED programs. However, that is not necessarily the case. Based on the analysis of several institutions, plans and programs of study are very similar. They generally differ only in some courses each law school adds according to their approach or ideology, or in areas of specialization at higher levels of study. Ana Laura Magaloni points out that: "In our experience when we started the CIDE program, we could see that there is a strong idea in Mexico that a set of substantive law courses is the central core of lawyers' education. Thus, its modification or reduction would practically mean not to train lawyers."[56] Moreover, upon analyzing the plans of study of seven leading institutions in the country, she adds, "variations in the programs are subtle, and the emphasis is on the substantive law courses that intend to soundly describe branches considered 'fundamental' in the regulatory system."[57]

What produces homogeneity in the programs of study despite the relative freedom institutions have to define their programs? There are several explanations. The first derives from Magaloni's idea about the standardized idea among lawyers regarding the basic education that a law graduate must have. These lawyers are deans and faculty members at the law schools. They define what and how to teach in their institutions. They are also the students' future employers, so they expect students to have that basic knowledge.

Another explanation is the lack of opportunities for change. Research on Mexican law schools is almost nonexistent, so there is virtually no new knowledge that may affect legal education.[58] In addition, most professors practice law and teach at the same time; they do not have enough time to prepare their classes. Consequently, they end up teaching what they were taught when they went to law school. Finally, in the case of private IHEs with a federal or state RVOE, government agencies are in charge of unifying study programs. For example, in the case of federal RVOE, the SEP's Department of Curricula Evaluation determines whether the study plans and programs submitted with the application for federal recognition are suitable. Every year, this department has to go over an average of 1,000

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56 Ana Laura Magaloni, *Cuellos de botella y ventanas de oportunidad de la reforma a la educación jurídica de elite en México*, in DEL GOBIERNO DE LOS ABOGADOS AL IMPERIO DE LAS LEYES 61, 83 (Héctor Fix-Fierro ed., 2006).

57 *Id.* at 64.

58 According to Miguel Carbonell, "If we want to significantly renew legal education, we will first have to create a new model of intellectuals with the ability, intelligence, devotion and academic rigor that allow them to successfully undertake such a complicated and difficult task." MIGUEL CARBONELL, LA ENSEÑANZA DEL DERECHO 61 (2004).

study plans and programs in different areas with a staff consisting of only the director, four analysts and one secretary.[59] With such limited resources, plus the lack of specialized knowledge on the subject, the approval process for law programs requesting a RVOE involves comparing the applicant's plans and programs with a pre-established format. If there is a match of 80% or better, the study plan and program is approved.[60]

If there is a "central core" or a basic LED education, what are its characteristics? We will now address this question by describing the common courses in the study plans and their basic structure.

2. *Basic courses in the study plans*

In general, law students take between 40 and 70 mandatory courses as part of the law program. This considerable number of courses confirms the idea that Mexican law students receive an "encyclopedic" education: "A lawyer must know all the areas of law."[61]

In its study plans, each institution integrates some courses that reflect its identity or ideology, as well as courses in one or several specialized fields of law if the program has a particular focus. However, a set of courses considered the basic legal education is included in every law program.[62] The first level usually includes courses like Introduction to the Study of Law, Civil Law (Individual Rights and Family Law), Roman Law, Sociology of Law, Economic Theory, and Legal Methodology. The rest of the levels include, among others:

Civil Law II - Property and Succession Law	General Theory of Procedure
Civil Law III - Liabilities	Civil Procedure I
Civil Law IV - Civil Contracts	Civil Procedure II

[59] Based on a visit to the DIPES and information provided from that office (March 18, 2004).

[60] It must be pointed out that this procedure of approving the study plans and programs has the purpose of achieving a certain degree of uniformity in legal education, but it also inhibits the possibility of new or different forms of legal education. See Luis Fernando Pérez Hurtado, *Evaluación, reconocimiento y acreditación educativa en México: espacios para la innovación en la enseñanza del derecho*, *supra* note 62.

[61] Magaloni points out that, "[In law programs,] a teaching model based on the transmission of a great amount of information about the content of rules, and about key legal concepts to understand those rules prevails. The idea that a good lawyer is one who knows lots of laws, is still deeply rooted in Mexican legal education." Ana Laura Magaloni, *supra* note 66, at 64.

[62] The names of the courses may vary in some programs, as well as the level at which they are taken, but the content is generally the same.

Criminal Law I - General Theory	Criminal Procedure
Criminal Law II - Specific Crimes	Commercial Procedure
Commercial Law I - Corporations	Administrative Procedure
Commercial Law II - Com. Paper & Secured Credit	Labor Procedure
Commercial Law III - Commercial Contracts	Constitutional Appeal Proceedings (*Amparo*)
Commercial Law IV - Bankruptcy	Mexican Legal History
Individual and Social Rights	Local and State Legislations
Constitutional Law	International Public Law
General Theory of the State	International Private Law
Administrative Law I - Structure of Federal Gov.	Philosophy of Law
Administrative Law II - Gov. Legal Functions	Legal Ethics
Labor Law I - Collective Labor Rights	Social Security Law
Labor Law II - Individual Labor Rights	Notary and Registry Law
Tax Law I - General Theory	
Tax Law II - Income and Property Tax	

Some of the courses that have been introduced recently in an increasing number of programs are Electoral Law, Human Rights Law, International Commerce Law, Securities Law, Environmental Law and Intellectual Property Law. At advanced levels, some programs have sets of courses designed for students seeking a particular specialization, as well as elective courses, seminars and/or law clinics.

Besides the courses directly related to the law program, study plans also include "trademark" or "institutional identity" courses, mandatory for all the students in an institution since they represent the institution's characteristic approach or ideology. These courses are generally given in the first levels and are oriented towards human, social, religious, or entrepreneurial education, or certain skills deemed common to all professionals. These include Oral and Written Communication, Computer Skills or English as a Second Language.

After analyzing the study plans of seven leading institutions, Magaloni concludes that most of the courses are focused on the areas of law traditionally considered "fundamental," while fewer courses deal with new areas of law or the practice of law (like clinics or seminars).[63]

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[63] Ana Laura Magaloni, *supra* note 56, at 67.

3. *Modality*

The modality of the LED determines the rate of learning, class attendance, and class shifts. The modality can be full-time, part-time, open or distance education. The full-time modality is in-class education at the IHE's facilities with a common study calendar and schedule for all students. The open education modality is based on a flexible schedule. It usually requires student attendance only for tutoring or exams. The part-time modality is a combination of the full-time modality and the open education modality. It requires student attendance on certain days for short periods to participate in some program components while the rest of the program involves self-study and tutoring. The distance education modality is based on remote communication to complete the program and have contact with instructors and fellow students.

Most law programs are offered in the full-time modality (see Table 1).[64] A program's modality primarily depends on the type of students an institution wants to attract and, to a certain extent, the other modalities available in the region.

TABLE 1. LEDS AT THE BEGINNING OF THE 2006-2007 ACADEMIC YEAR, BY MODALITY

	Public IHEs	*Private IHEs*	*Total LEDs*
Full-time	94 (75.2%)	798 (79.4%)	892 (78.9%)
Part-time	17 (13.6%)	133 (13.2%)	150 (13.3%)
Open	13 (10.4%)	63 (6.3%)	76 (6.7%)
Distance	1 (0.8%)	11 (1.1%)	12 (1.1%)
Total	125 (100%)	1005 (100%)	1130 (100%)

SOURCE: Data collected by the author.

From this point on, only full-time programs will be analyzed since they are the most prevalent and offer the "traditional" educational structure: students and professors regularly attend class to advance together in the corresponding plan of study.[65]

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64 In 165 institutions, LEDs are offered in two modalities and in 4 IHEs, three modalities are offered. Some offer two, three and, in one case, up to four law programs in a single modality, but they are different in terms of duration, structure or entity awarding the RVOE or incorporation.

65 Full-time programs represent almost 80% of all the law programs and their students represent more than 90% of the total law school enrollment. Source: Database from the Dirección de Análisis y Sistemas de Información, SEP.

4. *Structure of plans of study*

Among law programs, there are plans of study that are rigid, flexible or specialized. A rigid plan establishes the courses the students must take each academic term. Some IHEs with a rigid study plan offer students the opportunity to choose from a set of optional courses, which generally represent less than 20% of the LED courses, but the study plan indicates how many and when they can be taken. In contrast, a flexible study plan allows students to choose the courses they want to take in each academic term, although there are mandatory courses, an established sequence for certain courses and a minimum and maximum number of courses that can be taken each term. A specialized study plan usually starts as a rigid plan, but in the last LED terms, students can select a set of courses that focuses on a specific area of law. There are also mixed options in a single study plan, which can start as a rigid plan and later become flexible.[66]

Most law programs in Mexico have a rigid study plan, mainly due to two factors. First, there is the "central core" that must be included in every lawyer's education, which represents approximately 80% of the *Licenciatura en Derecho*. By implementing a rigid study plan, an institution can ensure that every student is receiving that "essential" knowledge. Second, most institutions have a low enrollment, so they cannot offer a wide variety of elective courses. In addition to this, their facilities are small and funds for faculty salaries are very limited. For instance, in some small institutions, the group votes on the elective courses in the study plan. The course with the most votes is scheduled for the following term and all the students take that course.

At some public IHEs with a relatively large student population and a few private IHEs with the economic resources, we observed a tendency towards flexible programs and curricular specialization. This approach addresses the issue of specialization in certain areas, as well as institutions' concern about high dropout rates. Institutions have experienced increasing student retention rates by allowing students to choose the courses they want to take, and by offering individualized help to guide them in the selection process.

5. *Division and duration of law programs*

In general, each IHE decides the academic terms and the duration of its study plan. Still, Agreement 279, which standardizes certain aspects of higher

66 There are also a few programs focused on an older population or on professionals. These reduce the number of courses by offering only those relevant for law practice, and adapt the program fit into the short time available to these students. Two examples are the Executive Programs at the Universidad del Valle de México (see *www.uvmnet.edu*) and the Adult Education Program at the Universidad del Noroeste (see *www.uno.mx*).

education, states that the minimum amount of time for learning activities under an instructor's guidance in a full-time program is 2,400 hours.[67]

Traditionally, law programs lasted five years, but since the 1980s, shorter programs have been developed. By the 2006-2007 academic year, only 23% of full-time law programs were five-year programs.[68] In contrast, 33% of the full-time law programs that year were less than four years long.[69] A few full-time LEDs may be completed in two years and eight months.

It is possible to shorten the time needed to complete a program by restructuring the academic terms. Study plans used to be divided into years or semesters, but nowadays more and more programs are divided into four-month periods or quarters. Instead of offering a 5-year or 9-10 semester LED with long breaks in December-January and in June-August, these programs offer an LED in 9 or 10 four-month terms with only a one or two week break between terms. Thus, institutions have been able to attract more students who work and are not interested in long breaks, but in finishing their degree as quickly as possible. If these institutions have to "sacrifice" courses to reduce the time it takes to complete a degree, they usually dispense with non-substantive law courses. The impact reducing the length of law programs has on the quality of legal education has yet to be analyzed.

6. *Class Shifts*

Full-time law programs currently offer six different options for class shifts: *a)* mixed: the student must attend morning and evening classes; *b)* flexible: classes are offered all day long and students choose their schedule; *c)* morning: classes take place from 7:00 AM to 11:00 AM;[70] *d)* midday: classes take place from 11:00 AM to 3:00 PM;[71] *e)* evening: classes take place from 4:00 PM to 8:00 PM; *f)* night: classes take place from 6:00 PM to 10:00 PM. Each class shift implies a different student profile, especially when the student has access to choose from different options. For example, programs with morning classes generally attract recent high school gradu-

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[67] Article 15 of Agreement 279. Study plans for all bachelor's degrees, including law, will consist of at least 300 credits. One credit equals 16 hours of effective learning activities. A learning activity is any action in which the student participates to acquire the required knowledge and skills in a study plan, either under academic staff supervision or independently. Articles 13, frac. II and 14 of Agreement 279.

[68] However, this correspond to 55% of the law programs in public IHEs, and only 19% of the law programs in private IHEs.

[69] All of these programs, except one, are offered at private institutions.

[70] As an interesting note, morning classes at the Universidad Juárez Autónoma de Tabasco start at 6:00 A.M.

[71] In some institutions, the midday class shift is called intermediate, mixed or pilot.

ates who do not work, while programs with evening or night classes mainly attract mainly working students or older students.

Each IHE determines the class shift for the LED. One IHE can even offer the full law program (that is, all levels) at different class shifts. Three out of every ten LEDs are offered in two or more class schedules and most offer morning or evening classes.[72] A single law program may combine class schedules, depending on the year of study in the program. Ten percent of all full-time law programs follow this model. For example, the first half of the program is offered in the mornings, and the second half is offered in the afternoons. This allows students to hold a job during the final years of their program. Naturally, the structure of the plan of study is reflected in the class shift. Generally, IHEs with rigid study plans have mixed, morning, evening or night shifts, while flexible plans have flexible shifts.

IV. The Increase in the Number of Law Schools

During the 1997-1998 academic year, there were 170,210 law students in 364 institutions offering 367 LEDs. By the 2006-2007 academic year, the number of law students had increased to approximately 240,000 distributed among 930 institutions offering 1,130 LEDs.[73] This represents a 41% increase in enrollment over the past decade, a 156% increase in IHEs offering a law program, and a 208% increase in *Licenciaturas en Derecho*.[74] In other words, in the past ten years, approximately every week a new law school begins to offer one or two new LEDs to 134 new law students.

It is a paradox that this rapid increase of the number of law programs has occurred simultaneously with a serious problem of lack of job opportunities for law graduates. In principle, higher education must give a balanced response to both social demand for opportunities of higher education and the needs of the job market. Nevertheless, employment prospects for most law graduates are not very good. In the 1990s, ANUIES examined the employment prospects for graduates from different programs.[75] The study found that 13 programs, including the LED, had a high enrollment surplus, which could be considered critical in the mid-term job market.[76]

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72 A single full-time program may be offered up into four class shifts. The LED at the Universidad Autónoma de Nuevo León is one example.

73 Source: Personal database and data from the Dirección de Análisis y Sistemas de Información de la SEP.

74 Population in Mexico increased 13% over the same period. Source: Instituto Nacional de Estadística, Geografía e Informática (INEGI).

75 ANUIES, Mercado Laboral de Profesionistas en México: Escenarios de Prospectiva 2000-2006-2010, Segunda Parte (2003).

76 Besides law, the other critical degrees are Business Administration, Accounting, Computer and Systems Engineering, Elementary Education, Mechanical and Industrial Engi-

The study calculated a surplus of approximately 47% of the law graduates and points out that "long-term perspectives (through 2010) further emphasize the adverse conditions expected for the job market."[77] The ANUIES study concludes that law graduates, like those in other *critical* programs, "may be unemployed, and at best, they may find a low quality occupation that is not a professional career. This implies a considerable amount of sub-employment for professionals."[78]

The main causes of this growth include: 1) increased availability of higher education in Mexico, in general, in response to the growing demand for higher education programs; 2) ease with which new law programs can be started, as well as the low investment required to do so; and 3) the wide range of reasons students have to study law.

1. *Increase in Higher Education Enrollment*

The rapid increase in the number of academic programs is not a phenomenon exclusive to law studies, but extends to other higher education programs in Mexico. Higher education enrollment has almost tripled over the last twenty-five years, going from 731,147 students in 1980 to 2,150,146 in 2006.[79] From 1995 to 2004, enrollment increased 53%, surpassing, for example, the average 41% enrollment increase in Organization for Economic Cooperation and Development (OECD) countries.[80] Due to this growing need, the federal government's Education Development Program has made extensive access to higher education a priority for several decades.[81]

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neering, Medicine, Political Sciences and Public Administration, Pedagogy and Education Sciences, Electrical and Electronic Engineering, Communication Sciences, Marketing and Architecture, all which, according to the study, "will provide 82% of the total offer of professionals with a bachelor's degree during 2000-2006." *Id.* at 217.

77 *Id.* at 218.

78 *Id.*

79 ANUIES, ANUARIO ESTADÍSTICO 2004. POBLACIÓN ESCOLAR DE LICENCIATURA Y TÉCNICO SUPERIOR EN UNIVERSIDADES E INSTITUTOS TECNOLÓGICOS 4 (2004), citing as source: ANUARIOS ESTADÍSTICOS DE LA ANUIES, 1980-2004 and SEP, *Sistema educativo de los Estados Unidos Mexicanos. Principales cifras ciclo escolar 2006-2007* (2007), at 177, available at: *www.dgpp.sep.gob.mx/Estadi/Principales%20cifras%202006-2007%20gris1.pdf*.

80 ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, EDUCATION AT A GLANCE 2007, BRIEFING NOTE FOR MEXICO 7 (2007) (hereinafter referred to as "OECD, BRIEFING NOTE FOR MEXICO"), available at: *www.oecd.org/dataoecd/51/22/37392816.pdf*.

81 See, for example SECRETARÍA DE EDUCACIÓN PÚBLICA, PROGRAMA PARA LA MODERNIZACIÓN EDUCATIVA 1989-94 (1989); *id.*, PROGRAMA NACIONAL DE EDUCACIÓN 1995-2000 (1995); *id.*, PROGRAMA NACIONAL DE EDUCACIÓN 2001-2006 (2001).

This growth will continue for at least another decade. The enrollment rate in higher education is still lower than it should be. For example, the higher education enrollment rate for 20-24 year-olds increased from 14.83% in 1995 to 23.9% in 2003, but it is less than the average rate of 28.5% for Latin America.[82] If we compared Mexico's rate with that of other OECD countries, the difference is even greater. According to the OECD, if the present tendency continues, only 30% of young Mexicans will receive a college education at some time in their lives, considerably lower than the 54% average for other OECD countries.[83]

Interest in enrolling in a higher education program is linked to easy access to those programs, combined with the general perception that the higher the educational level individuals attain, the better their jobs and the higher their salaries.[84] According to the OECD, in Mexico, having a college degree gives a 19% advantage in employment opportunities, reflecting a difference between 61% for high school graduates and 82% for college graduates.[85] Thus, the percentage of young Mexicans interested in higher education is greater than in other countries; 49% of fifteen-year-olds want to finish a bachelor's degree, while the average in OECD countries is 44.5%.[86]

2. *Creation of a new* Licenciatura en Derecho

Héctor Fix-Fierro and Sergio López Ayllón point out that "opening a new establishment [that offers the LED] does not require a large investment. All you need is a classroom and one or several part-time professors. There is no

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[82] INSTITUTO INTERNACIONAL PARA LA EDUCACIÓN SUPERIOR EN AMÉRICA LATINA Y EL CARIBE / INTERNATIONAL INSTITUTE FOR HIGHER EDUCATION IN LATIN AMERICA AND THE CARIBBEAN (IESALC-UNESCO), INFORME SOBRE LA EDUCACIÓN SUPERIOR EN AMÉRICA LATINA Y EL CARIBE 2000-2005. LA METAMORFOSIS DE LA EDUCACIÓN SUPERIOR 247 (2006) (hereinafter referred to as "IESALC-UNESCO").

[83] ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, EDUCATION AT A GLANCE 2007, OECD INDICATORS 286-87 and 294 (2007) (hereinafter referred to as "OECD, EDUCATION AT A GLANCE 2007"), available at: *http://www.oecd.org/dataoecd/4/55/39313286.pdf*.

[84] One study that explores these ideas is: OECD, EDUCATION AT A GLANCE 2007, *supra* note 94, especially the sections "A8: How does participation in education affect participation in the labor market?" and "A9: What are the economic benefits of education?"

[85] OECD, EDUCATION AT A GLANCE 2007, *supra* note 94, at 136. See also OECD, BRIEFING NOTE FOR MEXICO, *supra* note 91, at 8.

[86] Indicator A4: What are the students' expectations for education?; Table A4.1a. Percentage of students that expect to complete different levels of education (2003), in OECD, EDUCATION AT A GLANCE 2007, *supra* note 94, at 84 (Source: OECD PISA 2003). See also OECD, BRIEFING NOTE FOR MEXICO, *supra* note 91, at 13. It is important to point out that in Mexico the percent of women that want to complete a bachelor's degree is 56%, surpassing 42% for men.

real need to invest in a library (maybe a basic one), nor [is there any need] for an ambitious research program and publications."[87] This observation refers to institutions, mainly private ones, with a low enrollment, which at present offer more that 50% of Mexico's law programs (see Table 2).

TABLE 2. ENROLLMENT IN LEDS IN THE 2006-2007 ACADEMIC YEAR

Enrollment	*Public IHEs*			*Private IHEs*			*Total*		
	LED	*%*	*Cum.*	*LED*	*%*	*Cum.*	*LED*	*%*	*Cum.*
50 or less	4	3.7	3.7	274	32.9	32.9	278	29.6	29.6
51 to 100	12	11.1	14.8	193	23.3	56.1	205	21.8	51.4
101 to 250	19	17.6	32.4	232	27.9	84.0	251	26.7	78.1
251 to 500	26	24.1	56.5	92	11.1	95.1	118	12.6	90.6
501 to 1000	12	11.1	67.6	31	3.7	98.8	43	4.6	95.2
1001 to 2500	23	21.3	88.9	10	1.2	100.0	33	3.5	98.7
2501 to 5000	8	7.4	96.3				8	.9	99.6
+ 5000	4	3.7	100.0				4	.4	100.0
LEDs	108	100.0		832	100.0		940	100.0	

SOURCE: Author's elaboration based on data from Dirección de Análisis y Sistemas de Información, SEP.

Facilities and professors are the aspects that involve the largest expense for IHEs offering a LED. According to the General Education Law, an institution's facilities must comply with the hygiene, safety and pedagogic conditions set by the authority granting permission to operate.[88] However, in most cases, having a classroom for each level and space for the administrative office is enough. The only additional required item is a library, but a single copy of the books indicated as the "bibliography" for each class is sufficient and might require fewer than 200 books.

Regarding the faculty, most institutions do not have full-time professors, but have all the courses taught by outside lecturers instead.[89] These profes-

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87 Héctor Fix-Fierro & Sergio López-Ayllón, *¿Muchos abogados pero poca profesión? Derecho y profesión jurídica en el México contemporáneo*, in DEL GOBIERNO DE LOS ABOGADOS AL IMPERIO DE LAS LEYES 1, 16 (Héctor Fix-Fierro ed., 2006).

88 Article 55, frac. II of LGE.

89 Agreement 279 establishes a minimum percentage of courses that must be assigned to full-time faculty depending on the program. Law and Legal Sciences programs are classified as professional programs, which are defined in Article 10 as "those whose graduates will, in general, have a professional practice and whose study plans do not require a high proportion of basic courses in sciences or humanities or courses exacting a large amount of

sors are usually practicing lawyers who dedicate certain hours a week to teaching a class in exchange for a meager sum. One item in the questionnaire we administered to more than 700 law professors in the 2004-2005 academic year asked how much their payment for teaching classes represented of their total income. A preliminary analysis shows that, for the most part, those payments are "a minor complement to their overall income," or "an insignificant income when compared with their other professional activities."[90]

Furthermore, the procedure to obtain the proper authorization is not complicated because one government goal is to increase access to higher education. Multiple entities may award a RVOE or incorporation, and the procedures and requirements to open a law program have been simplified. Agreements 243 and 279 strive to simplify and clearly define the requirements and procedures to obtain a RVOE. For example, there were 194 requests for LED federal recognition between 1999 and 2003; 122 of these requests received recognition, and 72 were denied it.[91] In other words, over 60% of the requests were approved.

3. *Reasons for Studying Law*

The general increase in college degrees as well as the fact that opening a new law program is relatively easy and inexpensive facilitates the increase in the availability of LED programs. However, student demand for these programs is the real motor behind the growth of law degree programs. Until 2003, the LED was the higher education program with the largest enrollment in the country, and the demand for this program continues to rise.[92]

According to a study of almost 22,000 law students in Mexico, the high demand may result from the wide range of ways future students are exposed to law and the many factors that make the profession attractive.[93] The students were exposed to law mainly through: *a)* day-to-day experi-

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time for student attention." As a result, a full-time faculty is not required for bachelor, specialization, or master's law programs. However, for doctoral programs —regardless of the field— at least 50% of the courses must be taught by a full-time professor. Article 10 of Agreement 279.

90 When asked: "Do you consider academic activities as an opportunity for you to…?," most answered that it was an opportunity to "fulfill an academic vocation," "Keep updated," and "participate in profession/transform society." Very few responded, "to obtain additional income." The results of the survey will be reported in another research article.

91 Information provided by the SSES of the SEP (March 18, 2004).

92 ANUIES, *Anuario Estadístico 2003, Licenciatura en Universidades e Institutos Tecnológicos, Resúmenes y Series Históricas* 17 (2003), available at: *http://www.anuies.mx*.

93 See Luis Fernando Perez Hurtado, *The Next Generation of Mexican Lawyers: A Study of Mexico's System of Legal Education and its Law Students* (2008) (J.S.D. dissertation, Stanford Law School), available at: *www.educacionjuridica.org* (Chapter IV: Deciding to Study Law).

ences, especially those involving violations of rights or because they perceive an environment of injustice, corruption and impunity (almost one in every five students); *b)* the influence of family members or acquaintances; *c)* contact with legal practice at a professional level; or *d)* contact during previous school levels in the form of a class, a paper, a teacher or an academic conference.

Once students have come in contact with the law, attraction to this field may be due to *a)* the contents of the study plan; *b)* the legal protection a training in law can give them or their family; *c)* the characteristics of the legal profession; and *d)* the associated personal benefits such as income, prestige and contacts.

Professionally, the *Licenciatura en Derecho* offers students a broad range of opportunities for types of professional practice and places to work. At the personal level, it represents a suitable income, access to certain social networks, as well as prestige. At the social level, it offers them the opportunity to spread democracy, social justice and the common good. It is easy to see how one or several of those motives can attract high school graduates in Mexico.

The largest increase in enrollment has been (A) in private education, especially in small IHEs and in IHEs that belong to a system of institutions; (B) in regions that offered fewer educational opportunities in the past; and (C) in places outside Major Urban Zones.

A. *The Role of Private Education*

The increase in law programs in private institutions has been particularly impressive. From the 1997-1998 academic year to the 2006-2007 academic year, their enrollment has increased 97%. The number of IHEs offering LEDs rose 177%, and the number of law programs increased by 236%.[94] In contrast, the increase in public institutions was modest. In the same period, their law enrollment grew only 8%, the number of IHEs offering LEDs increased by 61%, and the number of law programs grew 84%.[95] As of the 2004-2005 academic year, private institutions have a higher enrollment of law students than their public counterparts.

One significant reason for the growth of private IHEs is that public IHEs have been unable to meet the large demand for higher education. The

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[94] In private IHEs enrollment in law programs increased from 63,310 students to approximately 124,600, the number of IHEs with LEDs increased from 297 to 822, and the number of law programs increased from 299 to 1005. Source: Personal database and data from the Dirección de Análisis y Sistemas de Información of the SEP.

[95] In public IHEs enrollment in law programs increased from 106,900 students to approximately 115,400, the number of IHEs with LEDs increased from 67 to 108, and the number of law programs increased from 68 to 125. Source: Personal database and data from the Dirección de Análisis y Sistemas de Información of the SEP.

massification of public education in the 1970s affected educational quality and institutions' ability to properly execute their functions. As a result, they limited enrollment. Fix-Fierro and López Ayllón point out that

> According to several observers, legal education in public universities (UNAM, but also other state universities with regional prestige, such as Guanajuato, Veracruz and San Luis Potosí) was quite good in the fifties and the sixties. However, this level began to drop with the massification of the seventies. This was an important reason for the growth of private universities. Later on, however, public universities also limited their growth [of enrollment], which has offered, as we have seen, new growth opportunities for private universities.[96]

Another reason for this growth is private institutions' ability to adapt to the demand. Most of these institutions offer LEDs in a shorter time, have eliminated the thesis requirement to obtain a diploma, offer class shifts attractive to working students, have a plan of study mostly focused on the practice of law, and some of them offer specialized programs. In addition, a large number of institutions are located in areas that formerly offered few or no opportunities to pursue a higher education. Thus, they are becoming increasingly more accessible to a larger number of individuals.

Two major characteristics of most of the private institutions established in the last decade are their low enrollment and membership in a system of institutions. At present, more than half of the LEDs in private institutions have fewer than 100 students. In contrast, during the 1997-1998 academic year, only 36% of the programs had fewer than 100 students (see Table 3). That year, most law programs had between 101 and 250 students, but nowadays a large number of programs have fewer than 50 students.

Over the last decade, private institutions have also tended to create their own networks or educational "systems".[97] In the 1997-1998 academic year, there were 31 systems of private institutions with 115 IHEs and the same number of law programs. In other words, 38% of the private institutions and their law programs formed part of a system. In the 2006-2007 academic year, the numbers grew to 103 systems of private institutions with 457 IHE and 571 law programs, or 57%.[98]

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96 Héctor Fix-Fierro & Sergio López-Ayllón, *¿Muchos abogados pero poca profesión? Derecho y profesión jurídica en el México contemporáneo*, *supra* note 88, at 18.

97 As mentioned before, a System of IHEs is formed of two or more IHEs sharing the same organizational, administrative, financing, curricular, ideological and/or pedagogical structure. Each system states the characteristics or elements that unify or identify the institutions in the system. We only took into account those Systems that offer law programs at two or more of their institutions.

98 There are three systems with more than 20 private institutions: Universidad UNIVER with 37 IHE; Red UVM (Universidad del Valle de México) with 25 IHE; and Sistema UNID (Universidad Interamericana para el Desarrollo) with 22 IHE. As a basis for com-

TABLE 3. ENROLLMENT IN LEDS IN PRIVATE INSTITUTIONS (1997-1998 AND 2006-2007 ACADEMIC YEARS)

Enrollment	*1997-1998*			*2006-2007*		
	LED	*%*	*Cum.*	*LED*	*%*	*Cum.*
50 or less	66	22.1	22.1	274	32.9	32.9
51 to 100	61	20.4	42.5	193	23.2	56.1
101 to 250	92	30.8	73.2	232	27.9	84.0
251 to 500	49	16.4	89.6	92	11.1	95.1
501 to 1000	26	8.7	98.3	31	3.7	98.8
1001 to 2500	4	1.3	99.7	10	1.2	100.0
2501 to 5000	1	.3	100.0	0	0	
+ 5000	0	0		0	0	
LEDs	299	100.0		832	100.0	

SOURCE: Author's elaboration based on data from Dirección de Análisis y Sistemas de Información, SEP.

Private IHE membership in a system clearly indicates that the expansion of higher education has largely been generated by institutions or groups with experience in higher education and in institutional administration and operation. Most of these systems are run by companies, families or religious groups. An important segment of the IHEs that do not belong to a system are institutions that also offer elementary and secondary education programs. These institutions can use their facilities and experience to secure a large number of students from their own high school graduates. Therefore, most of the newly established law programs are expansion projects carried out by organizations, groups or institutions that are already involved in educational activities.

B. *Regions with Reduced Educational Opportunities*

The increase in enrollment in law programs is a nationwide phenomenon.[99] However, the largest growth has occurred in regions with lower col-

parison, the public institution system with the most IHEs is the Red UdG (Universidad de Guadalajara), with 13 institutions, followed by the Universidad Autónoma del Estado de México, with 10 institutions.

[99] ANUIES divides IHEs into 6 regions: Northwest (Baja California, Baja California Sur, Chihuahua, Sinaloa, Sonora); Northeast (Coahuila de Zaragoza, Durango, Nuevo León, San Luis Potosí, Tamaulipas, Zacatecas); Central-West (Aguascalientes, Colima, Guanajuato, Jalisco, Michoacán, Nayarit); Mexico City Region (Metropolitan Zone of Mexico City); Central-South (Guerrero, Hidalgo, México, Morelos, Puebla, Querétaro,

lege enrollment per capita (see Table 4). In general, the lower the enrollment rate, the larger the growth.

TABLE 4. ENROLLMENT GROWTH IN LEDS, BY REGION (AND COLLEGE ENROLLMENT, GDP AND POPULATION GROWTH)

	Enrollment in LEDs			*College Enrollment / 1000 hab.*[a)]	*GDP per capita (thous. of pesos)*[b)]	*% Population growth 1995 to 2005*[c)]
Region	*1997-1998*	*2006-2007*	*% Inc.*			
Northwest	21,823	28,045	28.5	17.1	38.0	18.5
Northeast	25,967	33,927	30.7	17.4	36.8	13.5
Central-West	27,607	40,683	47.4	10.1	25.2	10.2
Mexico City[d)]	44,311	55,895	26.1	22.0	50.2	11.2
Central-South[d)]	28,223	42,496	50.6	11.6	22.6	15.4
South-Southeast	22,279	37,370	67.7	9.7	20.1	13.2
Total	170,210	238,416	40.1	14.4	31.5	13.3

a) College enrollment in 1997, per 1,000 inhabitants.[100]

b) GDP per thousand of pesos in current prices for basic values in 1997, per capita.[101]

c) Population growth from 1995 to 2005.[102]

d) The college enrollment and the GDP in the Metropolitan region were calculated from the proportion of the population in the state of Mexico that form part of this region.

SOURCE: Author's elaboration based on data from INEGI and Dirección de Análisis y Sistemas de Información, SEP.

Regions with relatively larger increases were the Central-West, Central-South and South-Southeast parts of Mexico. The states with more than 100% increase in LED enrollment were Colima, Guanajuato, Hidalgo, Morelos, Querétaro, Veracruz and Quintana Roo. On the other hand, the states with decreased enrollment were Oaxaca and Guerrero. Considering

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Tlaxcala); and South Southeast (Campeche, Chiapas, Oaxaca, Quintana Roo, Tabasco, Veracruz, Yucatán). See Regiones de la ANUIES, available at: *www.anuies.mx/r_anuies/index2.php*.

100 Source: Table of College Enrollment by State 1992-2003, in ANUIES, *Anuario Estadístico 2003, Licenciatura en Universidades e Institutos Tecnológicos*, *supra* note 103, at 12.

101 The figures were calculated by dividing the population in 1995 by region and the GDP per thousands of pesos in current prices for basic values in 1997, by region. 1997 GDP Source: INEGI, *Sistema de Cuentas Nacionales de México, Producto Interno Bruto por Entidad Federativa 1997-2002* 40 (2003), available at: *http://www.inegi.gob.mx/prod_serv/contenidos/espanol/bvinegi/productos/derivada/cuentas/pib/pibef97_02.pdf*.

102 Source: INEGI, Conteos de Población y Vivienda 1995 and 2005, available at: *www.inegi.gob.mx*.

the Gross Domestic Product (GDP) per capita, most states with enrollment increases are at the middle or lower-middle level on the national scale. However, Oaxaca and Guerrero, where enrollment decreased, are two of the poorest states in Mexico. Fewer educational opportunities in these entities may be because fewer people can pay tuition at a private IHE —which offers most of the new higher education opportunities— and there are fewer opportunities for graduates to enter the job market.

C. *Locations Outside Major Urban Zones*

Most law students are concentrated in institutions located in "Major Urban Zones" (MUZ),[103] even though only half of the population of Mexico lives in those zones. This is because the larger, older or more prestigious IHEs are located in these areas, and attract students from different regions of the country. Moreover, there are more opportunities in these zones for professional growth. However, from the 1997-1998 academic year to the 2006-2007 academic year, enrollment in these zones barely exceeded the rate of growth of the general population, while enrollment outside MUZs doubled (see Table 5). Most law programs are in MUZs, but the largest increase in this number occurred outside MUZs (238%).

TABLE 5. ENROLLMENT IN LEDS BY MAYOR URBAN ZONE (1997-1998 AND 2006-2007 ACADEMIC YEARS)

	Enrollment 97-98	*%*	*Enrollment 06-07*	*%*	*Population Growth*	*Enrollment Growth*
No MUZ	19,833	11.7	46,766	19.6	8.2	135.8
MUZs	150,377	88.3	191,650	80.4	18.3	27.4
Mexico City	44,311	29.5	55,906	29.2	11.2	26.2
Guadalajara	11,820	7.9	15,128	7.9	17.6	28.0
Monterrey	9,239	6.1	10,475	5.5	20.6	13.4
Puebla	8,032	5.3	9,058	4.7	23.9	12.8
Toluca	2,705	1.8	4,401	2.3	28.4	62.7
Other MUZs	74,270	49.4	96,682	50.4	23.4	30.2
Total	170,210	100.0	238,416	100.0	13.3	40.1

SOURCE: Author's elaboration based on data from INEGI and Dirección de Análisis y Sistemas de Información, SEP.

103 The Major Urban Zones are state capitals (and, if the case, the entire metropolitan area), Mexico City and metropolitan areas that, according to the INEGI classification in 2005 had more than 500,000 inhabitants. See INEGI, Delimitación de las Zonas Metropolitanas de México (2004), available at: *www.inegi.gob.mx/est/contenidos/espanol/metodologias/otras/zonas_met.pdf* (visited on October 24, 2007).

Regarding specific MUZs, relatively greater growth took place in the Toluca Metropolitan Zone, while enrollment in the Monterrey and Puebla Metropolitan Zones increased less than that of the population growth. This phenomenon may be due to two factors. First, Monterrey and Puebla have had a large number of IHEs for many years and so may have provided adequate coverage for their population. Second, these cities have traditionally attracted many students from different regions of the country. However, these students now have more opportunities to receive a higher education in their localities, making it likelier that they stay in their "home" region.

V. Summary of Principal Findings and Conclusions

1) The quality and structure of Mexican legal education directly affects the quality of the professional services lawyers offer, as well as the quality and efficiency of Mexico's legal system. Despite its importance, there are only a few studies on Mexican legal education and very little is known about the subject. This study aims to provide information about the subject by analyzing the structure of Mexico's system of legal education, specifically the content and structure of the law programs and the procedure to obtain the license to practice law.
2) In a narrow sense, the term Mexico's system of legal education refers to the necessary studies and requirements for obtaining a license to practice as a lawyer. At first glance, the process that allows an individual to practice law seems to be straightforward. After graduating from high school, a student begins the *Licenciatura en Derecho* at an institution that is part of the National Education System. There, the student takes the requisite courses, meets the institution's graduation requirements, and earns the degree diploma. The student then registers the diploma at the General Office for Professional Practice, and finally receives the license (*cédula profesional)*, which allows that individual to practice as a lawyer throughout the country. However, each of the steps may present some variations depending on the specific case; for instance, there are different ways for an institution to be part of the National Education System, each of them with its own requirements and procedures. The way in which each IHE enters the system determines the degree of academic and administrative freedom the institution has and, consequently, the flexibility to define the requirements that its students must meet in order to obtain the law degree and the license to practice law.
3) In general, law students take between 40 and 70 mandatory courses during the law program. Moreover, each institution integrates some courses that reflect its identity or ideology into its study plans, as well as courses in one or several law areas if the program has a particular

specialization. Despite the relative freedom that IHE have to define study plans and programs, they do not differ significantly in the content of the law programs that they offer. This uniformity is the result of the strong belief among lawyers regarding a "core" of knowledge that every law student must acquire, the lack of appropriate proposals promoting change, and the standardized process for recognizing study plans and programs for most private IHE. Existing differences do not center on the content of the study plan, but rather on the program structure and development, including the degree of flexibility, division, duration and class shift.

4) Mexico's system of legal education has increased in size dramatically. Even though employment prospects for most law graduates are not very optimal, enrollment in legal education programs has grow by 41% in the past decade, with a corresponding 156% increase in the number of IHE offering a law program, and a 208% increase in *Licenciaturas en Derecho*. In other words, during the past ten years, every week, an institution began to offer one or two new LED programs to 134 new law students. The principal causes of this growth include: 1) the increased availability of higher education in Mexico, in general, as a response to the growing demand for higher education programs; 2) the ease with which a new law program could be started, including the low investment required; and 3) the diverse reasons that students have to study law. The largest increases have been in *a)* private education, especially in small IHE and in IHE that belong to a system of institutions; *b)* regions that formerly offered fewer educational opportunities; and *c)* locations outside of the Major Urban Zones.
5) The rapid growth in the number of institutions that offer law degrees as well as the new role of law in Mexico require a clear definition of what basic legal knowledge is and who can practice law. Debates and initiatives addressing this challenge should be based on reliable, updated information, as well as on meaningful and systematic research on this subject. This study aims to provide useful information for the endeavors and serve as a catalyst for new research on the matter.

VI. Field Work

In late 2003, I attended the conferences held by the associations of more than two hundred law schools in Mexico and Latin America, such as: the Association of Law Colleges, Schools and Institutes in Latin America (*Asociación de Facultades, Escuelas e Institutos de Derecho de América Latina*), and the Mexican National Association of Law Colleges, Schools, Departments, and Research Institutions (*Asociación Nacional de Facultades, Escuelas de Derecho, De-*

partamentos de Derecho e Institutos de Investigación Jurídica). I spoke with experts in the field, who helped me develop the best approach for our study.

The next step was to identify those in charge of enforcing the regulatory framework and conduct semi-structured interviews to learn their functions and the way the regulatory framework is applied. In March 2004, I visited the Ministry of Education's Office of the Undersecretary of Higher Education (*Subsecretaría de Educación Superior*, formerly known as the Office of the Undersecretary of Higher Education and Scientific Research). I also went to the General Office of Higher Education (*Dirección General de Educación Superior*), which includes the Office of Private Institutions of Higher Education, the Office of Planning and Evaluation of Higher Education, and the Office of University Subsidies; and the General Office of Professions (*Dirección General de Profesiones*), which comprises the Office of Authorization and Professional Registration and the Office of Professional Associations.[104] While there, I interviewed the Undersecretary as well as all the heads of the general offices with its corresponding offices.

Afterwards, I gathered all available data on legal education and the legal profession regarding public and private entities. The main sources of information were the Ministry of Education's General Office of Planning and Programs, and the National Association of Universities and Institutions of Higher Education (*Asociación Nacional de Universidades e Instituciones de Educación Superior*, or ANUIES). This was a rather complex process in view of the limited and sometimes unreliable information. The federal government gathers information about students, teachers and institutions nationwide by means of Ministry of Education Statistic Questionnaires on Higher Education.[105] Based on this, the ANUIES annually publishes catalogs with data on different aspects of higher education. From the Ministry of Education (*Secretaría de Educación Pública*, or SEP), I obtained the data from statistical questionnaires on IHEs offering the *Licenciatura en Derecho* from 1997 to date and on LED students in the 2004-2005 academic year. However, these statistical questionnaires are incomplete since the SEP does not have a complete and updated list of all the institutions that offer this degree.

I developed an updated list of all the institutions that offer the *Licenciatura en Derecho* with information on the institutions, their students and their programs.[106] After several months, I was able to complete a list of 930 institu-

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104 I also interviewed directors of the General Registar's Office and the General Office of Incorporation and Validity of Studies at the Universidad Nacional Autónoma de México (UNAM).

105 A telephone interview with Fernando Ulises González Colorado, Director, Dirección de Sistemas de Información de la Secretaría de Educación Pública (November 16, 2006).

106 To develop this database, I: (1) combined different existing lists, such as the Subsecretaría de Educación Superior de la SEP (*www.ses4.sep.gob.mx*), Dirección General de Planeación y Programación de la SEP (*www.dgpp.sep.gob.mx*), ANUIES (*www.anuies.mx*), Uni-

tions that offered 1,130 law programs at the beginning of the 2006-2007 academic year.[107]

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versia (*www.universia.net.mx*), UNIoportunidades (*www.unioportunidades.com.mx*), Instituto de Investigaciones Jurídicas de la UNAM (*www.juridicas.unam.mx/navjus/esc*), Guía Universitaria Reader's Digest (Special Edition, Year 2, No. 2, 2004); (2) consulted lists of private IHEs and the programs recognized by authorities and accreditation institutions, such as federal government lists (*e.g.*, Subsecretaría de Educación Superior, SEP, in *www.ses4.sep.gob.mx*); state governments (*e.g.*, Chiapas, en *www.educacionchiapas.gob.mx/1024/es3.htm*), and autonomous universities (*e.g.*, UNAM, in *www.dgire.unam.mx*); (3) called dozens of lawyers and law faculty members; (4) conducted a broad internet search. When this list was completed, it was verified with the official web page of each institution that offers an LED. For those without a web page, the information was verified by phone. Finally, in the case of not having an IHE's number (or in the case the IHE did not have a phone line, as happened in some cases), I resorted to personal contacts, lawyers, an authority or another IHE in the region that might be related to the institution, to verify the information.

107 The database is available at *www.educacionjuridica.org*.

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LEGISPRUDENCE: THE ROLE AND RATIONALITY OF LEGISLATORS —*VIS-À-VIS* JUDGES— TOWARDS THE REALIZATION OF JUSTICE*

Imer B. FLORES**

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I. INTRODUCTION

Putting justice in its place as the legal value *per antonomasia* and the political/social and ethical/moral virtue *par excellence* implies readdressing —and redressing— some (mis)conceptions about it and requires reassessing —and restoring— some (mis)interpretations on its relation to legal officials and op-

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erators, as well as lawyers and citizens, but especially to legislators and judges. In that sense, in this article I intend to: 1) contrast several ideas related to the realization of justice, in general;[1] 2) contest the idea that due to their respective roles, legislators and judges necessarily compete against each other and therefore are in conflict, in particular;[2] and 3) consider some of the new developments in make-law in the pursuit of rationality in legislation and its relationship with adjudication.[3] Accordingly, this paper is divided into three main parts:

In the first part, I will contrast two basic conceptions of "justice". In one sense, "justice" is considered totally subjective and as such it is neglected as a (valid) scientific claim. In another, "justice" is deemed not completely subjective and as such it is accepted but seems to be reduced to being literally and uncritically applied by judges to whatever was enacted as law by legislators or law-abiding conduct. In contrast, I claim that "justice," if correctly understood, must first be objective —or at least without anything precluding its existence as such; and, second, cannot be reduced to being applied literally and uncritically by either judges or as mere law-abiding conduct. There is yet another idea I would like to challenge, but due to limited space here I will only mention it in passing: "justice" is valuated as necessarily in conflict with other (legal) values such as (legal) certainty and security, but, if correctly understood, "justice" comprises the realization of all (legal) values, including (legal) certainty and security.

In the second part, I will contest the idea that legislators and judges are inevitably in competition and conflict. The implication not only comprises the conflictive views on justice held by legislators and judges, but also the assumption according to which the conflict must be solved in favor of the legislative view. On the contrary, I contend that legislators and judges are

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[1] See Imer B. Flores, *Assessing Democracy and Rule of Law: Access to Justice*, in PROCEEDINGS OF THE 21ST IVR WORLD CONGRESS, LUND (SWEDEN), 12-17 AUGUST, 2003, PART I: JUSTICE 146-154 (Aleksander Peczenik ed., Franz Steiner Verlag, 2004).

[2] See Imer B. Flores, *The Living Tree: Fixity and Flexibility. A General Theory of (Judicial Review in a) Constitutional Democracy?*, 2 PROBLEMA. ANUARIO DE FILOSOFÍA Y TEORÍA DEL DERECHO 285 (2008).

[3] See Imer B. Flores, *The Quest for Legisprudence: Constitutionalism v. Legalism*, in THE THEORY AND PRACTICE OF LEGISLATION: ESSAYS ON LEGISPRUDENCE 26-52 (Luc J. Wintgens ed., Ashgate, 2005); and, *Legisprudence: The Forms and Limits of Legislation*, 1 PROBLEMA. ANUARIO DE FILOSOFÍA Y TEORÍA DEL DERECHO 247 (2007) (There are two previous versions: *Legisprudence: The Forms and Limits of Legislation*, in PROCEEDINGS OF THE 22ND IVR WORLD CONGRESS GRANADA 2005, VOLUME I: LEGAL THEORY/TEORÍA DEL DERECHO. LEGAL POSITIVISM AND CONCEPTUAL ANALYSIS/POSITIVISMO JURÍDICO Y ANÁLISIS CONCEPTUAL 194-202 (José Juan Moreso ed., Franz Steiner Verlag, 2007); and *Lon L. Fuller's Implicit Laws of Lawmaking: The Forms and Limits of Legislation*, 5 DE LEGIBUS. REVIEW OF THE HARVARD LAW SCHOOL ASSOCIATION OF MEXICO 83 (2006).

not in competition and conflict and hence, collaboration and cooperation provide a better understanding of the role and rationality of both legislators and judges towards the realization of justice in its best (moral) light, which can be either the legislative perspective or the judiciary point of view.[4]

In the third and last part, I will consider some of the new developments in make-law, the two most important ones being: the appearance —or re-appearance— of legisprudence, (*i.e.* a term coined more than half century ago to describe —and even to prescribe— a (new) theoretical approach or theory of legislation, which implies not only leveling the legal playing field, but also reincorporating legislation into the center of legal studies next to adjudication);[5] and, as a consequence, the emergence —or reemergence— of the rationality of legislation —and its relationship with adjudication— to the forefront of legal discussion.[6]

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[4] See WILFRID J. WALUCHOW, A COMMON LAW THEORY OF JUDICIAL REVIEW. THE LIVING TREE (Cambridge University Press, 2007); Wilfrid J. Waluchow, *A Common Law Theory of Judicial Review*, 1 PROBLEMA. ANUARIO DE FILOSOFÍA Y TEORÍA DEL DERECHO 117 (2007); and, *Constitutions as Living Trees: An Idiot Defends*, 43 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 207 (2005); and, Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE LAW JOURNAL 1346 (2006).

[5] See Julius Cohen, *Towards Realism in Legisprudence*, 59 THE YALE LAW JOURNAL 886 (1950); and *Legisprudence: Problems and Agenda*, 11 HOFSTRA LAW REVIEW 1163 (1983); and Luc J. Wintgens, *Rationality in Legislation. Legal Theory as Legisprudence: An Introduction* and *Legislation as an Object of Study of Legal Theory: Legisprudence*, in LEGISPRUDENCE: A NEW THEORETICAL APPROACH TO LEGISLATION 1-7 and 9-39 (Luc J. Wintgens ed., Hart Publishing, 2002); and, *Introduction* and *Legisprudence as a New Theory of Legislation*, in THE THEORY AND PRACTICE OF LEGISLATION…, *supra* note 3 at 3-25.

[6] See LON L. FULLER, THE MORALITY OF LAW 39 (2nd ed., Yale University Press, 1969); Lon L. Fuller, *Implicit Elements in Made Law*, in THE ANATOMY OF LAW 91-110 (Frederick A. Praeger, 1968); Norberto Bobbio, *Le bon législateur* (*The Good Legislator*), in *Le raisonnment juridique/Legal Reasoning/Die juridische Argumentation* 243-249 (Hubert Hubien ed., Établissements Émile Bruylant, 1971); and, Manuel Atienza, *Sociología jurídica y ciencia de la legislación* (*Legal Sociology and The Science of Legislation*), in EL DERECHO Y SUS REALIDADES. INVESTIGACIÓN Y ENSEÑANZA DE LA SOCIOLOGÍA JURÍDICA 41-70 (R. Bergalli ed., PPU, 1989); *Contribución a la teoría de la legislación* (*Contribution to the Theory of Legislation*), 6 DOXA 385 (1989); *Para una teoría de la argumentación jurídica* (*For a Theory of Legal Argumentation*), 8 DOXA 39 (1990); *Razón práctica y legislación* (*Practical Reason and Legislation*), 3 REVISTA MEXICANA DE ESTUDIOS PARLAMENTARIOS 9 (1991); MANUEL ATIENZA, CONTRIBUCIÓN A LA TEORÍA DE LA LEGISLACIÓN (Contribution to the Theory of Legislation) (Tecnos, 1997); LAS RAZONES DEL DERECHO. TEORÍAS DE LA ARGUMENTACIÓN JURÍDICA (The Reasons of Law. Theories of Legal Argumentation) (Centro de Estudios Constitucionales, 1997); and Manuel Atienza, *Reasoning and Legislation* in THE THEORY AND PRACTICE OF LEGISLATION..., *supra* note 3 at 297-317. *Vid*. also EDUARDO GARCÍA MÁYNEZ, LOS PRINCIPIOS DE LA ONTOLOGÍA FORMAL DEL DERECHO Y SU EXPRESIÓN SIMBÓLICA (THE PRINCIPLES OF THE FORMAL ONTOLOGY OF LAW AND ITS SYMBOLIC EXPRESSION) (Imprenta Universitaria, 1953); and IMER B. FLORES, EDUARDO GARCÍA MÁYNEZ (1908-1993) 50-59 (UNAM-IIJ, 2007).

II. The Realization of Justice

Let me start by recalling that it is commonplace to affirm not only that *justice* is the major legal *value* and the superior political/social and ethical/moral *virtue*, but also that justice is an *end* in itself and *law* is the *means* to that end. It is worth mentioning that the primacy of justice as the legal value *per antonomasia* or the political/social and ethical/moral virtue *par excellence* is not unchallenged. Marcus Tullius Cicero's long-established claim is forthright: *Ollis salus populi, suprema lex est* ("Let the good of the public be the supreme law" or "The welfare of the people shall be the supreme law").[7] But Gustav Radbruch's reply is also straightforward: *iustitia fundamentum, regnorum* ("justice is justified and reigning")[8] —or alternatively as Cicero himself claimed *Iustitia enim una virtus omnium est domina et regina virtutum* ("Justice as a virtue is the ruling and queen of all virtues.")[9] Following John Rawls, we can affirm that justice is justified in a way that does not depend on any particular vision of the good and reigning, an end in itself above all other ends and regulative to such ends.[10]

It is also worth noting that the *Digest* of Justinian compiled, among others, Ulpian's definitions of both *ius* (law) as *ars boni et aequi* (art of good and fair)[11] and *iustitia* (justice) as *constans et perpetua voluntas, ius suum cuique tribuendi* (set and constant purpose of giving everyone what is due.)[12] The latter im-

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[7] Marcus Tullius Cicero, De Legibus, III, 3, § 8.

[8] Radbruch has pointed out the tensions not only between the first and second adages but also with its twins: *fiat iustitia pereat mundus* (*i.e.* "Let justice prevail even if the world perishes") (quoted by Immanuel Kant, *Appendix I. On the Disagreement between Morals and Politics in Relation to Perpetual Peace*, *The Perpetual Peace*, in Political Writings 123 (trans. H. B. Nisbet) (Hans Reiss ed., Cambridge University Press, 1970): "*fiat iustitia, pereat mundus* (*i.e.* let justice reign, even if all the rogues in the world perish)"); and *summum ius, summa iniuria* (*i.e.* "More law, less justice" or "The strict application of law leads to an injustice") (quoted by Marcus Tullius Cicero, De Officiis I, 10, § 33). *Vid*. Gustav Radbruch, *El fin del derecho*, (*The End of Law*) in Louis Le Fur *et al*., Los fines del derecho. Bien común, justicia y seguridad 55-70 (UNAM, 1981). *Vid*. also Imer B. Flores, *La definición del derecho* (*The Definition of Law*), 209-210 Revista de la Facultad de Derecho de México 81-83 (1996).

[9] Marcus Tullius Cicero, De Officiis, III, 6, § 28. *Vid*. John Rawls, A Theory of Justice § 1, 3-4 (Harvard University Press, 1971); and Michael Sandel, Liberalism and the Limits of Justice (Cambridge University Press, 1982). See also Imer B. Flores, *El liberalismo igualitario de John Rawls* (*The Egalitarian Liberalism of John Rawls*), 1 Cuestiones Constitucionales. Revista Mexicana de Derecho Constitucional, 85 (1999).

[10] See John Rawls, A Theory of Justice, *supra* note 9 at § 1, 3-6. *Vid*. also Tom Campbell, Justice (Humanities Press International, 1988); and, Brian Bix, *Justice*, in Jurisprudence: Theory and Context 103-117 (3rd ed., Sweet & Maxwell, 2003).

[11] See Iustinian, Digest, 1.1.1.

[12] *Id*., 1.1.10.

plies a two-part formula: 1) "set and constant purpose" and 2) "give everyone what is due." Traditionally, authors have focused almost exclusively on the second, and almost entirely ignored the first, the one compatible with the realization of (legal) certainty and security. In other words, once a criteria for giving everyone what is due has been set, its application must be constant.[13]

However, what is "due" to each is still an open-ended question because it is simply too vague. What does "due" actually —or eventually— mean?[14] For example, Rawls considers justice as a set of principles that "provide a way of assigning *rights* and *duties* in the basic institutions of society and they define the appropriate distribution of the *benefits* and *burdens* of social cooperation."[15] But which of those rights and duties, benefits and burdens are to be assigned or distributed? Furthermore, for someone else, "due" might mean something else in keeping with differing moral and political outlooks. For instance, David Miller identifies three independent "interpretations of justice which may be summarized in three principles: to each according to his rights; to each according to his deserts; to each according to his needs." Similarly, Michael Walzer pinpoints three distributive principles: "free exchange," "desert," and "need" and, consequently, points out the existence of the different "spheres of justice."[16]

While everyone agrees that justice is by definition giving people what is "due," there appears to be little agreement concerning what it is "due" for them. In sum, there is apparently one concept of justice but as many conceptions of it as there are authors. Some emphasize one principle over another,[17] *e.g.* liberty over equality and vice versa;[18] and others, even one ver-

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[13] See Imer B. Flores, *La definición del derecho*, *supra* note 8 at 81-83.

[14] See Hans Kelsen, *What is Justice?* in WHAT IS JUSTICE? JUSTICE, LAW AND POLITICS IN THE MIRROR OF SCIENCE 1-24 (University of California Press, 1971).

[15] JOHN RAWLS, A THEORY OF JUSTICE, *supra* note 9, at § 1, p. 4 (The emphasis is mine).

[16] See DAVID MILLER, SOCIAL JUSTICE 27 (Clarendon Press, 1976); and, PRINCIPLES OF SOCIAL JUSTICE (Harvard University Press, 1999); and, MICHAEL WALZER, SPHERES OF JUSTICE. A DEFENSE OF PLURALISM AND EQUALITY 21-26 (Basic Books, 1983). *Vid.* also DAVID MILLER & MICHAEL WALZER (eds.), PLURALISM, JUSTICE AND EQUALITY (Oxford University Press, 1995).

[17] For some of the debates on liberty or equality, distribution/state intervention or property rights, justice or efficiency: *vid.* JOHN RAWLS, A THEORY OF JUSTICE, *supra* note 9; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (2nd ed. Harvard University Press, 1978); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (Basic Books, 1974); and, Amartya Sen, *Rawls* versus *Bentham: An Axiomatic Examination of the Pure Distribution Problem*, 4 THEORY AND DECISION 301 (1974).

[18] See RONALD DWORKIN, A MATTER OF PRINCIPLE 188 (Harvard University Press, 1985): "Unfortunately, liberty and equality often conflict: sometimes the only effective means to promote equality require some limitation of liberty, and sometimes the consequences of promoting liberty are detrimental to equality."

sion of a principle over an alternative or alternatives, *v.gr.* instead of enforcing equality of *welfare*, authors are implementing equality of *capabilities* (Amartya Sen), *opportunities* (G. A. Cohen and John E. Roemer), and *resources* (Ronald Dworkin).[19]

Notwithstanding its open-ended formulation, the second part of the definition of justice is not a weakness, but strength in itself. Justice is not a meaningless empty or rigid concept but a meaningful rich and flexible one, requiring that conditions for its application be adaptable and revisable from place-to-place and time-to-time in case-by-case scenarios. What is more, it is the first part that provides a fixed point. Once a criteria of justice is "set" (established by a legitimate authority such as a legislator or a judge —and even by other legal officials), it must be "constant" (applied to like cases in a similar fashion and to dislike cases in a different one).

Let me bring to mind that Aristotle devoted the "Book V" of the *Nichomachean Ethics* to the analysis of "Justice" and "Injustice."[20]

"Now we observe that everybody means by Justice that moral disposition which renders men apt to do just things, and which causes them to act justly and to wish what is just; and similarly by Injustice that disposition which makes men act unjustly and wish what is unjust."

However, he realized that the terms were "used in several senses, but as their equivocal uses are closely connected, the equivocation is not detected" and proceeded to uncover the equivocation by distinguishing between two different senses of "just" and "unjust."[21]

> Let us then ascertain in how many senses a man is said to be "unjust." Now the term "unjust" is held to apply both to the man who breaks the law and the man who takes more than his due, the unfair man. Hence it is clear that the law-abiding man and the fair man will both be just. "The just" therefore means that which is lawful and that which is equal or fair, and "the unjust" means that which is illegal and that which is unequal or unfair.

Accordingly, in the first sense "just" means that which is legal or lawful and "unjust" that which is illegal or unlawful. In the second, "just" means that which is equal or fair and "unjust" that which is unequal or unfair.

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[19] See AMARTYA SEN, INEQUALITY REEXAMINED (Harvard University Press, 1992); G. A. Cohen *On the Currency on Egalitarian Justice*, 99 ETHICS (1989); and G. A. COHEN, IF YOU'RE AND EGALITARIAN, HOW COME YOU'RE SO RICH? (Harvard University Press, 2000); JOHN E. ROEMER, EQUALITY OF OPPORTUNITY (Harvard University Press, 1998); and Ronald Dworkin, *What is Equality? Parts 1 and 2*, in SOVEREIGN VIRTUE. THE THEORY AND PRACTICE OF EQUALITY 11-64 and 65-119 (Harvard University Press, 2000).

[20] Aristotle, *Nicomachean Ethics*, Book V, 1129[a], in THE GREAT LEGAL PHILOSOPHERS. SELECTED READINGS IN JURISPRUDENCE 16 (Clarence Morris ed., University of Pennsylvania Press, 1959).

[21] *Id.*

With this in mind, we can proceed to contrast the two ideas already outlined:

(1) "Justice" —in the Aristotelian use of just that refers to equal and fair by implying a value judgment— is considered entirely subjective and is discounted as a (valid) scientific claim by legal positivists like Hans Kelsen.

The Austrian jurist not only censured the open-ended formulation of justice for providing justification to any social order —capitalist or socialist, democratic or aristocratic— but also condemned it for requiring a valuation (a value judgment) and, as such, for being relative and subjective.[22] He severely criticized both points, which imply moral judgments, for being inconsistent with a scientific description of law, as the one his "pure theory of law" aimed to provide.[23]

By definition, legal positivists maintain that there is no necessary conceptual relation between law and morality —or for that purpose between law and justice— (the so-called *separation thesis*) and for the most part retain a form of value-skepticism, *i.e.* the impossibility of considering values as objective —and determinate. This sort of skepticism is analogous to the rule-skepticism of the legal realists, *i.e.* the impossibility of considering legal rules as objective —and determinate.

Moreover, if H. L. A. Hart[24] was right in responding analytically that, despite the existence of subjective elements in its creation and application, rules are to a certain degree objective to govern or guide human conduct. I do not see why we cannot continue along this line to state that, despite the presence of subjective elements in its recollection and recreation values —including principles such as justice— are objective. By failing to apply this distinction in the second case, analytical legal philosophers are compromising the first one as well. Why can they affirm that it is possible in one case and not in the other? In contrast, I would like to advise my analytical friends to be more —and not less— analytical by introducing a distinction between "justice for me/you" and "justice in itself:" the former being a *subjective* appraisal whilst the latter, an *objective* value.[25]

Consider the following example. Imagine that via an executive decree, the government exercises its eminent domain by taking private property from legitimate owners for public use and paying them a compensation that

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[22] See Hans Kelsen, *What is Justice?*, *supra* note 14 at 1-24.

[23] See HANS KELSEN, THE PURE THEORY OF LAW 1 (trans. Max Knight) (University of California Press, 1967). See also Brian Bix, *Hans Kelsen's Pure Theory of Law*, in JURISPRUDENCE…, *supra* note 10 at 56.

[24] See H. L. A. HART, THE CONCEPT OF LAW 124-154 (2nd ed., Oxford University Press, 1994).

[25] See EDUARDO GARCÍA MÁYNEZ, EL PROBLEMA FILOSÓFICO-JURÍDICO DE LA VALIDEZ DEL DERECHO [THE LEGAL-PHILOSOPHICAL PROBLEM OF LEGAL VALIDITY] 37 (Imprenta Mundial, 1935). See also IMER B. FLORES, EDUARDO GARCÍA MÁYNEZ…, *supra* note 6 at 30-41.

apparently satisfy the criteria set by the legislature —or the framers for that purpose.[26] One owner may be right in believing it an *injustice for him or her* to have to give up a piece of land, especially when the government could be taking property from another neighbor, but those are *subjective* appreciations. However, the very same owner is certainly right in considering it an *injustice in itself* if the government fails to justify the takings for public use or fails to pay compensation, specifically if it is willing to pay the neighbor, but those are *objective* evaluations.

It is clear that in the search for a (valid) scientific claim, the *objective* sense of justice ("in itself") ought to prevail over the *subjective* one ("for me/you"). To that extent, justice —if correctly understood— is and must be an objective value or virtue. Additionally, nothing precludes the legislature —or the judiciary— from developing the criteria that justice must meet in order to be and remain objective as in the previous example by requiring both public use and compensation. To clarify, this is not to say that law is just, but that law must tend toward the realization of justice objectively and not subjectively by both legislators and judges, as well as by other legal officials.

(2) "Justice" —in the Aristotelian use of just that refers to legal or lawful— is regarded not wholly subjective or accepted *prima facie* as objective, but it seems to be reduced to literal and uncritical application by judges of whatever passes as law by legislators or mere law-abiding conduct by other legal officials and citizens, deferring completely to the legislative branch or taking what has been enacted literally.

In Aristotle's words:[27]

> Again, we saw that the law-breaker is unjust and the law-abiding man just. It is therefore clear that all lawful things are just in one sense of the word, for what is lawful is decided by legislature and the several decisions of the legislature we call rules of justice. Now all the various pronouncements of the law aim either at the common interest of all, or at the interest of a ruling class determined either by the excellence or in some similar way; so that in one of its senses the term "just" is applied to anything that produces and preserves the happiness, or the component parts of the happiness, of the political community.

There is clearly a problem. This notion of justice is based not only on the assumption that legislators are rational and that whatever the legislature decides is legal or lawful and in the common interest of all, but also on the presumption that the legislature is truly representative of the people and

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[26] The article 27 of the Mexican Constitution establishes two requirements for takings: (1) taken for "public use," and (2) through "compensation;" whereas the Amendment V of the United States requires it be: (1) taken for "public use"; and (2) through "just compensation."

[27] Aristotle, *Nicomachean Ethics*, Book V, 1129^{b}, *supra* note 20 at 16-17.

a legitimate form of self-government in a democracy or republic.[28] Instead of taking this for granted, I would like to suggest that legislators and judges —as well as other legal officials— must meet certain criteria in order for them and their decisions to be —and remain— truthfully objective.[29]

Consider the takings example again. Imagine that the government, via an executive decree, justifies the takings for public good, but is willing to pay a ridiculous amount as compensation. Is the executive meeting the criteria set by the legislative branch —or the framers? Would the takings be legal or lawful? Would it be in the common interest of all? Could the executive argue that the law only requires paying "compensation" and that he or she is doing so? Furthermore, do judges need to apply it literally and uncritically or is mere law-abiding conduct sufficient? In that sense, do law and justice entail a literal and uncritical approach?

In a nutshell, "justice" —if correctly understood— cannot be reduced either to a literal and uncritical application by judges or mere law-abiding conduct by legal officials and citizens. A critical —and hence an evaluative— but still objective approach to law and justice is indispensable: "something like" Rawls' "reflective equilibrium" or even Hart's "critical reflective attitude."[30] In that sense, either the legislator —and for that purpose the framer— or the judge can explicitly make objective conditions implicit in the term "compensation" requiring it to be "fair" or "just" to truly be so. The framers of the United States Constitution did succeed in explicitly requiring a "just compensation" in the Fifth Amendment , while the framers of the Mexican Constitution failed by merely requiring "compensation." However, in interpreting such a norm and its purpose, judges must, not literally, but critically, say that the compensation must be objectively and not

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[28] We are already disregarding the possibility of law being only on the interest of the ruling class since it is incompatible with the idea of self-government (in a democracy or republic). See Jeremy Waldron, *Dirty Little Secret*, 98 COLUMBIA LAW REVIEW 522 (1998): "[T]o start the construction of a jurisprudence appropriate to the aspiration of a free people to govern themselves under laws that they themselves have made." See also Jean-Jacques Rousseau, *On the Social Contract* in THE BASIC POLITICAL WRITINGS (trans. Donald A. Cress) (Hackett, 1987); and Immanuel Kant, *The Metaphysics of Morals* in POLITICAL WRITINGS, *supra* note 8 at 131-175.

[29] See EDUARDO GARCÍA MÁYNEZ, LOS PRINCIPIOS DE LA ONTOLOGÍA FORMAL…, *supra* note 6 at 5-6. *Vid*. also IMER B. FLORES, EDUARDO GARCÍA MÁYNEZ…, *supra* note 6 at 50-59.

[30] See JOHN RAWLS, A THEORY OF JUSTICE, *supra* note 9 at 20-21 and 48-51; and, H. L. A. HART, THE CONCEPT OF LAW 57, *supra* note 24. Elsewhere I have criticized Hart's "critical reflective attitude" as uncritically developed by him and his disciples, but have endorsed the necessity of adopting the internal point of view and the need for a critical reflective attitude —or at least "something like" it. See Imer B. Flores, *In the Dark Side of the Conventionality Thesis?*, in STUDIES IN SOCIAL, POLITICAL AND LEGAL PHILOSOPHY. PHILOSOPHY OF LAW AND OF POLITICS 155-156 (Enrique Villanueva ed., Rodopi, 2002).

subjectively "fair" or "just" to truly be so. The judge is not legislating out of the blue —or inventing— these conditions, but interpreting the principles embedded in the term "compensation," which implies the objective criteria to be fair or just.

It is now clear that "justice" —as a result of (1) and (2)— has been looked upon as an openly subjective matter of law creation or make-law, a justified political decision by legislatures; and, paradoxically, as a literal and uncritically objective matter of law application or find-law, seen as a legitimate technical decision as long as the courts defer to whatever was decided by the legislature and whenever they depart from it —or even exercise discretion— it becomes a presumably subjective matter of law creation or make-law, under the form of "judicial legislation" or "judicial usurpation."[31] On the contrary, "justice" should be regarded as a critical and objective matter of law creation or make-law and law application or find-law, by legislators and judges, as well as other legal officials, who meet and must meet the same criteria of legal rationality.[32]

III. The Role of Legislators *vis-à-vis* Judges

As mentioned above, I contest not only the idea that legislators and judges are necessarily in competition and therefore in conflict, but also the implication that in the event of holding conflicting views on justice in a matter, it is assumed that the disagreement must be solved unwaveringly in favor of the legislative view.

This idea derives from a notion advocated by legal formalists and positivists, who hold that presumably any political decision by the legislative branch is justified solely due to its elective-representative character; whereas a technical decision of the judiciary is legitimated as long as the court defers to whatever was previously decided by the legislature, because of their non-elective and non-representative nature. But, whenever the court has to depart from the legislature or exercise its discretion, it appears to be illegitimately assuming a legislative role. Apparently, in case of conflict between the legislature and the court, the former ought to prevail over

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[31] See H. L. A. Hart, *American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, in Essays in Jurisprudence and Philosophy 128 (Clarendon Press, 1983); and, Lon L. Fuller, *The Case of the Speluncean Explorers*, 112 Harvard Law Review 1858 (1999). *Vid*. also H. L. A. Hart, The Concept of Law, *supra* note 24 at 204: "Laws require interpretation if they are to be applied to concrete cases, and once the myths which obscure the nature of the judicial processes are dispelled by realistic study, it is patent… that the open texture of law leaves a vast field for a creative activity which some call legislative."

[32] See *infra* IV. The Rationality of Legislation —and Adjudication.

the latter, due merely to its elective-representative nature following James Madison's maxim: "In republican government, the legislative authority necessarily predominates."[33]

However, the mere existence of elections or the fact of being elected is neither a necessary nor a sufficient condition for being representative —or even democratic. To recall Jean-Jacques Rousseau's criticism:[34]

> Sovereignty cannot be represented for the same reason that it cannot be alienated. It consists essentially in the general will, and the will does not allow of being represented. It is either itself or something else; there is nothing in between. The deputies of the people, therefore, neither are nor can be its representatives; they are merely its agents. They cannot conclude anything definitively. Any law that the populace has not ratified in person is null; it is not a law at all. The English people believes [*sic*] itself to be free. It is greatly mistaken; it is free only during the election of the members of parliament. Once they are elected, the populace is enslaved; it is nothing.

If judges were elected —and some actually are— the assumption in favor of the legislator would fade. Despite the fact of not being elected directly by the people, judges can still be considered as a "representative" agent designated indirectly by them through a "representative" agent —such as the executive or the legislative— and even protective of minorities against the will of the majorities.[35]

Whereas legislators are —or can be— held accountable for their political decisions, judges are *prima facie* politically unaccountable for their technical decisions. If judges were held accountable —and some actually are— the presumption in favor of the legislator would also fade. Hence, there is no conclusive reason for supposing that the legislative view ought to prevail in case of conflict over judges, due to the "false necessity" of their elective-representative and politically accountable position.[36] Moreover, the very idea of being in competition and in conflict is false or falsifiable, and must be replaced by the notion of collaboration and cooperation; as Fuller

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[33] James Madison, *No. 51*, in ALEXANDER HAMILTON *ET AL.*, THE FEDERALIST PAPERS 322 (Mentor, 1961).

[34] Jean-Jacques Rousseau, *On the Social Contract*, Book III, Chapter XV, *supra* note 28 at 198.

[35] See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 17; and, Ronald Dworkin *Introduction: The Moral Reading and the Majoritarian Premise*, in FREEDOM'S LAW. THE MORAL READING OF THE AMERICAN CONSTITUTION 1-38 (Harvard University Press, 1996); and, JOHN HART ELY, DEMOCRACY AND DISTRUST. A THEORY OF JUDICIAL REVIEW (Harvard University Press, 1980).

[36] See ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY (Cambridge University Press, 1987).

suggested: "The correction of obvious legislative errors or oversights is not to supplant the legislative will, but to make that will effective."[37]

According to Duncan Kennedy, the notion of competition and conflict derives from the "great dichotomies" between legal and political theory. Examples of these are the distinctions adjudication and legislation, law-application and law-creation, find-law and make-law, judges and legislators, courts and legislatures, and so on, all of which reinforce the apparent separation between law and politics.[38]

Correspondingly, it is held that adjudication as law-application or find-law by judges in courts belongs to the legal domain and legislation as law-creation or make-law by legislators in legislatures corresponds to the political realm. Interestingly, in adjudication the political and ideological element is overlooked and underestimated, while in legislation the political and ideological one is taken for granted and overestimated. Likewise, adjudication appears to be totally objective and the political element absolutely minimized, whilst legislation seems to be wholly subjective and the political element completely maximized.

Furthermore, it is alleged that "adjudication is what courts do and legislation is what legislatures do… But it is perfectly possible for a legislature to adjudicate and for a court to legislate."[39] As Fuller highlighted: "[T]he distinction between legislative and judicial functions, today taken for granted, is a comparatively modern development."[40] In fact, as he states: "The English Parliament in its origin was primarily an adjudicative or 'law-finding' body, and it only gradually began openly to assert legislative powers."[41] And, he actually brings this to light:[42]

> This is a point on which legal scholarship has diverged sharply. The old view, still not entirely abandoned, maintained that the courts do not make law at all, but merely discover or discern it. The opposing view is that the courts just as truly make law as do legislatures; the only difference is that the legislature lays down in advance a general rule, whereas the courts develop general rules gradually in the course of a case-by-case decision of controversies as they are presented for decision.

It is also said that "what legislatures do when they legislate is [create or] make law, and what courts do when they adjudicate is apply [or find] law."[43] The law-making process insists on value judgments, which appear

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37 Lon L. Fuller, *The Case of the Speluncean Explorers*, *supra* note 31 at 1859.

38 See DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) 23-38 (Harvard University Press, 1996).

39 *Id*. at 26.

40 LON L. FULLER, THE ANATOMY OF LAW, *supra* note 6 at 32.

41 *Id*. at 89-90.

42 *Id*. at 135.

43 DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION…, *supra* note 38 at 26.

to be subjective and political. Then, arguably, legislators, as elected and accountable officials, should do it and judges should abstain from legislating simply because they are *prima facie* not elected and unaccountable. The law-finding process involves questions that are apparently independent to value judgments, questions of meaning and of fact, which are objective and legal —or non-political. Thus, legal professionals as non-elected and unaccountable officials should do it and legislators should refrain from adjudicating because they are not necessarily legal professionals. As Kennedy points out:[44]

> When identified with the contrast between law making and law application, the legislation/adjudication dichotomy seems to admit of no middle term. But as soon as we shift to this broader notion of legal interpretation, it follows that adjudication involves both making and applying. But it does not follow, and is controverted, that judicial law making must be or is in fact "judicial legislation" and therefore abhorrent...

According to him, there are at least four different strategies for dealing with the problem:

1) Deny or at least ignore the possibility of a middle term, what is not law-application is law-creation, in the form of "judicial legislation;"[45]
2) Collapse the distinction between law-creating and law-applying;

    a) By demonstrating that any legal process entails both creation and application;[46] and/or
    b) By illustrating that application cannot be insulated from the ideological, political or subjective element;[47]

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[44] *Id*. at 28.

[45] See H. L. A. HART, THE CONCEPT OF LAW, *cit.* note 24 at 200: "Judicial decision, especially on matters of high constitutional import, often involves a choice between moral values, and not merely the application of some single outstanding moral principle; for it is folly to believe that where the meaning of the law is in doubt, morality always has a clear answer to offer. At this point judges may again make a choice which is neither arbitrary nor mechanical; and here often display characteristic judicial virtues, the special appropriateness of which to legal decision explains why some feel reluctant to call such judicial activity 'legislative'."

[46] See HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY § 32, 77 (trans. Bonnie Litschewski Paulson & Stanley L. Paulson) (Oxford University Press, 1992): "There is, in short, interpretation of all norms in so far as they are to be applied –that is, in so far as the process of creating and applying the law moves from one level of the legal system to the next."

[47] See ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 88-89 (The Free Press, 1975): "It is no help to have a doctrine for the justification of rulemaking unless we have one for the application of rules. Freedom requires general, impersonal, or neutral

3) Curtail the distinction to the extent that the court interstitially applies law, as a general rule, and creates law, as an exception;[48] and
4) Propose a genuine middle term between law-application and law-creation: the method of "coherence" or "fit," which concedes the ideological and political character of adjudication —and legislation— without giving up the demand for objectivity and maintaining that there is some sort of distinction between judging and legislating.[49]

In my opinion, it is imperative: first of all, to neglect points 1) and 3) completely, because they reject the plausibility of a middle term between law-creation and law-application (what is not law-application must be law-creation and vice versa) to the extent that the judiciary and judges instead of their own activity of law-finding (*ius iudicare*) should be law-making (*ius dare*) which not only does not apply to them, but also encroaches on the legislature and the legislative branch. Furthermore, in justifying this intrusion as a form of "judicial legislation" with a supposedly exceptional nature does not annul its invasive nature as "interstitial judicial legislation," which accounts for an invasion of the legislator's role and even worse an *ex post facto* legislation, regardless of how rarely this may occur.[50]

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laws. The definition of neutrality and its reconciliation with the demands of concreteness are the central themes of the theory of legislation. Once we manage to formulate an adequate doctrine of lawmaking, we still have to be able to determine what it means to apply the laws to particular cases… Unless we can justify one interpretation of rules over another, the claim of legislative generality will quite rightly be rejected as a sham. The theory of adjudication is therefore a continuation of the theory of legislation." *Vid.* also ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY. TOWARD A CRITICISM OF SOCIAL THEORY (The Free Press, 1976).

48 See Oliver Wendell Holmes Jr., *Dissenting Opinion*, in SOUTHERN PACIFIC V. JENSEN, 244 U.S. 205, 221-222 (1917): "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from 'molar to molecular motions'." *Vid.* also *The Path of Law*, 110 HARVARD LAW REVIEW 991-1009 (1997).

49 See Lon L. Fuller, *Positivism and Fidelity to Law —A Reply to Professor Hart*, 71 HARVARD LAW REVIEW 667 (1958): "This fabric [*i.e.* the interpretative process] is something we seek to discern, so that we may know truly what it is, but it is also something that we inevitably help to create as we strive (in accordance with our obligation of fidelity to law) to make a statute a coherent, workable whole." *Vid.* also *The Forms and Limits of Adjudication*, 92 HARVARD LAW REVIEW, 357-409 (1978); and RONALD DWORKIN, A MATTER OF PRINCIPLE, *supra* note 18 at 146: "I shall argue that legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes but generally. Law so conceived is deeply and thoroughly political. Lawyers and judges cannot avoid politics in the broad sense of political theory. But law is not a matter of personal or partisan politics, and a critique of law that does not understand this difference will provide poor understanding and even poorer guidance." See also RONALD DWORKIN, LAW'S EMPIRE 176-224 (Harvard University Press, 1987).

50 See Imer B. Flores, *Legisprudence*…, *supra* note 3 at 257-258.

Second, I propose accepting 2a) totally and 2b) partially, *i.e.* the possibility of a creative-applicative and political-ideological characterization of the process of legislation and adjudication by breaking down the distinction between law-creation and law-application to the point of demonstrating that any legal process entails both creation and application, as well as illustrating that both are political-ideological, but not necessarily subjective, as argued above.[51]

And, third, to admit 4) entirely, which concedes that despite being political-ideological, both legislation and adjudication do not have to renounce the demand for objectivity —and for the purpose of this paper "justice"— and that in spite of being creative-applicative, there is still some distinction between judging and legislating. The latter is a piece of legislation that creates a general and abstract norm (*invention*), whilst the former is a judicial decision that creates not only a particular and concrete norm —*i.e.* an individual norm— for the case at hand, but also criteria or precedent for future cases (*interpretation*).[52]

Since the implications are still implicit, I try to explain what follows from the fact that both legislation and adjudication are creative-applicative and political-ideological, while still being objective. Not only does it imply different legal processes with distinct degrees of freedom and constraint within a Kelsenian "frame"[53] for legislators and judges to the extent that the former can invent (new) laws and the latter must interpret the (existing) law,[54] but it also entails different legal products: a general and abstract norm created by legislators and a particular and concrete norm —and even a criteria or precedent for judging future cases— created by judges.[55] It requires a

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51 See *supra* II. The Realization of Justice.

52 See Imer B. Flores, *Legisprudence*…, *supra* note 3 at 259-260.

53 See Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 JOURNAL OF LEGAL EDUCATION, 518-562 (1986). *Vid.* also HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY, *supra* note 46 at 80-81.

54 See LON L. FULLER, THE MORALITY OF LAW, *supra* note 6 at 84: "If a court applies the statute to a weapon its draftsman had not thought of, then it would be '*legislating*', not '*interpreting*', as even more obviously it would be if it were to apply the statute to a weapon not yet invented when the statute was passed." *Vid.* also RONALD DWORKIN, LAW'S EMPIRE, *supra* note 49 at 366: "We cannot just dismiss that claim as obviously disingenuous, as masking what is really *invention* rather than *interpretation*." RONALD DWORKIN, JUSTICE IN ROBES 15 (Harvard University Press, 2006): "Any lawyer has built up, through education, training, and experience, his own sense of when an interpretation fits well enough to count as an *interpretation* rather than as an *invention*."

55 See Imer B. Flores, *Apuntes para una teoría —y práctica— del derecho judicial: algunas reflexiones críticas sobre técnica jurídica* (*Notes on a Theory —and Practice— of Find-Law: Some Critical Reflections on Legal Technique*), 7 REFORMA JUDICIAL. REVISTA MEXICANA DE JUSTICIA 3-25 (2006). *Vid.* also HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY, *supra* note 46 at 70, and Hans Kelsen, *The Law as a Specific Social Technique* in WHAT IS JUSTICE?..., *supra* note 14 at 244-246.

critical assessment of its objective character, and hence in the following part we need to focus on the criteria that both adjudication and legislation must meet in order to be objective.

IV. The Rationality of Legislation —and Adjudication

In this part, I will deal with two of the most important new developments in make-law: 1) the appearance —or reappearance— of the theory of legislation at the core of legal studies and, 2) the emergence —or reemergence— as a consequence of the rationality of legislation to the forefront of legal discussion.

1. *The Theory of Legislation*

In order to guarantee that legislation is objective, it must be subject to critical and scientific inquiry, and as such, an adequate theoretical approach to or theory of legislation (*i.e.* "Legisprudence") is needed. This (new) theoretical approach or theory implies the study of not only legislators and legislatures, but also of law-making, including its objective forms and limits.[56] For that purpose, the focus on the rationality of legislation is simply *sine qua non*.[57]

Consequently, it must focus on: 1) lawmaking —legislation itself and statutes— covering everything from a draft to the final product and the entire process from a statute's conception and gestation —through its drafting and implementation— to its death —either by fleeting derogation or lingering desuetude;[58] and 2) legislators and legislatures, beginning with the regulation of elections through which representatives are voted into Congress or Parliament, continuing with the organization of the legislature at large and/or committees and even subcommittees, and finishing with the supervision of what they —and others— may and may not do "lawfully" in the lawmaking process.[59]

2. *The Rationality of Legislation*

Paradoxically, the least dangerous branch of government is the more —and arguably better— examined, while the most dangerous one is the

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[56] See Imer B. Flores, *Legisprudence*…, *supra* note 3 at 247-266. *Vid*. also Imer B. Flores, *The Quest for Legisprudence*…, *supra* note 3 at 29-34.

[57] See Imer B. Flores, *Legisprudence*…, *supra* note 3 264-266. *Vid*. also Imer B. Flores, *The Quest for Legisprudence*…, *supra* note 3 at 35-38.

[58] See Imer B. Flores, *The Quest for Legisprudence*…, *supra* note 3 at 31-34.

[59] *Id*. at 30-31.

less —and presumably worse— studied, at least from a legal perspective.[60] However, there are few exceptions. Of these, we will discuss the cases of Norberto Bobbio and Lon L. Fuller in detail, and mention that of Manuel Atienza, in order to integrate the proposals into a single one.

In the proceedings of the IVR World Congress on "Legal Reasoning" celebrated in Brussels, in 1971, Bobbio published an article on the image of the *bon législateur*. In that paper, he distinguishes the essential and non-essential attributes of a (good) legislator.[61] He stipulates that "*essential attributes*" are those necessary prohibitions that the legislator cannot violate, without any exceptions (as imperatives); and "*non-essential attributes*" are those contingent that may, under certain conditions, institute prohibitions for the legislator but with certain exceptions (as directives). Therefore, he establishes that the essential attributes include the following: 1) *justice*: equal treatment to like cases and different treatment to unlike ones; 2) *coherence*: no (logical) contradictions; 3) *rationality*: in the formal-logical or intrinsic sense of *Zweck-rationalität* —according to Max Weber; and 4) *non-redundancy*: no repetition or unwarranted reiteration. Meanwhile, the non-essential attributes are: 1) *rigorous:* scrupulous in the process of law-making; 2) *systematic*: methodical in the order of their exposition; and 3) *exhaustive*: completeness in determining specific cases. In consequence, he assumes a necessary just, coherent, rational, and non-redundant legislator while presuming a contingent rigorous, systematic and exhaustive legislator.

On the other hand, Fuller advocates the existence of the "implicit laws of law-making" or "internal morality of law," that is certain limitations to what a legislator can objectively do.[62] The eight principles comprise: 1) *generality*: laws must be general not only by creating general and abstract cases, but also by promoting the common good or interest; 2) *publicity*: laws must be promulgated in order to be known by its subjects; 3) *non-retroactivity*: laws must not be applied *ex post facto* (*i.e.* to facts that occur before entering into force —and only under special circumstances applied retroactively); 4) *clarity*: laws must clear and precise in order to be followed; 5) *non-contradictory*: laws must be coherent and without (logical) contradictions or inconsistencies; 6) *possibility*: laws must not command something impossible and therefore must not be given a (merely) symbolic effect; 7) *constancy*: laws must be general not only in their creation, but also in their application, and hence laws should not be changed too frequently or enforced intermittently; and

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60 Bear in mind that "[T]he judiciary… will always be the least dangerous to the political rights of the Constitution." Alexander Hamilton, *No. 78*, in ALEXANDER HAMILTON *ET AL.*, THE FEDERALIST PAPERS, *supra* note 33 at 465. *Cfr*. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Yale University Press, 1962); and A. Michael Froomkin, *Climbing the Most Dangerous Branch of Government: Legisprudence and the New Legal Process*, 66 TEXAS LAW REVIEW 1071-1098 (1988).

61 See Norberto Bobbio, *Le bon législateur*, *supra* note 6 at 243-249.

62 See LON L. FULLER, THE MORALITY OF LAW, *supra* note 6 at 33-94.

8) *congruency*: laws must be applied according to the purpose for which they were created, preventing any discrepancy between the law as declared and as it is actually enforced.

Finally, in following Atienza, we can summarize that legal rationality —which is the same in adjudication as in legislation—[63] comprises five different types that are and must be integrated into one:

1) *Linguistic rationality*: laws must be clear and precise to avoid the problems of ambiguity and vagueness (*R1*).
2) *Legal-formal* —or *systematic*— *rationality*: laws must be not only valid —and as such general, abstract, impersonal and permanent— but also coherent, non-redundant, non-contradictory, prospective or non-retroactive, and publicized to avoid problems of antinomies, redundancies and gaps, while promoting the completeness of law as a system (*R2*).
3) *Teleological rationality*: laws must be efficacious in serving as a means to a end and consequently, they cannot establish something impossible or merely symbolic (*R3*).
4) *Pragmatic rationality*: laws must not only be efficacious, but also socially effective and economically efficient in the case of conflict (*R4*); and
5) *Ethical rationality*: laws must be just or fair and as a result can neither admit an injustice or the violation of basic principles and rights (*R5*).[64]

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[63] See Manuel Atienza, *Para una teoría de la argumentación jurídica*, *supra* note 6 at 39-40.

[64] It is worth pointing out that we agree with Atienza that the (good) legislator must begin by using clear and precise language to avoid problems related to ambiguities and vagueness (*linguistic* —or *communicative*— *rationality*) and must carry on by inquiring about the coherency and completeness of the legal system to avoid contradictions and gaps (*legal formal* —or *systematic*— *rationality*). However, we are at variance with him in the order of the pragmatic and teleological rationalities, and hence, have inverted their places. Our explanation is simple: the legislator must continue by drafting at least one end (*teleological rationality*) into law, but it may be the case of establishing more than two ends —or sets of interests, purposes or values— (*pragmatic rationality*) and not the other way around. Finally, the legislator must guarantee an overall justified principle embedded into the law or at least not violated by it (*ethical rationality*).

By the same token, the (good) judge must begin by asking about the clarity and precision of the language used (*linguistic* —or *communicative*— *rationality*); and, only when the language is neither clear nor precise, must carry on by inquiring about the coherency and completeness of the legal system (*legal formal* —or *systematic*— *rationality*). Analogously, only when the language and legal system appear to be incoherent or incomplete, the judge must go on to request an end (*teleological rationality*), as in the case when there are more than two ends —or sets of interests, purposes or values— equally available, by appealing to the better one (*pragmatic rationality*). Finally, only when their consequences and effects are illegitimate, the judge must strive to secure an overall legitimate principle (*ethical rationality*). *Cfr*. Manuel Atienza, *Sociología jurídica y ciencia de la legislación*, *supra* note 6 at 50-51; *Contribución a la teoría de la legislación*, *supra* note 6 at 385-393; and CONTRIBUCIÓN A LA TEORÍA DE LA LEGISLACIÓN, *supra* note 6 at 27-40.

In that sense, a (good) legislator —and a (good) judge— not only knows and must know the intricacies of our language (*R1*); the details of our existing legal system, its past, present and future (*R2*); the minutiae of our scheme of ends, interests, purposes and values (*R3*); the ins and outs of their possible consequences and effects (*R4*); and, the niceties of every single principle of justice (*R5*); but also integrate these five different types of legal rationality.

V. Conclusion

To conclude, let me quote —or more precisely paraphrase— Wilfrid J. Waluchow:[65]

> Seen in this light, judges and legislators need not be seen to be in *competition* with each other over who has more courage or the better moral vision. On the contrary, they can each be seen to contribute, in their own unique ways, from their own unique perspectives, and within their unique contexts of decision, to the achievement of a morally sensitive and enlightened rule of law… [and "justice"…] judicial review sets the stage for a "dialogue" between the courts and the legislature… not as an imposition that thwarts the democratic will but as one stage in the democratic process.

Finally, instead of a literal and an uncritical approach to justice embodied in the Latin adagio *Fiat iustitia, et pereat mundus* (*i.e.* "Let justice be done, though the world perish"), we need a critical attitude.[66] As a result there is no necessary conflict between the legislators and judges, since both meet —and must meet— the same objective criteria towards the realization of justice in its best (moral) light, as Dworkin anticipated:[67]

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65 Wilfrid J. Waluchow, A Common Law Theory of Judicial Review…, *supra* note 4 at 269-270.

66 Although this adage and its twin *Fiat iusticia, ruat cælum* ("Let justice be done, even if heavens falls") have analogous meanings along the lines of "justice must be done at any price or regardless of consequences." Nowadays, the former —popularized by the Emperor Ferdinand I— is used to criticize a legal opinion or practice that wants to preserve maxims in law at any price despite absurd or contradictory consequences, whereas the latter —recognized by William Murray, Lord Mansfield— is used to eulogize the realization of justice despite appearing to be outweighed by a pragmatic or utilitarian consideration. *Vid.* Lord Mansfield's judgment in *R v Wilkes* (1770) 4 Burr 2527 at 2561-2562 [98 ER 327 at 346-347]: "The constitution does not allow reasons of state to influence our judgments: God forbid it should! We must not regard political consequences; however formidable soever they might be: if rebellion was the certain consequence, we are bound to say '*fiat iustitia, ruat cælum*' (Let justice be done even if the heaven falls)."

67 Ronald Dworkin, Law's Empire, *supra* note 49 at 406.

We hope that our legislature will recognize what justice requires so that no practical conflict remains between justice and legislative supremacy; we hope that departments of law will be rearranged, in professional and public understanding, to map true distinctions of principle, so that local priority presents no impediment to a judge seeking a natural flow of principle throughout the law.

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PROMOTING HUMAN RIGHTS AS AN INTERNATIONAL POLICY FOR WORLD PEACE*

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I. INTRODUCTION

The idea of the state of peace as one in which the political groups do not direct the solution of their conflicts by means of durable collective and organized violence, necessarily implies the promotion of the respect of human rights to prevent resorting to violence. In this sense, the concern for peace and the promotion of human rights are inseparable. The conception of peace cannot be measured solely by the absence of conventional war, but constructed upon foundations of justice. The lack of justice is the primary source of conflict. Where human rights are violated, there are threats to peace.

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This conviction has been central to the evolution of the contemporary philosophy of international human rights. The two World Wars in the first half of the past century and the unimagined loss of human life led inevitably to the search for a new order in which armed conflict would never rise again. Thus, it was when the newly formed United Nations turned to consider the root causes of war and the construction of a peaceful society that it began to work on the Universal Declaration of Human Rights, adopted in 1948 in the belief that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[1]

During the immediate period after the end of the Cold War, it was thought that democracy and peace were headed towards a stage of consolidation, especially after the defeat of its enemy and immediate threats, such as Nazism and Communism.

Nevertheless, the fall of the Soviet Union was followed by the proliferation of conflicts related to claims of supposed religious vindications and cultural identities, which have returned the discussion on war and the necessity to redouble efforts for peace to the forefront. Support for a comprehensive and necessary relationship between the cause of peace and the concern for human dignity as preconditions for a peaceful world must not be lost, particularly if in present times the global community has so developed that a violation of rights in one place is felt throughout the world. Therefore, the idea of a law of world citizenship should not be a high-flown or exaggerated notion.

This essay addresses the importance of promoting human rights for keeping world peace. In doing so, it emphasizes the relationship between peace and law by describing the international human rights movement's contribution to solving the international conflicts shaped by the foremost world views, such as: Realism, Liberalism and the Clash of Civilizations. By comparing these forms of international and world order, the essay analyzes whether promoting human rights is compatible with the idea of world order as an international community of independent States or it is based on the assumption of a world government. This paper not only recommends a revaluation of the legal and institutional mechanisms that prevent violence and protect human rights, but also asks if the philosophical foundations of the international system correspond to the current human condition.

II. Is Promoting Human Rights Important for Keeping World Peace?

In the wake of the terrorist attacks of September 11, 2001 and the conflict in the Middle East, it seems to be generally accepted that the state of

[1] See the Preamble of the Universal Declaration of Human Rights, December 10, 1948.

our world remains fragile. This situation has reminded us that our life is permanently threatened by misfortunes that might annihilate our most definite plans, our highest ambitions or our deepest afflictions. It is nonetheless terrifying that this tragic character of human life is due to, not only the fragility of our biological constitution and the instability of our physical environment, but also our own work. These misfortunes occur not only because of the scarcity of resources to satisfy interests, but also because of the social practice of using fellow humans as just another resource. This practice of using human beings as instruments is even more disastrous if it is carried out by the powerful who have access to weapons or other means for submitting other people to their will on a large scale.[2]

The artificial antidote men have created to neutralize this source of misfortune is precisely that constituted by recognizing human rights.[3] This idea rests on two fundamental principles: that the mere will of the strong is not absolute justification for actions that affect the vital interests of individuals, and that the mere fact of being human is title enough for claiming goods that are necessary for an independent and dignified life.[4] In that sense, hu-

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[2] The grounding of human rights is based on what history tells us: "that human beings are at risk of their lives if they lack a basic measure of free agency; that agency itself requires protection through internationally agreed standards; that these standards should entitle individuals to oppose and resist unjust laws and orders within their own states; and, finally, that when all other remedies have been exhausted, these individuals have the rights to appeal to other peoples, nations, and international organizations for assistance in defending their rights." MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY, 55 (Amy Gutmann ed., Princeton University Press, 2001).

[3] Human rights are a product of human ingenuity, even though they might be based on natural facts. The conception of natural rights and human rights are fundamentally different. Many human rights enumerated in the Universal Declaration of Human Rights, such as the right to a fair hearing, have institutional presuppositions and, therefore, could not be conceived as human rights in a pre-institutional state of nature. The justification of human rights is rhetorical and not philosophical or political. In other words, a universal regime of human rights ought to be compatible with the idea of moral pluralism. Human rights as we know them today draw on historic ideas of justice and natural rights, but they are applications of those and other ideas in service of a political project undertaken after World War II. In international instruments, representatives of the states declare and recognize human rights, define their content, and ordain their consequences within political societies and in the system of nation-states. In that sense, human rights are derived from accepted principles, or are required by accepted societal ends, such as peace and justice, or by individual ends such as human dignity and happiness.

[4] See Declaration of the Rights of Man and of Citizen, August 26, 1789. These core ideas of the conception of human rights can be derived from the content of the Declaration of the Rights of Man and of Citizen of 1789. One should note that human dignity is conceived to be a moral principle, based on the assumption that all human beings are equal regardless of achievement, rank or standing. The idea that a human being cannot be reduced to a value in terms of something else is derived from the essential nature of humankind itself. Human dignity in this sense means both the circumstance of possessing

man rights embrace both the positive and negative prerequisites to secure for individuals the necessary conditions required for human flourishing.[5] On the one hand, human rights protect the core of negative freedom, freedom from abuse, oppression and cruelty; and on the other, they establish the necessary (but not sufficient) conditions for individuals to pursue their fundamental interests and foster their general capabilities.[6]

In that set of ideas, one possible definition of human rights could be conceived as those basic moral guarantees that people in all countries and cultures allegedly have simply because they are people. Recognizing such guarantees as rights suggests that they are attached to particular individuals who can invoke them, that they are high priority, and that their compliance is mandatory rather than discretionary.[7] Human rights are held to be univer-

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rights and the obligation to respect the fundamental rights of others. The key rationale for human dignity as a supreme moral principle is its universal validity. In Kantian ethics, the basis for human dignity is reason and, thus, the specifically human quality of acting and judging morally. Human dignity in this sense is the rational insight into the mutual obligation to treat other human beings "always as an end and never as a means only" (Kant 1789).

[5] In Henry Shue's words, the definition of human rights comprises three elements: first, there is the right to be free from government violation of the integrity of the person. Such violations include torture; cruel, inhumane or degrading treatment; arbitrary arrest or imprisonment. These violations all include the denial of fair public trial and invasion of home. Second, there is the right to fulfillment of such vital needs as food, shelter, health care and education. It is recognized that the fulfillment of these rights depends on a nation's economic development. However, these rights can be violated by a government's action or inaction, for example, through corrupt official processes that divert resources to an elite at the expense of the needy, or through indifference to the plight of the poor. Third, there is the right to enjoy civil and political liberties. In that sense, a moral right should provide "the rational basis for a justified demand and that the actual enjoyment of a substance be socially guaranteed against threats." HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY (Princeton University Press, 1996) (1980), p. 13.

[6] Political freedoms, economic facilities, social opportunities, transparency guarantees and protective security constitute the distinct type of rights and opportunities that help in advancing the capabilities of a person. As Amartya Sen claims in *Development as Freedom*, "public policy to foster human capabilities and substantive freedoms in general can work through the promotion of these distinct but interrelated instrumental freedoms" —freedoms that depend on social and economic arrangements, as well as on the establishment of human rights. AMARTYA SEN, DEVELOPMENT AS FREEDOM (Anchor Books Edition 2000).

[7] According to Jack Donnelly, "human rights are those rights held simply because one is a human being, goods, services, and opportunities to which everyone is entitled. Because one either is or is not a human being, human rights are held equally by all. Because one cannot stop being human, no matter how inhuman one's behavior or the treatment one is forced to endure, they are inalienable rights." Jack Donnelly, *The Universal Declaration Model: A Liberal Defense*, *in* INTERNATIONAL HUMAN RIGHTS IN THE 21ST CENTURY:

sal in the sense that all people have and should enjoy them, and to be independent, in the sense that they exist and are standards of justification whether or not they are recognized or implemented by the legal system of a certain country.[8] Consequently, the role of human rights could be defined as presenting an important shared set of values captured in international law that promote the decent treatment of people by governments, which can be held accountable for the treatment of their members, and hopes to thus establish a more stable and humane order.[9] In other words, the elemental priority of all human rights activism is to "stop torture, beatings, killings, rape and assault to improve the protection of ordinary people"[10] and thereby promote international peace and security. Reducing the likelihood of insecurity and war requires preventing severe and large-scale oppression within countries. As long as those, whose rights have been violated, feel a strong sense of resentment and have no means to remedy these injustices, their resentment simmers and could break out in what we identify as civil disorder, ethnic conflicts and wars.[11] On the contrary, when the individual's fundamental interests are satisfied, familiar motives for war will be absent: these people do not seek to convert others to their religions, or to conquer greater territory, or to wield political power over other people.[12]

PROTECTING THE RIGHTS OF GROUPS (Gene M. Lyons & James Mayall eds., Lanham, Rowman and Littlefield, 2001).

8 Public authorities, both national and international, are identified as those typically best placed to secure these conditions and thus, the doctrine of human rights has become, for many, an avenue for determining the basic moral guarantees all of us have a right to expect, both from one another but also, primarily, from those national and international institutions capable of directly affecting our most important interests.

9 In the language of the Universal Declaration of Human Rights, their role is viewed as "a common standard of achievement for all peoples and all nations." In that sense, the point of developing a concept of human rights, capable of being shared by adherents to different traditions, is to create agreement not on the basis of common speculative ideas, but on common practical ideas, not on the affirmation of one and the same concept of the world, of man, and of knowledge, but on the affirmation of a single body of beliefs for guidance on action. Universal Declaration of Human Rights, G.A. Res. 217a, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (December 12, 1948) [hereinafter Declaration of Human Rights].

10 IGNATIEFF, *supra* note 2, at 173.

11 Since government officials feel they must become increasingly repressive to hold down the potential violence in the society, it turns out to be a vicious circle leading in the end to a conflict between the oppressor and the oppressed.

12 See JOHN RAWLS, THE LAW OF PEOPLES: WITH THE IDEA OF PUBLIC REASON REVISITED 19 (Cambridge: Harvard University Press, 1997). One should note that although the implementation of human rights is a necessary condition to set up the basis for the realization of the people's interests, they are not sufficient to accomplish that goal. Once human rights set up the foundation for humans to develop their capabilities, there are other factors that influence the possibility of reaching that goal.

As we have seen, an underlying aspiration of the doctrine of human rights is thought to precede considerations of strict national sovereignty by providing a set of legitimate criteria to which all nation-states should adhere. Nevertheless, the primary problem of human rights is not their justification, but their implementation. International human rights treaties create obligations for States to respect, protect, and implement the rights of their citizens. The Universal Declaration of Human Rights was formulated as "a standard of achievement," a set of inspirational norms that left States with full sovereign authority to implement human rights within their territory.[13] The creation of these norms has been internationalized, but their implementation remains largely in the hands of sovereign states. In that sense, even though human rights constitute rights held by every person and have been internationalized, their execution remains largely national. However, it is important to note that the priority given to States as the near-exclusive instrument for implementing internationally recognized human rights relies on practical reasons rather than moral or theoretical ones.

This last consideration leads us to the relation between nation states and the international order, between rights protection and coercive action, and more importantly, between peace and law.

III. What is the Relation Between Peace and Law?

The law is fundamentally an order for promoting peace. Its primary purpose is to ensure peaceful interactions within a group of individuals in such a way that they have the possibility of settling their inevitable differences peacefully; that is, without the use of force in conformity with an order valid for all. This order is the law. The function of every social order is to "bring about a certain reciprocal behavior among individuals, to induce them to refrain from certain conduct which for one reason or another are deemed detrimental to society, and to engage in conduct that is for one reason or another regarded as useful to society."[14] Attainment of this goal can be achieved in two fundamental ways: with or without the use of force. It is precisely in this that one can distinguish between imperfect and perfect le-

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[13] Declaration of Human Rights, *supra* note 9. The Preamble of the Universal Declaration of Human Rights, which states: "Now, therefore the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."

[14] Hans Kelsen, Principles of International Law 3 (2nd ed., 1966).

gal norms where the former is characterized by its lack of force to implement the existing legal norms, and the latter, by its use of force to guarantee compliance to legal norms.[15] In that sense, a social order that attempts to bring about a desired conduct of individuals by enacting sanctions is called a coercive order since it provides measures of coercion as sanctions. As such, the law stands in sharpest contrast to all other orders, which rest on voluntary obedience. Consequently, the law might be conceived as an organization of force as long as it attaches certain conditions to the use of force in relations among men. It authorizes the use of force only by certain individuals and only under certain circumstances. Therefore, one could affirm that the law makes the use of force a monopoly of the community, and precisely by doing so, the law ensures peace to the community.

Peace is a condition in which there is no use of force. Therefore, "the law only provides a relative peace," in that it deprives the individual of the right to employ force, but reserves it for the community. Hence, "the peace of the law is not one of absolute absence of force," a state of anarchy, but rather a state of a monopoly of force, a monopoly of force by the community.[16] When preventing war or any use of force among states within the international community, one must consider the situation of the individual state, where the goal has been attained, at least in principle, in relations between its citizens. That is, except under certain conditions such as revolutions or civil wars, the use of force on a national level has been effectively eliminated from relations between citizens and reserved for a central organ authorized solely as a reaction against illegal acts.[17]

Considering the above, the ensuing question is whether international law conforms to such an order, and if not, then what adjustments have to be made in order for international law to be a workable order for promoting peace? In other words, to formulate the problem in a more realistic and less pretentious approach, how can an international community, embracing the greatest number of States possible, be organized within the limits of international law, and in accordance with the specific technique of this law, to form a community that really fosters peace?

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15 See HANS KELSEN, GENERAL THEORY OF LAW AND STATE (Cambridge: Harvard University Press, 1945).

16 HANS KELSEN, *supra* note 14, at 16.

17 It is important to note that contrary to this position, Inis Claude criticizes the idea that with a monopoly of power, an international government will achieve world peace because, she says, this has not been the case at a national level. Several examples of the failure of a State to maintain peace through a monopoly of power: "The proposition that the concentration of all or most of the coercive power of a society in an authoritative central institution is the solution to the problem of disorder at the national level is dubious." It is even more dubious a solution (says Claude) at the international level. See INIS CLAUDE, POWER AND INTERNATIONAL RELATIONS (Random House, N. Y. edition, 1988) (1962).

IV. International Law and World Order

A natural response could be formulated on the same terms employed to explain the rationale behind the formation of a nation-state, by uniting all individual States, or at least as many as possible, into one global-state and concentrating all their means of power and placing them at the exclusive disposal of a central government. In other words, to subject as many States as possible to a legal order that, as far as the degree of centralization is concerned, would be on a par with the legal order of the States themselves.[18]

In this regard, it is possible to consider the international legal system as a legal system like that of national law, for it appears as an ordering of the mutual conduct of States exhibiting the essential elements of a legal order. Any forcible interference by a subject in another subject's sphere of interests is in principle forbidden, permitted only as a reaction against a violation of order, that is to say, only as a reaction of the community.[19] International law can be conceived as a legal system shaped by perfect norms because it can be regarded as a coercive order, which reserves a legitimate monopoly of the use of force to the international community.

It is important to note that the international community differs from a national community in its degree of centralization.[20] Therefore, a possible solution of the problem of peace within the framework of international law means solving it through an international organization whose centralization should not go so far as eliminating international law from relations between the States embraced by that organization. That is, a solution to the problem of peace should be by establishing a community of States without altering the law governing relations between these States to such an extent that this law ceases to be international and becomes national. If this degree of centralization is exceeded, the international community would override all existing national orders and would transform into a national community. A solution for world peace formulated under these terms constitutes a political task since it entails organizing a community of states through specific means offered by international law.

International affairs studies have long been focused on the role of international law in the organization of the international community. The reasons that drive governments to subject themselves to international rules and under what conditions they comply with these commitments is an issue rooted in the major disagreements between realist and internationalist the-

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[18] Hans Kelsen, *supra* note 14, 39.

[19] *Id.*, 17.

[20] In that sense, one could affirm that: "The decentralized nature of international law is the inevitable result of the decentralized structure of international society". Hans Morgenthau & Kenneth Thompson, Politics Among Nations, the Struggle for Power and Peace 295 (6th ed. 1985).

orists in international relations. The main issue at stake is whether sovereign behavior can be influenced by an international legal commitment to rules of conduct and to what extent. It is a problem of weighing power, a "struggle for the soul of the community of nations."[21]

In general terms, one may thus distinguish two competing principal hypotheses. The first one conceives international law as a tool of diplomacy; it envisions international order as a system of rules to be taken into account by governments when they decide, on a case by case basis, what strategy most likely advances their national interest.[22] The power of the law to pull States towards compliance, in this analysis, derives solely from its occasionally coinciding with real motives, such as States' perception of the advantages obtained from compliance, or the perceived costs of non-compliance.[23] From that perspective, States never obey the law solely because of an inherent belief in the Rule of Law, per se. In this view, the law is not privileged and has no independent value. As Professors Goldsmith and Posner state, "international law does not pull states towards compliance contrary to their interests, and the possibilities of what international law can achieve are limited by the configurations of state interest and the distribution of state power."[24]

The counter-hypothesis, held by those who challenge the skeptical view of law beyond the nation-state, points out that at least some international norms and rules are complied with to an astonishingly high degree,[25] as "almost all nations observe almost all principles of international law and all of their obligations almost all of the time."[26] From this perspective, the role of coercive sanctions becomes relatively less important than other forms of

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21 THOMAS FRANK, THE POWER OF LEGITIMACY AND THE LEGITIMACY OF POWER: INTERNATIONAL LAW IN AN AGE OF POWER DISEQUILIBRIUM 5 (2006).

22 This perception, mostly shared by realist theorists, is based on the failure of the international order to fulfill the requirements set up by the law, mainly, a centralized coercion administered by an agent with superior resources that can take place only within an established national community. Otherwise, compliance with inconvenient commitments becomes a question of opportunism, a notion alien to any concept of law. Thus, it is the weakness of international law that makes it unreasonable for powerful States to obey it when it does not serve their interests.

23 Many authors doubt whether law is possible beyond the nation-state. Law requires that similar cases are treated in a similar manner. This, in turn, requires a high compliance rate for any given regulation, which seems to be the Achilles' heel of international regulations.

24 JACK GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 12 (Oxford Universty Press, 2005).

25 In that sense, the most serious challenge has been to prove realists wrong by credibly showing that compliance is based on anything other than immediate State or government interests.

26 LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2nd ed., Columbia University Press, 1979).

compliance-generation, such as incentives, capacity-building, dispute settlement, legitimacy-building, shaming, the internalization of law and so on.[27] Consequently, the real power of the law to secure systematic compliance rests not, primarily, on police enforcement, but rather on the general belief of those to whom the law is addressed that they have a stake in the rule of law.

To illustrate this point, one has to take into account that in any society, particularly at an international level, the compliance pull of the law is based on each agent's expectation that most others will obey the law "most of the time" not only because of their immediate interests to do so, but because of the faith in the power of the law to restrain and channel behaviors and acts. Following Thomas Franck, the "law has an inherent capacity to generate compliance. It is a *Grundnorm* that is as fundamental to the state system as it is ephemeral. It cannot be proven by reference to some antecedent norm. It is an article of faith, yet one that underpins the verifiable reality of a world in which sovereign states interact in a structural system of rules and an expectation of compliance."[28]

In sum, the main problem at an international level arises from the fact that in international affairs, the Rule of Law has often been limited to equality of the States under international law and the right to be free from force. Due to the political realism (*Realpolitik*)[29] of international relations, international law has been largely determined by world events and foreign self-interested policies of the great States and challenging alliances. In the view of many, international law is not really law at all because it has no legislature, has few courts, and has virtually no enforcement mechanism. International law has therefore been the poor cousin of the national system, and references to substantive principles may be a way to garner support for the legitimacy of the international system: to find common values and rules that define the terms of engagement for a global community.

Thus, one can conclude that the current paradigm established by international law has assimilated several of the basic premises of *Realpolitik*,[30] such as the following: States are the primary actors in the world's political system; States seek power as a means and an end to ensure their survival in an anarchical world; power is defined in terms of possessing resources and military forces; States are rational, egoistic actors insofar as they pursue solely what is in their best interests; and States' interests are driven primarily by the need for national survival.

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27 This perception of the law emphasizes on the softer means of inducing compliance based on rational consent and the link between legitimacy and compliance.

28 THOMAS FRANK, *supra* note 21, at 4.

29 See NORBERTO BOBBIO, NICOLA MATTEUCCI & GIANFRANCO PASQUINO, DICCIONARIO DE POLÍTICA (Siglo Veintiuno Editores, 2005), p. 350.

30 THOMAS FRANK, *supra* note 21, at 4.

V. Forms of International and World Order: Realism, Liberalism and the Clash of Civilizations

From the above, one could affirm that modern theory and the practice of international relations have been dominated by a political realistic approach. Its primary commitment to a unified view of power and national security as defining elements of the political world has come at a cost of increased human suffering, fear and depravation. Government policies, in particular those based on military operations intended to protect national integrity and power from threats from outside forces, have had a negative and systematic effect on individuals' lives within States and increasingly, throughout regions and around the world. In order to understand the nature of international conflicts in the light of a realist theory, one has to analyze its perception of international relations, the State, and more importantly, human condition.

For a complete understanding of the analytical framework and essential characteristics of the realist's conceptual universe, the relationship between war, peace and law from a realist point of view should be established. War, in absolute terms, is recognized as a non-legal condition. In other words, war can be primarily conceived as the denial of law. In contrast, law can be conceived as the affirmation of peace. The relationship between the state of war and the absence of effective laws on the one hand, and of the state of peace and the presence of binding laws on the other, is closely linked with the realist philosophy of the State. Thomas Hobbes, whose philosophy was the precursor of Realism, believed that the non-political condition is represented by a state of nature which entails a continuous warlike situation and state of anarchy, as long as it is absent from positive law. The state of nature assured men the free and equal exercise of their natural rights. However, those rights lacked protection by a common authority that could control competition for power and glory. As free and equal agents, each individual acted only in favor of his own self-interest, independently or in competition with the interest pursued or favored by others. The natural state entails not just individuals' freedom; it also entails their vulnerability because every other separate individual is a source of danger and threat. We might assume that human beings, like other animals, fought for their survival in a world characterized by uncertainty and dissatisfaction. In that sense, political society came into existence when human beings came together in the state of nature and agreed to surrender to the civil state their natural right to punish those who infringed on his or her own natural rights. This civil state, to which power is handed, is an external and artificial force embodied by the Leviathan.[31] In order to be defended from the

[31] It is important to notice that Hobbes uses the concept of "natural state" as an analyt-

invasion of foreigners and injuries from one another, human beings authorized a public authority to shape the boundaries of its members' rights, thus limiting power and regulating the dominion of every part and member of the political society.

Realists often base their pessimistic view of inter-state relations on a similarly pessimistic vision of human nature. The egoism of nation-states is a reflection of individuals' selfishness, characterized by self-interest based preferences. The corruption and wickedness of human nature, which makes conflict and insecurity inevitable features of human existence, finds expression in the supposedly anarchic structure of international relations. However, while the anarchy of the state of nature can be restrained by the establishment of a Leviathan, relations between Leviathans still take place in an anarchical international society due to the absence of an international superior authority.

In general, realists reject any positive concept of long-lasting peace mainly because of the circumstances of international relations that are seen as anarchic. The best possible scenario would be illustrated as a tenuous balance of power, that is, maintaining an "ordered" society of States through incessant contestation of opposing forces in world politics. In this system, each sovereign State is deemed both a guardian of security and a threat to security. This means that each State searching for protection from other States' potential threats enhances its power and tries to expand its capabilities to dominate others. By doing so, it threatens other States, which results in a vicious cycle in which security and insecurity are locked together.[32]

The aim of a balance of power system is to secure the welfare of each state, as well as its sovereignty, territorial integrity, political independence and domestic order. Hence, realists claim that as long as the State is territorially secure, individuals living in that State are secure as well. Consequently, one can conclude that given the realist paradigm of international politics as a power struggle in which violence is built into the inner workings of the system, the traditional national security paradigm is inherently a deficient means for protecting individuals.[33]

Contrary to the realist's position, which conceives of human beings as subjects who are used and wasted as mere objects to be manipulated at the

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ical tool to understand the necessity of a civil state: if there is no civil state, there is no security, hence no society.

[32] As explained in *Politics Among Nations*, individual nations' aspirations for power can come into conflict with other nations in two different ways: through the pattern of direct opposition and through the pattern of competition HANS MORGENTHAU & KENNETH THOMPSON, *supra* note 20, at 192-197.

[33] At least, one could affirm that as long as individuals are not conceived as the primary target of protection from a realist point of view, the possibility of human rights violations increases significantly.

State's will, Kant conceptually anticipated the internationalization and protection of human rights as the core value of both national and international law. In *Perpetual Peace*, one of the most innovative contributions to international relations theory, Kant describes two traditional levels of the law: *jus civitatis* as the national legal order and *jus gentium*, which regulates the international relations between States. In addition to these two legal orders, he proposes the establishment of *jus cosmopoliticum* to regulate the interdependence between States and human beings as citizens of the world.[34]

Kant bases his interpretation of international order on the Hobbesian pessimistic postulation of the impossibility of reaching a state of peace between men in their natural state. From this perspective, the state of peace can only be the product of man's artificial creation. In Kant's view, this argument applies to both the national and international State. He affirmed that the fact that there is no international peace in reality does not mean that its existence is impossible. To the contrary, for Kant, the state of peace is a necessary condition dictated by the same moral imperative that guided men to overcome the uncertain and unsatisfactory state of nature by assembling into a political community.

When designing the perpetual peace, Kant distinguished between the necessary and sufficient conditions for establishing international peace. Based on the former, Kant suggested that an international order could be created if nations could meet the following requirements:

1) Free nations should constrain their right to go to war or interfere in the national politics of other nations by signing non-aggression treaties.
2) Nations should promote the progressive disarmament of their armies.
3) Nations should renounce their right to make punitive war against others.

These preliminary articles clarify Kant's absolute rejection of any kind of aggression in order to protect what he conceives as basic human condition, in that human beings are ends in themselves.

In addition to the necessary conditions for creating a state of peace, Kant proposed three definitive articles, which are sufficient and essential to his philosophy of international politics:

1) The establishment of a republican Constitution for every State.
2) The formation of a union of nations.

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[34] See Declaration of Human Rights, *supra* note 9. While cosmopolitan law safeguards a State's sovereignty *vis-à-vis* other States, it is an innovation that allows the international community to monitor the international affairs of its members. The concept can be seen as a blueprint of the Universal Declaration of Human Rights, sharing the idea that some rights have a universal value.

3) The creation of a universal order of law under which every individual is recognized as a citizen of the world.

It is important to note that for Kant, a republican Constitution is a juridical form of government based on three principles: the freedom of its members as men; their dependence on a single legislation as subjects of law and their equality as citizens. Kant envisioned a political order in which citizens' consent is required to determine whether or not there should be war, and he assumed that citizens would consider all the calamities and risks before going to war.[35] Kant's philosophy is thus considered the main precursor of one of the most debated hypotheses of contemporary International Relations theory, namely, that democracies do not fight against each other.

The connection between Kant's ideas and the current debate on International Relations was emphasized more than a decade ago by Michael Doyle: "[Kant] predicts the ever-widening pacification of the liberal pacific union, explains the pacification, and at the same time suggests why liberal states are not pacific in their relations with nonliberal states."[36] Since then, literature presents Kant as the main forerunner of the democratic peace hypothesis.[37] From that perspective, war can only be overcome by a process of constitutional evolution of world politics in which emerging republics establish among themselves a state of peace. Kant did not promote an international state where nations would surrender their rights in favor of a common power (Leviathan), but suggested a non-aggression pact based on collaboration between states (*pactum societatis*).[38]

Kantian liberal internationalism has surely reduced the insecurity left by the Hobbesian anarchical state of international relations. However, it would be a mistake to affirm that Kantian liberal peace has placed us in perfect political equilibrium. The international system is constituted of a mix of hard choices among values where choosing one value entails leaving others aside. In order to have a better picture of this point, the political theorist Michael Walzer evaluated seven political conceptions as strategies for world order based on their capacity to promote peace, distributive justice, cultural pluralism and individual freedom.[39] In that sense, Kant's international lib-

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[35] The existence of a Constitutional Republic is not a guarantee of peace "per se;" it is only a form of government that reduces the probability of going to war based on the political ambitions of the rulers.

[36] Michael Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part I*, PHILOSOPHY AND PUBLIC AFFAIRS, Vol. 12, No. 3 225 (Summer 1983).

[37] See BRUCE RUSSET, GRASPING THE DEMOCRATIC PEACE (Princeton University Press, 1993).

[38] Nevertheless, Kant's liberal republics remain in constant state of war with non-republics; they see themselves threatened by non-republics because they lack representation (which assures legal equality of citizens and separation of powers; hence stability).

[39] Michael Walzer, *Governing the Globe: What Is the Best We Can Do?*, DISSENT, Fall, 2000.

eralism and Hobbes' realism were positioned at opposite ends of Walzer's spectrum. On one hand, Kant's conception of international politics is characterized by maximum centralization in which conventional warfare would be impossible given that its agents would have disappeared and none of the reasons for going to war could be applied. Additionally, since a centralized system is based on a single group of citizens with the same rights and obligations (as world citizens), individual autonomy would therefore be promoted, as well as their freedom to choose their own life plans. In contrast, cultural groups would be ignored by central authorities. Pluralistic tendencies would be overridden because the global State, even if tolerant, needs to command loyalty from its subjects and its power of accommodation is limited by the requirements of globalization. Finally, distributive justice would be felt more because the global authority would be able to transfer resources from the poor to the rich. On the other hand, the anarchistic conception as a realist conception of international politics is characterized by constant threat of war, inequality in each independent State's capability development (that is, there is no distributive justice), freedom to be different, and promotion of cultural pluralism as a consequence of the State's independence.

From the above, one can conclude that Michael Walzer's message is that there is no "perfect equilibrium,"[40] especially if we take into consideration that, in recent decades, international conflicts between States have shifted to conflicts without borders. Classical analytical frameworks focusing on relationships between States, military capacities and strategies, and international political economy have to be put aside.

> The years after 1989 saw more military operations in more parts of Europe, Asia and Africa than anyone could remember… since it was often unclear who was fighting for whom and why… these activities did not fit under any of the classic headings of war, international or civil… the century ended in a global disorder whose nature was unclear.[41]

At present, conflicts are not events with clear beginnings and ends, but instead elements of a broader process of social change that is turbulent, discontinuous and the result of contingent factors, such as global capitalism, the growth of supranational organizations, the intensified flow of peoples, weapons and culture across nations, the internationalization of telecommunications and media, and the rise of global terrorism. All of these factors have undermined claims that the nation-state alone is able to guarantee the

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[40] Michael Doyle, *The Liberal Peace and the Challenge of Globalization*, 26 REVIEW OF INTERNATIONAL STUDIES 83 (2000).

[41] ERIC HOBSBAWM, AGE OF EXTREMES: THE SHORT TWENTIETH CENTURY 1914-1991, 560-562 (1994).

physical security, order, and integrity of its territory and of the people that reside within it.

As a response to these current international conditions, two major theories have influenced recent foreign policy thinking in Western countries. One theory holds that the world is advancing to embrace several core values and the institutions that embody them, all of which the West possesses and include individual rights, democratic government and free markets. This position has been advanced by Francis Fukuyama in what he famously called the "end of history."[42] Fukuyama recognizes that many nations are still in history, but since the collapse of the communist bloc, he views a trend toward an increasing and worldwide dominance of individualism. Fukuyama's thesis is that the whole world is in the process of embracing Western values. Though these individualistic values are usually perceived as universal, non-Western societies were slower to recognize them and are now discovering that they are compelling in nature.

The other theory argued by Huntington holds that the world outside the West is largely governed by religious fundamentalists or other sets of values that are incompatible with the Western ones. Hence, these antithetical civilizations are bound to clash. Huntington argues:

> At a superficial level much of the Western culture has indeed permeated the rest of the world. At a more basic level, however, Western concepts differ fundamentally from those prevalent in other civilizations. Western ideas of individualism, liberalism, constitutionalism, human rights, equality, liberty, the rule of law, democracy, the free markets, the separation of church and state, often have little resonance in Islamic, Confucian, Japanese, Hindu, Buddhist or Orthodox cultures.[43]

One should notice that both viewpoints claim to being able to predict the direction in which the world is moving and prescribe the ways it ought to progress. They both imply that non-Western nations have little to contribute to the global development of political and economic institutions and to the values they embody since the ideas of individual rights, liberty and capitalism are Western contributions to the world.

VI. A Possible Conclusion

From the above, one can conclude that world politics is mainly shaped by two antagonistic positions: the return to the most elemental and aggressive references based on ideology; and the intention of integrating the world

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[42] Francis Fukuyama, The End of History, the National Interest (1989).

[43] Samuel P. Huntington, *The Clash of Civilizations?*, *in* Foreign Affairs 40 (1993).

under the cosmopolitan terms enunciated by Kant. In addition to this dichotomist concept of the world, we have been recently in the presence of global terrorism based on religious fundamentalism. In this regard, it is important to remark that the threat of death has undergone a qualitative change. While in the Cold War, the fear of death prevented both sides from causing a disastrous nuclear holocaust, in the terrorist attacks of September 11th, the element of fear from dying was absent. This was the true novelty in the subsequent phase from the Cold War and probably constituted the most influential factor in the social psyche: "In today's wars, there are no morals. We do not have to differentiate between military or civilian. As far as we are concerned, infidels are all targets."[44]

Under such explicit statements, foreign policy theorists suggested two opposite courses of action: unilateralism and multilateralism; in other words, autocracy and democracy. It is evident that the autocratic course of action (which constitutes the prevailing trend of the present international relations) represents the continuance of war, among other reasons, because there is no State powerful enough to solve the problem typified by the presence of non-conventional subjects. The democratic alternative seems to be the only way to strengthen civilized bonds between cultures in times of anarchism and insecurity.

Hence, it seems imperative that all decisions should be adopted with as much consent and as little opposition possible from the affected societies to assure that all collective decisions are the result of political debate initiated and controlled by the international community. In this regard, no nation should be excluded from this debate. Assuming the above, every society could identify the expression of a non-imposed will in international decisions —even if they do not agree with them— provided that they all participated on equal conditions in the decision-making process.

One could affirm that attaining a peaceful world community lies on the basis of postulating the unity of the human species: a universal set of core values (human rights), a universal law of respect, tolerance and compromise, as well as a universal state of inclusion that builds solid normative unity.

However, in achieving this goal, the present state of international relations seems to evoke a rather obscure and uncertain future, particularly because of its failure to provide the ideal mechanisms to prevent resorting to violence and to protect human rights. Perhaps we should not only revaluate the legal and institutional instruments that abolish war, disarm States, attenuate political conflicts and overcome the immense economic and cultural disparities that cleave the planet; but we should also ask ourselves if the philosophical foundations of this system correspond to current human

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[44] Lisa Beyer, *The Most Wanted Man in the World*, special issue TIME 40-45 (September 24, 2001).

condition, which should be conceived not in terms of individual survival, but of peaceful coexistence.

This last consideration leads me to ask: is peace a valuable and attainable good? If so, are the main world views, such as Realism, Liberalism, and the Clash of Civilizations, accurate enough to define the shape of international conflicts? If not, should we look for new paradigms that redefine international coexistence based on human rights? Should we also redefine its philosophical foundations? Could we analyze the seeds of conflict between individuals and transplant them to the international realm? And taking the possible answers into consideration, should we conceive a new idea of the State?

NOTES

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THE CONCEPT OF *JURISPRUDENCIA* IN MEXICAN LAW

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I. Introduction

This note describes the concept of *jurisprudencia* in Mexican law. This term refers to constant and unvarying criteria to interpret and apply the Constitution, federal and state statutes and rulings and international treaties, expressed in the decisions of either the Supreme Court of Justice sitting *en banc* or of one of its Chambers, the collegiate circuit courts, as well as the Federal Electoral Tribunal.[1] After meeting certain conditions and requirements analyzed below, the decisions issued by these courts may acquire binding authority with regard to lower courts. The notion of *Jurisprudencia* has certain similarities with the common law notion of precedent, however, as made evident below, there are important differences between the two concepts.

This note is organized as follows: First, there is a general, conceptual discussion on *jurisprudencia* in Mexican law. Then, constitutional and legal regimes of *jurisprudencia* are discussed. I go on to address the different rules found in the 1917 Mexican Constitution and different statutes that govern various aspects under study, such as types of *jurisprudencia* (binding/non-binding); the courts with the power to issue binding *jurisprudencia*; systems for forging/establishing binding *jurisprudencia;* the relationship between binding *jurisprudencia* and the concept of "tesis" in Mexico; the so-called *interruption* and *modification* of the binding effect of *jurisprudencia*; and a discussion of who is actually bound by *jurisprudencia* in Mexican law.

In the last to sections of this essay, I will briefly refer to the system for reporting *jurisprudencia* and the relationship between case law and legal teaching in Mexico.

II. Binding Legal Decisions in Mexico (*Jurisprudencia*)

In Mexico, *jurisprudencia* is the term used to refer to the idea of binding legal decisions. Mexico's legal system developed under the so-called civil law tradition. Thus, statute law has been considered the supreme source of law (as the expression of the "general will" of the people through their representatives in Congress); while judge-made laws have been seen as having a secondary role, an idea closely tied in with the belief that judges's roles should be limited to applying statute laws.[2]

Along with these ideas, the early years of Mexico's legal system did not develop the concept of precedent that in some way resembled the *stare*

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[1] Octavio Hernández, Curso de Amparo, 362 (2nd ed., Porrúa 1980).

[2] John Henry Merryman, La Tradición Jurídica Romano-Canónica, 72-75 (Fondo de Cultura Económica 1997).

decisis principle characteristic of the common law tradition. When making decisions, courts were supposed to strictly adhere to the text of codified statute laws and these codes were supposed to be coherent, complete and clear legal documents capable of providing a solution for any possible dispute that might arise in society. When solving cases, judges should not look at other (previous) legal decisions, but at the statute law passed by the legislature.

Today, binding legal decisions are allowed at a federal level, as governed by the *Amparo* Law. However, it took years for this idea of binding legal decisions to formally gain recognition.

In the beginning, the 1861 *Amparo* Law clearly prohibited binding authority of any sort of legal decision, as established in article 30: "Legal decisions rendered in trials of this nature are only applicable to those who were parties to the dispute. Therefore, no person shall be allowed to invoke them in order to avoid complying with the statute law on which they are grounded."[3]

However, for the first time in Mexico, a new *Amparo* Law passed in 1882 established limited binding authority of legal decisions in *amparo* proceedings, as stated in article 34: "Decisions issued by judges shall be based on the constitutional text applicable to the case. For its proper interpretation, they shall consider the sense that has been defined by the decisions of the Supreme Court and by legal doctrine."[4]

Moreover, article 70 of this statute established that:

> Article 70. The granting or denial of the *amparo* against the express text of the Constitution or against its interpretation as defined by the Supreme Court in at least five consistent decisions shall be punishable by loss of employment and a period of incarceration between six months and three years if the judge behaved intentionally. If the judge's behavior is due to ignorance or carelessness, he shall be suspended in his functions for a period of one year.[5]

The statement of legislative intent for the 1882 *Amparo* Law, the legislative debates and Article 70 of this statute clearly established the binding effect of Supreme Court decisions "by reiteration." In other words, Supreme Court decisions interpreting the Constitution need to be repeated in five consistent decisions to have authoritative force.

This rule, however, was later repealed by the 1897 Federal Code of Civil Procedure, in which its statement of legislative intent stated that:

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[3] Ley de Amparo [L.A.] [Amparo Law], Diario Oficial de la Federación [D.O.], November 30, 1861 (Mex.).

[4] Ley de Amparo [L.A.] [Amparo Law], *as amended*, Diario Oficial de la Federación [D.O.], December 14, 1882 (Mex.).

[5] *Id.*

> ...the Judicial Branch's tendencies to intervene are suppressed… The Commission also took into consideration the principle of division of powers… especially the relevant principle according to which only the legislature can interpret, clarify, modify or repeal a statute law and it is the Court's duty to apply it.[6]

Nevertheless, the idea of authoritative decisions by reiteration in *amparo* proceedings was reclaimed in the 1908 Federal Civil Procedure Code. Article 786 of this code established that: "Article 786. Supreme Court of Justice decisions passed by a majority vote of nine or more of its members, form a binding decision if what was decided is reiterated in five consecutive decisions unbroken by any decision to the contrary."[7]

Article 787 of this code also stated that *jurisprudencia* established thus was mandatory for district judges and, to a certain extent, the Supreme Court, which should be bound by its own decisions.[8] However, it also opened up the possibility for the Supreme Court to detach itself from its decisions by expressing its reasons to do so in every case. These explanations refer to the reasons that were taken into account when the decisions that were being contradicted had been made.

To justify these rules, the statement of legislative intent of the 1908 Federal Civil Procedure Code expressed that:

> *Jurisprudencia* must bind lower level judges because of the inherent nature of *jurisprudencia*. Therefore, a district judge shall be able to argue reasons against it for the Court to take into consideration; but shall abide by the resolutions established as *jurisprudencia* because if not, their establishment would be useless.
>
> The latter cannot be said of the Court itself because *jurisprudencia*, be it doctrinal or judicial, shall always be grounded on the authority granted to it by reason, and since the latter is progressive by nature, *jurisprudencia* must also be so by extension.
>
> To constrain the Court and bind it unconditionally to its precedents would amount to imposing a dogma similar to those established by religions; it would be equivalent to establishing, as in religions, absolute truths and giving *jurisprudencia*, even if mistaken, a dogmatic attribute that not even statute laws or other institutions should have.
>
> It is reasonable to establish that when the Court modifies its *jurisprudencia*, it should express the new reasons that it may have and that contradict precisely those it resorted to when it established the *jurisprudencia* it intends to modify.[9]

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[6] Código Federal de Procedimientos Civiles [C.F.P.C.] [Federal Civil Procedure Code], *as amended*, Diario Oficial de la Federación [D.O.], October 6th, 1897 (Mex.).

[7] Código Federal de Procedimientos Civiles [C.F.P.C.] [Federal Civil Procedure Code], *as amended*, Diario Oficial de la Federación [D.O.], December 26, 1908 (Mex.).

[8] *Id.*

[9] *Id.*

Article 785 of the 1908 Federal Code of Civil Procedure limited the possibility of creating binding decisions to the Supreme Court, which interprets the Constitution and federal statute laws. Meanwhile, article 788 established parties' possibility to invoke binding decisions by stating, in writing, its sense or meaning, its applicability to the respective case and showing that the decision was reiterated five times.[10] These rules denote explicit acceptance of a certain version of binding legal decisions in Mexican law.

III. The Constitutional Regime of *Jurisprudencia*

Before 1951, *jurisprudencia* had no constitutional basis. However, in that year article 107-XIII of the Constitution was amended to establish the following: "XIII. Statute law shall determine the terms and cases in which the jurisprudencia from Federal Judicial Branch Courts is binding, as well as the requirements for its modification."[11]

In 1967, this rule was transferred to article 94 of the Constitution with an amendment that sought to clarify the kind of norms that could be the object of *jurisprudencia*: "Statute law shall determine the terms in which the *jurisprudencia* from Federal Judicial Branch Courts on the interpretation of the Constitution, federal and local statutes and rulings, and international treaties entered into by the Mexican State is binding, as well as the requirements for its interruption and modification."[12]

From this paragraph, it is clear that:

A) Only federal courts can issue binding legal decisions.
B) These binding decisions refer to the interpretation of the Constitution, federal and state statutes and rulings and international treaties.
C) Statute laws passed by Federal Congress are the instruments that define the terms under which binding legal decisions can be produced.

These three aspects are part of the current constitutional system of binding legal decisions in Mexican law.

IV. The Legal Regime of *Jurisprudencia*

As explained above, the Constitution states that statute law determines the conditions under which binding legal decisions can be produced. In

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[10] *Id.*

[11] The reform was published on February 19, 1951. Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Diario Oficial de la Federación [D.O.], February 19, 1917 (Mex.).

[12] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Diario Oficial de la Federación [D.O.], October 25, 1967 (Mex.).

fact, two statues carry out this constitutional mandate: the *Amparo* Law (articles 192-197-B)[13] and the Organic Law of the Federal Judicial Branch (articles 177-179 and 232-235).[14]

From the analysis of the rules contained in these statutes, it is possible to describe the following:

1. *Types of* Jurisprudencia

There are two types of *jurisprudencia* in Mexican law:

A) Binding *Jurisprudencia*: These fulfill all the requirements established by statute law to have mandatory force, as explained below in the analysis of articles 192 and 193 of the *Amparo* Law,[15] and article 103 of the Organic Law of the Federal Judicial Branch.[16]
B) Non-Binding *Jurisprudencia*: Although they do not fulfill the abovementioned requirements, they at least have a persuasive force, as recognized by legal doctrine and the Supreme Court itself.

Indeed, there is a Supreme Court decision on which federal and local judges and magistrates can legitimately uphold their decisions in either type of *jurisprudencia*. However, the Court makes it clear that the only mandatory one is that which complies with the requirements established by statute law, while the other one has only persuasive value.[17]

2. *Courts Authorized to Issue Binding Legal Decisions*

According to articles 192 and 193 of the *Amparo* Law,[18] and article 232 of the Organic Law of the Federal Judicial Branch[19] only four kinds of federal courts can establish mandatory *jurisprudencia*:

A) The Supreme Court of Justice, working in plenary sessions (*en banc)* or in Chambers,

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[13] See Ley de Amparo [L.A.] [Amparo Law] *as amended*, Diario Oficial de la Federación [D.O.], January 10, 1936 (Mex.).

[14] See Ley Orgánica del Poder Judicial de la Federación [L.O.P.J.F.] [Federal Judicial Branch Law] *as amended*, Diario Oficial de la Federación [D.O.], May 24, 1995 (Mex.).

[15] *Supra* note 13.

[16] *Supra* note 14.

[17] JURISPRUDENCIA DE LA SUPREMA CORTE, OBLIGATORIEDAD DE LA, Primera Sala [First Chamber], Semanario Judicial de la Federación, Quinta Época, Vol. Fifth Epoch, Vol. CV, p. 1196.

[18] *Supra* note 13.

[19] *Supra* note 14.

B) Collegiate circuit courts,
C) The Upper Chamber of the Federal Electoral Tribunal, and
D) Regional Chambers of the Federal Electoral Tribunal.

As a federal state, Mexico has federal and state court systems. The only courts authorized to render binding legal decisions are certain federal courts. The Supreme Court of Justice is found at the very top of the federal court system. It is formed of 11 Justices, who can work in plenary sessions, *en banc,* or in chambers. There are two chambers with five Justices each (the president of the Supreme Court is not a member of either chamber). Each chamber has jurisdiction over a particular subject-matter.[20]

The Supreme Court working in plenary sessions has absolute jurisdiction to solve conflicts of competence at federal, state and municipal levels of government, as well as between the federal executive and legislative branches. It also has the power to exercise abstract control of federal and state statutes through actions of unconstitutionality. In these cases, Supreme Court decisions may become *jurisprudencia* (for the conditions needed for this to happen, see below).

In addition, the Supreme Court has the power to intervene in *amparo* proceedings. As explained by Fix-Zamudio, the Mexican *amparo* is a combination of various procedural instruments, each with its own specific protective function: *a)* protecting fundamental rights; *b)* attesting to allegedly unconstitutional laws; *c)* contesting legal decisions; *d)* petitioning against official administrative acts and resolutions; and *e)* protecting the social rights of farmers subject to Agrarian Reform Laws.[21] Eventually, a challenge of unconstitutionality to a statute, legal decision or administrative act may reach the Supreme Court through the *amparo* proceeding. Supreme Court decisions rendered in these cases may also become *jurisprudencia*.

The main function of collegiate circuit courts is to review the legal decisions of both federal and state courts, by means of a proceeding that closely resembles the French *cassation* (*Amparo Judicial* or *Amparo casación*),[22] while (in general and without entering into the details) the Upper and Regional Chambers of the Federal Electoral Tribunal resolve electoral disputes arising from federal and, in some cases, state and municipal elections. The decisions of these courts may also become *jurisprudencia*.

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[20] The First Chamber has the competence to hear civil and criminal cases, while the Second Chamber is empowered to hear administrative and labor cases.

[21] Héctor Fix-Zamudio, *A Brief Introduction To The Mexican Writ Of Amparo*, CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL, Vol. 9, Issue 2, 316-317 (Spring 1979).

[22] Héctor Fix-Zamudio, *Presente y Futuro de la Casación Civil a través del Juicio de Amparo Mexicano*, in HÉCTOR FIX-ZAMUDIO, ENSAYOS SOBRE EL DERECHO DE AMPARO, 237-284 (Porrúa, México, 2003).

3. *Systems for Establishing* Jurisprudencia Obligatoria *(Binding Legal Decisions)*

A. *Through Reiteration of Criteria*

According to articles 192 and 193 of the *Amparo* Law, both the Supreme Court and collegiate circuit courts may issue binding legal decisions by upholding the same point of law in five consecutive judgments. In the Supreme Court, these decisions require a majority vote of eight Justices (in plenary sessions or *en banc*) or four Justices (when sitting in their respective Chambers) for it to acquire binding authority. In collegiate circuit courts, all three judges must agree on the decision.[23]

This system of establishing binding decisions by reiteration requires, however, consecutive reiteration (that is, five consecutive decisions) of a decision upholding a different point of law regarding the same issue.

Article 232 of the Organic Law of the Federal Judicial Branch establishes specific rules that the Upper and Regional Chambers of the Federal Electoral Tribunal must follow to issue binding decisions by reiteration. In this way, the Upper Chamber is required to issue three consecutive decisions upholding a different point of law regarding to the same issue. Regional Chambers are required to issue five consecutive decisions upholding a different point of law regarding the same issue, in addition to the ratification by the Upper Chamber. For these courts to establish a binding decision, they must meet these requirements, but must also obtain a formal declaration from the Upper Chamber, stating that a binding decision has actually been made.[24]

B. *Through the Resolution of Contradictory Criteria in Collegiate Circuit Courts*

The emergence of this form of establishing binding decisions is closely related to the modifications the Federal Judicial Branch has undergone since 1951. In the late 19th century, the Supreme Court of Justice was granted the power to review and eventually annul appellate judgments of both federal and state courts. This power has led to the *Amparo Judicial*, which according to Fix-Zamudio bears direct similarities to the French remedy of cassation.[25]

In its original form, the Supreme Court had the power to make this kind of review. However, the number of *Amparo Judicial* claims increased significantly in the first decades of the 20th century. In 1928, the Supreme Court was structured not only to sit *en banc*, but also to work in chambers (for a to-

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[23] *Supra* note 21 at 347.

[24] See article 232 of the "Ley Orgánica del Poder Judicial de la Federación".

[25] See Fix-Zamudio, *supra* note 22, 237-284.

tal of four plus one "auxiliary" chamber until 1994). Subsequently, Supreme Court chambers were unable to handle the workload, which led to the creation of collegiate circuit courts specializing in *Amparo Judicial* cases. Only in matters of national importance and relevance can the Supreme Court still hear this kind of cases. However, the general rule is that collegiate circuit courts have the authority to hear these cases. Thus, the country is divided into 29 judicial circuits and while the number of collegiate circuit courts in each circuit varies, they total 184.[26]

Having a Supreme Court organized into chambers and a considerable number of Collegiate Circuit Courts solving similar cases often involving the same points of law gives way to the possibility of contradictory interpretations on the same laws. When this happens, there is a "contradiction of thesis"[27] which must be settled.

When there are contradictory theses issued by Supreme Court chambers, the Supreme Court *en banc* has the power to settle the contradiction. When the contradiction of theses involves two circuit courts, a Supreme Court chamber has the power to settle the contradiction.

This explanation refers to a second method to create binding precedents in Mexico.

In 1986, article 192 of the *Amparo* Law was amended and a third paragraph was added to clarify that resolutions solving contradictions of theses that arise in chambers of the Supreme Court or collegiate circuit courts also constituted *jurisprudencia* (binding legal decisions).

The rules for settling contradictions of theses can be found in the *Amparo* Law (articles 192, 197 and 197-A):[28]

1) This method does not apply in instances of contradictions between criteria held by a Chamber and a collegiate circuit court, but only in contradictions of courts at the same level.
2) No reiteration of criteria is required for establishing binding decisions under this method, nor is a specific number of votes of the Justices or Magistrates needed.
3) This procedure can only be initiated if the contradiction is "reported" *(denunciar)*. The subjects that can "claim" the existence of a contradiction of theses are:

   A) Contradictions of Theses in Supreme Court Chambers:

      a) The Chambers themselves (through their president).

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[26] See the "Acuerdo General 57/2006 del Pleno del Consejo de la Judicatura Federal", published in the Federal Oficial Gazzette on September 4, 2006.

[27] In Mexican law, the concept of "thesis" (in plural, "theses") has a technical meaning explained below.

[28] *Supra* note 13.

b) Any of the Justices members of these Chambers.
c) The Federal Attorney General.
d) Parties to the dispute to which the theses refer.

B) Contradictions of Theses in Collegiate Circuit Courts:

a) Supreme Court Justices.
b) The Federal Attorney General.
c) Judges of the Collegiate Circuit Courts that issued the contradictory theses.
d) Parties to the dispute to which the theses refer.

4) The decision that settles the contradiction has no impact on the parties to the disputes that led to the contradicting theses. The only purpose of this procedure is to unify federal court interpretations of the law.
5) Contradictions of theses in chambers are settled by the Supreme Court sitting *en banc*, while contradictions of theses in collegiate circuit courts are settled in Supreme Court chambers.

Article 232 of the Federal Judicial Branch Law allows the Upper Chamber of the Federal Electoral Tribunal to create binding decisions by settling contradictory theses in the Tribunal's Regional Chambers.[29]

C. *The Binding Character of the Reasons Stated in Supreme Court Rulings in Two Kinds of Proceedings:* "Controversias Constitucionales" [*Constitutional Controversies*] *and* "Acciones de Inconstitucionalidad" [*Actions of Unconstitutionality*]

Acting as a constitutional court, the Supreme Court of Justice has the power to settle disputes brought before it under a proceeding called "*controversia constitucional*." With this proceeding, different levels of government in the Mexican federal system (vertical division of power) and different branches of the federal and state governments (horizontal division of power) can defend their constitutional sphere of competence against interference from other organs or branches.

Moreover, the Mexican Constitution also provides for abstract control of constitutionality that can be brought before the Supreme Court of Justice, called "*acción de inconstitucionalidad*." In this case, legislative minorities, the Federal Attorney General, political parties and the National Commission on Human Rights, can challenge the constitutionality of a statute law passed by federal and state legislatures, within 30 days of its ratification.

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[29] *Supra* at 14.

The constitutional basis for these proceedings is found in Article 105 of the Federal Constitution, and the statute governing them is the Law on Article 105 of the Constitution.

Articles 43 and 73 of this statute law establish that the reasons included in Supreme Court rulings on "*controversias constitucionales*" and "*acciones de inconstitucionalidad*," approved by no less than eight votes, shall have mandatory authority for all courts (federal and local) in the land, including Supreme Court chambers.[30]

4. *Binding Legal Decisions and the Concept of* "Tesis" *in Mexico*

It is important to note that after one of the above-mentioned decisions has been issued, the criteria maintained by the respective court must still pass through a drafting process, the result of which is known in Mexico as a "*tesis*" [thesis]. This process implies extracting from the ruling the point of law that can be considered a law formulated by the court and can be applied to similar cases in the future.

The Supreme Court itself has drafted and published a "Manual" on the rules for drafting the above-mentioned "theses." Rule 1 defines what a thesis is: a written expression in an abstract form of the criteria used to interpret a legal norm which was applied to solve a specific case. Therefore, a thesis is not an extract, a synthesis or a summary of a legal decision. Rule 2 states that the text of a thesis shall not contain specific information, such as people's names, quantities, objects, etc., or that of a tentative, particular or contingent nature, but only those of a general and abstract nature. Rule 3 refers to the correlation that must exist between the thesis and the legal resolution of the case. Rule 4 orders that the thesis be written clearly and in such a way that it is fully understandable without the need to resort to the legal decision. However, it is not to be a simple transcript of a certain part of said decision. Rule 5 states that each thesis must contain only one criteria for interpretation. Rule 6 states that theses that form *jurisprudencia obligatoria* (that is, theses upholding the same point of law in five consecutive decisions as explained above) shall be amalgamated into a single text that corresponds to the five theses. Rule 7 refers to a thesis classification system to locate it easily and quickly. This system entails identifying each thesis under a heading, for example, "DIVORCE, ABANDONMENT OF CONJUGAL DOMICILE AS A CAUSE OF." Finally, Rule 8 states that at the end of the text of each thesis, the information identifying the corresponding case must be in-

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[30] Ley Reglamentaria de las Fracciones I y II del Artículo 105 de la Constitución Política de los Estados Unidos Mexicanos [L.R.Art. 105] [Law of Article 105 of the Federal Constitution], *as amended*, Diario Oficial de la Federación [D.O.], November 22, 1996 (Mex.).

dicated, as well as the existence of any prior theses with the same implications.[31]

Rule 2 has been particularly criticized by some authors, who have pointed out that the requirement of theses being both general and abstract, and the prohibition of specific references to persons, objects, etc., amounts to reproducing the abstraction of statute law. However, they argue that by nature, judge-made law cannot (and should not) be separated from the facts of the specific case because the facts determine the argument that leads to the point of law upheld.[32]

It is also important to note that not every thesis is deemed binding under Mexican law. When it does not, it is known as an "isolated thesis." Only after five decisions have been issued and approved by the majorities described above, can one properly speak of a binding thesis (*tesis jurisprudencial*).

The "theses" drafting process of "theses" is governed by article 195 of the *Amparo* Law.[33] The most relevant rules of this process are:

A) The Supreme Court *en banc*, its chambers or the corresponding collegiate circuit court must approve the text and heading (*rubro*) of the *tesis jurisprudencial*, and must give it a progressive number.
B) Within 15 business days, they must present the corresponding thesis to the federal judicial branch's official reporting instrument, the *Semanario Judicial de la Federación* [Weekly Federal Court Report], for its publication.
C) They must also submit the thesis to those who did not issue the thesis.
D) They must set up a database to allow the public access to said theses.

5. *The* Interruption *and* Modification *of the Binding Effect of* Jurisprudencia

Mexican legal doctrine makes a distinction between the interruption and the modification of *jurisprudencia obligatoria*.

Interruption refers to the removal of the authoritative nature of a decision when a decision that contradicts a former one has been approved with the required majority by the corresponding court (that is, by the court that produced the original binding decision). In these cases, the new decision must explain the reasons that justify the interruption, taking into account the reasons that supported the decision to interrupt the binding force (see article 194 of the *Amparo* Law).[34]

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[31] Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Gaceta del Semanario Judicial de la Federación, Issue 1, 115-16 (February 1988).

[32] HÉCTOR GERARDO ZERTUCHE GARCÍA, LA JURISPRUDENCIA EN EL SISTEMA JURÍDICO MEXICANO 124-125 (Porrúa 1990).

[33] *Supra* note 13.

[34] *Id.*

Modification implies the emergence of a new binding decision which overrules the previously existing *jurisprudencia obligatoria*. Article 194 of the *Amparo* Law states that the modification of a binding decision must follow the same rules required for the establishing the above-mentioned *jurisprudencia* (that is, five consecutive decisions supported by the vote of the required majorities).[35]

The *Amparo* Law also allows the possibility that, for a specific case, a collegiate circuit court may ask a chamber of the Supreme Court to modify a binding decision produced by this circuit court, stating reasons that justify the modification. The same can be done by a chamber of the Supreme Court. In this case, it must direct its petition to the Supreme Court of Justice *en banc* (see article 197, fourth paragraph).[36]

6. *Who is Bound by* Jurisprudencia *in Mexican Law?*

Neither the Executive branch nor the Legislative branch are bound to binding precedents issued by Mexican federal courts. According to articles 192 and 193 of the *Amparo* Law, binding decisions of the Supreme Court *en banc* have authoritative force for all the courts on Mexican territory, including its own chambers. In turn, binding decisions of the Supreme Court chambers are binding for all the courts in the land (with the exception of the Supreme Court *en banc*). Moreover, binding decisions produced by collegiate circuit courts are binding for all the courts in the land (with the exception of the Supreme Court *en banc* and its chambers).[37]

Using the words of a Supreme Court Justice, these rules imply that *jurisprudencia* does not produce binding effects for those who can contravene it (to thus prevent it), but only for those who may rectify the violation once it has been committed.[38]

IV. The Reporting System for *Jurisprudencia* in Mexico

Binding decisions issued by the Supreme Court, its chambers and collegiate circuit courts are published in the *Semanario Judicial de la Federación*. Founded in 1870, this publication has appeared regularly ever since with two interruptions (1875-1880 and August 1914-May 1917).[39]

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[35] *Id.*

[36] See the discussion of Jorge Ulises Carmona, *La Jurisprudencia obligatoria de los Tribunales del Poder Judicial de la Federación*, Boletín Mexicano de Derecho Comparado, Issue 83, 544-545 (May-August 1995).

[37] *Supra* note 13.

[38] José de Jesús Gudiño Pelayo, *¿A quién obliga la jurisprudencia?*, Revista Mexicana de Procuración de Justicia, Vol. I, Issue 3, 47 (October 1996).

[39] Miguel Carbonell, *Una Aproximación al Surgimiento Histórico de la Jurisprudencia en México*,

The original idea was that the *Seminario* should include complete Federal Court rulings.[40] Today, however, this publication mainly includes the theses described above (which can be either "*tesis aisladas*" or "*tesis de jurisprudencia*"). Moreover, theses that have acquired the character of binding criteria ("*tesis de jurisprudencia*") are published every year in an Appendix to the *Semanario*.

Complete judgments are not commonly published in the *Semanario,* though it is not unheard of if the Supreme Court, collegiate circuit courts or the General Coordinator of Compilation and Systematization of Theses deems they should be published. In this sense, Title Four, Chapter One, paragraph 5 of the Agreement on the rules for the creation, remission and publication of theses issued by federal judicial branch courts (Agreement Number 5/1996) states that:

> 5. Rulings shall be published, either totally or partially, following the respective theses whenever the Supreme Court or collegiate circuit courts expressly decide to do so and whenever dissenting opinions have been formulated; or when the Coordination [of Compilation and Systematization of Theses] decides to publish them, depending on the relevance of the legal issues settled by the ruling or because their complexity makes it difficult to fully understand them on the thesis only.[41]

V. Case-Law and Legal Teaching in Mexico

Since the 1960s, intermittent efforts have surfaced in Latin America, and particularly in Mexico, aimed at introducing important changes in law-teaching methods. For example, at a Law School Conference in Lima, Peru, in 1961, it was concluded that teaching law should be "active" and should reconcile theory with practice. This way, "practical teaching" was understood as teaching oriented at solving practical cases and problems.[42]

However, in current teaching methods at Mexican law schools, there has been little progress made along the path mapped out by conferences like

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Revista de la Facultad de Derecho de México, Vol. XIV, Issue 199-200, 84 (January-April 1995).

[40] See the decree that created the Semanario Judicial de la Federación, in Héctor Zertuche García, La Jurisprudencia en el Sistema Jurídico Mexicano, 349-350 (Porrúa, 1990).

[41] Acuerdo relativo a las Reglas para la Elaboración, Envío y Publicación de las Tesis que Emiten los Órganos del Poder Judicial de la Federación (Acuerdo No. 5/1996), found in Raúl Plascencia Villanueva, Jurisprudencia, Panorama del Derecho Mexicano, 100 (UNAM-McGraw-Hill 1999).

[42] Richard Wilson, *The New Legal Education in North and South America*, Stanford Journal of International Law, Vol. 25, 394 (1989).

the one mentioned above. The predominant teaching method used is the so-called "master class" (*cátedra magistral*), in which the teacher *explains* the law (predominantly statute law) to the students. This in turn has inhibited the use of more "active" methodologies in the legal teaching process.

Nevertheless, it is increasingly clear that this situation must be changed. As explained above, binding and non-binding legal decisions play an important role in Mexico's law-making process. In fact, litigators take court opinions into account when preparing their arguments to make their case before the court.

The use of case law in teaching, however, is determined to an important degree by the way court opinions are published. In the case of Mexico, the publication of court opinions is very limited. At a federal level, the *Semanario Judicial de la Federación* publishes excerpts pronounced by federal courts. Moreover, they are not published immediately, but often show a delay of several months. Besides that, they are hardly or rarely published as complete judgments, which could give analysts a more detailed and in-depth knowledge of the case. On a local level, the publication of opinions is even more limited or simply nonexistent.

The analysis of complete judgments is very important for students to see not only the outcome, but also the reasoning that led to it. Likewise, if the publication of opinions were quick and immediate, professors would be able to organize classes to discuss the current issues under legal debate.

Moreover, the analysis of complete opinions would make it possible for students to see how the principles and rules included in a judgment can be applied to future cases, as well as identify the elements, theoretical and empirical considerations, and methods used by judges to settle disputes through their decisions.

Finally, the analysis of complete legal decisions would allow students to acquire expertise in critical examination of rulings; and expertise is needed to better exercise social control over the judiciary in a constitutional democracy.

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GLOBAL CITIZENSHIP FOR THE 21ST CENTURY*

Diego VALADÉS**

I

When Professor Umberto Campagnolo and other intellectuals of his time founded the European Society of Culture, their aim was to encourage constructive dialogue among the protagonists of European culture. They wanted to overcome the division produced by the world conflagration and its lingering consequences during the Cold War. Almost sixty years later, we can affirm that the Society's efforts have been fruitful. Europe has regained peace mainly due to its federative structure, as Campagnolo predicted in his enlightened doctoral thesis, *Nations et droit,* published in 1937.

One of the most enthusiastic members this Society has had, the unforgettable Leopoldo Zea, once argued that the European Society of Culture really is an Ecumenical Society of Culture.[1] In turn, Vice-president Arrigo Levi has underlined that this institution is a *European society of culture*, and not a *society of European culture*.[2] This distinctive characteristic of the society complements the perspective of horizontal global presence, as Zea also sustained.

The cosmopolitan essence of culture and the unsolved problems of peace, development and equity have found echo in this forum, as Michelle Campagnolo-Bouvier[3] observed ten years ago in Mexico, when the society met outside continental Europe for the first time.

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* Lecture delivered in the Seminar: *Citoyens nationaux, citoyens européens, citoyens du monde: quel dialogue*? Societá Europea di Cultura, Venice, Italy, November 8, 2008.

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[1] See Leopoldo Zea, *Presentación*, *in* LATINOAMÉRICA EN LA CONCIENCIA EUROPEA. EUROPA EN LA CONCIENCIA LATINOAMERICANA 14 (Patricia Galeana ed., Fondo de Cultura Económica, 1999).

[2] See Arrigo Levi, *La política de la cultura y el universalismo frente a la globalización imperfecta* in CUADERNOS AMERICANOS, New Epoch, 69 (Universidad Nacional Autónoma de México, 1999).

[3] See Michelle Campagnolo-Bouvier, *América Latina sobre la fragmentación y globalización*

The cosmopolitan purpose of politics and culture must be highlighted when discussing dialogue between national and world citizens. The idea of citizen is what justifies collective life. J. J. Rousseau saw this with greater insight than any other thinker. In his time, he stated that most mistook *inhabitant* for *citizen*. Citizens, he stressed, "are participants of the sovereign authority" whose vote expresses "their unity, their common self, their life and will."[4] Based on this thesis, he developed the concept of the social contract and his radical idea of popular sovereignty, which has been incorporated into all constitutional systems since the 19th century.

The concept of citizen preoccupied Plato and Aristotle in classical times, French Encyclopedists in the modern era, and is still a matter of interest for juridical doctrines in the 21st century. Any constitutional system is explained by power relationships, which are in turn expressed by citizens' levels of liberty, equality and equity.

In the social order, T. H. Marshall[5] drew a theoretical framework to identify the relationships between the concept of class, citizen rights and the process of social development. From this sociological perspective he observed three aspects of citizenship: civil, political and social. According to Marshall, the *civil element* of citizenship is the set of components necessary for individual liberty. Among these are the freedoms of thought, of belief and of expression, as well as the right of transit, to work, access to justice, security and property.

The *political element* of citizenship is each person's right to participate in the exercise of power, be it by electing representatives or by being elected themselves. The *social element* of citizenship is the set of economic rights pertaining to wellbeing and the redistribution of wealth. Thus, citizenship involves political, cultural and economic elements.

One of the great modern achievements of citizenship is equality. Initially a privilege, it has become a universal right. Citizenship has always meant a form of liberty, but not all the members of a community have had this right. For instance, *Civis romanus sum* ("I am a Roman citizen") was an expression used in the Roman Empire[6] which denoted having the privilege of liberty and equality.

Citizenship implies a wide range of political liberties and without them citizenship would lose all significance. This was the original meaning of citizenship in classical times. Equality, independence and responsibility are modern contributions to the concept. Equality is a product of the English,

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in CUADERNOS AMERICANOS, New Epoch, 69 (Universidad Nacional Autónoma de México, 1998).

4 THE SOCIAL CONTRACT, *I, 6* (Jean-Jacques Rosseau).

5 THOMAS HUMPHREY MARSHALL, CLASS, CITIZENSHIP AND SOCIAL DEVELOPMENT, Doubleday and Company, New York 71 (1964).

6 *Acts* 22:28 (The King James Bible).

American and French Revolutions. Independence is based on methods of suffrage that guarantee voting secrecy first adopted in the 19th century. Responsibility derives from the representative system, a central element of modern constitutionalism. In recent times, a fourth element has begun to emerge: dignity, which denotes the progressive development of fundamental rights and makes equality an imperative.

Citizenship would be a futile construct if the most acute problems of our time, poverty and migration, were not addressed. Overlooking these issues would suppose a serious conceptual decline: the rights of citizens would run the risk of being reduced to their political meaning again while excluding cultural advancement based on modern political revolutions, as well as contemporary social revolutions. There is no better opportunity to enrich the concept of citizenship than the present. Despair among the poor, fear among the wealthy, uncertainty among political leaders, together leave some vulnerable parts of the world on the verge of an authoritarian resurgence. It is our duty to point out these dangers, as well as to provide realistic solutions.

II

If we understand politics in its classical meaning, a human activity aimed at promoting the cohesion and development of the *polis* (or later, the *civitas*), we also have to assume, like Bobbio and Campagnolo, that culture and politics form part of a complementary pair. In its classical sense, *citizen* is a concept that maintains a more direct relationship with politics because it links the community (*civitas*) with each of its components. Moreover, we must now implement a *civitas maxima*, as Campagnolo proposed seven decades ago.

At its inception, globalism only had mercantile motivations. Let us recall, for example, that in 1800, J. G. Fichte's work entitled *The Commercial Closed State*[7] implied there already existed an open market, which he opposed. But the globalization of our time has other ingredients: means of communication, cultural interaction, the irradiation of fundamental rights, the interweaving of political and juridical institutions, and the autonomous formation of cultural, civic and aid organizations. These are but some examples of our reality that make transversal globalism possible, which Zea held to be a central characteristic of open societies, and not a planetary version of authoritarian verticality, observed in closed societies.

To promote and consolidate *transversal globalism*, we must solve the challenges posed by poverty and migration. The magnitude of the concentration

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[7] See generally JOHANN GOTTLIEB FICHTE, DER GESCHLOSSENE HANDELSSTAAT (1800).

of wealth and the displacement of large groups of people has risen.[8] The flow of migrants is higher than ever, as they flee from misery in their own lands, but will inevitably encounter unfairness in the countries of their destination. This is a paradox because some of those countries embrace the principles of constitutionalism for their native citizens and deny that same sense of equality for recently arriving residents.

Broadly speaking, half of the world's population is made up of citizens who enjoy the benefits of goods and services offered by growth, while citizens who suffer the lack of distributive policies make up the other half.[9] The international community is so busy trying to avoid a catastrophe for the affluent that it scarcely pays attention to the increasing adversity the poor face. We are all answerable for the enormous burden of human beings living below any acceptable standards of justice. Unfortunately, in light of the intensity of the current financial and economic crisis, this ominous panorama is about to get even worse.

III

Migration has been closely linked to curiosity and satisfaction of human needs. Man has not slackened his pace of movement since he left his homeland alongside Lake Victoria. But today this pilgrimage is, to a greater extent, brought about by unfair motives, such as famine, labor scarcity, political seclusion and religious and racial constraints. The most common reasons are unemployment and hunger, but dramas of political and religious prosecution and the tragedy of ethnic cleansing are also present. The solution to the problem is in the end "cultural", understanding culture as the framework of knowledge, values, perceptions, beliefs, customs and institutions that guide human activity and govern coexistence.

Umberto Eco[10] makes a clear distinction: he identifies *immigration* as the legal process through which a foreigner is admitted into a national community different from his own, and he calls *migration* the social process through which the people arriving transform the culture of the receiving country. What interests us, in particular, is the second phenomenon because of its complexity and consequences.

The task of defining a new concept of *global citizen* requires adopting instruments of equality and justice to surmount problems of economic exclusion, social discrimination and religious intolerance. This means a global

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[8] See generally Phillipe Bernard, *Tous les migrants ne sont pas libres et égaux*, in L'ATLAS DES MIGRATIONS, Le Monde, 2008, at 116.

[9] See Gini index in U. N. Human Development Reports Web page, available at: *http://hdrstats.undp.org/indicators/147.html*.

[10] UMBERTO ECO, CINQUE SCRITTI MORALI, chapter 5 (Biompiani, 1997).

cultural transformation to solve the causes that compel great human contingents to migrate.

But that is not enough. It will also be necessary to modify the cultural patterns that beget the rejection of *migrants*, according to Eco's definition, and mitigate the effects of institutional distortions caused by their arrival. The right to justice is frequently denied to migrants and many times also to their descendants, who were born in the new land. The conservative political discourse which grounds these actions contradicts the very nature of the Constitutional State, whose essence is freedom and pluralism.

Voltaire, with his sense of cultural cosmopolitism, stated that "whoever should wish his native land might never be greater or smaller, richer or poorer than it is, would be a citizen of the world."[11] The French Constitution of 1791 included an integrating formula (Title II, article 1.3) that confers citizenship to foreigners after five years of uninterrupted residence in France, if they acquired real estate, married a French national, or formed a commercial or agricultural establishment. Today Jürgen Habermas[12] alludes to the *cosmopolitan State* and points out that "only a democratic citizenship that does not close itself off in a particularistic fashion can pave the way for a *world citizenship*, which is taking shape today in worldwide political communications."

IV

In his autobiography and in an early essay, Norberto Bobbio brought to our attention the theoretical work of Umberto Campagnolo,[13] whose fortunate rescue from undeserved oblivion, was possible thanks to Mario Losano.[14] I am convinced that Campagnolo's idea of law will encourage fresh and fructiferous reflection in the years to come. It is fortunate that in the early 21st century, Campagnolo's debate with Hans Kelsen is now published, as well as his remarkable *Verso una costituzione federale per l'Europa: una proposta inedita dal 1943*.[15] These works, though written seventy years ago, will prove useful in solving contemporary issues.

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[11] FRANCOIS VOLTAIRE, PHILOSOPHICAL DICTIONARY (Theodore Besterman trans., Penguin Classics 1984) (1764).

[12] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS, 514 (William Rehg trans., MIT Press 1996).

[13] See Norberto Bobbio, *Nazioni e diritto: Umberto Campagnolo allievo e critico di Hans Kelsen*, in DIRITTO INTERNAZIONALE E STATO SOVRANO (Mario G. Losano ed., 1997).

[14] *Diritto internazionale e Stato sovrano*, Milan, Giuffrè, 1999.

[15] Almost prophetically, he proposes: "La cittadinanza europea è automaticamente acquisita con la cittadinanza di una particolare collettività membro. Ogni cittadino europeo ha il diritto di stabilire la sua residenza in qualsiasi punto del territorio della Reppublica Federativa Europea, salvo disposizione restrittive decretate delle collettività partico-

One of the greatest constitutionalists of our time, Peter Häberle, has given vigorous impetus to relations between culture and legal institutions. In the same direction, although from a different starting point, Campagnolo postulates a logical sequence that comprehends three successive elements: law, international law and the development of international law.

First, according to Campagnolo's suggestive concept, law is "the reaction of the political society with respect to the action of each of its members, and in virtue of its regularity, it can be known with enough opportunity for directing that action at the same time."[16] The five elements of this concept are: *a)* a normative act, *b)* taken by a legitimate entity, *c)* to regulate behavior, *d)* systematically and *e)* publicly. According to its nature, the norm implies stability, abstraction and generality, and it is the result of human will and interaction.

Second, international law, whose conventional definitions Campagnolo opposed, is "the part of State law that regulates the behavior of citizens in relation to foreigners."[17] Finally, the third stage of this dynamic relationship is the development of international law expressed as the *progressive assimilation of the foreign person as a citizen*. Once synthesized, these three processes culminate in the universal State, the *civitas maxima*, "in which the distinction between citizen and foreigner should disappear, the same way the distinction between national and international law should."[18]

Campagolo's theory waited patiently to emerge at the right moment. The maelstrom of warfare throughout the 20th century led to both mortal and moral victims. Though slow, the recovery of ethics has been possible, among other things, thanks to initiatives like the one promoted by this European Society of Culture. Umberto Campagnolo left us his posthumous legacy: a rich instrument to design and renew legal institutions which should yield fruits in upcoming years. The most immediate step, the one that concerns us right now consists of promoting a concept of global citizenship based on clear recognition of the principles of equity and dignity, in which the *civitas maxima* ought to be based. For this purpose, dynamic dialogue between Europe and Latin America will be of paramount importance in transforming the old Atlantic into a new Mediterranean.

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lari con il consenso del Parlamento federale, che avrá cura di salvaguardare, nei limiti compatibili con l'unità europea, l'individualità delle nazione che la costituiscono." UMBERTO CAMPAGNOLO, VERSO UNA COSTITUZIONE FEDERALE PER L'EUROPA: UNA PROPOSTA INEDITA DEL 1943, 227 (Giuffrè, 2003).

16 Umberto Campagnolo, "As idéias mestras da minha tese", in DIREITO INTERNACIONAL E ESTADO SOBERANO, 201 (Mario Losano ed., 2002).

17 *Id.* at 107.

18 *Id.* at 109.

COMMENT

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INSTITUTIONAL FRAMEWORK FOR INTERNATIONAL JUDICIAL COOPERATION: OPPORTUNITIES AND CHALLENGES FOR NORTH AMERICA

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I. Introduction

The dynamic and complex forces of globalization[1] have created a growing and pressing need for legal certainty and stability at a global scale. However, existing legal institutions, legal provisions, legal remedies, and public and private forums all over the world have already shown their limitations and inability to efficiently adapt and respond to the challenges posed by globalization. As a result, we are already paying a high price for not having an efficient global legal order.

The absence of a global legal order has facilitated the expansion of international organized crime, international terrorism and uncontrolled international unfair competition and commercial piracy, to mention a few of the consequences.

Even people's private lives are being affected. Families of expatriates working for multinational corporations and international organizations can attest to the negative consequences of not having an efficient global legal order. For instance, collecting alimony and child support from employees of multinational corporations receiving their salaries in the most exotic places around the world can be a real hassle, not to mention international abduction of children by their own parents.

Indeed, the rise and evolution of supranational realities are pressing —to their very limits— many of the legal institutions, legal provisions, legal remedies, and public and private forums that have been a fundamental part of our daily lives.

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[1] "Globalization is unstoppable. Even though it may only be in its early stages, it is already intrinsic to the world economy. We have to live with it, recognize its advantages and learn to manage it. That imperative applies to governments, who would be unwise to attempt to stem the tide for reasons of political expediency. It also goes for companies of all sizes, who must now compete on global markets and learn to adjust their strategies accordingly, seizing the opportunities that globalization offers. Ralph Amissah, *The Autonomous Contract; Reflecting the Borderless Electronic – Commercial Environment in Contracting* (1997), available at: *http://www.jus.uio.no/lm/the.autonomous.contract.07.10.1997.amissah/doc.html* (quoting Maria Lievanos Cattaui, *The Global Economy – an Opportunity to be Seized,* I.C.C. Bus. World, July 17, 1997, available at *http://www.iccwbo.org/home/news_archives/1997globalec.asp*) (Last visited on September 9, 2007).

We live in a world of legal means and remedies developed under the model of the modern State. We are governed by legal frameworks created and developed to respond and deal with issues confined to the limits and boundaries of nation-states, and not for supranational realities or issues posed by the global village.

In the face of this, developing some sort of solution that allows the rule of law to respond to these challenges would seem urgent, a matter of priority. However, most legal solutions to these pressing needs have proven quite limited in terms of scope, reach and efficiency, and most lack of viable means to be enforced effectively within a real context, despite the general consensus on the need to find one.

The question of how to find and implement viable legal solutions is still in the air. Although much thought has been given to these issues, much more is needed. With this context in mind, the present article will focus on the institutional framework for international judicial cooperation. I will first address the current situation in Europe and Ibero-America, presenting a summary of what has been done in these regions in terms of developing legal solutions and institutions to frame and implement international judicial cooperation.

The European Union has accomplished some of the most significant and successful goals in this area. Europeans are committed to transferring and adapting their good practices to Ibero-American settings. So far, they have apparently been very successful at this.

Then, I will address the total lack of an institutional framework for international judicial cooperation in North America. The discussion will focus on the opportunities and challenges that any serious effort faces to developing and implementing the desperately needed institutional framework for the three countries in North America: Mexico, the United States and Canada.

The issues concerning the institutional framework for international judicial cooperation in North America should be addressed by working in at least three areas simultaneously:

a) Setting a "priority agenda," that is, reaching a consensus on the pressing issues affecting the three countries in North-America that require immediate and urgent attention;
b) An implementation agenda, which, among other things, would include the creation and developepment of an institutional framework for international judicial cooperation among these countries; and
c) A sustainability agenda, which, among other things, needs to address the complexities of the different legal traditions shaping the legal lives of the countries in North America. In discussing sustainability, this essay will highlight Canada's significant work in the field of "Civil Law-Common Law Bijuralism" because much can be learned from this.

Finally, I will present my conclusions and opinions.

II. Institutional Legal Framework for International Judicial Cooperation

It is generally acknowledged that international treaties are one of the best solutions for creating a legal framework on an international scale.[2] However, reaching such solutions —having a single treaty actually developed, signed and ratified— implies a very difficult, slow and often tortuous process, before even considering their actual implementation and administration, assuming they are made and put in effect.

Negotiating an international treaty requires significant commitment in terms of time and effort from all the countries involved. One of the major problems with international treaties is that once they come into effect, they are almost frozen in time. In practical terms, it can be said that international treaties are carved in stone because amending and updating them is an endeavor of Herculean proportions.

In the context of North American countries, the first step to amend and update an international treaty requires agreement from the presidents of the United States and Mexico, as well as from the Prime Minister of Canada. That is hard enough by itself, but on top of that, this process would also require ratification from the U.S. and Mexican Congresses, as well as from the Canadian Parliament.

Significant efforts have been made in dealing with this aspect of rigidity associated with international treaties.[3] However, in historical terms, it is too early to evaluate the efficiency of these methods.[4]

In any case, there are two very important examples in the field of international business transactions that provide both the means for establishing

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[2] *Cfr.* "...there is no issue that provokes more discussions, there is not a more confusing legal field, than that of private international law. Not only does every country have its own principles, its own international law, but there is none where private international law is completely filled with unsolved issues in the face of which the layman cannot understand a thing and learned people frequently find themselves in a true state of total despair... Current scholars believe this anarchic situation is an irrevocable fate, discussing if anything how to order it, through an opportunistic approach... This is why the only known solution is that of international treaties." Ernest Frankenstein, *Una doctrina moderna de derecho internacional privado*, Revista General de Derecho y Jurisprudencia, t. IV (1933). Author's translation of the Spanish translation made by Mr. Eduardo Triguero Saravia. Cited by Felipe de J. Tena, Derecho Mercantil Mexicano con Exclusión del Marítimo 577 (19th ed., Porrúa, 1978).

[3] For example, article 7 of CISG (the United Nations Convention for the International Sale of Goods) made it possible to use case law from different jurisdictions around the world to develop a body of case law on CISG matters. The same method has been followed by other UNCITRAL treaties and UNIDROIT principles on contracts.

[4] I am not aware of any study evaluating the success of any of these efforts in dealing with the aspect of rigidity associated with international treaties. However, I believe that at this point there are insufficient elements to give an opinion on this issue.

a stable legal framework and the flexibility required to update it whenever it may be required: Incoterms[5] and ICC rules for international letters of credit,[6] both published[7] by the International Chamber of Commerce.[8] However, Incoterms and ICC rules can only work within the context of a contractual agreement between private parties. Therefore, the desired aim is to find legal solutions that can work and operate in a supranational setting even when the will of the parties involved is absent.

The paradox is that even though we are living in a period where nation-states are already in decline, we are still under the strong influences of the paradigms of nation-states. The framework of these paradigms still determines our current understanding of private international law. Today, international treaties and domestic laws are still the law of the land in each country and territory, and the rules on conflicts of laws are still the rule of thumb in private international legal relations.

In a sense, we are walking on a tightrope. One of the major challenges for international legal cooperation is developing suitable and flexible means and structures, which can also respond to the needs of the global society and be congruent with each national system. Specifically, responding to the challenges of international judicial cooperation in North America would require a carefully crafted institutional framework. A framework of this kind would sustain relations among the judiciaries of North American countries, facilitating international judicial cooperation processes, and providing both suitable and flexible means and structures. That is, it would be an institu-

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5 Incoterms 2000 is a publication of the International Chamber of Commerce (*www.iccwbo.org*).

6 ICC Uniform Customs and Practice for Documentary Credits, UCP 600. 2007 Revision.

7 Incoterms and ICC Uniform Customs and Practice for Documentary Credits are official publications of the ICC, a private organization, and are voluntarily adopted by private parties.

8 "The International Chamber of Commerce (ICC) is an international organization that works to promote and support global trade and globalization. It serves as an advocate of world business in the global economy, in the interests of economic growth, job creation, and prosperity. As a global business organization, made up of member states, it helps the development of global outlooks on business matters. ICC has direct access to national governments worldwide through its national committees among others. To attain this objective, ICC has developed a range of activities. The ICC International Court of Arbitration is the most respected service of its kind in the world. Its voluntary rule-writing for business spreads best practice in areas as varied as banking, marketing, anti-corruption and environmental management. Their policy-making and advocacy work keeps national governments, the United Nations system and other global bodies apprised of the views of the world business on some of the most pressing issues of the day." Wikipedia, the Free Encyclopedia. *http://en.wikipedia.org/wiki/International_Chamber_of_Commerce* (last visited on September 27, 2007).

tional framework that can be both responsive to the needs of the global village and be congruent with the national systems of each one of the countries concerned.

I will now explore some significant steps that have been taken in this direction, both in Europe and Ibero-America.

1. *Europe*

Today, international judicial cooperation in Europe operates on the concept of a common judicial space[9] and the three most important institutional players behind international cooperation among the European judiciaries are Eurojust, the European Judicial Network and liaison magistrates.[10]

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[9] The Working Document of the European Parliament "Liberty, Security, Justice: An Agenda for Europe," dated March 24-25, 1999, states "a Judicial Space in Europe also means an area of common peace and common security." This document also adds that "[we] must in general begin thinking in terms of Europe as a common judicial space. Parents must, for example, be able to rely on the fact that a decision on shared custody will apply throughout the Union. And victims of crime must be able to assert their rights, despite the fact that the EU's legal systems differ one from another. Work in these and a series of other areas is a basic prerequisite if the concept of Europe is not to become unsustainable. Integration and the struggle for more freedom must never occur at the expense of people's security and law and order. Cooperation in the fields of justice and home affairs is now into its sixth year. A number of initiatives have been taken and in many areas we can show impressive results. In addition we have a deeper understanding of what remains to be done. The new Treaty also sets up an ambitious goal for the future: namely '...to keep and develop Europe as an area of freedom, security and justice.' As an overall expression of objectives this is particularly apt. The combination of the concepts of freedom, security and justice provides a simple, clear and at the same time ambitious indication of the direction of future work. What is required now is to define the concrete implications of this new concept." Working Document, European Parliament, Liberty, Security, Justice: An Agenda for Europe. 24-25 March 1999. pp. 8 and 15. *www.europarl.europa.eu/workingpapers/libe/pdf/106_en.pdf* (Last visited on September 27, 2008). Accordingly, the term is broadly used to refer to the territorial space of the European Union where judicial activity takes place in compliance with the European Union's institutional framework. This concept has been also used in criminal matters when dealing with judicial mechanisms between two countries, such as the Treaty for the Suppression of Extradition between Italy and Spain. This term has also been used within the Ibero-American context to refer to the judicial space of Ibero-American countries in which the European Union has sponsored the creation of an institutional framework for judicial cooperation (*e.g.* Red Iberoamericana de Escuelas Judiciales). *http://www.cjf.gob.mx/encuentroconsejos2002/docs/riaej.pdf* (Last visited on September 28, 2007).

[10] *Cfr*. Prontuario de Auxilio Judicial Internacional [Guide to International Judicial Cooperation]. Consejo General del Poder Judicial [General Council of the Judiciary]. Ministerio de Justicia [Ministry of Justice]. Fiscalía General del Estado [State Attorney General's Office]. *www.prontuario.org* (Last visited on September 27, 2007.)

In reference to the relation between international judicial cooperation and the European common judicial space, Javier Luis Parra[11] has written:

> This term —an end in itself more than a fact— covers initiatives that advance mutual and reciprocal knowledge of [European] legal systems, programs that confer mutual and reciprocal acknowledgment of court rulings, international instruments aimed at moving toward substantive and procedural legislation, the implementation and enforcement of court rulings, as well as concrete actions concerning processing and implementing requests for assistance among judicial agencies.[12]

According to Mr. Parra, European channels for judicial cooperation can be classified into three categories, namely: legal resources, virtual resources and institutional resources.

> Legal Resources: are made up of the entire normative framework and community regulations in particular, providing a legal basis for establishing a strengthened assistance system within the European Union: acts of communication, obtaining evidence, shaping jurisdiction, acknowledgment and implementation...
>
> Virtual Resources: a set of practical tools that provides assistance online and is especially suited to better implementing active international judicial cooperation.
>
> Institutional Resources: represented by a network of institutional agents established to facilitate and mediate for effective judicial cooperation.[13]

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[11] Mr. Javier Luis Parra is the Governing Secretary of the High Court of Justice of Murcia and a contact point for the European Judicial Network in Civil and Commercial Matters.

[12] A translation of Vademecun de Cooperación Jurídica Internacional. *http://www.vademecumjuridico.org/esp/03.php?a=3* (Last visited on September 20, 2007.) Original in Spanish: "Dentro de esta expresión, en sí misma, más un fin que una realidad, se enmarcan tanto las iniciativas de promoción del conocimiento mutuo recíproco de los sistemas legales, los programas de medidas de reconocimiento mutuo de resoluciones judiciales, los instrumentos internacionales dirigidos a la aproximación de legislaciones sustantivas y procesales, la ejecución y cumplimiento de resoluciones judiciales, como las concretas acciones consistentes en el despacho y ejecución de solicitudes de asistencia entre órganos judiciales."

[13] *Id.* Translation of the folowing text in Spanish: "Recursos legales: vienen integrados por toda la arquitectura normativa, en especial reglamentos comunitarios, que dan soporte jurídico al desarrollo de un régimen reforzado asistencia dentro de la UE: actos de comunicación, obtención de pruebas, determinación de competencia, reconocimiento y ejecución… Recursos virtuales: conjunto de herramientas prácticas que ofrecen asistencia vía web especialmente idóneas para un mejor desarrollo de la cooperación judicial internacional activa. Recursos institucionales: representado por el tejido de agentes institucionales puestos en marcha para facilitar e intermediar la efectiva cooperación judicial."

For purposes of this article, I will mainly focus on: Eurojust, the European Judicial Network (also EJN) and liaison magistrates.

> The relationship between the European Judicial Network, Eurojust and the liaison magistrates set up in the Joint Action of 22 April 1996 is natural and complementary as regards facilitating judicial cooperation in cross-border cases. The EJN is a decentralized network of contact points which advise and assist judicial authorities in Member States when judicial cooperation is necessary. Eurojust is a central unit with wide possibilities for coordination in cross-border cases. Their relations are based on consultation and complementarity to avoid duplication of efforts. Seconded liaison magistrates in Member States also encourage judicial cooperation by exchanging legal information to promote mutual understanding. Eurojust may, on a case-by-case basis cooperate with liaison magistrates that, at the same time, can be appointed as contact points of the EJN.[14]

A. *Eurojus*

The first European institution to work in the field of international judicial cooperation was the European Union's Judicial Cooperation Unit, also known as Eurojust.

> Eurojust is a new European Union body established in 2002 to enhance the effectiveness of the competent authorities within Member States when they are dealing with the investigation and prosecution of serious cross-border and organized crime.
>
> Eurojust stimulates and improves the co-ordination of investigations and prosecutions… supports the competent authorities of the Member States in order to render their investigations and prosecutions more effective...
>
> Eurojust fulfils a unique role as a new permanent body in the European legal area. Its mission is to enhance the development of Europe-wide co-operation on criminal justice cases. This means that Eurojust is a key interlocutor with the European institutions such as the Parliament, the Council and the Commission.
>
> The College of Eurojust is… composed of 27 National Members, one nominated by each EU Member State. The national members are senior, experienced prosecutors or judges; some national members are supported by Deputies and Assistants.
>
> Eurojust was created by an EU Council Decision of 28 February 2002 No. 2002/187/JHA (OJE L 63/1, 6.3.2002, amended by Council Decision of 18 June 2003 No 2003/659/JHA (OJE L 245/44, 29.9.2003). It operated from Brussels on a provisional basis from 1 March 2001 and moved to

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[14] Freedom Security and Justice. *http://ec.europa.eu/justice_home/fsj/criminal/network/fsj_criminal_network_en.htm* (Last visited on September 23, 2007).

The Hague in December 2002. Eurojust and Europol signed an agreement on close cooperation on 9 June 2004.[15]

B. *European Judicial Networks*

a. The European Judicial Network on Criminal Matters

There are two European judicial networks working under the common name of European Judicial Network: the original European Judicial Network, which was the first of its kind and the European Judicial Network on Civil and Commercial Matters, which was established later.

The original European Judicial Network (EJN) was the "first structured mechanism of the judicial cooperation in the EU to become truly operational." It was created by a Joint Action of the European Council adopted on June 29, 1998 (OJ L 191 of 07 July 1998, p.4), inspired on the principle of direct contact between competent judicial authorities, "with the purpose of creating a network of experts to ensure the proper execution of mutual legal assistance requests" in the area of judicial cooperation on criminal matters."[16]

> The EJN is a non concentrated, dynamic structure, with horizontal character and possessing only the minimum integration level necessary to its functioning. Therefore, flexibility is its main character.
>
> The EJN is composed of contact points of the Member States, as well as of the European Commission.
>
> National contact points are designated by each Member State among Central authorities in charge of international judicial co-operation, judicial authorities and other competent authorities with specific responsibilities in the field of international judicial co-operation, both in general and for certain forms of serious crime, such as organized crime, corruption, drug trafficking or terrorism.
>
> Keeping in mind EJN's flexibility and in view its wide dissemination through out the whole EU territory, the responsibility was each Member State to choice [*sic*] and appoint the contact points. The process takes place according to their constitutional rules, legal traditions and internal structure, providing effective coverage for all forms of serious crimes throughout the country. The result is the existence of almost 400 national contact points throughout the 27 Member States.
>
> Contact points are "active intermediaries," with the task of facilitating judicial cooperation between Member States, particularly in order to com-

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15 Europe. Agencies of the European Union. *http://europa.eu/agencies/pol_agencies/eurojust/index_en.htm* (Last visited on September 22, 2007).

16 *Cfr*. European Judicial Network. *http://www.ejn-crimjust.europa.eu/about-ejn.aspx* (Last visited on September 22, 2007).

bat different forms of serious crime. The Joint Action states they will enable local competent authorities to "establish the most appropriate direct contacts."

Other functions mentioned in the Joint Action are: to provide the legal and practical information necessary for the local authorities to prepare an effective request for judicial co-operation, as well as coordinating functions in cases where a series of requests from local judicial authorities in a Member State needs coordinated action in another Member State.[17]

b. The European Judicial Network on Civil and Commercial Matters

The European Judicial Network on Civil and Commercial Matters was established by means of a European Council decision dated September 28, 2001 (2001/470/EC), as a direct result of a special Council meeting "devoted to the establishment of an area of freedom, security and justice in the European Union" (Tampere, Finland, Autumn 1999).[18]

The network consists of representatives of the Member States' judicial and administrative authorities and meets several times each year to exchange information and experience and boost cooperation between the Member States as regards civil and commercial law.

The main objective is to make life easier for people facing litigation of whatever kind where there is a transnational element - *i.e.* where it involves more than one Member State.

The European Union currently has a wide variety of national legal systems, and this diversity often creates problems when litigation transcends national borders.

Individuals and firms, and even more so the legal professions, will find it very useful to have access to knowledge about the various national systems of civil and commercial law and the legislative instruments of the European Union and other international organizations including the United Nations, the Hague Conference and the Council of Europe.[19]

c. Liaison Magistrates

A liaison magistrate is an "official with special expertise in judicial cooperation, who has been posted in another State, on the basis of bilateral or multilateral arrangements, in order to increase the speed and effectiveness of judicial cooperation and facilitate their better mutual understanding be-

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17 *Id.*

18 *Cfr.* European Judicial Network on Civil and Commercial Matters. *http://ec.europa.eu/civiljustice/index_en.htm* (Last visited on September 23, 2007).

19 *Id.*

tween the legal and judicial systems of the States in question."[20] However, these are not officials with extraterritorial powers, nor persons assigned to engage in "limited, nonintrusive forms of self-help" in another State, with the tacit support of the authorities of the host State, or agents who may act in violation of international law or the laws of the host State.[21]

> Liaison magistrates work within the forest of bilateral and multilateral agreements and arrangements. They are the experts regarding which of these agreements and arrangements can best be applied to specific cases, how the requests should be formulated, and who should be contacted.
>
> The concept of the liaison magistrate is based on the positive experiences with the growing network of liaison officers used to promote cooperation between law enforcement agencies. In transnational law enforcement, the liaison officer uses direct contacts to facilitate and expedite the collection and exchange of information, in particular information of a strategic nature…
>
> The liaison magistrates form a small and select body of international experts in judicial co-operation. They are the fixers, the problem-solvers. As our societies are becoming more international, our prosecutors and our courts will have to co-operate more intensely with one another, within the framework of international law. Individual prosecutors and judges often lack the training, specialization and language skills that are required in the specialist area of judicial cooperation. As a consequence, we will inevitably have to rely increasingly on the expertise of the liaison magistrates.[22]

2. *Ibero-America*

The expression Ibero-America is used to refer to the countries located in the Iberian Peninsula: Spain, Portugal and Andorra; as well as the Portuguese and Spanish-speaking countries in the American Continent.[23]

> The Ibero-American Summit is a forum for political harmonization on matters concerning the region, taking as a basis the common accord of the Ibero-American countries with the principles of representative democracy and respect for human rights, fundamental liberty and self-determination of the people. This mechanism saw the light of day in Guadalajara, Mexico in 1991, during preparations for the celebration of the Quincentenary of the

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[20] *Cfr.* The Second Meeting of Nordic and Baltic Ministers of Justice. November 2, 2001, Tallinn, Radisson SAS Hotel *http://meeting.just.ee/topic3_2.php?menyy=t3* (Last visited on September 23, 2007).

[21] *Id.*

[22] *Id.*

[23] Argentina, Brazil, Bolivia, Mexico, Cuba, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Peru, the Dominican Republic, Uruguay and Venezuela.

Discovery of the Americas, with the common element of cultural identity between the Latin American and Iberian peoples.

At each summit meeting a declaration is issued named after the city where the meeting was held. The Guadalajara and Madrid (1992) declarations are considered as being foundational, that is to say, they set out the aims of the Ibero-American Group.

During the VIII summit meeting of the Ibero-American Conference (Porto, 1998) the creation of a Cooperation Secretariat was approved, with headquarters to be established in Madrid. The objectives of the Secretariat are:

- to contribute to the consolidation of the Ibero-American Community of Nations founded on its shared values.
- to contribute to the development of cooperation, approximation and interaction among the actors in Ibero-American cooperation.
- to strengthen specific Ibero-American characteristics.

These objectives interrelate with the following areas of emphasis:

- the diffusion of common languages and cultures.
- the interaction of the societies and expansion of mutual understanding.
- the strengthening of institutions.[24]

From a perspective of international judicial cooperation, the general trends of Ibero-American summits have made possible the creation of the following institutions: the Ibero-American Judicial Summit, the Ibero-American Network of Judicial Information and Documentation (Iberius), the Ibero-American Classroom, the Ibero-American Network of Judicial Schools, and the Juan Carlos I Judicial School of Central America and the Caribbean.

A. *The Ibero-American Judicial Summit*

The Ibero-American Judicial Summit is an organization that gives structure to cooperation and agreement among the judiciaries of the twenty- three countries of the Ibero-American community of nations, gathering the highest authorities and government agencies of the Ibero-American judicial systems in a single forum. It assembles Presidents of Supreme Courts and High Tribunals of Justice, and the highest Ibero-American judicial council officials.

The main purpose of the Ibero-American Judicial Summit is to "adopt officially approved projects and actions, with the conviction that a common cultural background based on respect for existing differences is a unique in-

[24] Ibero-American Summit. *http://www.mre.gov.br/cdbrasil/itamaraty/web/ingles/relext/mre/orgreg/cupula/apresent.htm* (Last visited on September 23, 2007.) Ibero-American summits are held once a year in one of the countries of the region. Each conference adopts a central theme.

strument that contributes to strengthening the judiciary, and consequently the democratic system."

Under its current structure, as of June, 2004, the Ibero-American Judicial Summit is the result of merging or converging the two previous structures: the Ibero-American Summit of Presidents of Supreme Court and High Tribunals of Justice and the Ibero-American Conference of Judicial Councils.[25]

B. *The Ibero-American Network of Judicial Information and Documentation (Iberius)*

The Ibero-American Network of Judicial Information and Documentation, Iberius, is defined as a community for cooperation, agreement and mutual support in the field of legal information and documentation. Since its inception, it was not created as a virtual community, (it did not fall under the definition of yet another online network), but a real community of cooperation.

Additionally, it rose out of the need to strengthen national judiciary branches in terms of legal information by providing well-established structures on a professional basis, that is, through Documentation Centers aimed at guaranteeing stability, quality information, regular updates of information and project sustainability.

This defines the two main components of this project:

1. The network project itself.
2. National projects for creating or building up Documentation Centers.

Hence, it is a broad-ranged and long-term project to establish an Ibero-American Network of Judicial Documentation Centers, with Documentation Centers as the agencies that assist in the access of systematized, managed and processed legal information.

However, to guarantee Network's sustainability as well as its quality and regular information updates, it envisions the establishment of Documentations Centers in countries where none exist, or building up those that already do.

The website and the project are both instruments and a means.[26]

C. *The Ibero-American Classroom*

The Ibero-American Classroom Project of the General Council of the Judiciary was conceived as an express request from the 1997 Ibero-American

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[25] Translation of Secretaría Permanente, Cumbre Judicial Ibero-Americana. *http://www.cumbrejudicial.org/eversuite/GetRecords?Template=default&app=cumbres* (Last visited on September 23, 2007).

[26] Translation of Iberius. Red Iberoamericana de Información y Documentación Judicial. *http://www.iberius.org/eversuite/GetRecords?Template=default&app=iberius* (Last visited on September 23, 2007).

Summit of Presidents of Supreme Courts and High Tribunals of Justice held in Madrid. The General Council of the Spanish Judiciary was formally asked to create an Ibero-American Classroom, envisioned by all as a forum for specialized legal education/training and discussion aimed at Ibero-American judges.

Established in April 1998, it has since carried out various ongoing activities. This training program for Ibero-American judges pursues the following goals, among others:

- Providing expertise in the field of judicial education to the Ibero-American legal community.
- Strengthening existing relations among the Supreme Courts and Tribunals, as well as among Judiciary Councils in Ibero-American countries.
- Consolidating a meeting place for highly specialized Spanish and Ibero-American judges, so that they can become a point of reference in the different fields related to the exercise of jurisdictional duties.
- Implementing an Ibero-American judicial community that makes it possible to exchange experiences, information and research projects.[27]

D. *The Ibero-American Network of Judicial Schools*

The Ibero-American Network of Judicial Schools (IANJS) was created within the framework of the "2nd Conference of Ibero-American Judicial Councils" and approved at the "6th Ibero-American Summit of Presidents of Supreme Courts and High Tribunals of Justice" held in Spain in May 2001. It is a networking community for mutual cooperation, agreement and support among Judicial Schools and Public Centers for Judicial Training in Ibero-America, contributing to the exchange of information about legal programs, methodologies and training systems, making it possible to organize activities for its members and planning joint training activities. All this is based on a flexible organizational structure that respects the independence of each member.

The Network strives to be seen:

- As a model for Ibero-American organization and integration in the field of judicial training for its contribution the good management of the common judicial space to thus strengthen judicial systems and the Rule of Law.
- By the judiciaries and the beneficiaries of the public service of justice, as a reliable strategic instrument for institutional development in judiciaries, for the consolidation of a democratic, just and humane society; as well as for its professionalism, ethics, efficiency, transparency and commitment.

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[27] Translation of Consejo General del Poder Judicial. Aula Iberoamericana. *http://www.poderjudicial.es/eversuite/GetRecords?Template=cgpj/cgpj/principal.htm* (Last visited on September 23, 2007).

The following policies have been outlined to achieve this purpose:

1. Assist in the consolidation of constitutional and democratic States of law and justice.

2. Strengthen justice as a public service by improving judicial training and attaining the professional excellence of public servants in the field of justice, especially judges.

3. Strengthen Ibero-American judiciaries by promoting ongoing work at Judicial Schools and public legal training centers.

4. Reinforce Ibero-American judicial integration through understanding among members of the judiciary of the legal and judicial systems in other Ibero-American countries, as well as instruments for national and international cooperation and training of members of the judiciary to foment this understanding.

5. Uphold elements inherent to Ibero-American legal culture and identity.[28]

E. *The Juan Carlos I Judicial School of Central America and the Caribbean*

The General Council of the Judiciary and the Spanish Agency for International Cooperation in collaboration with the Supreme Courts of the region have created –as of 2005– the Juan Carlos I Judicial School of Central America and the Caribbean.

This school emerges as a result of the Guatemalan Judiciary's Juan Carlos I School. With the assistance of the General Council of the Judiciary and SAIC financing, it was established in 1998. Aware that this school's term as a bi-lateral project was about to end, the project was restructured to give way to a regional one.

The general purposes of the Juan Carlos I School are:

1. To contribute to the consolidation of democratic processes initiated in the region,

2. To support the processes strengthening of the Rule of Law,

3. To assist governability, and

4. To promote mechanisms and synergies for regional integration in the sector of justice.

Under its current structure and with headquarters in the city of La Antigua, Guatemala, it organizes activities for three weeks with the assistance of teachers from Nicaragua, El Salvador, Honduras, Panama, Costa Rica, the Dominican Republic and Guatemala, and led by lecturers from those countries and Spain. All this is carried out under academic guidance from the General Council of the Judiciary of Spain.

This is an ambitious project because the Juan Carlos I School for Central America and the Caribbean was conceived as a first step in implement-

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[28] Translation of Red Iberoamericana de Escuelas Judiciales. *http://www.riaej.org/content/view/1/42/lang,es* (Last visited on September 23, 2007).

ing two more similarly structured regional judicial schools in the Andean Community and MERCOSUR.[29]

3. *The EUROsociAL Program and its Justice Consortium*

The EUROsociAL Program of the European Union is one of the most important programs for economic development in the world today. Eventually, it could even be deemed the most important effort existing in this field. The EUROsociAL Program aims to develop a new and more effective and efficient way of implementing international development programs.[30]

The EUROsociAL program aims to promote economic development by contributing to "generate or reinforce social cohesion processes in Latin America" by increasing the efficacy and efficiency of public policies that actually influence strengthening social cohesion.[31]

> The implementation of EUROsociAL is carried out by a set of institutions from the European Union and Latin America, grouped in consortia for the sectors of Education, Taxation, Justice and Health. The management of the Employment sector has been entrusted to the International Training Centre of the International Labour Organization.
>
> The internal coherence of the actions is guaranteed by an Intersectorial Coordination and Guidance Committee —ICGC—, which includes representatives from all the consortia, and works permanently through an Executive Secretary Office or Coordination Office. The strategic guidelines of the Programme are established by a Joint Committee formed by the European Commission, the Inter- American Development Bank (IADB), the Economic Commission for Latin America (CEPAL) and the United Nations Development Programme (UNDP). The Joint Committee also guarantees the integration of the actions carried out with other development initiatives in course in the region and with the Millennium Development Goals.[32]

These goals are to be achieved by implementing individual and coordinated actions in the five different sectors.[33]

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[29] Translation of Consejo General del Poder Judicial. *http://www.poderjudicial.es/eversuite/GetRecords?Template=cgpj/cgpj/principal.htm* (Last visited on September 23, 2007).

[30] The first meeting of the program's Executive Secretariat, Joint Committee and the consortia of the five sectors was held in Cuernavaca, Mexico, in September 2005.

[31] *Cfr.* EUROsociAL Programme. Aims and methods. *http://programaeurosocial.eu/index.php?PHPSESSID=qu25gakleuf6t6kfdumnl9tgr2&nIDMenu=3&nIDSeccion=3* (Last visited on September 27, 2007).

[32] *Cfr.* EUROsociAL Programme. Implementation, Guidance and Coordination. *http://programaeurosocial.eu/index.php?PHPSESSID=qu25gakleuf6t6kfdumnl9tgr2&nIDMenu=20&nIDSeccion=20* (Last visited on September 27, 2007).

[33] *Id.*

Based on the premise that economic development cannot be sustained in conditions where social cohesion does not exist, the EUROsociAL program realizes that the program needs to have effective parallel influence in the five sectors mentioned above. That is, the education sector cannot be strengthened while sacrificing the health sector, or the justice sector cannot be strengthened while sacrificing the employment sector. Therefore, program activities must have a parallel and effective influence in generating or reinforcing social cohesion processes.

The first stage of the EUROsociAL program method is to identify experiences and practices in each sector that has proven successful, efficient and sustainable in a given country or region. The second step is to identify potential receivers that may be interested in implementing these successful experiences in their own reality. The third step is a process that facilitates transplanting these experiences to the receivers' actual cultural and legal setting.

This method has at least two initial advantages. First of all, the owner of the successful experience is usually ready and willing to demonstrate and share all its benefits. Meanwhile, the recipients are generally ready to learn and put their best effort towards the process of legal transplants because they truly want to solve their current needs.

The next step in the EUROsociAL Program is to efficiently work with those inter-relating and inter-communicating actions that make the program effective across the different sectors. Finally, the program is inductive, intuitive and flexible because its structure allows it to learn from its own processes and adapt to the changing conditions and demands of reality.

Justice sector activities are headed by the Justice Consortium, which is made up of 10 institutional members acting under the leadership of the Fundación Internacional y para Iberoamérica de Administración y Políticas Públicas (FIIAPP) of Spain. In addition to the FIIAPP, the other members of the consortium are the Consejo General del Poder Judicial from Spain; the École Nationale de la Magistrature from France; the German Foundation for International Legal Cooperation; the National Council of Justice Office from Hungary; the Secretaría de Reforma do Judiciario from Brazil; the Suprema Corte de Justicia from Costa Rica, the Consejo Superior de la Judicatura from Colombia; the Centro de Estudios Jurídicos de las Américas and the Instituto Tecnológico de Estudios Superiores Monterrey from Mexico.[34]

The Justice Consortium began work in December 2005. One of the strategies the Justice Consortium follows is that of working through existing Ibero-

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[34] *Cfr*. EUROsociAL Programme. Eurosocial Justice. *http://programaeurosocial.eu/index.php?PHPSESSID=qu25gakleuf6t6kfdumnl9tgr2&nIDMenu=33&nIDSeccion=33* (Last visited on September 27, 2007).

American and country networks in the justice sector, including Iberius and the Ibero-American Judicial Summit.

III. Opportunities and Challenges for North America

Canada, the United States and Mexico offer a very interesting microcosm. These three countries have strong economic, commercial and cultural ties with each other,[35] and yet there are significant differences between them. However, not many comparative studies have been made among these North American countries and almost no work has been done in the field of international judicial cooperation among them.[36]

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[35] "The North American Free Trade Agreement exceeded all expectations and consolidated Mexico as the United States' second trade partner with transactions of over 100 billion dollars in the first half of the year..." unofficial translation of Communique No. 1725 from the Office of the Mexican President, Piedras Negras, Coahuila, (September 3, 1999), *http://zedillo.presidencia.gob.mx/pages/vocero/boletines/com1725.html* (Last visited on May 1, 2006). "After NAFTA was put in effect ten years ago, the largest free trade area of the world was created. It comprises 406 million people producing more than 11.4 billion dollars worth of good and services. This makes North America one of the largest free trade areas in the world with more than a third of the world GDP. Total trade between NAFTA countries has more than doubled, going from 288.55 billion dollars in 1993 to almost 626 billion dollars in 2003. Currently, Mexico is the United States' second trade partner after Canada. Mexican exports to the United States grew 342% over the first ten years, going from 42.85 billion dollars in 1993 to 146.80 billion dollars, improving the population's living conditions and reducing poverty in Mexico. In Mexico, the export sector is the main generator of employment: one out of every five people in Mexico work in this sector and almost half of the 3.5 million jobs created in Mexico between 1995 and 2000 were a direct result of NAFTA and the increased exports. Jobs in the export sector pay 37% more that other employments in the manufacturing sector." Translation of U.S. Embassy in Mexico, *http://www.usembassy-mexico.gov/sataglance_trade_info.html* (Last visited on May 1, 2006). Figures for 2003 are found in this same page. "The United States is Mexico's main trade partner. Bilateral trade with this country amounts to 71% of Mexico's entire foreign trade. 87% of Mexican exports go to the United States, while it receives 55% of the United States' imports. The integration reached during the 11 years NAFTA has been in effect explains the figures. The flow of Mexican trade grew 211.5% between 1993 and 2004. Mexican exports grew by 285% in this period, which generated a trade balance that has benefited our country over the last ten years." Translation of Mexican Embassy in the United States, *http://www.embassyofmexico.org/index.php?option=com_content&task=view&id=258&Itemid=89* (Last visited on May 1, 2006). "Mexico is still the United States' second trade partner with a trade balance of 24.889 billion dollars in the month of February…" Office of the President of Mexico, El Universal Online (April 12, 2006), *http://www.presidencia.gob.mx/buenasnoticias/?contenido=24460* (Last visited on May 1, 2006).

[36] Actually, I have to be more specific: Other than my book The Correlation Between Personal Jurisdiction and Foreign Judgments (A Comparative Law Study about Canada, the United States and Mexico) (VDM Verlag, December 19, 2008), and my article *Entre la jurisdicción, la competencia y el forum non conveniens* (Boletín

While Canada is a constitutional monarchy with a parliamentary form of government, the United States and Mexico are republics under a presidential system. These three countries are federal States, but actual practice of federalism in each one is very different. Furthermore, while Mexico's legal system belongs to the Roman-Germanic tradition, most of the U.S. and Canada belong to the common law tradition. And there is more: Puerto Rico and Louisiana in the United States, as well as Quebec in Canada, are rooted in the Roman-Germanic tradition. Accordingly, the common law and the Roman-Germanic traditions have to coexist harmoniously in the interactions that the domestic systems of Puerto Rico, Louisiana and Quebec have in the federal realm of their respective countries.

The North American countries and the world can learn many important lessons from the working coexistence between the common law and Roman-Germanic legal traditions. At least in Canada, this situation has produced important developments in what is known today as Canadian Bijuralism.[37] In my opinion, Canadians (probably without having clear conscience of it) are developing the model that will frame supranational law and global legal interaction in the 21st century.

There are significant and contrasting legal differences between Canada, the United States and Mexico: differences in paradigms, approaches, concepts, structures, procedures, etcetera. It is within this context of legal diversity that these three countries must coexist, interact and work together. The judiciaries of the three countries in North America have a unique opportunity to functionally strengthen judicial cooperation in the region.

The question is how to do it?

One of the first steps lies in creating the conditions that allow these goals to be achieved successfully. This requires us to understand and respect our respective cultural and legal identities. Respect and understanding is needed in terms of what is unique to each country, what is different in each one; common goals; goals that are not in common; what they wish to achieve together; what they may not want to achieve together; and also what they can and should learn from each other.

Mexico's distinguished 19th century president Benito Juárez's famous phrase comes to my mind: "Among individuals, as well as among nations, peace is the respect of other's rights." In this context, peace should be understood not only as the absence of war, but also as the possibility of achieving efficient and successful interaction within a setting of respect and com-

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MEXICANO DE DERECHO COMPARADO 69-115, No. 121, 2008) I am not aware of any studies specifically focusing on the three North-American countries, or between Mexico and Canada. However, there are some important thematic studies on comparisons between the U.S. and Mexico, as well as between the U.S. and Canada.

37 *Cfr*. Canadian Legislative Bijuralism Site: *http://doj.ca/en/bijurilex/index.html* (Last visited on September 27, 2007). Candian Bijuralism: Studies on Canadian Bijuralism: *http://www.compare.law-droit.ca/welcome_en.php* (Last visited on September 27, 2007).

pliance with the order that should exist under the rule of law; not only in our respective countries, but also among ourselves.

It is here where comparative law and the comparative law method[38] can play a significant role in trying to make sense of such legal diversity. We can only efficiently interact with others, if we make an effort to understand each other and develop the ability to work efficiently in the face of each other's paradigms.

An additional step may lie in learning from the ongoing processes taking place in the field of international judicial cooperation in Europe and Ibero-America. There is much to learn from the approach and the method currently under development in the EUROsociAL program. At the same time, we also need to facilitate the process required for transferring these experiences to the diverse cultural and legal settings that exist today in North America.

However, as mentioned in the introduction of this article, to this date almost nothing has been done to develop an institutional framework for judicial cooperation in North America.

The San Antonio Initiative

I believe the current state of affairs among the three countries in North America is not prepared, nor has evolved to the point in which having something similar to what has been done in Europe or Ibero-America in the field of an institutional framework for judicial cooperation is viable.

Accordingly, I think that under the current state of affairs among the three countries in North America, the best possibility is to have a permanent conference to that purpose. That is, a permanent space should be set up so that members of the judiciary from the three countries of North America can sit and discuss the issues affecting international judicial cooperation between them.[39]

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[38] On the meaning of comparative law, it has been said that "the expression implies an intellectual activity where the Law is the object and comparison is the process." Translation of Konrad Zwetgert & Hein Kötz, INTRODUCCIÓN AL DERECHO COMPARADO 3 (2002). On the role of comparative law and the comparative law method, see "Comparing Comparisons: In Search of a Methodology" by Professor Hiram E. Chodosh. Hiram E. Chodosh, *Comparing Comparisons: In Search of a Methodology*, 84 IOWA L. REV. 1025 (1999). Different persons around the world undoubtedly share the same thoughts even without knowing each other. I do not agree with all the points Professor Chodosh makes, but I share many of them, as I do his intellectual queries. Actually, the conceptual content of comparative law and the search of the method within the context of legal phenomena and comparative law are questions that have also driven my intellectual interest and queries for the last thirty years.

[39] In the course of preparing for the 2007 annual US-Mexico Bar Association meeting, Mr. Wayne Fagan, the U.S. co-president, told me of his idea to have a judicial panel par-

To this purpose, participants from Mexico and the U.S. met during the 2007 US-Mexico Bar Association meeting which took place in San Antonio Texas, and received this idea of establishing a permanent conference for judicial cooperation with enthusiasm and a commitment was made to begin working towards it. The San Antonio meeting also had the participation of Spanish judge Fernando Martínez Pérez, appointed by the General Council of the Spanish Judiciary to attend the meeting in response to an invitation extended by the Eduardo Elizondo Chair.

In the course of the year, the Mexican delegation reiterated its commitment to this initiative. The Spanish Council of the Judiciary officially accepted to become an observer and advisor to this process, inviting the U.S. and the Mexican delegations to attend a seminar on European judicial cooperation in Aguilas, Spain. Mexican federal judge Jorge Meza Pérez attended this conference endorsed by the Mexican Council of the Judiciary.

At the San Antonio meeting, it was generally agreed that working towards a permanent conference on judicial cooperation for North America would require work on three levels:

a) A priority agenda, including issues affecting the three countries of North America that require immediate and urgent attention. Since this agenda would require learning about each other at all times, especially during the early stages of such a serious effort, the comparative law method was suggested as a working tool for this purpose.
b) An implementation agenda, which includes the need to create and develop an institutional framework for international judicial cooperation among the three countries; and
c) A sustainability agenda, which needs to address the complexities of the different legal traditions shaping the legal lives of the these countries.

IV. Conclusions

Honoring the laws and the judicial procedures of foreign countries is a common matter for North American judiciaries. Judicial cooperation, especially in the field of enforcing foreign rulings has taken place among North American countries even in the absence of international treaties to that effect. Lessons should be learned from this reality because it offers a fertile

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allel to the annual meeting to be held in San Antonio, Texas, in October 2007, in hopes of instating this function as a permanent feature of USMBA annual conferences. I responded to this idea with enthusiasm and suggested we take advantage of the USMBA forum to take it a step further and discuss the possibility of creating a permanent conference for judicial cooperation in North America. Mr. Fagan agreed. I invited the Mexican delegation and in turn, Mr. Fagan did the same for the United States.

common ground to strengthen current judicial cooperation among the three countries in North America. Still, more needs to be accomplished.

Judicial cooperation requires the ability to understand the particulars of other legal systems, but the appropriate means need to be developed to facilitate this process.There are also significant lessons to be learned from European and Ibero-American accomplishments in developing institutional means and channels for international judicial cooperation. We should learn from and take advantage of the methods developed by EUROsociAL and the EUROsociAL Justice Consortium.

Finally, it is worthwhile noticing the utmost importance of the developments accomplished by Canada in the field of Roman-Germanic (Civil Law) — Common Law Bijuralism because a viable program for international judicial cooperation in North-America should necessarily take into consideration the legal cultural diversity in this region.

ABSTRACTS

Two Steps Forward, One Step Back: Assessing the Implementation of Mexico's Freedom of Information Act*

Zachary Bookman
Juan-Pablo Guerrero Amparán

The Mexican political and administrative system is usually known for the acceptance of model legislation and the creation of advance institutions. Even though, dominated by economic and burocratic interests, along with short-term political agendas, such system has resulted less effective to apply those rules and consolidate its institutions. This article shows that the latter is true in regards to the Federal Transparency Law and the IFAI: Designed in an innovative way, in few years went from being the major contribution of political exchange for democracy, to institutions of diminishing relevance and legitimacy.

Key Words: Transparency, IFAI, democracy, bureaucracy, legitimacy.

El sistema político-administrativo mexicano suele ser notable para la aprobación de legislaciones modelo y la creación de instituciones avanzadas. No obstante, dominado por intereses económicos y burocráticos, así como por agendas políticas de corto plazo, dicho sistema ha resultado menos eficaz para aplicar esas reglas y consolidar sus instituciones. Este artículo muestra lo anterior para la Ley Federal de Transparencia y el IFAI: diseñados en forma innovadora, pasaron, en pocos años, de ser la mayor contribución de la alternancia política para la democracia, a instituciones de relevancia y legitimidad declinante.

Palabras Clave: Transparencia, IFAI, democracia, burocracia, legitimidad.

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An Overview of Mexico's System of Legal Education*

Luis Fernando Pérez Hurtado

This article summarizes the central elements of Mexico's system of legal education, specifically referring to the study of a *Licenciatura en Derecho* [a law degree] and the process to obtain a license to practice law. This study describes and analyzes three issues in particular: *a)* the licensing process; *b)* the content and structure of law programs; and *c)* the increase in the number of law schools over the last decade, focusing on the causes and characteristics of this growth.

Key Words: Bachelors' degree in law, license, law school, legal programs, and growth.

Este artículo sintetiza los elementos centrales del sistema de educación legal en México, refiriéndose específicamente al estudio de la licenciatura en derecho y los procesos necesarios para obtener una cédula que permita practicar derecho. Este estudio describe y analiza tres puntos en particular: *a)* el proceso para obtener la cedula; *b)* el contenido y la estructura de los programas de educación legal, y *c)* el incremento en el número de facultades de derecho en esta ultima década, enfocándose en las causas y características de este crecimiento.

Palabras clave: Licenciatura en derecho, cédula, facultad de derecho, programas de educación legal, crecimiento.

Legisprudence: The Role and Rationality of Legislators —*vis-à-vis* Judges— Towards the Realization of Justice**

Imer B. Flores

The author in this article not only addresses some of the misconceptions about justice and its relation with legislators and judges but also intends to: 1) contrast several ideas related to the realization of justice; 2) contest the

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idea that legislators and judges compete against each other and therefore are in conflict; and 3) consider some of the new developments in make-law in the pursuit of rationality in legislation and its relationship with adjudication.

KEY WORDS: Justice, legislators, judges, rationality, legislation, adjudication.

El autor de este artículo no sólo analiza algunos de los malos entendidos acerca de la justicia y su relación con los legisladores y los jueces, sino que también intenta: 1) contrastar varias ideas relacionadas con la realización de la justicia; 2) cuestionar la idea de que los legisladores y los jueces compiten entre ellos y por ende están en conflicto, y 3) considerar algunos de los desarrollos recientes en la creación de las leyes y buscar la racionalidad de la legislación y su relación con la adjudicación.

PALABRAS CLAVE: Justicia, legisladores, jueces, racionalidad, legislación, adjudicación.

PROMOTING HUMAN RIGHTS AS AN INTERNATIONAL POLICY FOR WORLD PEACE*

Jorge E. SÁNCHEZ-CORDERO GROSSMANN

This essay intends to address the importance of promoting human rights for keeping world peace. In doing so, it emphasizes the relation between peace and law, describing the contribution of the international human rights movement to the solution of international conflicts shaped by the main world views such as: Realism, Liberalism, and the Clash of Civilizations. By comparing these forms of international and world order, the essay analyzes whether the promotion of human rights is compatible with the idea of world order as an international community of independent states or if it is based on the assumption of a world government. The paper proposes a revaluation not only of the legal and institutional mechanisms that prevent violence and protect human rights, but also questions if the philosophical foundations of the international system correspond to the current human condition.

KEY WORDS: International law, human rights, international conflict solution, peace and law, international human rights law.

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Este ensayo pretende atender la importancia de promover los derechos humanos como política internacional para el mantenimiento de la paz mundial. Al respecto, se analiza la relación entre paz y derecho, enfatizando en la contribución del movimiento de universalización de los derechos humanos en el ámbito internacional a la luz de las teorías más reconocidas que han establecido los parámetros de solución de conflictos internacionales, tales como el realismo, el liberalismo y el choque de civilizaciones. De la comparación de estas formas de orden internacional, el ensayo aborda la compatibilidad de la promoción de los derechos humanos con el orden internacional compuesto por Estados independientes y autónomos, así como su posible sustento en la idea de un gobierno global. El autor propone una reevaluación no sólo de los mecanismos legales e institucionales de prevención del recurso a la violencia y del fomento del ejercicio de los derechos humanos, sino también cuestiona si las bases filosóficas sobre las que descansa el sistema internacional corresponden a la condición humanan en la actualidad.

PALABRAS CLAVE: Derecho internacional, derechos humanos, solución de conflictos internacionales, derecho y paz, derechos humanos del orden internacional.

THE CONCEPT OF *JURISPRUDENCIA* IN MEXICAN LAW*

José María SERNA DE LA GARZA

The present essay describes the concept of *jurisprudencia* in Mexican law, a term which refers to constant and unvarying criteria to interpret and apply the Constitution, federal and state statutes and rulings and international treaties, expressed in the decisions of some federal courts. Firstly, the concept of *jurisprudencia* in Mexican law is discussed. Secondly, both the constitutional and legal regimes of *jurisprudencia* are explained and analyzed. Finally, the system for reporting *jurisprudencia* and the relationship between case law and legal teaching in Mexico are examined.

KEY WORDS: Precedent, judicial decisions, case law.

El presente ensayo examina el concepto de *jurisprudencia* en el derecho mexicano, un término que se refiere a los criterios de interpretación y apli-

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cación de la Constitución, las leyes y reglamentos federales y locales, así como los tratados internacionales, tal y como se expresan en las decisiones de algunos tribunales federales. Así, en primer lugar se analiza el concepto de *jurisprudencia*; en segundo lugar se examinan los regímenes constitucional y legal de la *jurisprudencia*, y finalmente se estudia el sistema de publicación de la *jurisprudencia* y la relación de la misma con la enseñanza del derecho en México.

PALABRAS CLAVE: Precedente, decisión judicial, jurisprudencia.

GLOBAL CITIZENSHIP FOR THE 21ST CENTURY*

Diego VALADÉS

This essay gives an explanation about the citizens in the early twenty first century, making an extensive discussion of several schools of thought, going from Leopoldo Zea to Rosseau. The essay analyzes the term citizens and the effects that it has had from the times of Plato and Aristotle, giving specific examples. The essays will also analyze Eco´s school of thought in regards to the differences between migration and immigration, along with the existing debt arising from the British, French, and American revolutions in terms of equality.

KEY WORDS: Citizens, migration, immigration, equality, equity.

Este ensayo da una explicación acerca de la ciudadanía en el naciente siglo XXI, haciendo un extenso recorrido por los más diversos pensadores y sus escuelas, desde Leopoldo Zea hasta Rousseau. El ensayo analiza el término de ciudadanía y los efectos que ésta ha tenido desde los tiempos de Platón y Aristóteles, proporcionando ejemplos exclusivos. También se analizará a la luz del pensamiento de Eco con las diferencias entre migración e inmigración, así como de la deuda que existe con las revoluciones inglesa, francesa y americana en términos de igualdad.

PALABRAS CLAVE: Ciudadanía, migración, inmigración, igualdad, equidad.

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Institutional Framework for International Judicial Cooperation: Opportunities and Challenges for North America*

Carlos A. Gabuardi

This essay surveys the existing international judicial cooperation institutions, both in Europe and Ibero-America. Then, it addresses the current situation in the North American region where almost nothing has been taking place.

In the author's opinion international judicial cooperation in the North-American region should address at least in three simultaneous areas: *a)* a priority agenda; *b)* an implementation agenda; and *c)* a sustainable agenda, where the significant Canadian contribution in the field of "Civil Law – Common Law bijuralism," shows significant lessons to be learned.

Key Words: International judicial cooperation, european judicial cooperation, institutions, Ibero-America judicial cooperation institutions, international law, comparative law, Ibero-America, North American Region.

Este trabajo examina las instituciones actualmente existentes para la cooperación judicial internacional, tanto en Europa como en Iberoamérica. Posteriormente se refiere a la situación actual en la región de América del Norte, en donde prácticamente no ha ocurrido nada.

En opinión del autor, la cooperación judicial internacional en la América del Norte debe cubrir cuando menos tres áreas simultaneas: *a)* una agenda prioritaria; *b)* una agenda de implementación, y *c)* una agenda de sustentabilidad, en donde la significativa contribución canadiense en el ámbito del "Bijuralismo romano-germánico – *Common Law*", muestra importantes lecciones para ser aprendidas.

Palabras clave: Cooperación judicial internacional, Instituciones para la cooperación judicial europea, Instituciones para la cooperación judicial iberoamericana, derecho internacional, derecho comparado, Iberoamérica, subcontinente norteamericano.

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